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Remand
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ArcelorMittal Stainless Belgium N.V. v. United States
Court of International Trade No. 08-00434

FINAL RESULTS OF REDETERMINATION PURSUANT TO REMAND

SUMMARY

The Department of Commerce (the Department or Commerce) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (CIT or Court) in ArcelorMittal Stainless Belgium N.V. v. United States. See ArcelorMittal Stainless Belgium N.V. v. United States, Court No. 08-00434 (Ct. Int'l Trade Mar. 12, 2010) (order indicating intent to remand and seeking proposed remand instructions) (March 12 Order); ArcelorMittal Stainless Belgium N.V. v. United States, Court No. 08-00434 (Ct. Int'l Trade Mar. 30, 2010) (order remanding to the Department) (Remand Order).

In accordance with the Court's instructions, the Department has reviewed and reconsidered information on the record to determine whether stainless steel plate in coils (SSPC) with a nominal thickness of 4.75 millimeters (mm) but an actual thickness of less than 4.75 mm is subject to the antidumping duty (AD) orders covering SSPC from Belgium, Italy, South Africa, South Korea and Taiwan, and the countervailing duty orders (CVD) covering SSPC from Belgium and South Africa, pursuant to 19 CFR 351.225, and in conjunction with the decisions of the United States Court of Appeals for the Federal Circuit in Duferco Inc. v. United States, 296 F.3d 1087 (Fed. Cir. 2002) (Duferco) and Tak Fat Trading Co. v. United States, 396 F. 3d 1378 (Fed. Cir. 2005) (Tak Fat).

After further analysis, and for the reasons explained below, the Department finds that, after reexamination of the scope language and the criteria specified by 19 CFR 351.225(k)(1), it is not possible to conclude definitively based on record evidence that the scope of the Orders on stainless steel plate in coils (SSPC) from Belgium¹ includes stainless steel products with a

¹ Because the description of the scopes in all seven SSPC orders is identical and given the nature of the inquiry, pursuant to 19 CFR 351.225(m) we consider it appropriate to conduct a single inquiry and issue a single scope ruling that applies to all such orders. See Notice of Amended Final Determinations: Stainless Steel Plate in Coils from Belgium and South Africa; and Notice of Countervailing Duty Orders: Stainless Steel Plate in Coils from

nominal thickness of 4.75 millimeters (mm), but with an actual thickness that is less than 4.75 mm.

BACKGROUND

On May 11, 2007, the Department received a scope inquiry request from ArcelorMittal Stainless Belgium N.V. (AMS Belgium)² regarding whether the scope of the orders on SSPC from Belgium excludes stainless steel products with an actual thickness less than 4.75 mm, regardless of its nominal thickness. On July 3, 2007, petitioners submitted comments in opposition to AMS Belgium's scope request. On July 17, 2007, AMS Belgium submitted comments in rebuttal to petitioner's July 3, 2007, opposition comments. No other parties commented on the aforementioned request.

On July 23, 2007, the Department initiated a formal scope inquiry. See Stainless Steel Plate in Coils from Belgium: Initiation of Formal Scope Inquiry Letter to All Interested Parties, dated July 23, 2007.

On September 21, 2007, petitioners³ and AMS Belgium submitted their comments on the scope inquiry. However, AMS Belgium's submission was rejected by the Department because it was deficient in several respects. See Letter to U&A dated September 26, 2007, which is a public document on file in the Central Records Unit (CRU) in room 1117 of the main Commerce building. On September 27, 2007, AMS Belgium resubmitted its comments. On October 10, 2007, both petitioners and AMS Belgium submitted their rebuttal comments. Following notice to interested parties with respect to the other orders, we did not receive any comments from respondents with respect to the other orders.

On December 3, 2008, the Department issued its final scope ruling. See Stainless Steel Plate in Coils from Belgium: Final Scope Ruling, dated December 3, 2008 (Scope Ruling). In that scope ruling, the Department stated that a review of the description of the merchandise does not show clear and unambiguous language that allows the Department to determine whether SSPC with a nominal thickness of 4.75 mm or more, regardless of its actual thickness, is within or outside the scope of the Orders. See Scope Ruling at 5-6. Therefore, the Department conducted the scope determination pursuant to 19 CFR 351.225(k)(2). Based on that analysis, the Department found

Belgium, Italy and South Africa, 64 FR 25288 (May 11, 1999); Antidumping Duty Orders: Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 64 FR 27756 (May 21, 1999); Notice of Amended Antidumping Duty Orders: Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 68 FR 11520 (March 11, 2003); and Notice of Amended Countervailing Duty Orders: Certain Stainless Steel Plate in Coils From Belgium, Italy, and South Africa, 68 FR 11524 (March 11, 2003) (collectively, the Orders).

² Formerly known as Ugine & ALZ Belgium N.V. (U&A).

³ Petitioners in this proceeding are: Allegheny Ludlum Corporation, AK Steel Corp., and North American Stainless (collectively, petitioners).

SSPC with a nominal thickness of 4.75 mm, but with an actual thickness that is less than 4.75 mm, to be within the scope of the Orders. See id. at 13-14.

AMS Belgium challenged the Department's Scope Ruling to the CIT. Recognizing its inadvertent failure to address certain substantial arguments raised by the parties in its Scope Ruling, the Department asked for voluntary remand. In successive orders dated March 12, 2010, and March 30, 2010, respectively, the CIT remanded the matter to the Department to determine whether SSPC with a nominal thickness of 4.75 mm, but an actual thickness of less than 4.75, mm is subject to the antidumping duty orders covering SSPC from Belgium, Italy, South Africa, South Korea and Taiwan, and the countervailing duty orders covering SSPC from Belgium and South Africa. See Remand Order at 1. In remanding the case, the Court directed the Department to apply 19 CFR 351.225, in conjunction with the decisions in Duferco and Tak Fat. Id. at 1-2.

LEGAL FRAMEWORK

In its March 12 Order, the CIT summarized the legal framework for scope determinations as follows:

Pursuant to 19 CFR § 351.225, parties may make formal inquiries as to whether “a particular product is included within the scope of an antidumping or countervailing duty order” In making this scope inquiry, prevailing case law and Commerce's regulations require it to engage in a three-step analysis. According to the Federal Circuit, Commerce's first required step is to consider the language of an order. See Duferco, 296 F. 3d at 1097; Tak Fat, 396 F. 3d at 1378. Only if Commerce finds that the language of an order is ambiguous may Commerce consider “{t}he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the {International Trade Commission}.” 19 CFR § 351.225(k)(1); see Tak Fat, 396 F. 3d at 1382-83. Then, if these criteria “are not dispositive,” Commerce considers the factors referred to as the Diversified Products factors, codified at 19 CFR § 351.225(k)(2): “(i) The physical characteristics of the product; (ii) The expectations of the ultimate purchasers; (iii) The ultimate use of the product; (iv) The channels of trade in which the product is sold; and (v) The manner in which the product is advertised and displayed.”

March 12 Order at 4-5 (internal citations shortened).

SCOPE OF THE ORDERS

The product covered by the Orders is certain SSPC. The scope set forth in the investigations was as follows:

stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject plate products are flat-rolled products, 254 mm or over in width and 4.75 mm or more in thickness, in coils, and annealed or otherwise heat treated and pickled or otherwise descaled. The subject plate may also be further processed (e.g., cold-rolled, polished, etc.) provided that it maintains the specified dimensions of plate following such processing. Excluded from the scope of this order are the following: (1) Plate not in coils, (2) plate that is not annealed or otherwise heat treated and pickled or otherwise descaled, (3) sheet and strip, and (4) flat bars. In addition, certain cold-rolled stainless steel plate in coils is also excluded from the scope of this order. The excluded cold-rolled stainless steel plate in coils is defined as that merchandise which meets the physical characteristics described above that has undergone a cold-reduction process that reduced the thickness of the steel by 25 percent or more, and has been annealed and pickled after this cold reduction process.

The merchandise subject to these order is currently classifiable in the Harmonized Tariff Schedule of the United States (HTUS or HTS) at subheadings: 7219110030, 7219110060, 7219120005, 7219120020, 7219120025, 7219120050, 7219120055, 7219120065, 7219120070, 7219120080, 7219310010, 7219900010, 7219900020, 7219900025, 7219900060, 7219900080, 7220110000, 7220201010, 7220201015, 7220201060, 7220201080, 7220206005, 7220206010, 7220206015, 7220206060, 7220206080, 7220900010, 7220900015, 7220900060, and 7220900080. Although the HTS subheadings are provided for convenience and Customs purposes, the written description of the scope of this order is dispositive.

See Antidumping Duty Orders: Certain Stainless Steel Plate in Coils from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 64 FR 27756 (May 21, 1999).

Effective March 11, 2003, in accordance with Allegheny Ludlum Corp. v. United States, 287 F.3d 1365 (Fed. Cir. 2002) remanded to CIT No. 99-06-00361, slip op. 2002-147 (CIT Dec. 12, 2002), and Notice of Amended Antidumping Duty Orders: Certain Stainless Steel Plate in Coils from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 68 FR 11520 (March 11, 2003), the scope of the Orders was amended. In accordance with the court ruling, the current scope of the Orders is as follows:

stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject plate products are flat-rolled products, 254 mm or over in width and 4.75 mm or more in thickness, in coils, and annealed or otherwise heat treated and

pickled or otherwise descaled. The subject plate may also be further processed (e.g., cold-rolled, polished, etc.) provided that it maintains the specified dimensions of plate following such processing. Excluded from the scope of this order are the following: (1) Plate not in coils, (2) plate that is not annealed or otherwise heat treated and pickled or otherwise descaled, (3) sheet and strip, and (4) flat bars.

The merchandise subject to this order is currently classifiable in the HTS at subheadings: 7219.11.00.30, 7219.11.00.60, 7219.12.00.06, 7219.12.00.21, 7219.12.00.26, 7219.12.00.51, 7219.12.00.56, 7219.12.00.66, 7219.12.00.71, 7219.12.00.81, 7219.31.00.10, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.11.00.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80. Although the HTS subheadings are provided for convenience and Customs purposes, the written description of the merchandise subject to these Orders is dispositive.

See Notice of Amended Antidumping Duty Orders: Certain Stainless Steel Plate in Coils from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 68 FR 11520 (March 11, 2003).

ANALYSIS

The regulations governing the Department's AD and CVD scope rulings can be found at 19 CFR 351.225. After first considering the language of an order to determine whether the language of the scope is ambiguous as to the particular scope issue, see March 12 Order at 4 and Duferco, 296 F. 3d at 1097, the Department examines the descriptions of the merchandise contained in the petition, the determinations of the Secretary and the U.S. International Trade Commission (ITC), the initial investigation, and prior scope rulings. See 19 CFR 351.225(k)(1). If the Department determines that these descriptions are dispositive of the matter, the Department will issue a final scope ruling as to whether or not the subject merchandise is covered by the order. See 19 CFR 351.225(d). Conversely, where the descriptions of the merchandise are not dispositive, the Department will consider the following factors set forth at 19 CFR 351.225(k)(2): i) the physical characteristics of the merchandise; ii) the expectations of the ultimate purchasers; iii) the ultimate use of the product; iv) the channels of trade in which the product is sold; and v) the manner in which the product is advertised and displayed. These factors are known commonly as the Diversified Products criteria. See Diversified Prods. Corp. v. United States, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983).

The Language of the Orders

The starting point for any analysis of the scope of a proceeding is the scope language contained in the AD order. See Duferco, 296 F. 3d at 1097. In this case, the language refers to a number of specifications of width, thickness, and chemical content. The words "nominal" or "actual" do

not appear in the scope language. Thus, there is no specific guidance on the matter from the language. While an independent observer might assume that a thickness measurement of 4.75 mm is based on actual measurements because of the lack of modifying language, the absence of a specific word is insufficient to answer the question conclusively. This is because producers and purchasers of the relevant merchandise may, in fact, use these terms based on nominal measurements. However, these facts generally only come to light once the detailed factual information is placed on the record of a given proceeding. In instances like this, the written description of the merchandise in the scope language may omit certain technical details necessary to a proper and reasonable interpretation.

For purposes of clarity for all interested parties, not just producers and purchasers (e.g. the administering authority), if a given measurement was meant to be interpreted as being an actual or nominal figure, it would be more precise to use those terms in the language of the scope. Unfortunately, this is not always the case. In this proceeding, interested parties have provided various examples of scope language where the term “nominal” or “actual” is used and is not used. AMS Belgium has suggested that the term “nominal” only applies when it is specified in the language. However, this is not always the case. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From South Africa, 62 FR 61731 (Nov. 19, 1997) (Certain Cut-to-Length Carbon Steel Plate) (discussed further below). To some extent the Department has become more sensitive to this issue since publication of the Orders in this case, and has been working with parties filing petitions to clarify the scope by including such language where it is relevant. See, e.g., Seamless Refined Copper Pipe and Tube From Mexico: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 75 FR 26726, 26727 (May 12, 2010) (Copper Pipe and Tube From Mexico).

While some scopes include nominal and/or actual thickness language and other scopes do not, the lack of the words “nominal” or “actual” does not necessarily mean that the measurements pertain to actual thickness. As noted, each scope is unique and the product definitions (including measurements) incorporated into scope language can be affected by industry practice. The circumstances surrounding such product definitions and industry practice vary from case-to-case. For instance, the scope of the order in Softwood Lumber does not mention the term nominal or actual, yet the underlying merchandise is produced and sold on a nominal basis, e.g., a 2” by 4” stud meets the definition as long as it is at least 1 and 5/8” thick. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, 67 FR 15539 (April 2, 2002) (Softwood Lumber). One of the common factors in understanding product definitions is the nature of the machinery used to produce the merchandise and how the products are used by the end-users. In the instant case, as in Softwood Lumber and others, the machinery used by producers of the subject merchandise is limited in how precise it is able to meet the measurement specifications. Similar to the ranges in dimensions for the nominal designations of lumber products, SSPC is ordered to a nominal thickness, with a tolerance range for each nominal thickness. The American Society for Testing and Materials (ASTM) A480 Standard lists thicknesses (i.e., nominal thicknesses) and shows the permitted variations in thickness (i.e., actual thicknesses). For example, the ASTM standard permits a variation in thickness of minus 0.010 inches (0.25 millimeters) to plus 0.020 inches

(0.50 millimeters) for plate with specified (nominal) thickness ranges from 0.1875 inches to 0.250 inches.⁴ These industry standards mean that plate ordered to a nominal thickness of 0.1875 inches (4.75 mm), subject to standard ASTM tolerances, can be delivered with an actual thickness that ranges from 4.50 mm (*i.e.*, 4.75 mm minus 0.25 mm) to 5.25 mm (*i.e.*, 4.75 mm plus 0.50 mm) and still be within the nominal thickness of 4.75 mm. Similarly, the Australian metals distributor Austral Wright Metals product data sheet states that products may be ordered either to nominal or to minimal thicknesses and that the thickness range for product ordered to nominal thickness is approximately +/-5%. *See* Petitioners Scope Inquiry Comments, dated September 21, 2007, at Attachment 9. Therefore, customers who order SSPC on the basis of nominal thickness realize that the actual thickness may be thinner than the nominal size they ordered. *Id.* at Attachment 5. Returning to the Softwood Lumber example, a purchaser of a 2” by 4” stud is able to use the merchandise even if it is 1 and 5/8” in width. Likewise, in this instant case, the subject plate products ordered with a nominal thickness of 4.75 mm and delivered with an actual thickness below 4.75 mm is still within industry standards and acceptances by the end-users. *Id.* at Attachments 2 and 9.

In another example, Certain Cut-to-Length Carbon Steel Plate, the scope of the order does not mention nominal or actual thickness. In that case, petitioners argued that the scope of the investigation, which referred to products 4.75 mm or more in thickness, should be clarified to include subject merchandise sold as having a 3/16” nominal thickness but “rolled light” to an actual thickness of just under 4.75 mm. Petitioners also argued that all 3/16” nominal thickness plate is within the scope of the investigation regardless of whether its actual thickness is less than 4.75 mm. The Department referenced a memo from J. Spetrini to R. La Russa in the Certain Cut-to-Length Carbon Steel Plate notice which explained that the scope already includes products with actual thickness between 4.75 mm and 4.7625 mm, so certain products made to a nominal thickness of 3/16” but produced to slightly below 3/16” in thickness would already be included under the scope.⁵

The language of the scope that the subject plate may also be further processed (*e.g.*, cold-rolled, polished, etc.) provided that it maintains the specified dimensions of plate following such processing pertains to the minimum heat treatment and surface conditions and thus does not have any bearing on the HTS definition of stainless steel. As stated above, our experience administering the SSPC orders is that the application of scope dimension measurements is largely based upon the underlying industry practice. Stainless steel plate thickness cannot be maintained precisely in the steel forming process. For this product, the limitation of the machinery producing it, or further processing it, affects the accuracy of the dimensions. Thus, as mentioned previously, the ASTM standard lists specific thicknesses and permitted variations for

⁴ *See* Petitioners Scope Inquiry Comments, dated September 21, 2007, at Attachment 2 (“ASTM Standard at Table A2.13”).

⁵ *See* Certain Cut-to-Length Carbon Steel Plate, 62 FR at 61741; Memorandum from J. Spetrini to R. LaRussa on Scope of Investigations on Carbon Steel Plate, dated October 24, 1997, at 1 (included as Exhibit 13 in Respondent’s Scope Inquiry Comments, dated May 11, 2007).

acceptable tolerance ranges in thickness. See ASTM Standard at Table A2.13. Hence, even if a customer orders SSPC with a nominal thickness of 4.75 mm or more, the customer will accept SSPC with an actual thickness that is less than 4.75 mm provided it is within the thickness tolerance range, which is consistent with the meaning of the term “nominal” which means “in name only.” See Webster’s II Dictionary (1984) at page 798. Moreover, there is no evidence on the record to indicate that further processing alters these dimensional tolerances.

Thus, based upon the language of the scope, which does not include the terms “actual” or “nominal” and whose understanding is informed by Department practice of taking into account product definitions and industry practice to interpret scope language, we are unable to make a definitive finding based on the language of the scope. We therefore move on to consider the following factors specified by 19 CFR 351.225(k)(1).

The Petition, the Investigation, and Determinations by the Secretary

The Petition

The description of the merchandise in the petition states that:

The product covers certain stainless steel plate in coils. According to the HTSUS or HTS, stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject plate products are flat-rolled products, 10 inches (254 mm) or over in width and 0.1875 inch (4.75 mm) or more in thickness, in coils, and annealed and pickled. The subject plate may also be further processed (e.g., cold-rolled, polished, etc.) provided that they maintain the specified dimensions of plate following such processing. Plate is further defined by the American Iron and Steel Institute (AISI) as a flat-rolled or forged product that is 10 inches and over in width and 0.1875 inches and over in thickness.

See Petitioners Scope Inquiry Comments, dated July 3, 2007, at Exhibit 1 and Exhibit 16 (AD Petition dated March 31, 1998).

The petitioners stated that:

Neither the HTS definition of stainless steel nor the AISI’s definition of the product form of plate notes any requirement or limitations as to mechanical tolerances. Thus, the subject merchandise should be described solely in terms of its chemical composition, its dimensions, and shape, and its minimum condition when imported in terms of its heat treatment (i.e., annealed) and surface condition (i.e., descaled), whether or not subject to further processing. Petitioners also stated that they did not believe that the

minimum heat treatment and surface conditions specified have any bearing on the HTS definition of stainless steel, or the AISI definition of the product form of plate.⁶

The Investigation and Determinations by the Secretary

The Department has never made an explicit finding in its prior determinations that the scope of its proceedings included nominal measurements. However, the Department has generally, but not consistently, acted as though nominal measurements were included within the scope. As discussed below, in a variety of instances, the Department indicated to interested parties that the scope included nominal measurements; however, in making these indications, the Department did not explain the basis for its determinations or cite record evidence upon which these findings were based. As discussed below in these results, because the basis for these indications was not explained, it is difficult for these indications to serve as a reliable basis for an affirmative finding under 19 CFR 351.225(k)(1).

Because the scope description in the petition and the notice of initiation does not indicate whether thickness is to be measured on a nominal or actual basis, on October 1998, the Department sent letters to respondents in the SSPC cases (e.g., Belgium, the Republic of Korea, South Africa, and Taiwan) that instructed respondents to report all sales of products for which the nominal thickness is greater than or equal to 4.75 mm.⁷ In addition, in the appendix to questionnaires issued in the SSPC investigations, the Department indicated that it interpreted the scope measurements to be based on nominal measurements, by requesting and including all sales of products for which the nominal thickness is greater than or equal to 4.75 mm. Thus, the record of the investigation suggests that the scope of the investigation includes SSPC with a nominal thickness greater than or equal to 4.75 mm.⁸

In subsequent questionnaires in various segments of the proceedings for the Belgium order, as well as all segments of the SSPC proceedings covering other countries, the Department's approach mirrored that in the investigation. For instance, in the July 1, 2002 through June 30, 2003, antidumping duty review of SSPC from Taiwan, the Department requested that respondents code the thickness variables according to actual thickness and to also include in their responses all sales of products for which the nominal thickness is greater than or equal to 4.75 mm. See, e.g., Questionnaire issued to Ta Chen Stainless Pipe Co, in SSPC from Taiwan, July 7, 2002, at Appendix V (submitted in Petitioners Scope Inquiry Comments, dated July 3, 2007, at Exhibit 10). Moreover, in SSPC from Taiwan, the Department noted that it requested that respondent Yieh United Steel Corporation (YUSCO) report all sales of merchandise that

⁶ See Letter from petitioner regarding Stainless Steel Plate in Coils in Belgium, Canada, Italy, South Korea, South Africa and Taiwan, dated April 14, 1998 (submitted in Petitioners Scope Inquiry Comments, dated July 3, 2007, at Exhibit 17).

⁷ See Petitioners Scope Inquiry Comments, dated July 3, 2007, at Exhibit 3.

⁸ See id. at Exhibit 2.

nominally fit the gauge included in the scope of the investigation, *i.e.*, with gauge greater than or equal to 4.75 mm. YUSCO had reported sales only on an actual basis as of the time of the preliminary determination, *i.e.*, it reported sales of merchandise with an actual gauge of greater than or equal to 4.75 mm. By letter to YUSCO of November 6, 1998, the Department had reiterated its request for data based on the nominal gauge.⁹

There are other instances of the Department indicating that the scope of its proceedings include SSPC with a nominal thickness greater than or equal to 4.75 mm. The Department's practice has been to require respondents to report on a nominal basis regardless of whether or not the actual thickness was less than 4.75 mm. For example, in the verification report from the investigation of this case, respondent TrefilARBED/ALZ recalculated its indirect selling expenses to reflect changes to the sales database to include products with an actual thickness less than 4.75 mm but with a nominal thickness of 4.75 mm or above.¹⁰ In the sales verification report of ALZ, N.V. (ALZ)¹¹ in the Belgium investigation, ALZ reported that its final home market database consists of the original database plus additional sales to account for the Department's instructions with respect to reporting the following additional two groups of sales: all sales of SSPC with 1997 invoice dates and with nominal thickness ≥ 4.75 mm (and actual < 4.75 mm); and all sales of SSPC with 1997 order dates, with 1998 invoice dates, and with nominal thickness ≥ 4.75 mm (regardless of actual thickness).¹² Company officials also indicated that "normal products" are ordered with nominal thickness equal to or greater than 4.75 mm but actual thickness less than 4.75 mm.¹³ The report also noted a home market sales trace of an invoice that was missing from the original database (and added after the nominal thickness clarification). The report stated that the ordered nominal thickness was greater than 4.75 mm, which the company indicated was a normal ordered thickness, and that the acceptable tolerance range resulted in the measured thickness that fell below 4.75 mm.¹⁴

In the administrative review of the AD Belgium order covering the May 1, 2003, through April 30, 2004, period, the Department stated that it has consistently instructed respondent to report sales of nominal SSPC in each segment of this proceeding. AMS Belgium has argued that it excluded sales of nominal SSPC from its reported U.S. and home market sales databases in the

⁹ See Notice of Amended Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Taiwan, 63 FR 66785, 66786 n.1 (December 3, 1998) (SSPC from Taiwan).

¹⁰ See Memorandum to the File, Through Steven Presing, Program Manager, Office 7 from Steve Bezirgianian, Team Leader regarding the U.S. Sales Verification Report (TrefilARBED/ALZ), dated January 27, 1999 (1999 Sales Verification Report), (included in Petitioners Scope Inquiry Comments, dated July 3, 2007, at Exhibit 5).

¹¹ AMS Belgium was formerly known as ALZ.

¹² See 1999 Sales Verification Report at 15.

¹³ Id. at 23.

¹⁴ Id.

2000-2001 and 2002-2003 administrative reviews.¹⁵ Moreover, AMS Belgium has argued that, during the course of both reviews, the Department verified and accepted the exclusion of nominal SSPC sales and that it relied on the Department's practice in those reviews to continue to exclude sales of nominal SSPC in the 2003-2004 review.¹⁶ Petitioners did not comment on the sales exclusion in the 2000-2001 review. Moreover, the sales exclusion was not identified or addressed by either the Department or petitioners in the 2002-2003 administrative review. In the 2003-2004 review, the Department placed copies of the verification report for the 2000-2001 administrative review and the verification report and respondent's sales reconciliation for the 2002-2003 administrative review on the record of that segment of the proceeding, and determined that based on an analysis of the verification reports and the 2002-2003 sales reconciliation, it appeared that the respondent did not report sales of nominal SSPC and that the Department accepted the exclusion of sales of nominal SSPC. See id. Thus, the Department has not consistently treated all SSPC with a nominal thickness greater than or equal to 4.75 mm regardless of the actual thickness as within the scope in its prior determinations.

Further, in the 2003-2004 review, the Department determined that all sales of SSPC with a nominal thickness greater than or equal to 4.75 mm regardless of the actual thickness were not properly reported by the respondent, and therefore it was necessary to apply facts available to those unreported sales. For a complete discussion of our treatment of these sales of nominal SSPC, see SSPC Final at Comment 9 ("Application of Facts Available").¹⁷

Determinations by the ITC

The scope in the ITC report states that the subject plate products are flat-rolled products, 254 mm (10 inches) or over in width and 4.75 mm (0.1875 inches) or over in thickness, in coils, and annealed or otherwise heat-treated and pickled or otherwise descaled. The subject plate may also be further processed (e.g., cold-rolled, polished, etc.) provided that it maintains the specified dimensions of plate following such processing. Excluded from the scope of the investigations are the following: (1) plate not in coils, (2) plate that is not annealed or otherwise heat treated and pickled or otherwise descaled, (3) sheet and strip, and (4) flat bars.¹⁸

According to the ITC Report, stainless steel plate is defined in the ASTM Standard A480/480M, which applies to flat-rolled stainless and heat-resisting steel plate, sheet, and strip, as a flat-rolled product that is over 10 inches in width and 0.1875 inch and over in thickness. Sheet is such

¹⁵ See Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review, 70 FR 72789 (December 7, 2005) (SSPC Final), and accompanying Issues and Decision Memorandum at Comment 8.

¹⁶ Id.

¹⁷ Id., at Comment 9.

¹⁸ Investigations Nos. 731-TA-788-793 (Final): Certain Stainless Steel Plate from Belgium, Canada, Italy, Korea, South Africa, and Taiwan, U.S. International Trade Commission (USITC) Publication 3188 (May 1999) at I-4 (ITC Report).

product that is under 4.75 mm in thickness and 600 mm (24 inches) and over in width. Strip is product that is under 4.75 mm in thickness and under 600 mm in width. Imports of stainless steel sheet or strip are not subject to these investigations. See ITC Report at I-4. Based on the ITC Report, we are unable to draw any conclusions that would clarify whether SSPC with a nominal thickness of 4.75 mm, but an actual thickness of less than 4.75 mm, is subject to the Orders.

Other Considerations

Regarding the effect of U.S. Customs and Border Protection (Customs) ruling on the interpretation of the scope, all scopes of AD and CVD proceedings include reference to the HTS number that covers the subject merchandise. The Department has consistently held that although HTS subheadings are provided for convenience and Customs purposes, the written description of the scope of the orders is dispositive in terms of what merchandise is subject to the order.¹⁹ Therefore, the Customs ruling on scope is not directly relevant to the Orders, nor do the Department's scope rulings have any effect on the HTS language.

COMMENTS ON DRAFT REDETERMINATION

On June 18, 2010, we invited interested parties to comment on the Draft Results of Redetermination Pursuant to Remand (Draft Remand Results). On July 2, 2010, petitioner and AMS Belgium submitted comments on the Draft Remand Results. At the request of the Department, the Court granted an extension for the filing of this redetermination on remand to July 29, 2010. Interested parties' comments and the Department's positions are summarized below.

I. The Language of the Orders

AMS Belgium claims that, on one hand, the Department agrees that SSPC with 4.75 mm or more in thickness has a common meaning (i.e., actual measurements), while, on the other hand, the Department posits that producers and purchasers of the relevant merchandise may, in fact, use these terms based on nominal measurements. According to AMS Belgium, the Department then incorrectly concludes in its Draft Remand Results that these two alternative definitions of the phrase "4.75 mm or more in thickness" create ambiguity requiring clarification.

¹⁹ See, e.g., Orders. See also Notice of Final Determination of Sales-at-Less-Than Fair Value: Commodity Matchbooks from India, 74 FR 54536 (October 22, 2009) (Scope of Investigation), and Brake Rotors from the People's Republic of China: Final Results and Partial Rescission of the Fifth Antidumping Duty Administrative Review and Final Results of the Seventh New Shipper Review, 68 FR 25861 (May 14, 2003) (Scope of Order).

Petitioners argue that AMS Belgium has claimed that the orders unambiguously exclude SSPC that has a nominal thickness of 4.75 mm but an actual thickness less than 4.75 mm. However, petitioners argue that the Department has rightly concluded that the language of the Orders is ambiguous, and that the reasons for such a conclusion are logical, supported by substantial evidence, and otherwise in accordance with law. Petitioners state that the factors outlined by the Department as to how and why the scope language of the Orders is ambiguous are valid. In addition, petitioners claim that the Department's standard approach is consistent with the statute's purpose of providing relief to the U.S. industry, and that nothing in the statute precludes the Department from applying this common-sense approach.

AMS Belgium argues that the premise upon which the Draft Remand Results are based is contrary to black letter administrative law, which holds that regulatory acts must be construed according to their plain language and that terms must be construed in accordance with their common meanings. Moreover, AMS Belgium argues that its interpretation of the common meaning is the only plausible interpretation and prevails over the Department's "industry" meaning. In support of its contention, AMS Belgium cites to Duferco and states that the Federal Circuit interpreted orders consistent with their common meanings while rejecting the Department's and petitioner's argument that the type of merchandise at issue was "generally recognized" by industry standards as meeting the criteria defined in the scopes of the orders. See AMS Belgium Draft Remand Comments at 4.

Petitioners state that the Department has followed the legal framework for scope inquiries, addressed the contentions raised by AMS Belgium, properly taken into account SSPC industry's practice of accepting tolerances in thickness, and has reasonably concluded that nominal thickness has been the controlling measurement since the investigations. Thus, petitioners urge the Department to maintain its position in final remand results.

AMS Belgium also argues that the Department's interpretation of the Orders is overly broad and ignores key words included within the scope. AMS Belgium contends that the Department's interpretation of the scope language implies that everything the industry potentially considers SSPC could be covered by the Orders, at least insofar as the dimensions of the product are concerned. Thus, AMS Belgium argues that the Department's expansive interpretation of the scope language would mean that all merchandise within a product class is covered by the Orders. According to AMS Belgium, such a result is at odds with the fact that the Orders cover only "certain" SSPC. In support of its argument, AMS Belgium cites to Eckstrom Indus., Inc. v. United States, 254 F.3d 1068, 1073 (Fed. Cir. 2001) (Eckstrom Indus.), where AMS Belgium claims that the Department argued that an order "appli[ed] broadly" to stainless steel butt-weld pipe. In doing so, "[t]he Government's argument essentially reduce[d] to an interpretation of the order as covering any stainless steel butt-weld pipe fittings under fourteen inches in diameter." Id. However, AMS Belgium states that the Court rejected the Department's argument and held that "[t]his construction is belied by the terms of the order itself, which indicate that it applies only to 'certain stainless steel butt-weld pipe fittings. . . .'" Id.

Next, AMS Belgium asserts that the Department failed to reconcile its recognition of tolerance ranges with the "specified" language in the Orders. AMS Belgium argues that the Orders state

that they only cover products that “maintain the specified dimensions of plate following such processing.” However, AMS Belgium states that nowhere are tolerance ranges “specified” in the Orders. In addition, AMS Belgium argues that, contrary to the Department’s current position, the history of the Orders clearly shows that the phrase “specified dimensions” is neither ambiguous, as the Department claims, nor refers to dimensions not specified in the Orders. According to AMS Belgium, the “specified dimensions” language was taken directly from the petition and was not modified by the Department in adopting the scope. Thus, the Department’s reconciliation of the claimed ambiguous language as to what the phrase “the specified dimensions” refers is completely belied by the evolution of the scope language. Moreover, AMS Belgium argues that the Department’s analysis does not take into consideration from where the relevant language in the Orders was derived and what those terms meant when they were inserted into the scope language.

AMS Belgium further notes the Department’s draft statement that “the written description of the merchandise in the scope language may omit certain technical details necessary to a proper and reasonable interpretation.” Draft Remand Results at 6. AMS Belgium argues that beyond suffering from an inaccurate premise, the Orders could not be reasonably interpreted to extend only to merchandise with an actual thickness of 4.75 mm or more because this characterization does not describe the intent behind the language. Rather, the necessary technical information (*i.e.*, the use of the term “nominal thickness” and reference to ASTM standards) was intentionally not included in the language of the Orders because the petitioners did not want to define the product that way.

AMS Belgium claims that the listed HTS subheadings in the Orders do not cover SSPC, with the exception of “basket provisions.” AMS Belgium states that, while it agrees that the HTS classifications do not supersede the language of the Orders, the Department erred by ignoring the classifications themselves as part of its consideration of the scope language.

AMS Belgium claims that the only source cited in the investigations that mentions 4.75 mm is the Harmonized Tariff Schedule of the United States (HTSUS) or Harmonized Tariff Schedule (HTS), which means that any ambiguity in the language must be resolved by the HTS. Contrary to the petitioner’s arguments, AMS Belgium states that its position in this respect is not that the HTS classifications listed in the Orders are dispositive, but rather that, when an order incorporates a term from a source such as the HTS, the incorporated term in the order has the same meaning as the source from which it was incorporated. Thus, when, as here, a term is taken from the HTS, the HTS meaning of the term controls. According to AMS Belgium, this was the very position that the Department argued in Tak Fat. See AMS Belgium Draft Remand Comments at 4. AMS Belgium concludes that the HTS definition is clear in that the language “4.75 mm” does not extend to products with an actual thickness less than 4.75 mm.

AMS Belgium states that the Department has consistently held that although HTS subheadings are provided for convenience and Customs purposes, “the written description of the scope of the orders is dispositive in terms of what merchandise is subject to the order.” However, AMS Belgium argues that the Department has found the written “description of the merchandise” to be ambiguous; therefore, the description cannot be dispositive. Thus, AMS Belgium argues that

there is no reason why the Department should not consider the subheadings in resolving any ambiguity. In addition, AMS Belgium states that the Federal Circuit has held that while the listing of HTS subheadings is not “dispositive, the tariff schedule is nonetheless a factor in determining the scope of the order.” Eckstrom Indus., 254 F.3d at 1073. However, AMS Belgium asserts that the Department did not view the HTS subheadings as a factor in interpreting the scope language.

Moreover, AMS Belgium argues that the Department’s failure to give any weight to the HTS classifications is contrary to the spirit of its regulations. Specifically, 19 CFR 351.225(c) requires that when parties submit an application for a scope review, they specify the HTS classifications of the products. AMS Belgium contends that the Department ignoring HTS classifications renders this information request superfluous.

AMS Belgium argues that the Department failed to address the exclusion of sheet and strip from the scope of the Orders. AMS Belgium claims that a reading of the scope language to include “nominal” was never intended, as made clear by the fact that a dozen other products were also specifically excluded from the stainless steel sheet and strip (SSSS) orders, and that at no point during the definition of these technical and detailed exclusions was the issue of “nominal” mentioned.

Moreover, AMS Belgium claims that to the extent that the Department attempts to redefine the scope of the Orders by including material with an actual thickness of less than 4.75 mm that is nominally plate, it is also similarly redefining the scopes of the SSSS orders. AMS Belgium argues that, while none of the Department’s references is relevant to the plain language of the Orders and, in fact, seems to further contradict the plain language of the orders, under all of these definitions, record evidence establishes that the product in question is SSSS. See AMS Belgium Draft Remand Comments at 20. Therefore, including this material in the scope of the Orders is not only contrary to the plain and unambiguous scope language, but it also serves to eliminate this material from the scope of all SSSS orders, whether or not there is a companion SSPC order. Given the parallel language and intentional differentiation between the orders, AMS Belgium argues that any failure to exclude this material from all SSSS orders would be arbitrary and capricious. In addition, AMS Belgium asserts that the Department has not conducted a similar clarification of the SSSS orders or sought comments in those proceedings.

Petitioners state that the language of the Orders specifically excludes some products, including sheet and strip, but do not make any reference to what measurement of thickness, whether actual or nominal, defines SSPC, sheet and strip or the other excluded products. Therefore, petitioners claim that under these circumstances, it is evident that the Orders language is unclear and subject to interpretation. Petitioners state that AMS Belgium seems to feel that the specification in the Orders of 4.75 mm or more in thickness is unquestionably precise and inflexible and leaves no room for interpretation. However, petitioners claim that by not referring to actual or nominal thickness, the AD and CVD SSPC orders do not expressly and unambiguously establish whether the subject SSPC is delineated by a nominal thickness of 4.75 mm and greater, as is the SSPC’s industry common practice, or by an actual thickness of 4.75 mm and greater, as AMS Belgium believes. Thus, as the Department decided in the Draft Remand Results, the language of the

Orders is ambiguous and scrutiny of the factors in 19 CFR 351.225(k)(1) to interpret the subject orders is warranted.

Department's Position

AMS Belgium's assertions that the Draft Remand Results are inconsistent with the common meaning of the language of the Orders and that the Department failed to understand the context of that language are not persuasive. While we agree that interpreting the language of the Orders to mean "actual" measurements of 4.75 mm might be reasonable in terms of common meaning, we maintain that that alone is not dispositive as there are other reasonable interpretations of the relevant language that could be construed as imparting a meaning of "nominal," thus resulting in ambiguity. The absence of the words "actual" or "nominal" from the scope language necessarily complicates that inquiry into the common meaning of the language of the Orders because the phrase "4.75 mm or more in thickness" is without a modifying clarification that would resolve its meaning conclusively. We further find that the context of language in fact supports our finding of ambiguity in the language of the Orders. As described in detail above, the meaning of certain terms and expressions in the scope language is informed by industry practice. See supra at 5-7. Additional context is provided by the fact that the Orders incorporated language drafted by the domestic industry to describe the merchandise subject to this proceeding. Record evidence establishes that the domestic industry has always considered the scope language to cover SSPC with a "nominal" thickness of 4.75 mm or more. Specifically, petitioners state that because the scope description in the petition and the Notice of Initiation does not indicate whether thickness is to be measured on a nominal or actual basis, the Department clarified its reporting methodology in the original investigation of all SSPC proceedings covering Belgium, as well as other countries, by issuing a letter dated October 8, 1998, to all parties. Petitioners also state that this reporting methodology was consistently and clearly applied in all SSPC proceedings. See Petitioners' Scope Inquiry Comments, dated July 3, 2007, at 5- 6.

Regarding the word "certain," we disagree with AMS Belgium that this somehow undermines the logic of the Draft Remand Results. The word "certain" is often used in scopes for the purpose of limiting the coverage of products as defined by the language of the scope. It does not limit the language of the scope with respect to dimensional specifications, particularly given the absence of modifying language clarifying whether the 4.75 mm measurement is to be considered on an actual or nominal basis.

Regarding the term "specified" we also disagree with AMS Belgium that this somehow undermines the logic of the Draft Remand. The word "specified" is used to refer to the applicable dimensions. Nothing about the word "specified" means that any given measurement must be interpreted as actual or nominal.

Finally, we disagree with AMS Belgium's assertion that the absence of tolerance ranges from the language of the Orders was intentional. As discussed above, tolerance ranges in the ASTM Standards are widely used by producers and purchasers of the subject merchandise and add to the understanding of dimensional specifications within the industry. The absence of tolerance ranges from the scope language is, therefore, not dispositive.

We also disagree with AMS Belgium’s argument concerning HTS subheadings. In this proceeding, and in numerous ongoing proceedings, the Department has consistently indicated that the HTS categories are provided for Customs convenience and that the written description of the scope is dispositive. In virtually every proceeding, the language of the orders is different from the language of HTS categories cited in the scope. Moreover, when the Department describes the scope language as being dispositive, it merely indicates that the language of the scope defines the merchandise covered by the Orders. HTS numbers are used to facilitate the suspension of liquidation and the appropriate application of AD and CVD duties to merchandise entering the Customs Territory of the United States. Although we may review the language associated with the relevant HTS numbers while administering a given order, the language of those classifications by itself does not constrain or modify the scope of a given proceeding. As stated above, “if a given measurement was meant to be interpreted as being an actual or nominal figure, it would be more precise to use those terms in the language of the scope.” Supra at 6. In any case, after examining the HTS categories, which themselves do not distinguish between actual or nominal measurements, we conclude that they do not meaningfully assist in our interpretation of the language of the Orders.

With respect to AMS Belgium’s argument regarding the SSSS orders, first, the scope inquiry was requested for SSPC only. Thus, the scope ruling was issued for the SSPC Orders. However, we agree with AMS Belgium that SSSS is specifically excluded from the SSPC orders, and vice versa. The SSSS scope of the orders is sheet and strip that is flat-rolled in coils that is greater than 9.5 mm in width and less than 4.75 mm in thickness. See, e.g., Stainless Steel Sheet and Strip in Coils from Taiwan: Final Results and Rescission in Part of Antidumping Duty Administrative Review, 73 FR 74704 (December 9, 2008). Further, we point out that the ITC in its determination noted that SSSS closely follows industry distinctions for sheet and strip product thickness and width, as detailed by the ASTM, the Iron and Steel Society (ISS), ASM International (ASM), and the American Iron and Steel Institute (AISI). According to these industry definitions, sheet is at least 24 inches in width, whereas strip is less than 24 inches wide. The ITC Report also states that The ASTM, ASM, ISI, and AISI have developed industry standards that distinguish sheet and strip from plate. According to these standards, sheet and strip are less than 0.1875 inch thick, whereas plate is 0.1875 inch or greater in thickness. Further, the interchangeability between SSSS and SSPC is limited by the inherent differences in their thickness and appearance.²⁰

II. The Department’s Analytical Approach to Interpreting the Language of the Orders

AMS Belgium argues that the Department impermissibly looked to the Diversified Products criteria in an attempt to create ambiguity in the plain language, and therefore, the Department’s analysis is fundamentally flawed. AMS Belgium claims that none of the arguments upon which the Department relies in analyzing the language of the Orders was articulated until the Department initiated its Diversified Products analysis in the original Scope Ruling. AMS

²⁰ See Investigations Nos. 701-TA-380-382 and 731-TA-797-804 (Final): Certain Stainless Steel Sheet and Strip from France, Germany, Italy, Japan, the Republic of Korea, Mexico, Taiwan, and the United Kingdom, USITC Publication 3208 (July 1999).

Belgium argues that this demonstrates that the Department's textual interpretation of the scope language is solely related to the consideration of the Diversified Products factors and has no bearing on the analysis the Department has been ordered to conduct.

AMS Belgium states that it appears that the Department's analytical reasoning is that: (1) a dimension in an order could be based on a common meaning (actual thickness) or industry meaning (nominal thickness); (2) the history of the Orders is inconsistent and, therefore, ambiguous; thus, (3) the Department must look to the Diversified Products factors to resolve which meaning is correct. However, AMS Belgium contends that, given this reasoning, the only way an order that does not specify "actual thickness" is governed by actual thickness is if the history of that order is clear and unambiguous. Thus, AMS Belgium argues that the rule seemingly adopted by the Department that all dimensions, in all orders, are "nominal," except where the Department has taken affirmative action during the history of a proceeding to clarify that "nominal" standards do not apply, is unsupported by Department's practice.

AMS Belgium argues that the Department's statement that its interpretation of terms in the language of the Orders based upon nominal measurements "only come[s] to light once the detailed factual information is placed on the record of a given proceeding" is inconsistent with due process and prejudices parties. Draft Remand Results at 6. AMS Belgium contends that the effect of such an analytical approach means that the Department would be able to substantially clarify or modify scopes long after the expiry of the time by which respondents must submit scope exclusion requests and have waived other rights. Furthermore, AMS Belgium asserts that adoption of such a policy by the Department creates no incentive for petitioners to specify with precision the scopes of orders and could encourage petitioners and the Department to wait to see how proceedings unfold before making important decisions regarding the scopes of orders.

AMS Belgium states that the scopes in Certain Cut-to-Length Carbon Steel Plate and in the instant case apply to products "4.75 mm or more in thickness." AMS Belgium also states that, in Certain Cut-to-Length Carbon Steel Plate, the Department found that because the scopes applied to products 4.75 mm or more in thickness, rather than the industry standard of 4.7625 mm, the scopes already covered a subset of what the petitioners defined as products with an actual thickness of less than 4.75 mm but with a nominal thickness greater than 4.75 mm. AMS Belgium argues that, because the Department made its finding in Certain Cut-to-Length Carbon Steel Plate less than a year before the Department adopted the scope language of the Orders in the instant case, context clearly demonstrates that the language of the Orders is not meant to include products with an actual thickness of less than 4.75 mm, and that the Department is bound by the meanings of terms that it has previously ascribed to them in Certain Cut-to-Length Carbon Steel Plate. See AMS Belgium Draft Remand Comments at 12.

AMS Belgium also argues that the Department failed to note, however, that customers ordering carbon plate at a nominal thickness of 0.1875 inch (4.76 mm) would accept products rolled to 0.1775 inch (4.51 mm), just as customers ordering SSPC at a nominal thickness of 0.1875 inch (4.76 mm) would accept products rolled to 0.1775 inch (4.51 mm). AMS Belgium argues that, despite the Department's claim in the Draft Remand Results that it uses "product definitions" and "industry practice" to interpret the scopes of orders, the Department has now interpreted

identical language in the two scopes that cover virtually the same product differently. Moreover, AMS Belgium argues that the Department appears to recognize that, although 19 CFR 351.225(k)(1) identifies prior scope determinations as a separate factor from the plain language of the Orders, fundamental principles of administrative law require that the Department interpret the same language used in different orders the same way.

AMS Belgium asserts that the Department's citation to Softwood Lumber to illustrate what "nominal" means and why a petitioning group may want products with an actual thickness of less than 4.75 mm covered is irrelevant to the instant case. Moreover, AMS Belgium claims that, contrary to the Department's comments, during the discussion of scope exclusions, the orders do use the terms "actual" and "nominal thicknesses," while also leaving some dimensions unmodified. AMS Belgium cites this as additional support for its reading of the Orders.

Department's Position

We disagree with AMS Belgium that the Department somehow applied Diversified Products criteria in analyzing the language of the Orders in the Draft Remand Results. On the contrary, the structure of the Draft Remand Results, and by extension these final results, complies with the March 12 Order and Remand Order in that, consistent with Duferco and Tak Fat, the Department first considered the language of the Orders. As noted above, that analysis focused on the absence of the words "actual" or "nominal" from the Orders and recognized that the meaning of certain terms in the scope language could be informed by how those terms are understood in the relevant industry. Only upon finding the language of the Orders to be ambiguous did the Department move to a consideration of the factors identified in 19 CFR 351.225(k)(1), namely the descriptions of the merchandise contained in the petition, the initial investigation, and determinations by the Department and the ITC. Only then upon finding continued ambiguity did the Department incorporate by reference its Diversified Products analysis under 19 CFR 351.225(k)(2) from its original Scope Ruling.

The same is true regarding AMS Belgium's assertions about our analytical method and due process concerns. Our analysis of the language of the Orders and the factors specified in 19 CFR 351.225(k)(1) complies with the remand instructions of the Court.

We disagree with AMS Belgium that the Department has somehow unfairly adopted as a "rule" or practice an interpretive method that would allow the Department of change the scope at whim. As stated above, each scope is unique. See supra at 6. Moreover, our finding above is limited to the specific factual question of whether SSPC meeting the dimensions of the scope on a nominal basis is within the scope. Our findings in this matter are based solely on the language of the Orders and the criteria identified in Duferco, Tak Fat, and 19 CFR 351.225(k) in a manner consistent with the remand instructions of the Court.

Finally, regarding AMS Belgium's assertion that the Certain Cut-to-Length Carbon Steel Plate case establishes that only when the word "nominal" actually appears in scopes does it apply, the Department has already acknowledged its inconsistency in this regard. See supra at 6. First, while 19 CFR 225(k)(1) requires the Department to take into account prior scope rulings, this

refers to prior scope rulings in the proceeding at issue. Second, the fact pattern in the Cut-to-Length Carbon Steel Plate case is different than the fact pattern in the instant case. Contrary to AMS Belgium's interpretation of the Department's finding in Cut-to-Length Carbon Steel Plate, the Department did not find that only plate of 4.75 mm or more in actual thickness was covered by the scope of the investigations. As noted above, the Department specifically noted that the scope description in Cut-to-Length Carbon Steel Plate already included certain products with an actual thickness between 4.75 mm and 4.7625 mm, so certain products made to a nominal thickness of 3/16" but produced to slightly below 3/16" in thickness would already be included under the scope or the orders. Moreover, both parties have cited different examples of cases where the terms "actual" and "nominal" were and were not used in scope language. However, the Department has become more conscious since publication of the Orders in using more precise scope language to differentiate between "actual" and "nominal." See, e.g., Copper Pipe and Tube from Mexico, 75 FR at 26727.

We disagree with AMS Belgium's characterization of Softwood Lumber. Softwood Lumber exemplifies different scopes where the issue of nominal or actual measurements is addressed or, more appropriately, not addressed. While AMS Belgium identifies instances in which certain products or product lines under consideration for a scope exclusion were described in terms of actual or nominal measurements, there were more instances in which such terms are not used. Regardless, the Department granted no scope exclusions in Softwood Lumber, so no such language was incorporated into the scope language of that order.²¹ Although we do not rely on Softwood Lumber as the basis for any specific decision, it remains useful background to help illustrate the underlying issue.

III. The Petition, the Investigation, and Determinations by the Secretary and the ITC

This discussion is divided into two parts: 1) General, and 2) Technical Standards. Some of AMS Belgium's arguments about the language of the orders overlapped with matters covered by this section. For clarity, we consolidated these arguments in this section.

General

AMS Belgium states that, in the Draft Remand Results, the Department quotes two paragraphs from the petitioners' comments that were made prior to the initiation of the investigations as the entirety of its analysis of the petition stage of the investigations. However, AMS Belgium argues that the Department omits other relevant language from the petitioners' letters. Moreover, AMS Belgium argues that the Department fails to give any analysis of what this language means, and that petitioners did not indicate that they wanted to use tolerance ranges in the Orders. Therefore, AMS Belgium asserts that even the limited quotations cited by the Department disavow the Department's reading of the Orders.

²¹ See Softwood Lumber, and accompanying Issues and Decision Memorandum at Comment 57.

AMS Belgium also argues that the Department erroneously states that “in the appendix to questionnaires issued in the SSPC investigations, the Department indicated that it interpreted the scope measurements to be based on nominal measurements, by requesting and including all sales of products for which the nominal thickness is greater than or equal to 4.75 mm. Thus, the record of the investigation suggests that the scope of the investigation include[s] SSPC with a nominal thickness greater than or equal to 4.75 mm.” Draft Remand Results at 9. AMS Belgium states that for this proposition, the Department cites Exhibit 2 of the Petitioners Scope Inquiry Comments, dated July 3, 2007, which corresponds to the Reporting Letter. However, AMS argues that the letter states just the opposite: “As you know, the scope of the investigation states that the products subject to this investigation ‘...are flat-rolled products, 254 mm or over in width and 4.75 mm or more in thickness. . . .’ AMS Belgium also states that, in the Department’s antidumping questionnaire, the Department requested that the thickness variables be coded according to actual thickness, irrespective of whether your client records thickness on an actual or on a nominal basis (see Appendix V).” See Petitioners Scope Inquiry Comments, dated July 3, 2007, at Exhibit 3. AMS Belgium argues that this citation does not support the Department’s point and, in fact, supports the opposite conclusion.

AMS Belgium asserts that the Department places almost its entire reliance on the Reporting Letter as showing that the Orders could have meant nominal. In so doing, according to AMS Belgium, the Department does not acknowledge that it can request information on products outside the scope of the orders in order to ensure the accurate recording of information.

AMS Belgium also contends that that the Department does not consider the countervailing duty (CVD) investigation. According to AMS Belgium, factors considered by the Department in the section of the Draft Remand Results entitled “The Investigation and Determinations by the Secretary” occurred after the Preliminary Results in the CVD investigation and, by definition, could not have influenced the interpretation of the CVD orders with the same language. Without that subsequent history, the history of the CVD orders is clear in that the language only extended to “actual” merchandise and that products with an actual thickness of less than 4.75 mm are not included in the CVD orders. See Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination: Stainless Steel Plate in Coils from Belgium, 63 FR 47239 (September 4, 1998) (Preliminary CVD Determination).

Petitioners argue that the ITC in its preliminary and final injury determinations worked from the description in the Department’s notices of initiation, and that the ITC was clear that it was evaluating the issue of material injury on the strength of the definition of SSPC found in the ASTM standards, which provide for tolerances in the thickness of SSPC and thus incorporate nominal thickness as a practical response to the imprecision that exists in the production of SSPC. Moreover, petitioners point out that in the ITC’s preliminary and final injury determinations, the ITC pointed to the ASTM Standard A/480 in support of the proposition that industry standards for stainless steel products expressly differentiate between plate, and sheet and strip, notably as to thickness.

Petitioners believe that the Department can justly find that the ITC's emphasis on defining SSPC with reference to ASTM Standard A 480/A 480M warrants the conclusion that the Orders subject merchandise is SSPC with a nominal thickness of 4.75 mm and greater under 19 CFR 351.225(k)(1). In addition, petitioners state that, in light of evidence that the Department has intended from the outset of the SSPC proceedings to define the subject merchandise as SSPC with a nominal thickness of 4.75 mm and greater, corroborative evidence that the ITC shared this intent during the investigation should override any aberrations that occurred after the investigation.

Petitioners point out that, although the Department has reviewed the history of the SSPC proceedings and found that "inconsistency" in the record precludes resolution of the scope of the Orders under 19 CFR 351.225(k)(1), evidence from the petition, the original investigation, and prior determinations by the Department and the ITC supports a conclusion that the subject merchandise is SSPC with a nominal thickness of 4.75 mm and greater. Although petitioners do not believe that recourse to a Diversified Products analysis under 19 CFR 351.225(k)(2) is needed to clarify the scope of the Orders, petitioners find that the Department's Scope Ruling and analysis under 19 CFR 351.225(k)(2) reinforce the conclusion in favor of nominal thickness.

Department's Position

We disagree with AMS Belgium that the Department did not give proper analysis to petitioners' pre-initiation comments. As excerpted above, petitioners' description of the merchandise in those comments speaks for itself in expressly recognizing mechanical tolerances.²²

We disagree with AMS Belgium's argument that the Department fails to note the petitioners' comments on May 8, 1998. Petitioners' comments in its May 8, 1998, submission regarding inclusion of further processed SSPC were taken into account during the investigations to determine the coverage of subject merchandise. Moreover, we disagree with AMS Belgium that the Department did not consider petitioners' comments in its May 8, 1998, letter as part of this scope inquiry. The May 8, 1998, letter was in response to the Department's request for comments on the scope during the investigations. In the letter, petitioners primarily discussed SSPC that was "further processed," but was still within the scope, as long as it met the specified dimensions. Nothing in this letter referred to nominal or actual measurements.²³

As noted by AMS Belgium, the October 8, 1998, letter references the scope of the Orders, and requested respondents to code the thickness variables according to actual thickness, irrespective of whether the respondent records thickness on an actual or nominal basis. The letter also requested respondents to ensure that all sales of products for which the nominal thickness is

²² Letter from petitioner regarding Stainless Steel Plate in Coils in Belgium, Canada, Italy, South Korea, South Africa and Taiwan, dated April 14, 1998 (submitted in Petitioners Scope Inquiry Comments, dated July 3, 2007, at Exhibit 17).

²³ See AMS Belgium's Scope Inquiry Request at Exhibit 2

greater than or equal to 4.75 mm in thickness are reported.²⁴ The Department, however, explained its actions in the SSPC Final as follows:

Notwithstanding respondent's arguments to the contrary, the Department clarified the scope of this Order to include nominal SSPC during the investigation. The record shows that on October 14, 1998, AMS Belgium's predecessor-in-interest protested the Department's instructions to report sales of nominal SSPC. In that letter, respondent also acknowledged that the Department has now redefined the "scope to include material with a nominal thickness of 4.75 mm or greater." As such, AMS Belgium was clearly aware of the Department's understanding of the scope to include nominal SSPC, as well as the Department's requirement that Respondent report sales of nominal SSPC. Indeed, as AMS Belgium acknowledges, it complied with the Department's instructions and reported sales of nominal SSPC in the investigation. Thus, the record of the investigation strongly suggests that the scope of the Orders includes nominal SSPC.

See SSPC Final at Comment 8.

As discussed above, other actions in subsequent segments of proceeding may have created ambiguity so that the Department is not able to conclude whether nominal merchandise was inside or outside the scope of the Orders based on the criteria specified in 19 CFR 351.225(k)(1).

With respect to the CVD investigation, those proceedings were aligned with the AD cases under investigation. See Preliminary CVD Determination, 63 FRat 47239. Hence, any findings by the Department and the ITC affected all of the companion cases. The description of the scopes in all seven SSPC orders is identical, and, given the nature of the inquiry pursuant to 19 CFR 351.225(m) and the remand instructions of the Court, we consider it appropriate to conduct a single inquiry and issue a single scope ruling that applies to all such orders.

The Department does not agree with petitioners' belief that the Department can determine based upon substantial evidence that the ITC's emphasis on defining SSPC with reference to ASTM Standard A 480/A 480M warrants the conclusion that the Orders' subject merchandise is SSPC with a nominal thickness of 4.75 mm and greater under 19 CFR 351.225(k)(1). The Department also does not agree with petitioners that evidence from the petition, the original investigation, and prior determinations by the Department and the ITC supports a conclusion that the subject merchandise is SSPC with a nominal thickness of 4.75 mm and greater. While petitioners identify additional information strongly suggesting that the SSPC with a nominal thickness of 4.75 mm and greater is included within the Orders under the criteria specified by 19 CFR 351.225(k)(1), petitioners do not address conflicting information from subsequent segments of

²⁴ See Petitioners Scope Inquiry Comments, dated July 3, 2007, at Exhibit 3.

the proceeding identified by the Department in the Draft Remand Results. Because of such ambiguity, the Department continues to rely on its findings from its December 3, 2008 Scope Ruling conducted pursuant to 19 CFR 351.225(k)(2) as the basis for including SSPC with a nominal thickness of 4.75 mm and greater within the Orders.

Technical Standards

AMS Belgium argues that the Department appears to recognize that, in order to give full effect to the language of the Orders, the Orders must specify the dimensions of the product after further processing. AMS Belgium states that although the only relevant dimension for thickness specified in the Orders is 4.75 mm, the Department has read tolerance ranges into the Orders. According to AMS Belgium, in adding tolerance ranges to the Orders, the Department has impermissibly amended the Orders by (1) adding the word “nominal”; (2) adding tolerance ranges; and by (3) defining the tolerances to the ASTM instead of using the importers’ own practices or another industry standard.

AMS Belgium claims that the Draft Remand Results repeatedly suggest that the ASTM standard represents industry practice and that it was this practice that was incorporated in the language of the Orders. However, AMS Belgium argues that nowhere during its consideration and adoption of the dimensions of the scope language did either the Department or any party refer to the ASTM. Thus, the ASTM could not have been the reference source for the language. Therefore, AMS Belgium argues that it is a betrayal of the language and history of the Orders for the Department to impose a new definition for a term not considered in the adoption of the scope language.

AMS Belgium states that contrary to the implication in the Draft Remand Results, 4.75 mm is not the industry measurement for thickness of SSPC. Rather, the ASTM standard, as cited by the Department, is “4.76 mm” and/or “5 mm.” AMS Belgium argues that 4.7625 mm does not equal 4.75 mm and that the Department’s equating 4.75 mm to 4.76 mm and/or 5 mm is an impermissible modification of the scope language. According to AMS Belgium, this disparity dispositively shows that the Department, when adopting the scope language, did not conform the Orders to an industry standard. Furthermore, AMS Belgium argues that because the Orders did not use the industry standard, there is no competing “industry” meaning of whether the measurement in question is to be “actual” or “nominal” and, thus, there can be no tension with the common meaning of this language.

Department’s Position

Although the language of the Orders does not specifically mention ASTM Standards, the standards for SSPC were considered during the investigations. As noted above, the ITC Report noted that stainless steel plate is defined in the ASTM Standard A480/480M. Thus, the injury determination was made on the product as defined in the ASTM Standard.

Regarding the applicability of ASTM Standards, we disagree with AMS Belgium. The ASTM standard clearly identifies dimensional tolerances that aid in our interpretation of the language of the Orders and our analysis under 19 CFR 351.225(k).

We also disagree with AMS Belgium that our interpretation of the scope language on remand has the effect of reading new language into the scope. Aided by an understanding of industry practice and confronted by imprecise scope language, the Department has determined that reference in the scope to “4.75 mm or more in thickness” is not as clear and unambiguous as advocated by AMS Belgium.

FINAL RESULTS OF REDETERMINATION

The Department finds on remand that based on our reexamination of scope language, we are unable to make a definitive finding whether SSPC with a nominal thickness of 4.75 mm, but an actual thickness of less than 4.75 mm, is subject to the Orders. Furthermore, although the Department and the ITC have, for the most part, interpreted the scopes of the Orders to include SSPC with a nominal thickness greater than or equal to 4.75 mm regardless of the actual thickness, we acknowledge that our actions in certain segments of the proceeding may have created ambiguity that such merchandise was outside the scope of the Orders. Based on this inconsistency, we find that the matter cannot be resolved under the criteria set forth in 19 CFR 351.225(k)(1). Therefore, the Department incorporates its analysis under 19 CFR 351.225(k)(2) from its December 3, 2008 Scope Ruling, wherein the Department found that based on our analysis of the comments received and application of the criteria under 19 CFR 351.225(k)(2), we have determined that the AD orders on SSPC from Belgium, Italy, South Africa, the Republic of Korea, and Taiwan and CVD orders on SSPC from Belgium and South Africa include stainless steel products with a nominal thickness of 4.75 mm, regardless of the actual thickness.

Paul Piquado
Acting Deputy Assistant Secretary
for Import Administration

Date