U.S. Customs and Border Protection

AUTOMATED COMMERCIAL ENVIRONMENT (ACE) EXPORT MANIFEST FOR RAIL CARGO TEST: RENEWAL OF TEST

AGENCY: U.S. Customs and Border Protection; Department of Homeland Security.

ACTION: General notice.

SUMMARY: This notice announces that U.S. Customs and Border Protection (CBP) is renewing the Automated Commercial Environment (ACE) Export Manifest for Rail Cargo Test, a National Customs Automation Program (NCAP) test concerning ACE export manifest capability.

DATES: The voluntary pilot initially began on September 9, 2015, and it was modified and extended on August 14, 2017, and was further extended on April 27, 2022. This renewal is effective May 13, 2024. The renewed test will run for an additional two years from the date of publication of this notice in the **Federal Register**.

ADDRESSES: Applications for new participants in the ACE Export Manifest for Rail Cargo Test must be submitted via email to CBP Export Manifest at *cbpexportmanifest@cbp.dhs.gov.* In the subject line of the email, please write "ACE Export Manifest for Rail Cargo Test Application". Applications will be accepted at any time during the test period. Written comments concerning program, policy, and technical issues may also be submitted via email to CBP Export Manifest at *cbpexportmanifest@cbp.dhs.gov.* In the subject line of the email, please write "Comment on ACE Export Manifest for Rail Cargo Test". Comments may be submitted at any time during the test period.

FOR FURTHER INFORMATION CONTACT: Thomas J. Pagano, Branch Chief, or David Garcia, Program Manager, Outbound Enforcement and Policy Branch, Office of Field Operations, CBP, via email at *cbpexportmanifest@cbp.dhs.gov,* or by telephone, 202–325–3277.

SUPPLEMENTARY INFORMATION:

I. Background

The Automated Commercial Environment (ACE) Export Manifest for Rail Cargo Test is a voluntary test in which participants agree to submit export manifest data to U.S. Customs and Border Protection (CBP) electronically at least two hours prior to loading of the cargo onto the rail car, in preparation for departure from the United States or, for empty rail cars, upon assembly of the train. The ACE Export Manifest for Rail Cargo Test is authorized under § 101.9(b) of title 19 of the Code of Federal Regulations (19 CFR 101.9(b)), which provides for the testing of National Customs Automation Program (NCAP) programs or procedures.

The ACE Export Manifest for Rail Cargo Test examines the functionality of filing export manifest data for rail cargo electronically in ACE. ACE creates a single automated export processing platform for certain export manifest, commodity, licensing, export control, and export targeting transactions. This will reduce costs for CBP, partner government agencies, and the trade community, as well as improve facilitation of export shipments through the supply chain.

The ACE Export Manifest for Rail Cargo Test also assesses the feasibility of requiring the manifest information to be filed electronically in ACE within a specified time before the cargo is loaded on the train. This capability will enhance CBP's ability to calculate the risk and effectively identify and inspect shipments prior to the loading of cargo in order to facilitate compliance with U.S. export laws.

CBP announced the procedures and criteria related to participation in the ACE Export Manifest for Rail Cargo Test in a notice published in the **Federal Register** on September 9, 2015 (80 FR 54305). This test was originally scheduled to run for approximately two years. On August 14, 2017, CBP extended the test period (82 FR 37893). At that time, CBP also modified the original notice to make certain data elements optional and opened the test to accept additional applications from all parties who met the eligibility requirements. CBP further renewed the test for an additional two years on April 27, 2022 (87 FR 25036). Through this notice, CBP is renewing the test again.

The data elements, unless noted otherwise, are mandatory. Data elements which are mandatory must be provided to CBP for every shipment. Data elements which are marked "conditional" must be provided to CBP only if the particular information pertains to the cargo. Data elements which are marked "optional" may be provided to CBP but are not required to be completed. The data elements are set forth below:

(1) Mode of Transportation (containerized rail cargo or noncontainerized rail cargo) (optional)

(2) Port of Departure from the United States

(3) Date of Departure

(4) Manifest Number

(5) Train Number

(6) Rail Car Order

(7) Car Locator Message

(8) Hazmat Indicator (Yes/No)

(9) 6-character Hazmat Code (conditional) (If the hazmat indicator is yes, then UN (for United Nations Number) or NA (North American Number) and the corresponding 4-digit identification number assigned to the hazardous material must be provided.)

(10) Marks and Numbers (conditional)

(11) SCAC (Standard Carrier Alpha Code) for exporting carrier

(12) Shipper name and address (For empty rail cars, the shipper may be the railroad from which the rail carrier received the empty rail car to transport.)

(13) Consignee name and address (For empty rail cars, the consignee may be the railroad to which the rail carrier is transporting the empty rail car.)

(14) Place where the rail carrier takes possession of the cargo shipment or empty rail car (optional)

(15) Port of Unlading

(16) Country of Ultimate Destination (optional)

(17) Equipment Type Code (optional)

(18) Container Number(s) (for containerized shipments) or Rail Car Number(s) (for all other shipments)

(19) Empty Indicator (Yes/No)

If the empty indicator is no, then the following data elements must also be provided, unless otherwise noted:

(20) Bill of Lading Numbers (Master and House)

(21) Bill of Lading Type (Master, House, Simple or Sub)

(22) Number of house bills of lading (optional)

(23) Notify Party name and address (conditional)

(24) AES Internal Transaction Number or AES Exemption Statement (per shipment)

(25) Cargo Description

(26) Weight of Cargo (may be expressed in either pounds or kilograms)

(27) Quantity of Cargo and Unit of Measure

(28) Seal Number (only required if the container was sealed)

(29) Split Shipment Indicator (Yes/No) (optional)

(30) Portion of split shipment (e.g., 1 of 10, 4 of 10, 5 of 10, Final, etc.) (optional)

(31) In-bond Number (conditional)

(32) Mexican Pedimento Number (only for shipments for export to Mexico) (optional)

For further details on the background and procedures regarding this test, please refer to the September 9, 2015 notice and August 14, 2017 extension and modification.

II. Renewal of the ACE Export Manifest for Rail Cargo Test Period

CBP will renew the test for two years to continue evaluating the ACE Export Manifest for Rail Cargo Test. This will assist CBP in determining whether electronic submission of manifests will allow for improvements in the functionality and capabilities at the departure level. The renewed test will run for two years from the date of publication.

III. Applicability of Initial Test Notice

All provisions in the September 2015 notice and in the August 2017 modification and extension remain applicable, subject to the further extension of the time period provided in this renewal.

IV. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3507), an agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget (OMB). The collections of information in this NCAP test have been approved by OMB in accordance with the requirements of the Paperwork Reduction Act and assigned OMB control number 1651–0001.

Dated: May 6, 2024.

DIANE J. SABATINO,
Acting Executive Assistant Commissioner,
Office of Field Operations, U.S. Customs and
Border Protection.

NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING BATTERY-ELECTRIC SEMI-TRUCKS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection (CBP) has issued a final determination concerning the country of origin of Nikola's Tre Bev, class 8, battery-electric semi-truck. Based upon the facts presented, CBP has concluded that various imported components do undergo a substantial transformation in the United States when assembled into the battery-electric semi-truck.

DATES: The final determination was issued on May 8, 2024. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination no later than within 30 days of publication of this determination in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ani Mard, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325–0737.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on May 8, 2024, U.S. Customs and Border Protection (CBP) issued a final determination concerning the country of origin of Nikola's Tre Bev, class 8, battery-electric semi-truck for purposes of title III of the Trade Agreements Act of 1979. This final determination, HQ H335387, was issued at the request of Carter Machinery Co., Inc., under procedures set forth at 19 CFR part 177, subpart B, which implements title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP has concluded that, based upon the facts presented, the various imported components do undergo a substantial transformation in the United States when assembled into the battery-electric semi-truck.

Section 177.29, CBP Regulations (19 CFR 177.29), provides that a notice of final determination shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

ALICE A. KIPEL,
Executive Director, Regulations and Rulings,
Office of Trade.

HQ H335387
May 8, 2024
OT:RR:CTF:VS H335387 a.m.
CATEGORY: Origin

AARON SULLIVAN
CARTER MACHINERY CO., INC.
1330 LYNCHBURG TURNPIKE,
SALEM, VA 24153

RE: U.S. Government Procurement; Title III, Trade Agreements Act of 1979 (19 U.S.C. 2511); subpart B, part 177, CBP Regulations; Country of Origin of Battery-Electric Semi-Truck.

DEAR MR. SULLIVAN:

This is in response to your request, dated November 1, 2023, on behalf of Carter Machinery Co., Inc. ("Carter Machinery"), for a final determination concerning the country of origin of Nikola's Tre Bev, class 8, battery-electric semi-truck pursuant to Title III of the Trade Agreements Act of 1979 ("TAA"), as amended (19 U.S.C. 2511 *et seq.*), and subpart B of part 177, U.S. Customs and Border Protection ("CBP") Regulations (19 CFR 177.21, *et seq.*). Carter Machinery is a party-at-interest within the meaning of 19 CFR 177.22(d)(1) and 177.23(a) and is therefore entitled to request this final determination.

FACTS

The merchandise at issue is Nikola's Tre Bev, class 8, battery-electric semi-truck ("Tre Bev"). The Tre Bev is a battery-electric, zero emission, heavy duty truck, with a 330-mile range. It is described as a 6x2 cab over style truck designed for short-haul regional-metro applications.

In response to a request from this office for a more detailed breakdown of components, Carter Machinery submitted a bill of materials (BOM) containing the country of origin of the Tre Bev components, as well as documents illustrating the assembly process. According to the submission, the Tre Bev is comprised of 1,349 individual parts. The total cost of the parts was provided, and it is indicated that 67% of that cost is represented by U.S.-made products. The trucks are built in Coolidge, AZ.

The U.S. assembly process is described as follows:

Station 0: The chassis[1] (product of Mexico) is brought inside the manufacturing plant. Based on the photograph submitted, the chassis is a black rectangular base metal structure/frame. It is imported in its "bare" form, and the mechanical components are incorporated into the frame in subsequent stations. Each chassis is loaded in the upside position onto a set of automatic guided vehicles ("AGV").

Station 1: AGVs are moved from station zero to station one. Several major components and brackets are installed, including suspension brackets, cab tilt pump, rear axle alignment, air spring brackets, high voltage routing brackets, and the steering gear (product of USA).

Station 2: Pre-cut pneumatic lines (product of USA) are transported from the subassembly station to the mainline. These lines control air flow to help with steering, turning, and braking functions. The low voltage harnesses

[1] The term "chassis" refers to the frame of the vehicle. The chassis is the main supporting structure of the vehicle and is also described as the "skeleton." Carter Machinery uses the terms "frame" and "chassis" interchangeably.

(product of Spain) are installed, which help route power from the batteries to areas that require a lower voltage to operate.

Station 3: High voltage cables are bundled and assembled. These cables are directly connected to the batteries (product of USA) and e-axle. E-motor hoses, inverter pipes, and air spring suspension are also installed. Additionally, the DCDC converter (product of USA) is installed.

Station 4: The front axle (product of USA), tag axle (product of Italy), and e-axles (product of Italy) are installed. The e-axle houses twin motors that power the vehicle.

Station 5: Station five focuses on the final preparation of the chassis. The last of the major internal support brackets, battery brackets, radiator support brackets, front under rider protection assembly, high voltage compressor, and HVAC are installed.

Station 6: The vehicle gets flipped in the truck position. The AGV is moved out of the station and the AGVs for the second half of the assembly process move into the station. The flip equipment releases the chassis back down onto the new AGV in truck position.

Station 7: The high voltage cable bundles are routed. The rear Power Distribution Unit ("PDU") (product of Malta) is installed and connected to the rear inverter (product of USA). Simultaneously, the front PDU is installed and connected to the high voltage lines that will be connected to the batteries. The heat compressor, fuse box, and expansion tanks are connected to brake resistor lines. Thermal lines are also connected in the front.

Station 8: The high voltage batteries are installed using a lift assist into the individual housing units creating by the battery brackets. Additionally, two low voltage batteries are installed in a small housing under the cab to power cab functions such as instrument panel, doors, lights, etc.

Station 9: The cab is prepared to be mounted in the next station. This includes installing and securing the brackets onto which the cab will slide. Radiators, rear cargo lights, rear cameras, quick exhaust, and Tire Pressure Monitoring System (TPMS) fuse boxes are also installed.

Station 10: The cab is lifted using an overhead lift assist. The cab is married onto the support brackets installed in the previous station. The electrical harness and pneumatic connections between the cab and chassis are made. The tilt pin that allows the cab to lift is also installed here.

Station 11: The cab steps, lower side plates for batteries, fifth wheel, and mud flaps are all installed. The horn and speakers are installed to the cab. The rear inverter is also routed and connected.

Station 12: The electrical side panels, storage boxes, and side steps are installed. The wheel trim is installed on the cab tires and are then mounted to the axles. Air conditioning coolant, battery coolant, windshield wiper, and power steering fluids are filled. The chassis steps are also installed.

Station 13: Bonding checks on high voltage components like batteries, compressors, DCDC converters are done to ensure they are grounded. Unified Diagnostic Services (UDS) routines are completed. Manual service disconnects are installed, completing the battery circuits. Skid plates are installed under the batteries. Electronic Braking Software (EBS) is flashed before high voltage is brought up.

Station 14: The truck is powered on at this point in the assembly process. The e-axle and controllers are paired to the accelerator through resolver learning. Air conditioning is activated, and the odometer is reset. Additionally, the lane departure warning system is programmed.

Alignment: The front axle alignment is adjusted. Rear axle alignment and thrust angle are measured. Headlamps are adjusted. Lane departure warning and autonomous emergency brake systems are also calibrated.

Dyno: The Dyno[2] confirms vehicle propulsion including acceleration/deceleration, braking, and vehicle speed sensors. The vehicle function lights, windshield wipers, and cruise control are also tested.

ISSUE

Whether the imported components are substantially transformed when made into the Tre Bev, class 8, battery-electric semi-truck in the United States.

LAW & ANALYSIS

CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purpose of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government, pursuant to subpart B of part 177, 19 CFR 177.21 *et seq.,* which implements title III, Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–2518).

CBP's authority to issue advisory rulings and final determinations is set forth in 19 U.S.C. 2515(b)(1), which states:

> For the purposes of this subchapter, the Secretary of the Treasury shall provide for the prompt issuance of advisory rulings and final determinations on whether, under section 2518(4)(B) of this title, an article is or would be a product of a foreign country or instrumentality designated pursuant to section 2511(b) of this title.

Emphasis added.

The Secretary of the Treasury's authority mentioned above, along with other customs revenue functions, are delegated to CBP in the Appendix to 19 CFR part 0—Treasury Department Order No. 100–16, 68 FR 28,322 (May 23, 2003).

The rule of origin set forth in 19 U.S.C. 2518(4)(B) states:

> An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also 19 CFR 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of part 177 consistent with the Federal Acquisition Regulation ("FAR"). *See* 19 CFR 177.21. In this regard, CBP recognizes that the FAR restricts the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 CFR 25.403(c)(1).

[2] A dynamometer, also known as a "dyno", is a device that measures force, torque, or power.

The FAR, 48 CFR 25.003, defines "U.S.-made end product" as:

> . . . an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

Therefore, the question presented in this final determination is whether, as a result of the operations performed in the United States, the Tre Bev is substantially transformed into a product of the United States.

In deciding whether the combining of parts or materials constitutes a substantial transformation, the determinative issue is the extent of the operations performed and whether the parts lose their identity and become an integral part of the new article. *See Belcrest Linens v. United States,* 6 CIT 204 (1983), *aff'd,* 741 F.2d 1368 (Fed. Cir. 1984). Assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. Factors, which may be relevant in this evaluation, may include the nature of the operation (including the number of components assembled), the number of different operations involved, and whether a significant period of time, skill, detail, and quality control are necessary for the assembly operation. *See* C.S.D. 80–111, C.S.D. 85–25, C.S.D. 89–110, C.S.D. 89–118, C.S.D. 90–51, and C.S.D. 90–97. If the manufacturing or combining process is a minor one, which leaves the identity of the article intact, a substantial transformation has not occurred. *See Uniroyal, Inc. v. United States,* 3 CIT 220 (1982), *aff'd,* 702 F.2d 1022 (Fed. Cir. 1983).

In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, factors such as the resources expended on product design and development, the extent and nature of post-assembly inspection and testing procedures, and worker skill required during the actual manufacturing process will be considered when determining whether a substantial transformation has occurred. No one factor is determinative.

In Headquarters Ruling Letter ("HQ") H155115, dated May 24, 2011, CBP found that assembly in the United States of an imported glider, and other imported and U.S.-origin parts, constituted a substantial transformation into the electric vehicle, an article with a new name, character, and use. The electric vehicle was composed of 31 components, of which 14 were of U.S. origin. The assembly process in the United States was complex and time-consuming and involved a significant U.S. contribution in both parts and labor. CBP determined that the country of origin of the electric vehicles for purposes of U.S. Government procurement was the United States. *See also* HQ H229157, dated November 16, 2012.

In HQ H118435, dated October 13, 2010, CBP determined the United States to be the country of origin for purposes of U.S. Government procurement for a line of electric golf and recreational vehicles. In this case, CBP found that a Chinese-origin chassis, plastic body parts and pieces of plastic trim were substantially transformed when they were assembled with U.S.-origin battery packs, motors, electronics, wiring assemblies, seats, and chargers in the United States. The vehicles were composed of approximately 53 and 62 inputs, of which between 12 and 17 inputs were U.S. components and

critical in making the electric vehicle. The imported parts lost their individual identities and became integral parts of a new article possessing a new name, character, and use.

In HQ H022169, dated May 2, 2008, CBP held that a mini-truck glider from India was substantially transformed when assembled in the United States with approximately 87 different components, 68 of which were of U.S. origin, to produce an electric mini-truck. CBP found that the imported glider lost its individual identity and became an integral part of a new article possessing a new name, character and use. Accordingly, CBP determined the assembly process was complex and time-consuming and involved a significant U.S. contribution, in both parts and labor. The components used to power the vehicle were assembled in the United States, and then incorporated into the vehicle in the United States.

In the case at hand, various imported components such as the chassis, e-axle, and PDU cannot independently function and operate as an electric vehicle. These components need to be assembled in the United States with other necessary components of U.S. origin, such as the batteries, converter, wheels, and front axle. Furthermore, given the complexity and duration of the U.S. manufacturing process, such as installation, calibration, mounting, and preparation of the product, we consider these operations to be more than mere assembly. Importantly, 67% of the total cost of the truck is comprised of U.S.-made products.

This case is distinguishable from HQ H302821, dated July 26, 2021, in which we held that the assembly of Volvo vehicles in Sweden as part of a "knockdown operation" did not result in a substantial transformation. Unlike in that case, where the Chinese subassemblies had pre-determined end uses and did not undergo a change in character and use during the assembly process in Sweden, here, applying the name, character and use test, the imported components lose their individual identities and will become an integral part of a new article possessing a new name, character, and use. The assembly of the Tre Bev in the United States constitutes a substantial transformation resulting in an article with a new name, character, and use.

Based on the foregoing, we find that the last substantial transformation occurs in the United States, and therefore, the Tre Bev battery-electric semi-truck is not a product of a foreign country or instrumentality designated pursuant to 25 U.S.C. 2511(b). As to whether the Tre Bev produced in the United States qualifies as a "U.S.-made end product," you may wish to consult with the relevant government procuring agency and review *Acetris Health, LLC v. United States,* 949 F.3d 719 (Fed. Cir. 2020).

HOLDING

Based on the information outlined above, we determine that the components imported into the United States undergo a substantial transformation when made into Nikola's Tre Bev, class 8, battery-electric semi-truck.

Notice of this final determination will be given in the **Federal Register**, as required by 19 CFR 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 CFR 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 CFR 177.30, any party-at-interest may, within 30 days of publication of the **Federal Register** Notice referenced above, seek judicial review of this final determination before the U.S. Court of International Trade.

Sincerely,

ALICE A. KIPEL,
Executive Director, Regulations & Rulings,
Office of Trade.

19 CFR PART 177

REVOCATION OF ELEVEN RULING LETTERS AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF NON-SLIP GRIP PADS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of eleven ruling letters, and proposed revocation of treatment relating to the tariff classification of non-slip grip pads.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking eleven ruling letters concerning tariff classification of non-slip grip pads under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 58, No. 14, on April 10, 2024. One comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 29, 2024.

FOR FURTHER INFORMATION CONTACT: Reema Bogin, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325–7703.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 58, No. 14, on April 10, 2024, proposing to revoke eleven ruling letters pertaining to the classification of non-slip grip pads. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In Headquarters Ruling Letter (HQ) H302153, New York Ruling Letter (NY) PD 816479, NY G83126, NY H86099, NY I83543, NY K82162, NY L86033, NY N033496, and NY N044145, CBP classified non-slip grip pads in heading 3921, HTSUS, specifically in subheading 3921.12.19, HTSUS, which provides for "other plates, sheets, film foil and strip, of plastic: cellular: of polymers of vinyl chloride: other." In HQ 088142 and HQ 088909, CBP classified non-slip grip pads in heading 3921, HTSUS, specifically in subheading 3921.12.11, HTSUS, which provides for "other plates, sheets, film foil and strip, of plastic: cellular: of polymers of vinyl chloride: products with textile components in which man-made fibers predominate by weight over any other single textile fiber: over 70 percent by weight of plastics," and in subheading 3921.12.15, HTSUS, "other plates, sheets, film foil and strip, of plastic: cellular: of polymers of vinyl chloride: products with textile components in which man-made fibers predominate by weight over any other single textile fiber: other." CBP has reviewed HQ H302153, HQ 088142, HQ 088909, NY PD 816479, NY G83126, NY H86099, NY I83543, NY K82162, NY L86033, NY N033496, and NY N044145 and has determined the ruling letters to be in error. It is now CBP's position that non-slip grip pads are properly classified, in heading 3926, HTSUS, specifically in subheading 3926.90.99, HTSUS, which provides for "other articles of plastics and articles of other materials of heading 3901 to 3914: other: other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking HQ H302153, HQ 088142, HQ 088909, NY PD 816479, NY G83126, NY H86099, NY

I83543, NY K82162, NY L86033, NY N033496, and NY N044145 revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H305115 set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H305115

May 14, 2024
OT:RR:CTF:CPMMA H305115 RRB
CATEGORY: Classification
TARIFF NO.: 3926.90.99

MR. VICTOR QUINTANA
IMPORT SUPERVISOR
MOHAWK INDUSTRIES, INC.
160 S. INDUSTRIAL BLVD.
P.O. BOX 12069
CALHOUN, GA 30703

RE: Revocation of HQ H302153, HQ 088142, HQ 088909, NY PD 816479, NY G83126, NY H86099, NY I83543, NY K82162, NY L86033, NY N033496, NY N044145; Tariff classification of non-slip grip pads

DEAR MR. QUINTANA:

This is to inform you that U.S. Customs and Border Protection ("CBP") has reconsidered Headquarters Ruling Letter ("HQ") H302153, dated July 12, 2019, regarding the classification under the Harmonized Tariff Schedule of the United States ("HTSUS"), of non-slip grip pads. After reviewing this ruling in its entirety, we believe that it is in error. For the reasons set forth below, we hereby revoke HQ H302153.

For the reasons set forth below, we are also revoking ten other rulings on substantially similar merchandise: HQ 088142[1], dated January 18, 1991; HQ 088909[2], dated April 22, 1991; New York Ruling Letter ("NY") PD 816479[3], dated December 5, 1995; NY G83216[4], dated October 31, 2000; NY H86099[5], dated December 14, 2001; NY I83543[6], dated July 31, 2002; NY K82162[7], dated January 15, 2004; NY L86033[8], dated July 20, 2005; NY N033496[9], July 18, 2008; and NY N044145[10], dated December 4, 2008.

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[1] HQ 088142 classified an anti-slip mesh warp knit fabric that is completely encased in PVC in heading 3921, HTSUS.

[2] HQ 088909 classified a stay put rug pad made of an open mesh warp knit fabric that is completely covered in PVC in heading 3921, HTSUS.

[3] NY PD 816479 classified non-skid fabric covered in PVC in heading 3921, HTSUS.

[4] NY G83216 classified a non-slip grip liner made of a PVC coated textile with an open-work warp knit construction in heading 3921, HTSUS.

[5] NY H86099 classified a grip net shelf lining material consisting of an open work warp knit fabric that has been coated with PVC in heading 3921, HTSUS.

[6] NY I83543 classified non-skid material constructed from open mesh fabric that is coated on both sides with PVC and is used as drawer liners, non-skid rug pads, and shelf liners in heading 3921, HTSUS.

[7] NY K82162 classified non-skid material consisting of an open mesh fabric that is coated on both sides with PVC in heading 3921, HTSUS.

[8] NY L86033 classified anti-skid material consisting of an open mesh fabric coated on both sides with PVC in heading 3921, HTSUS.

[9] NY N033496 classified PVC coated anti-skid material composed of an open mesh fabric in heading 3921, HTSUS.

[10] NY N044145 classified drawer liners composed of an open mesh fabric and encased on both sides with PVC in heading 3921, HTSUS.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the Customs Bulletin, Volume 58, No. 14, on April 10, 2024. One comment was received in response to this notice.

FACTS:

In HQ H302153, we described the product as follows:

> The non-slip grip pads are made of one hundred percent warp knitted, polyester open mesh fabric that is visibly coated on both sides with foamed polyvinyl chloride ("PVC"). The spaces within the mesh of each of the samples vary, with the largest spaces being approximately 0.125 inches by 0.125 inches. The grip pads come in the following sizes: 20 inches x 30 inches, 20 inches x 32 inches, 28 inches x 42 inches, 40 inches x 60 inches, and 56 inches x 60 inches.
>
> These grip pads are used under rugs to add cushioning underfoot in order to reduce fatigue. They are also used for lining shelves, drawers and cabinets in the kitchen, bathroom and garage work areas.

ISSUE:

Whether non-slip grip pads are classified in heading 3921, HTSUS, as "other plates, sheets, film, foil and strip, of plastics," in heading 3924, HTSUS, as "tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics," or in heading 3926, HTSUS, as "other articles of plastics and articles of other materials of headings 3901 to 3914."

LAW AND ANALYSIS:

Classification under the HTSUS is governed by the General Rules of Interpretation ("GRI"). GRI 1 provides, in part, that "for legal purposes, classification shall be determined according to terms of the headings and any relative section or chapter notes..." In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

The 2024 HTSUS provisions under consideration are as follows:

3921	Other plates, sheets, film, foil and strip, of plastics:
3924	Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics:
3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:

* * * *

Note 10 to chapter 39, HTSUS, provides as follows:

> In headings 3920 and 3921, the expression "*plates, sheets, film, foil and strip*" applies only to plates, sheets, film, foil and strip (other than those of chapter 54) and to blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use).

* * * *

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System. While not legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the proper classification of merchandise. It is CBP's practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUS. *See* T.D. 89–90, 54 Fed. Reg. 35127 (August 23, 1989).

The General Notes to the ENs to chapter 39 also state that "[h]eading 39.26 is a residual heading which covers articles, not elsewhere specified or included, of plastics or of materials of heading 39.01 to 39.14." Thus, the subject merchandise can only be classified in heading 3926, HTSUS, if they are excluded from heading 3921, HTSUS, and heading 3924, HTSUS.

The non-slip grip pads in HQ H302153 consist of warp knitted, polyester open mesh fabric coated with foamed PVC. The mesh fabrics include open spaces that are still present following the application of the PVC coating. The largest spaces within the mesh samples are approximately 0.125 inches by 0.125 inches[11]. Despite the presence of a knitted fabric, CBP correctly noted in HQ H302153 that the non-slip grip pads are not classified as a textile of chapter 59.[12]

In HQ H302153, CBP classified the non-slip grip pads in heading 3921, HTSUS, because CBP determined that the merchandise were sheets of plastic under the terms of the heading. The term "sheet" is not defined in the text of the HTSUS or in the Explanatory Notes. In HQ H302153, CBP examined various dictionary definitions of the term "sheet" for purposes of heading 3921, HTSUS. For example, HQ H302153 cited to the Merriam-Webster Online Dictionary definition of "sheet" as "a surface or part of a surface in which it is possible to pass from any one point of it to any other without leaving the surface." *See* https://www.merriam-webster.com/dictionary/sheet (last visited August 27, 2019). That ruling also cited to definitions of "sheet" that are set forth in the Oxford English Dictionary and the MacMillan Dictionary.[13] Relying on dictionary definitions to determine the common and commercial meaning of "sheet," CBP held that "the instant grip pads feature a weave tight enough that it is possible to pass from any one point of it to another point without leaving the surface." For the reasons set forth below, we now find this to be in error.

While we accept and agree with the above definitions, we find that they were incorrectly applied in HQ H302153. There, CBP stated that "the instant grip pads feature a weave tight enough that it is possible to pass from any one point of it to another point without leaving the surface." However, it would,

[11] For comparison to other rulings, this is equivalent to approximately 3.175 mm x 3.175 mm.

[12] We note a clerical error in HQ H302153 on page 4, in which CBP excluded the non-slip grip pads from classification in chapter 59 "pursuant to note 2(a)(3) to chapter 53." Rather, the non-slip grip pads are excluded from classification in chapter 59 pursuant to note 2(a)(3) to chapter 59.

[13] In HQ H302153, CBP stated that "[t]he Oxford English Dictionary defines 'sheet' as 'a relatively thin piece of considerable breadth of a malleable, ductile, or pliable substance.' *See* https://www.oed.com (last visited May 30, 2019). The MacMillan Dictionary defines "sheet" as "a thin flat piece of paper, metal, plastic, glass, etc." *See* https://www.macmillandictionary.com/us/dictionary/american/sheet (last visited May 30, 2019); HQ 967346, dated January 25, 2005, which classified extruded polyethylene mesh netting in heading 3926, HTSUS, also relied on the Oxford English Dictionary definition of "sheet."

in fact, be impossible to do this as the non-slip grip pads consist of areas without surface where there are holes in the open-work knit base fabric and plastic mesh. Upon reexamination of the merchandise, we note that the construction of the mesh is not tight enough to allow one to go from one point to another without leaving the surface.

Though the term "sheet" is not defined in the HTSUS or the Explanatory Notes, CBP, the Court of International Trade ("CIT") and the World Customs Organization ("WCO") have identified accepted definitions of the term "sheet" in heading 3921, HTSUS. In *3G Mermet Fabric Corp. v. United States*, 25 C.I.T. 174, 178; 135 F. Supp. 2d 151, 156 (2001), the CIT defined the term "sheet" in the context of "sheets of plastic" as a "material in the form of a continuous stem covering or coating." *3G Mermet Fabric Corp.* 25 C.I.T. at 178. There, the CIT classified window shade fabrics with a mesh component that was coated with acrylic or PVC plastic in heading 3926, HTSUS, under GRI 3(b) based upon the plastic mesh component imparting the essential character. In defining "sheet" for purposes of classification as a plastic of chapter 39, the court relied on the definition of "sheeting of plastic" in *Sarne Handbags Corp. v. United States,* 100 F. Supp. 2d 1126, 1136 (CIT 2000). *3G Mermet Fabric Corp.* 25 C.I.T. at 177. Moreover, the WCO has determined that articles with holes are excluded from classification in heading 3921, HTSUS. In particular, the Harmonized System Committee of the WCO classified a similar article in heading 3926. The article was described as a flexible reinforcement grid of high-strength polyester fibers woven and covered on all sides with a protective layer of PVC visible to the naked eye, where "each element of the grid takes the form of a narrow fabric made of parallel yarns, with the 'weft' inserted at right angles between the yarns of the 'warp', forming mesh openings measuring 35 x 40 mm." *See* WCO Compendium of Classification Opinions (C.O.) at C.O. 3926.90/9 (2002).

In HQ H302153, CBP noted that certain rulings relying on the definition of "sheeting" in *Sarne Handbags Corp.* classified geotextile mesh material and extruded polypropylene or polyethylene mesh in heading 3926, HTSUS. *See* HQ 965889, dated March 17, 2003; HQ 966281, dated March 17, 2003; HQ 967325, dated November 8, 2004; HQ 967346, dated January 25, 2005; HQ 967348, dated January 25, 2005; and HQ 967349, dated January 25, 2005. CBP had distinguished the geotextile and extruded plastic mesh items in those rulings from the non-slip grip pads based on the size of the open mesh spaces. For example, in HQ 965889, the size of open spaces in the geotextile mesh varied from 16 mm x 16 mm to 21 mm x 24 mm, while the size of the open spaces in HQ 966281 varied from approximately 0.5 inches to 2 inches x 2 inches. Accordingly, CBP found that because the spaces in the non-slip grip pads were smaller than the spaces in the geotextile and extruded mesh, those rulings classifying geotextile and extruded mesh material in heading 3926, HTSUS, based on *Sarne* were inapplicable.

However, we now find this conclusion to be in error as the construction of the non-slip grip pad surface in HQ H302153 is not tight enough to pass from one point to another without leaving the surface due to the presence of holes in the open-work knit base fabric. Moreover, CBP incorrectly determined that the non-slip grip pads are sheets of plastic based on the size of the mesh openings. While the size of the open mesh spaces in the non-slip grips pads are smaller than the spaces in the merchandise in HQ 967346 and HQ 966281, we have identified other rulings classifying similar grip pads in heading 3926, HTSUS, where the size of the open spaces in the mesh surface

was the same size or smaller than those in HQ H302153. For example, in NY N292335, dated December 19, 2017, CBP classified PVC coated debris netting of a non-pile warp knit construction, which had holes measuring 0.125 inches, in heading 3926, HTSUS, rather than as sheets of plastic of heading 3921, HTSUS, even though the holes in the netting were, in fact, the same size or smaller than the holes in the non-slip grip pads in HQ H302153. Thus, CBP inconsistently applied its analysis of sheets of plastic based on the size of mesh openings for purposes of classification in heading 3921, HTSUS. Consequently, CBP incorrectly distinguished HQ 965889, HQ 966281, HQ 967325, and HQ 967346, which relied on the definition of "sheeting" of plastic in *Sarne*, from the non-slip grip pads in HQ H302153. Therefore, these rulings are, in fact, dispositive of the classification of the subject non-slip grip pads as both sets of merchandise consist of surfaces in which it is not possible to pass from any one point of it to any other without leaving the surface. Accordingly, the non-slip grip pads are not classifiable in heading 3921, HTSUS, as sheets of plastic.

We note that HQ 088142, HQ 088909, and NY PD 816479 involved merchandise that is exceedingly similar to the non-slip grip pads in HQ H302153. These rulings were issued prior to *Sarne* and the WCO's decision to exclude merchandise with holes from classification in heading 3921, HTSUS. Although these rulings were revoked by operation of law following the *Sarne* decision, we are including these decisions in the instant revocation to prevent further confusion. Moreover, as NY G83126, NY H86099, NY I83543, NY K82162, NY L86033, NY N033496, and NY N044145 each involved the classification of non-skid/non-slip open mesh material that is similar to the non-slip grip pads in HQ H302153, we are revoking these rulings as well.

Noting that the non-slip grip pads are not classifiable in heading 3921, HTSUS, we next determine whether they are classifiable as household articles of plastic under heading 3924, HTSUS. Classification of merchandise under heading 3924, HTSUS, as a household article presumes that it is not more specifically provided for elsewhere in the HTSUS. In fact, most common household articles are provided for more specifically in other headings of the HTSUS. For example, household hand tools such as vegetable peelers are classified as hand tools under heading 8205, HTSUS. *See, e.g.*, HQ 964648, dated March 26, 2001. Here, although the non-slip grip pads are stated to be used under rugs, in the kitchen, bathroom or garage, the merchandise can be used in any setting outside the home as well. The fact that the non-slip grip pads can be used in the home occasionally in itself is not sufficient to warrant its classification as a household article of heading 3924, HTSUS. Therefore, the non-slip grip pads are more specifically provided for outside of heading 3924, HTSUS, as an article of plastic under heading 3926, HTSUS.

Based on the foregoing, we find that the non-slip grip pads and similar merchandise in HQ H302153, HQ 088142, HQ 088909, NY PD 816479, NY G83126, NY H86099, NY I835543, NY K82162, NY L86033, NY N033496, and NY N044145 are properly classified in subheading 3926.90.99, HTSUS, as "Other articles of plastics and articles of other materials of heading 3901 to 3914: Other: Other."

As noted above, we received one comment in response to the notice of the proposed revocation. The commenter agrees with classification of the merchandise in NY N044145, NY I83543, NY H86099, NY G83126, PD 816479, HQ 088909, NY N033496, NY L86033, and NY K82162 in heading 3926, HTSUS, as "[o]ther articles of plastics and articles of other materials of

headings 3901 to 3914" because those rulings indicate that the non-slip grip pads would be found either in a setting other than a home, or not specify any particular setting where the pads would be found. However, the commenter contends that the merchandise in HQ 088142 and HQ H302153 are described as articles found "specifically (and predominantly, if not solely) in a home", and should therefore be classified in heading 3924, HTSUS, rather than in heading 3926, HTSUS. The commenter notes that in HQ 088142, "[t]he goods are intended to be used on the bottom or lamps, furniture, and other items to prevent slipping, scratching, etc." Thus, the commenter asserts that the pads in HQ 088142 are "specifically (predominantly, if not solely) 'household articles' rather than merely 'other articles." The commenter also notes that in HQ H302153, "[t]here grip pads are used under rugs to add cushioning underfoot in order to reduce fatigue. They are also used for lining shelves, drawers and cabinets in the kitchen, bathroom and garage work areas." Thus, the commenter again asserts that this description indicates that such goods are "specifically and predominantly 'household articles.'"

We disagree. Heading 3924, HTSUS, is organized into categories (*e.g.*, tableware and kitchenware) followed by the general phrase "other household articles." "[W]hen a list of items is followed by a general word or phrase, the rule of *ejusdem generis* is used to determine the scope of the general word or phrase." *Aves. in Leather, Inc. v. United States*, 178 F.3d 1241, 1244 (Fed. Cir. 1999). "In classification cases, *ejusdem generis* requires that, for any imported merchandise to fall within the scope of the general term or phrase, the merchandise must possess the same essential characteristics or purposes that unite the listed examples preceding the general term or phrase ... Thus, under an *ejusdem generis* analysis, a court must consider the common characteristics or unifying purpose of the listed exemplars in a heading as well as consider the specific primary purpose of the imported merchandise. Classification of imported merchandise under *ejusdem generis* is appropriate only if the imported merchandise shares the characteristics or purpose and does not have a more specific primary purpose that is inconsistent with the listed exemplars." *Id.*

The essential characteristics or purposes of the exemplars of EN 39.24 are that they are of plastic, are used in the household, and are reusable. *See* HQ W968181, dated October 3, 2006. The non-slip grip pads in HQ 088142 and HQ H302153 are not tableware, kitchenware, or a hygienic and toilet article. Thus, we need to determine whether these non-slip grip pads can be classified, *ejusdem generis*, in heading 3924, HTSUS, under "other household articles." The primary location of the article alone does not determine its primary function and does not make it classifiable as a household article of heading 3924, HTSUS. EN 39.24 reflects that household articles are utilitarian and decorative in character or function as a receptacle, and are closely associated with household functions and activities such as dustbins and buckets for cleaning, watering cans for watering plants or a garden, and food storage containers to store food products for and in a household.

Unlike the exemplars provided as household articles of heading 3924, HTSUS, the sole purpose of the non-slip grip pads in HQ 088142 and HQ H302153 is to protect items placed on top of the pads from slipping or scratching and to provide added cushioning that reduces fatigue. While the non-slip grips in HQ 088142 and HQ H302153 may be used in the household, their uses are not strictly lor even primarily used in the household. They can also be used in an office, garage, or school setting, among others. Such

potential uses are not consistent with the narrow uses contemplated by household articles of heading 3924, HTSUS. The fact that the non-slip grip pads in HQ 088142 and HQ H302153 can be used in the home occasionally in itself is not sufficient to warrant its classification as a household article of heading 3924, HTSUS. Thus, they are not *ejusdem generis* with the "other household article of plastics" exemplars of EN 39.24(C) because even though they are of plastic and are reusable, they are not primarily used in the household.

HOLDING:

By application of GRIs 1 and 6, the non-slip grip pads are classified in heading 3926, HTSUS, specifically under subheading 3926.99.99, HTSUS, which provides for "Other articles of plastics and articles of other materials of heading 3901 to 3914: Other: Other[.]" The 2024 column one, general rate of duty is 5.3% *ad valorem*.

EFFECT ON OTHER RULINGS:

HQ H302153, dated July 12, 2018; HQ 088142, dated January 18, 1991; HQ 088909, dated, April 22, 1991; NY PD 816479, dated December 5, 1995; NY G83216, dated October 31, 2000; NY H86099, dated December 14, 2001; NY I83543, dated July 31, 2002; NY K82162, dated January 15, 2004; NY L86033, dated September 20, 2005; NY N033496, July 18, 2008; and NY N044145, dated December 4, 2008, are hereby revoked.

This ruling will become effective 60 days from the date of publication in the Customs Bulletin.

Sincerely,

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U.S. Court of Appeals for the Federal Circuit

SAHA THAI STEEL PIPE PUBLIC COMPANY LIMITED, Plaintiff-Appellee v. UNITED STATES, Defendant WHEATLAND TUBE COMPANY, Defendant-Appellant

Appeal No. 2022–2181

Appeal from the United States Court of International Trade in No. 1:20-cv-00133-SAV, Judge Stephen A. Vaden.

Decided: May 15, 2024

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CHRISTOPHER CLOUTIER, Schagrin Associates, Washington, DC, argued for defendant-appellant. Also represented by MICHELLE ROSE AVRUTIN, NICHOLAS J. BIRCH, ELIZABETH DRAKE, WILLIAM ALFRED FENNELL, JEFFREY DAVID GERRISH, LUKE A. MEISNER, ROGER BRIAN SCHAGRIN.

Before LOURIE, REYNA, and CHEN, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* REYNA.

Dissenting opinion filed by *Circuit Judge* CHEN.

REYNA, *Circuit Judge*.

Wheatland Tube Company appeals a decision of the U.S. Court of International Trade, which affirmed the U.S. Department of Commerce's remand determination as to the scope of an antidumping duty order concerning certain steel pipes imported from Thailand. For the following reasons, we reverse.

BACKGROUND

This appeal concerns whether certain imports of steel pipes from Thailand fall within the scope of an existing antidumping duty order. As background, we provide a brief overview of the antidumping duty framework and the initial, underlying antidumping duty investigation, before turning to the scope of the order at issue.

The U.S. trade statutes generally provide that an interested party may petition the U.S. Department of Commerce ("Commerce") and the U.S. International Trade Commission ("ITC") to initiate antidumping duty investigations and, if the investigations result in affirmative determinations, impose antidumping duties on the particular imported merchandise that was subject to the investigations. 19

U.S.C. §§ 1673,[1] 1673a(b). Commerce's role in an antidumping investigation is to determine whether the merchandise subject to the investigation (subject merchandise) is being, or likely to be, sold in the United States at less-than-fair-value ("LTFV"), an unfair trade practice commonly referred to as dumping. *Id.* §§ 1673, 1673b(b)(1)(A). Concurrently, the ITC investigates whether a U.S. domestic industry producing like or similar merchandise as those under Commerce's investigation is materially injured, or threatened with material injury, by virtue of the dumped imports. *Id.* §§ 1673, 1673b(a)(1)(A). If Commerce's and the ITC's investigations both lead to affirmative final determinations, namely Commerce's final LTFV determination and the ITC's final determination of material injury or threat of material injury, Commerce issues an antidumping duty order imposing antidumping duties on the imports of the subject merchandise. *Id.* §§ 1673, 1673d(c)(2).

An antidumping duty order describes the specific merchandise subject to the order and antidumping duties. This description is paramount. Given the realities in the marketplace and everchanging varieties of merchandise, questions frequently arise as to whether a particular product is subject to or falls within the scope of an antidumping duty order. 19 C.F.R. § 351.225(a). Consequently, U.S. trade law provides that an interested party may request that Commerce issue a scope ruling to clarify whether a particular product falls within the scope of the order. *Id.* This appeal involves such a ruling.

I. The Initial Antidumping Duty Investigation

In February 1985, a coalition of domestic manufacturers of steel pipes, including Appellant Wheatland Tube Company ("Wheatland"), petitioned Commerce and the ITC to initiate antidumping duty investigations on certain circular welded carbon steel pipes and tubes ("CWP") imported from Thailand. *Petition for the Imposition of Antidumping Duties[:] Certain Welded Carbon Steel Circular Pipes and Tubes from Thailand* (Feb. 28, 1985), J.A. 40519–56.[2] The petition identified Thai manufacturers producing the imported pipes, including Appellee Saha Thai Steel Pipe Public Company Limited ("Saha"). J.A. 40563.

In the original February 1985 petition, as required under the regulations, the petitioners provided a detailed description of goods the

[1] Section 731 of the Tariff Act of 1930, codified in 19 U.S.C. § 1673, sets forth the general framework for the imposition of antidumping duties.

[2] Typically, petitioners requesting the initiation of an antidumping duty investigation simultaneously request the initiation of a countervailing duty investigation, as was the case here. *See, e.g.*, J.A. 40519. This appeal is limited to the scope of the antidumping duty order resulting from the antidumping duty investigation.

petitioners believed should be investigated, including their technical characteristics, uses, and tariff classifications. J.A. 40536–39. Specifically, the petition asserted that the subject merchandise was "certain circular welded carbon steel circular pipes and tubes, .375 inch or more but not over 16 inches in outside diameter." J.A. 40536. The petition continued to state,

> The product *includes "standard pipe,"* which is a general-purpose commodity used in such applications as plumbing pipe, sprinkler systems and fence posts and is commonly referred to in the industry as a standard pipe. . . . (These products are generally produced to [the American Society for Testing & Materials ("ASTM")] specifications A-120, A-53, or A-135.) The product *also includes "line pipe,"* which is produced to [the American Petroleum Institute ("API")] specifications for line pipe, API-5L or API5X.[3]
>
> . . . Small diameter pipes with a wall thickness greater than .065 inch are now classified [under the Tariff Schedules of the United States Annotated ("TSUSA")] in 610.3208, 610.3209, 610.3231, 610.3234, 610.3241, 610.3242, 610.3243, 610.3252, 610.3254, 610.3256, and 610.3258. Circular pipe with a wall thickness less than .065 inch is now classified in 610.4925.

J.A. 40536–37 (emphasis added). According to the petition, the subject merchandise was produced using the same process worldwide, and the finished products were identical. J.A. 40538–39; *see also* J.A. 40537–38 (quoting description of the manufacturing process the ITC formulated in previous CWP investigations).

The petition described the U.S. domestic industry producing the subject merchandise as consisting of U.S. producers of *both* standard pipes and line pipes. J.A. 40545–46. Most domestic producers, according to the petition, produced both standard and line pipes using the same equipment. *Id.*

In March 1985, the petitioners partially withdrew their petition "insofar as they concern *line pipe*, TSUS numbers 610.3208 and 3209."[4] J.A. 40612 (emphasis added). According to the petitioners, they had ascertained that no Thai company was licensed at that time to produce steel pipes to API specifications. *Id.* Despite the partial withdrawal, the petitioners maintained that "the appropriate domes-

[3] As noted *infra*, ASTM and API are both industry standards organizations in the steel industry.

[4] Relevant here, under the TSUSA (1985), line pipes conforming to API specifications would be classified under items 610.3208 and 3209. *See* J.A. 40212.

tic industry for injury determination purposes [was] the industry producing [both] standard and line pipe[s]." J.A. 40613.

Commerce and the ITC initiated and conducted their respective investigations. *See Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand; Initiation of Antidumping Duty Investigation*, 50 Fed. Reg. 12068, 12608 (Mar. 27, 1985) ("*Commerce Initiation Notice*"); *Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela*, 50 Fed. Reg. 10866, 10866 (Mar. 18, 1985). Commerce's LTFV investigation reached an affirmative preliminary determination in September 1985, and an affirmative final determination in January 1986. *Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand; Preliminary Determination of Sales at Less Than Fair Value*, 50 Fed. Reg. 40427, 40428 (Oct. 3, 1985); *Antidumping: Circular Welded Carbon Steel Pipes and Tubes from Thailand; Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 3384, 3384 (Jan. 27, 1986) ("*Final LTFV Determination*"). In the *Final LTFV Determination*, Commerce described the subject merchandise under its investigation as encompassing

> certain circular welded carbon steel pipes and tubes, also known as "standard pipe" or "structural tubing," which includes pipe and tube with an outside diameter of 0.375 inch or more but not over 16 inches, or any wall thickness, as currently provided in items 610.3231, 610.3234, 610.3241, 610.3242, 610.3243, 610.3252, 610.3254, 610.3256, 610.3258 and 610.4925 of the *Tariff Schedules of the United States Annotated*.

Final LTFV Determination, 51 Fed. Reg. at 3384. Commerce determined that imports of the subject merchandise from Thailand were being, or were likely to be, sold in the United States at less than fair value. *Id.*

The ITC's injury investigation resulted in an affirmative preliminary determination in April 1985. *Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela*, *Determinations of the Commission*, Inv. Nos. 701-TA-242, 731-TA-252, -253, USITC Pub. 1680 (Apr. 1985) (Preliminary) ("*Preliminary Injury Determination*"). Subsequently in February 1986, the ITC issued an affirmative final determination that the investigated imports from Thailand materially injured or threatened material injury to a domestic industry. *Certain Welded Carbon Steel Pipes and Tubes from Turkey and Thailand, Determinations of the Commission*, Inv. Nos. 701-TA-253, 731-TA-252, USITC Pub. 1810 (Feb. 1986) (Final) ("*Final Injury Determina-*

tion"). In the *Final Injury Determination*, the ITC evaluated the injury effects of standard pipes imported from Thailand, and the injury effects of both standard pipes and line pipes imported from Turkey. *Id.* at I-1, II-1.

Following its practice in previous CWP investigations, the ITC treated standard and line pipes as two separate like products, and correspondingly, found two domestic industries, a domestic standard pipe industry and a domestic line pipe industry. *Final Injury Determination* at 6–7; *see also Preliminary Injury Determination* at 6–8. The ITC concluded that "domestically produced standard pipe[s] [were] like imported standard pipe[s]" and that the domestic standard pipe industry included domestic producers of standard pipes, some of which simultaneously produced line pipes. *Final Injury Determination* at 6–7, I-5–I-6, II-4; *see also Preliminary Injury Determination* at 8–9, A-8–A-9.

In its analysis, the ITC described how steel pipes are manufactured, used, and classified in the industry. *Final Injury Determination* at I-1 & n.1 (referencing product description in a previous investigation involving steel pipes from Korea), II-1. The ITC explained that in the industry, steel pipes can be divided based on the method of manufacture, welded or seamless, and each category can be further divided based on the grades of steel.[5] *Id.* at I-1. Relevant here, the American Iron & Steel Institute distinguishes among various pipes based on six end uses, including standard pipes, line pipes, mechanical tubing, and others.[6] *Id*. Additionally, steel pipes are generally produced to standards, or specifications, established by industry standards organizations such as ASTM and API. *Id*. Each specification has its corresponding requirements for chemical and mechanical characteristics, which a product must satisfy in order to comply with that specification. *Id.* at I-2, II-1.

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[5] In the steel industry, for the most part, the terms "pipes" and "tubes" can be used interchangeably. *Final Injury Determination* at I-1. The parties generally refer to the products at issue in this case as "pipes," and we do the same.

[6] Standard pipes are generally used for "the low-pressure conveyance of water, steam, natural gas, air, and other liquids and gases," such as in plumbing and heating systems and air-conditioning units. *Final Injury Determination* at I-1. Line pipes are used for "the transportation of gas, oil, or water, generally in pipeline or utility distribution systems." *Id.* at II-1.

The manufacturing processes for line pipes and standard pipes are nearly identical, and they can be produced using the same equipment. *Id.* The principal difference between the two is that line pipes are made of higher-grade steel and may require additional testing to ensure conformance to API specifications. *Id.* The ITC provided similar comparative descriptions of standard pipes and line pipes in its *Preliminary Injury Determination*. *See Preliminary Injury Determination* at A-5–A-8.

For the standard pipes under its investigation, the ITC stated,

> [t]he imported pipe and tube products that are the subject of these investigations are circular welded carbon steel pipes and tubes over 0.375 inch but not over 16 inches in outside diameter, which are *known in the industry as standard pipes* and tubes. . . . They are most commonly produced to ASTM specifications A-120, A-53, and A-135.

Id. at I-1–I-2 (emphasis added). The ITC concluded that "an industry in the United States [was] materially injured, or threatened with material injury, by reason of imports from Thailand of welded carbon steel standard pipes and tubes," which Commerce found to be sold in the United States at less than fair value. *Id.* at 2.

II. The Thailand Antidumping Duty Order

In March 1986, following the affirmative final determinations of Commerce and the ITC, Commerce issued the Thailand antidumping duty order, imposing antidumping duties on standard pipes imported from Thailand. *Antidumping Duty Order; Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 51 Fed. Reg. 8341, 8341 (Mar. 11, 1986) ("Thailand Order" or "Order"). According to the scope language of the Order,

> [t]he products covered by the order are certain circular welded carbon steel pipes and tubes from Thailand. The subject merchandise has an outside diameter of 0.375 inches or more, but not exceeding 16 inches, of any wall thickness.
>
> These products, which are commonly referred to in the industry as "*standard pipe*" or "structural tubing" are hereinafter designated as "pipes and tubes."
>
> The merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) item numbers 7306.30.1000, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085 and 7306.30.5090. Although the HTSUS subheadings are provided for convenience and purposes of U.S. Customs and Border Protection (CBP), the written description of the merchandise subject to the order is dispositive.

J.A. 40763 (citations omitted) (paragraphing and emphasis added); *see also Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand; Preliminary Results of Antidumping Duty Administrative Review*, 55 Fed. Reg. 42596, 42596 (Oct. 22, 1990) ("*1990 Administrative Review*").

In 1989, the scope language in the 1986 Order was updated to conform to the new tariff nomenclature framework, the Harmonized Tariff Schedule of the United States ("HTSUS").[7] *See 1990 Administrative Review*, 55 Fed. Reg. at 42596 (noting the 1989 transition to the HTSUS). As shown above, the current scope language maintains the same physical description of the subject merchandise and lists tariff codes under the new HTSUS framework. The Order also clarifies that "the written description of the merchandise subject to the order is dispositive," and the listed tariff codes are "provided for convenience and purposes of" the U.S. Customs and Border Protection ("CBP"). J.A. 40763; *1990 Administrative Review*, 55 Fed. Reg. at 42596 ("The written product description remains dispositive.").

Consequently, all standard pipes imported from Thailand and falling within the scope of the Order became subject to antidumping duties.

III. The Present Case

In January 2019, Wheatland, along with a group of other domestic producers, filed a request with Commerce seeking an antidumping circumvention ruling against Saha. J.A. 10169. The domestic producers alleged that Saha was exporting "standard pipe[s] with minor alterations in form or appearance" or "misclassified as line pipe[s]" that circumvented the Thailand Order and evaded antidumping duties. J.A. 10171–72, 10172 n.1. The domestic producers' request covered what is central to this appeal, dual-stenciled pipes.[8] J.A. 10173. According to the domestic producers, the specifications for standard pipes and line pipes "often require engineering characteristics that overlap," so a pipe may be dual-stenciled or dual-certified. *Id.* That is, such pipes were "stamped to indicate compliance with" both an ASTM specification and an API specification. *Id.* (citing *Certain Circular Welded Pipe and Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*, Inv. Nos. 701-TA-253, 731-TA-132, -252, -271, -273, -532–534, -536, USITC Pub. 4754 (Jan. 2018) ("*Fourth Sunset Review*")).

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[7] As originally issued in 1986, the Thailand Order provides,

> [t]he products under investigation are certain circular welded carbon steel pipes and tubes (referred to in this notice as "pipes and tubes"), also known as "standard pipe" or "structural tubing," which includes pipe and tube with an outside diameter of 0.375 inch or more but not over 16 inches, of any wall thickness, as currently provided in items 610.3231, 610.3234, 610.3241, 610.3242, 610.3243, 610.3252, 610.3254, 610.3256, 610.3258, and 610.4925 of the *Tariff Schedules of the United States Annotated* (TSUSA).

51 Fed. Reg. at 8341.

[8] The domestic producers' request broadly covered pipes produced by Saha and identified as "line pipe[s]," which included pipes singularly stenciled as line pipes *and* those dually stenciled as both standard and line pipes. *See* J.A. 10173–76; *see also* J.A. 40631–32.

Commerce initiated a scope inquiry to determine whether "line pipe" and "dual-stenciled standard and line pipe" were covered by the Thailand Order. J.A. 40631. With respect to the latter, Commerce explained that standard pipes may be "dual-stenciled," namely "identified to indicate compliance with two different specifications, as conforming to industry standards for both standard pipe[s] and line pipe[s]." J.A. 40635. Before Commerce, Saha argued that the Thailand Order did not cover line pipes because during the initial 1985–86 antidumping duty investigation, the petitioners partially withdrew their petition concerning line pipes from Thailand. J.A. 40769. To Saha, *all* line pipes, including those dual-stenciled as both standard and line pipes, were excluded from the scope. *Id.*

A. Commerce's Scope Ruling

In June 2020, Commerce reached a final scope ruling, which determined that the Thailand Order did not cover line pipes, and thus Saha's line pipes did not fall within the scope of the Thailand Order. *Antidumping Duty Order on Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Scope Ruling on Line Pipe and Dual-Stenciled Standard and Line Pipe*, J.A. 40762–80 ("*Scope Ruling*"). Commerce determined, however, that the Thailand Order covered dual-stenciled pipes so that the imports of Saha's dual-stenciled pipes fell within the scope of the Order and were subject to antidumping duties.[9] J.A. 40780.

In reaching its determination, Commerce first looked to the scope language of the Order covering "circular welded carbon steel pipes and tubes," commonly referred to as "standard pipe[s]," "limited by the dimensional requirements stated in the scope of the Order." J.A. 40763; J.A. 51. While the Order did not cover "line pipe[s]," Commerce determined that the Order included dual-stenciled pipes. J.A. 40775. Commerce reasoned that dual-stenciled pipes were certified as "standard pipe[s]" under ASTM specifications and that they also met the physical description of merchandise included in the scope of the Order. *Id.*; J.A. 51. To Commerce, if a pipe is certified as "standard pipe," it is "standard pipe" and subject to the Order "regardless of whether it is also certified as line pipe." J.A. 40775.

[9] The focus of the proceedings before the Court of International Trade and the instant appeal before this court is whether dual-stenciled pipes fall within the scope of the Thailand Order. Commerce's determination that line pipes fall outside of the scope of the Thailand Order is not at issue in this appeal.

Commerce next examined the criteria listed in 19 C.F.R. § 351.225(k)(1) (2020),[10] the so-called (k)(1) factors or (k)(1) materials, and other evidence, and it found the record information did not support that dual-stenciled pipes were not covered by the Order. *See* J.A. 40773–78; J.A. 51–53. Commerce considered that the petitioners withdrew their petition concerning line pipes from Thailand and that both Commerce's and the ITC's investigations were limited to standard pipes and did not cover line pipes. J.A. 40773–75. Commerce determined that dual-stenciled pipes were not excluded. J.A. 40775. Commerce reasoned that, in contrast to other CWP investigations leading to orders that explicitly excluded dual-stenciled pipes, here neither Commerce's *Final LTFV Determination* nor the ITC's *Final Injury Determination* addressed dual-stenciled pipes. *Id.* Commerce thus found no basis in these determinations to find that dual-stenciled pipes were excluded from the resulting Thailand Order. *Id.*; J.A. 51.

Commerce rejected Saha's reliance on certain isolated statements in the ITC's sunset reviews evaluating various CWP orders, including the orders concerning imports from other countries, such as Brazil, Korea, Mexico, and Venezuela. J.A. 40776–77. Sunset reviews refer to the periodic evaluations of antidumping and countervailing duty orders to determine whether the orders should remain in place. *See* 19 U.S.C. § 1675(c). Since the sunset review process was established, the ITC has conducted four sunset reviews of various CWP orders.[11] Commerce explained that the sunset reviews simultaneously assessed various existing CWP orders: some explicitly excluded dual-stenciled pipes while others, such as the Thailand Order, did not. J.A. 40776–77.[12] Commerce reasoned that the ITC's statements must be

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[10] Under 19 C.F.R. § 351.225(k)(1) (2020), in determining whether a particular product falls within the scope of an order, "[Commerce] will take into account the following: (1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [ITC]." The regulation has since gone through revision. Because the 2020 version governs at time relevant to this case, parties cite to this version and we do the same.

[11] *Certain Pipe and Tube from Argentina, Brazil, Canada, India, Korea, Mexico, Singapore, Taiwan, Thailand, Turkey, and Venezuela*, Inv. Nos. 701-TA-253, 731-TA-132, -252, -271, -273, -276, -277, -296, -409, -410, -532–534, -536, -537, USITC Pub. 3316 (July 2000) ("*First Sunset Review*"); *Certain Pipe and Tube from Argentina, Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*, Inv. Nos. 701-TA-253, 731-TA-132, -252, -271, -273, -409, -410, -532–534, -536, USITC Pub. 3867 (July 2006) ("*Second Sunset Review*"); *Certain Circular Welded Pipe and Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*, Inv. Nos. 701-TA-253, 731-TA-132, -252, -271, -273, -532–534, -536, USITC Pub. 4333 (June 2012) ("*Third Sunset Review*"); *Fourth Sunset Review*, USITC Pub. 4754.

[12] For example, Commerce pointed out that the antidumping duty orders on standard pipes imported from Brazil, Korea, Mexico, and Venezuela explicitly state: "Standard pipe that is dual or triple certified/stenciled that enters the U.S. as line pipe of a kind used for oil or gas pipelines is [] not included in these orders." J.A. 40775 n.89.

viewed in context and not as mechanically and equally applicable to *all* orders under review. J.A. 40776. In other words, each CWP order stands alone and certain language in one order does not "dispositively provide meaning to an order which does not include the same language." *Id*.

Further, Commerce found unsubstantiated Saha's claim that the petitioners had intended to exclude dual-stenciled pipes from the initial investigation underlying the Thailand Order. J.A. 40778. Saha based its claim on its view of the petitioners' interest and involvement in *other* CWP investigations, which occurred *years or decades later*. *See id.* Commerce determined that Saha's interpretation of the petitioners' intentions in the initial investigation leading to the instant Order were "mere speculation" and lacked support in the record. *Id.*

Accordingly, Commerce issued a *Scope Ruling* concluding that although line pipes were not covered, dual-stenciled pipes were within the scope of the Thailand Order.

B. *Saha I*

Saha appealed Commerce's *Scope Ruling* to the U.S. Court of International Trade. *Saha Thai Steel Pipe Pub. Co. v. United States*, 547 F. Supp. 3d 1278, 1281 (Ct. Int'l Trade 2021) ("*Saha I*"). The Court of International Trade found Commerce unlawfully expanded the scope of the Thailand Order by determining that it covered dual-stenciled pipes. *Id.* To the Court of International Trade, the Thailand Order's scope language did not address "dual-stenciled pipes," so it was unclear what qualified as "standard pipe[s]" under the Order. *Id.* at 1293–94. The Court of International Trade then reviewed the (k)(1) materials and concluded they did not support Commerce's determination that the dual-stenciled pipes fell within the scope of the Order. *Id.* at 1294–99.

In reaching its conclusion, the Court of International Trade relied on the petitioners' partial withdrawal during the initial 1985–86 investigation, which in the court's view, also withdrew dual-stenciled pipes. *Id.* at 1295. To the Court of International Trade, by withdrawing "[their] petitions insofar as they concern line pipe, TSUS numbers 610.3208 and 3209," the petitioners "withdrew all pipes that were importable under 610.3208 and 3209 from consideration by the ITC and Commerce." *Id.* This withdrawal, the Court of International Trade continued, encompassed dual-stenciled pipes because they would have been imported under "TSUS numbers 610.3208 and 3209." *Id.* Accordingly, the Court of International Trade concluded that dual-stenciled pipes were not included in the subsequent injury investigation conducted by the ITC and hence omitted from the re-

sulting Thailand Order. *Id.* at 1295–96.

The Court of International Trade asserted that its conclusion was supported by the ITC's sunset reviews. *Id.* at 1297. In the Court of International Trade's view, the ITC consistently treated dual-stenciled pipes as line pipes, and its sunset reviews referenced exclusions of dual-stenciled pipes from CWP orders. *Id.* The Court of International Trade noted that the *First* and *Second Sunset Reviews* discussed dual-stenciled pipes only in the context of a "safeguard" remedy, where President Clinton imposed increased duties on line pipe imports as defined in his proclamation.[13] *Id.; see Second Sunset Review* at Overview-5 n.16 (commenting that the safeguard measure covered "dual-stenciled" pipes but excluded "arctic grade" line pipes). The Court of International Trade also considered that the *Third* and *Fourth Sunset Reviews* included a statement that "[d]ual-stenciled pipe, which enters as line pipe under a different subheading of the [HTSUS] for U.S. customs purposes, is not within the scope of the orders." *Saha I*, 547 F. Supp. 3d at 1297–98 (alteration in original) (first citing *Fourth Sunset Review* at 6–7; and then citing *Third Sunset Review* at 8). The Court of International Trade considered this statement as "unqualified and [giving] no indication that the scope language d[id] not apply to the Thailand Order." *Id.*

The Court of International Trade thus remanded to Commerce to reconsider its *Scope Ruling* based on the court's analysis. *Id.* at 1299.

C. *Saha II*

On remand, to comply with the remand order, Commerce concluded, under protest, that the Thailand Order did not cover dual-stenciled pipes. *Final Results of Redetermination Pursuant to Court Remand*, J.A. 46–73 ("*Remand Determination*"). "Under protest" means that the Court of International Trade's decision dictated that Commerce reach a result that is contrary to what it would have reached absent the Court of International Trade's directive. *Meridian Prods. v. United States,* 890 F.3d 1272, 1276 n.3 (Fed. Cir. 2018) ("*Meridian II*"). In its *Remand Determination*, Commerce affirmed its reasoning as stated in its *Scope Ruling* and expressed various concerns it had with the Court of International Trade's analysis. J.A. 59–65. Commerce believed that the Court of International Trade misunderstood the ITC's injury findings and ignored relevant statements in the ITC's sunset reviews that detracted from the Court of

[13] In March 2000, President Clinton issued Proclamation No. 7274, 65 Fed. Reg. 9193 (Feb. 23, 2000), imposing additional duties on line pipe imports over certain quantities each year from each supplying country for a period of three years, excluding those from Mexico and Canada.

International Trade's conclusion. J.A. 61–65; *see also* J.A. 63–64 (noting ITC statements that CWP orders have varying scopes).

The Court of International Trade sustained Commerce's *Remand Determination*, namely the conclusion that dual-stenciled pipes were not covered by the Thailand Order. *Saha Thai Steel Pipe Pub. Co. v. United States*, 592 F. Supp. 3d 1299, 1301 (Ct. Int'l Trade 2022) ("*Saha II*"). In its decision, the Court of International Trade maintained its reasoning in *Saha I*, stressing (1) its view that the petitioners' partial withdrawal concerning line pipes during the initial investigation encompassed dual-stenciled pipes; and (2) its view that the ITC consistently identified dual-stenciled pipes as line pipes. *Id.* at 1305, 1312–13. The Court of International Trade concluded that Commerce's *Remand Determination* properly complied with its remand order in finding dual-stenciled pipes not included in the Thailand Order. *Id.* at 1313.

Wheatland appeals, contending that Commerce's *Scope Ruling* was correct and should have been affirmed by the Court of International Trade. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

STANDARD OF REVIEW

We review the Court of International Trade's decisions de novo, applying the same standard of review used by the Court of International Trade in reviewing Commerce's scope rulings. *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351, 1354 (Fed. Cir. 2015). We affirm Commerce's scope ruling unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence means such relevant evidence that a reasonable mind may accept as adequate to support a conclusion. *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1071 (Fed. Cir. 2001).

In our review, we accord deference to Commerce's own interpretation of its antidumping duty orders. *King Supply Co. v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012). This deference is appropriate because determinations as to the meaning and scope of antidumping duty orders are matters "particularly within the expertise" of Commerce and its "special competence." *Id.* (quoting *Sandvik Steel Co. v. United States*, 164 F.3d 596, 600 (Fed. Cir. 1998)). Our caselaw has also recognized that in conducting our review, we pay due respect to and "will not ignore the informed opinion of the Court of International Trade." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 983 (Fed. Cir. 1994); *see Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006).

Under the substantial evidence review standard, even if an inconsistent conclusion could be drawn from the record, "such a possibility does not prevent Commerce's determination from being supported by substantial evidence." *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001). A party challenging Commerce's scope ruling under the substantial evidence standard "has chosen a course with a high barrier to reversal." *King Supply*, 674 F.3d at 1348 (quoting *Nippon Steel*, 458 F.3d at 1352).

DISCUSSION

I. Legal Framework

There is no specific statutory provision that governs the interpretation of the scope of an antidumping duty order. *Shenyang Yuanda*, 776 F.3d at 1354. The regulations provide an analytical framework guiding Commerce's reasoning and analysis in reaching a scope ruling. *Id.* Under the applicable regulations at the time of Commerce's scope ruling, 19 C.F.R. § 351.225(k) (2020),[14]

in considering whether a particular product is included within the scope of an order or a suspended investigation, [Commerce] will take into account the following:

> (1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [ITC].
>
> (2) When the above criteria are not dispositive, [Commerce] will further consider:
>
> > (i) The physical characteristics of the product; (ii) The expectations of the ultimate purchasers; (iii) The ultimate use

[14] In 2021, Commerce amended various sections of its regulations concerning antidumping and countervailing duties, including the regulations on scope rulings. *See Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*, 86 Fed. Reg. 52300 (Sept. 20, 2021) ("*2021 Revised Regulations*"). As amended, effective November 4, 2021, 19 C.F.R. §351.225(k) provides,

> (1) In determining whether a product is covered by the scope of the order at issue, [Commerce] will consider the language of the scope and may make its determination on this basis alone if the language of the scope, including the descriptions of merchandise expressly excluded from the scope, is dispositive.
>
> > (i) The following primary interpretive sources may be taken into account under paragraph (k)(1) introductory text of this section, at the discretion of [Commerce]: (A) The descriptions of the merchandise contained in the petition pertaining to the order at issue; (B) The descriptions of the merchandise contained in the initial investigation pertaining to the order at issue; (C) Previous or concurrent determinations of [Commerce], . . . ; and (D) Determinations of the [ITC] pertaining to the order at issue, ...
> >
> > (ii) [Commerce] may also consider secondary interpretive sources . . . .

> 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.

This court has considered the tiered analysis framework in its review of Commerce's scope rulings. *E.g.*, *Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1381 (Fed. Cir. 2017) ("*Meridian I*"); *Shenyang Yuanda*, 776 F.3d at 1354; *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002). We have long recognized that the scope language of the order is the "cornerstone" of this analysis and "a predicate for the interpretive process." *Duferco Steel*, 296 F.3d at 1097. Although the scope of the order can be clarified, the scope language cannot be interpreted or "changed in a way contrary to its terms." *Id.* (quoting *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990)).

While the terms of the order describe the merchandise within the scope of the order, they may also expressly describe merchandise that, for whatever reason, is excluded from the scope. Hence, the parties may argue that a particular product is not within the scope on the ground that it falls within an explicit exclusion expressed in the order. *See, e.g.*, *Meridian I*, 851 F.3d at 1379 (parties disputing whether merchandise at issue fell within express exclusions of the order); *Shenyang Yuanda*, 776 F.3d at 1358 (same); *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998) (same). But, here, the Order contains no such express exclusions.

In addition, antidumping duty orders list tariff codes relevant to the merchandise subject to the orders or subject to the explicit exclusions in the orders, which the CBP references in regulating imports as they enter the U.S. border.[15] Consequently, antidumping duty orders generally contain instructions that the tariff codes are for purposes of the CBP, and "the written description of the merchandise subject to the order is dispositive.[16]

Again, as the above indicates, Commerce must begin a scope determination inquiry with a review of the scope language of the order.

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[15] J.A. 40763; *see, e.g.*, *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Anti-dumping Duty Order*, 77 Fed. Reg. 73018, 73019 (Dec. 7, 2012), discussed in *Sunpreme Inc. v. United States*, 946 F.3d 1300, 1304 (Fed. Cir. 2020); *Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order: Certain Tissue Paper Products from the People's Republic of China*, 70 Fed. Reg. 16223, 16223–24 (Mar. 30, 2005), discussed in *Walgreen Co. of Deerfield, IL v. United States*, 620 F.3d 1350, 1353 (Fed. Cir. 2010); *Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Preserved Mushrooms from the People's Republic of China*, 64 Fed. Reg. 8308, 8309 (Feb. 19, 1999), discussed in *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1383 (Fed. Cir. 2005).

[16] *See* exemplary orders identified in *supra* note 15.

Shenyang Yuanda, 776 F.3d at 1354. In doing so, Commerce considers how the scope language of the order describes the subject merchandise it covers. *E.g.*, *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1303 (Fed. Cir. 2013). If the scope language expressly and dispositively resolves whether the subject merchandise falls within or outside of the scope, the scope analysis comes to an end. *Id.*[17]

If the scope language *itself* does not clearly answer the scope question, Commerce continues its interpretation to understand the meaning of the scope language by consulting criteria identified in 19 C.F.R. § 351.225(k)(1) (2020), the so-called (k)(1) factors or (k)(1) materials. *See, e.g.*, *Meridian I*, 851 F.3d at 1382. The (k)(1) materials include "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [ITC]." 19 C.F.R. § 351.225(k)(1) (2020). While these materials do not substitute for the scope language, they reflect the historical context and may provide "valuable guidance" for the interpretation of the order. *Duferco Steel*, 296 F.3d at 1097.

The (k)(1) materials cannot control or alter the scope language of the order. Rather, they serve as interpretative aids that clarify or support Commerce's understanding of the scope language that Commerce may arrive at upon reviewing the scope language itself. For instance, in *Meridian I*, the parties disputed whether Commerce erred in its interpretation of the exclusionary term "finished goods kit" in the scope language. *Meridian I*, 851 F.3d at 1384. We concluded that Commerce correctly interpreted that exclusionary term and that its determination was further supported by the (k)(1) materials. *Id.* In *King Supply*, similarly, we determined that Commerce reasonably read the disputed language at issue as not constituting an end-use restriction, and that the (k)(1) materials supported that reading. *King Supply*, 674 F.3d at 1350–51. We thus held that Commerce's scope ruling was supported by substantial evidence and reversed the Court of International Trade's judgment to the contrary. *Id.* at 1351.

In cases where an analysis of the (k)(1) materials is still not dispositive, Commerce may proceed to consider the factors listed under 19 C.F.R. § 351.225(k)(2) (2020), the so-called (k)(2) factors. *Shenyang Yuanda*, 776 F.3d at 1354; *see also id.* at 1358 (declining to consider the (k)(2) factors because the scope language read in the context of the

[17] *Cf. 2021 Revised Regulations*, 86 Fed. Reg. at 52322 (Commerce commenting that "in most straightforward cases, the agency is not required to consider the four listed (k)(1) interpretative sources if such an analysis would waste agency time and resources"); 19 C.F.R. §351.225(k) ("In determining whether a product is covered by the scope of the order at issue, [Commerce] . . . may make its determination on this basis alone if the language of the scope, including the descriptions of merchandise expressly excluded from the scope, is dispositive.").

(k)(1) materials proved dispositive). These factors include the "physical characteristics of the product," the "expectations of the ultimate purchasers," the "ultimate use of the product," and the relevant "channels of trade" and manner of marketing. 19 C.F.R. § 351.225(k)(2) (2020).

Thus, depending on the clarity of the scope language relative to the merchandise at issue, a scope analysis may encompass varying sources. Consequently, scope analysis is "highly fact-intensive and case-specific." *King Supply*, 674 F.3d at 1345.

II. Analysis

We now turn to the principal issue of this appeal: whether the Thailand Order on "standard pipes" covers Saha's "dual-stenciled pipes," namely pipes certified as "standard pipes" and concurrently as "line pipes."

As noted *supra*, Commerce's *Scope Ruling* determined that the Order covered dual-stenciled pipes. The Court of International Trade, in sustaining Commerce's *Remand Determination*, reached the opposite conclusion finding dual-stenciled pipes excluded from the Order. On appeal, Wheatland contends that the Court of International Trade erred in its analysis and should have affirmed Commerce's determination in its *Scope Ruling*. Saha argues in favor of the Court of International Trade's affirmance of Commerce's *Remand Determination*. For the reasons discussed below, we hold that Commerce's determination that imports of dual-stenciled pipes from Thailand are within the scope of the Thailand Order on standard pipes is supported by substantial evidence. As a result, we reverse the judgment of the Court of International Trade that affirmed Commerce's *Remand Determination*.

Before turning to the scope language, we first address Wheatland's contention that Commerce "impermissibly relied on (k)(1) factors" in reaching its *Scope Ruling*. Appellant Br. 21–23. Commerce, in its *Scope Ruling*, rejected Wheatland's similar contention raised below. J.A. 40768. We conclude that Commerce properly considered the (k)(1) materials in reaching its *Scope Ruling*.

As Commerce pointed out, the applicable regulations provide that Commerce, in reaching a scope ruling, "will take into account" the (k)(1) materials. 19 C.F.R. §351.225(k) (2020). Thus, the regulations at least *permit*, if not mandate, Commerce to consider the (k)(1) materials. Further, where, as here, the parties explicitly rely on the (k)(1) materials for their contradictory interpretation of an order, Commerce cannot arbitrarily ignore those arguments and evidence

on the record. *See* 19 U.S.C. §1516a(b). If Commerce were to reject a contrary contention allegedly supported by the (k)(1) materials, Commerce must adequately explain its reasoning for that rejection. *See, e.g.*, *CP Kelco US, Inc. v. United States*, 949 F.3d 1348, 1356 (Fed. Cir. 2020). Commerce properly did so here.

We note the Court of International Trade's observation that this court "arguably" provided two "distinct methods" to determine "whether a scope's language is sufficiently ambiguous that Commerce must resort to additional documents" to interpret an antidumping duty order. *Saha I*, 547 F. Supp. 3d at 1289 (first citing *OMG, Inc. v. United States*, 972 F.3d 1358, 1363 (Fed. Cir. 2020); and then citing *Meridian II*, 890 F.3d at 1277)). According to the Court of International Trade, under the *OMG* approach, "the first step in a scope ruling proceeding is to determine whether the governing language is in fact ambiguous;" and Commerce considers the (k)(1) materials if "the language is ambiguous." *Id.* at 1289–90. The second approach, according to the Court of International Trade, is the *Meridian* approach. *Id.* at 1290. In the Court of International Trade's view, under the *Meridian* approach, when "reviewing the plain language of a duty order" to determine whether it is ambiguous, Commerce must consider the (k)(1) materials. *Id.*

As we outlined above, there is only one framework which, as both the *OMG* and *Meridian* decisions stress, *begins* with a review of the scope language *itself*. *OMG*, 972 F.3d at 1363; *Meridian II*, 890 F.3d at 1277; *Meridian I*, 851 F.3d at 1381. And if the scope cannot be clearly and dispositively discerned based on the scope language itself, Commerce must turn to the aid of the (k)(1) and, if still necessary, (k)(2) sources. *See, e.g.*, *OMG*, 972 F.3d at 1363; *Meridian I*, 851 F.3d at 1382. In other words, the (k)(1) materials are interpretive tools that, where needed, help clarify what the scope language means relative to the scope question at issue, namely whether a particular product falls within the scope. But this assistance may be unnecessary if the scope language *itself* answers that scope question and thus needs no further interpretation. We note that in Commerce's recent effort to clarify the regulatory framework, Commerce expressed a similar understanding based on its practice, as now codified in the revised regulations. *2021 Revised Regulations*, 86 Fed. Reg. at 52323. The current regulations clarify that the traditional (k)(1) materials are "primary interpretive sources" that Commerce may consider "at [its] discretion," if it determines the scope language itself does not clearly and sufficiently answer the scope question. 19 C.F.R. § 351.225(k)(1)(i). The current regulations also list other "secondary interpretative sources" that Commerce "may also consider," as well as the hierarchy of these

interpretative sources. *Id.* §351.225(k)(1)(ii).

Practically, because the scope language is necessarily written in general terms, Commerce will *likely* consider the (k)(1) materials to assist in understanding the meaning of the scope language relevant to the determination of whether a particular product is within the scope. *See 2021 Revised Regulations*, 86 Fed. Reg. at 52323 (noting that "in the majority of scope inquiries, it is likely that the current (k)(1) sources would be considered" in reaching a scope ruling). This is particularly true where, as here, a scope ruling is requested, subsequently disputed, and eventually appealed to this court.

A. The Scope Language Covers Dual-Stenciled Pipes

We now turn to reviewing the scope language at issue. We find that in its *Scope Ruling*, Commerce reasonably interpreted the Thailand Order's scope as covering standard pipes dually stenciled as line pipes. The first sentence of the Order states that it covers "certain circular welded carbon steel pipes and tubes from Thailand. The subject merchandise has an outside diameter of 0.375 inches or more, but not exceeding 16 inches, of any wall thickness." J.A. 40763. There is no dispute that Saha's dual-stenciled pipes are "circular welded carbon steel pipes and tubes from Thailand" and that they meet the physical dimensions the Order describes. *E.g.*, Appellee Br. 16–17.

In the following sentence, the Order adds that the products covered by the Order are "commonly referred to in the industry as 'standard pipe[s].'" J.A. 40763. By this limitation, the Order further explicitly refines the universe of merchandise defined by the as-described physical characteristics, limiting it to "standard pipe[s]." Recognizing the effect of this limitation, Commerce determined that, pipes singularly certified as line pipes (not as standard pipes), even if they meet the described dimensions, fell outside of the scope of the Order. J.A. 40773–75.

The same conclusion does not, as Saha contends, extend to dual-stenciled pipes. *See, e.g.*, Appellee Br. 20 (Saha interpreting the "commonly referred to in the industry as 'standard pipe[s]'" language as further excluding standard pipes dual-stenciled as line pipes). There is no dispute that dual-stenciled pipes are certified as "standard pipe[s]," suitable for standard-pipe applications and in compliance with ASTM specifications. *E.g.*, *id.* at 4, 16–17, 19. There is also no dispute that these pipes additionally meet the API specification for, and are dually stenciled as, line pipes. *Id.* at 11. But meeting an additional specification, namely API line pipe specification(s), does not strip away the qualification of these pipes as standard pipes. J.A.

40775; *see* J.A. 40765 (diagram illustrating pipes meeting overlapping industry standards). "[S]tandard pipe[s]," as recited in the Order, means what it plainly says, "standard pipe[s]." It cannot be reasonably read to mean, as Saha contends, an unidentified subset within standard pipes that remains after another unidentified subset is excluded. *E.g.*, Appellee Br. 20 (Saha asserting that the Order excludes standard pipes that are dually stenciled, leaving within the scope only those that are singularly stenciled as standard pipes).

The last part of the Order provides a listing of tariff codes under which the subject merchandise is classifiable. Saha contends that because the listing does not include those tariff codes under which dual-stenciled pipes would be imported, it shows that the Order does not cover dual-stenciled pipes. *Id.* at 18–19. We disagree.

Immediately following the listing of tariff codes, the concluding sentence of the Order explicitly instructs that the tariff codes are "provided for convenience and purposes" of the CBP, and that "the written description of the merchandise subject to the order is dispositive." J.A. 40763. As we noted above, antidumping duty orders listing tariff treatment for CBP purposes often contain the same instructions. The regulations do not require Commerce to provide an exhaustive and dispositive listing of all tariff codes covering the entirety of merchandise subject to an antidumping duty order. *Novosteel SA v. U.S., Bethlehem Steel Corp.*, 284 F.3d 1261, 1270–71 (Fed. Cir. 2002). The listed tariff codes are thus what the Order instructs them to be, "for convenience and purposes" of the CBP. J.A. 40763. They cannot be reasonably read to exclude a subset of standard pipes, contradicting the "written description" that the Order instructs to be "dispositive." *Id.*

Accordingly, Commerce's determination in its *Scope Ruling* reasonably read the scope language to cover standard pipes that are dually stenciled as line pipes. The Thailand Order does not contain any exclusionary language, and we find Saha's attempt to read in an exclusion unsupported and unreasonable.

B. The (k)(1) Materials Support Commerce's Interpretation

Saha alternatively argues that the scope language itself does not resolve whether the Order covers dual-stenciled pipes and that the (k)(1) materials support excluding dual-stenciled pipes from the Order. Appellee Br.24. We disagree. Consideration of the (k)(1) materials supports Commerce's *Scope Ruling* determination and not Saha's proposed exclusion.

As noted *supra*, Saha does not dispute that dual-stenciled pipes are certified as standard pipes, meet ASTM specifications for standard

pipes, and suit the corresponding standard-pipe applications. The sole remaining dispute thus boils down to, absent an express exclusion in the scope language in the Thailand Order, whether the (k)(1) materials support an implicit exclusion of standard pipes if they are dually stenciled as line pipes. They do not.

There is a long history of antidumping proceedings involving imports of steel pipes from various countries going back to the early 1980s. *See Fourth Sunset Review* at I-4. As Commerce explained, in the industry, steel pipes are broadly classified based on end-use, and they are "generally produced according to" and "distinguishable based on" industry standards and specifications. J.A. 40773; *see also Final Injury Determination* at I-1 n.1 (referring to steel pipes descriptions set forth in *Certain Welded Carbon Steel Pipes and Tubes from the Republic of Korea, Determination of the Commission*, Inv. No. 701-TA-168, USITC Pub. 1345 (Feb. 1983) (Final)). Throughout the initial investigation culminating in the Thailand Order, the same industry specifications and designations were consistently used to define standard pipes, with no qualifiers based on additional specifications the same pipes might also meet.

In the initial February 1985 petition, the petitioners described "standard pipe" as a "general-purpose commodity . . . commonly referred to in the industry as a standard pipe" and "generally produced to ASTM specifications."[18] J.A. 40536. Line pipes, which the petitioners originally included in the petition but later withdrew, were described as "produced to API specifications for line pipe[s]." *Id.*

When Commerce initiated the antidumping duty investigation in March 1985, Commerce described the pipes under investigation as "*commonly referred to in the industry as standard pipe* or structural tubing, [] produced to various ASTM specifications." *Commerce Initiation Notice,* 50 Fed. Reg. at 12068–12069 (emphasis added). In its injury investigation and like-product determination, the ITC adopted the same description in defining standard pipes subject to its investigation, describing that "[t]he imported pipe and tube products that are the subject of these investigations are . . . *known in the industry as standard pipes* and tubes. . . . *They are most commonly produced to*

[18] The particular ASTM or API specifications referenced in the historical documents are not in dispute in this case. *E.g.*, J.A. 40764 (noting that standard pipes are commonly produced to "ASTM specifications A-120, A-53, and A-135," and line pipes to "API specification 5L").

ASTM specifications." *Final Injury Determination* at I-1–I-2 (emphasis added); *Preliminary Injury Determination* at A-6.

None of the historical documents contains any qualifier restricting the definition of standard pipes or carves out any subset of standard pipes based on additional specifications they may meet. As long as the pipes meet ASTM specifications, they are considered standard pipes.[19] The historical context of the initial antidumping duty investigation therefore supports Commerce's interpretation of the scope of "standard pipe[s]" under the Order. Because dual-stenciled pipes meet ASTM specifications for standard pipes, they constitute "standard pipe[s]" and fall within the Thailand Order's scope.

The (k)(1) materials do not support Saha's proposed clarification of the Order to exclude dual-stenciled pipes from the scope. Saha primarily relies on (1) its proposed interpretation of the petitioners' intention behind their partial withdrawal concerning line pipes during the initial investigation; and (2) the exclusions in other trade remedy proceedings, as referenced in the ITC's sunset reviews. Appellee Br. 11–13. Neither is persuasive. At bottom, Saha would have us inject an implicit exclusion into the scope language based on a supposed implicit inclusion that Saha reads from certain (k)(1) materials. That is backwards and ignores the paramount weight the scope language carries that the (k)(1) materials do not. *E.g.*, *Duferco Steel*, 296 F.3d at 1097. While the (k)(1) materials may aid in clarifying the scope of an order, they cannot rewrite or change the scope of the order, and they do not here. *Id.*

During the initial investigation, in March 1985, the petitioners partially withdrew their petition "insofar as they concern line pipe[s], TSUS numbers 610.3208 and 3209." J.A. 40612. Saha now interprets this statement to indicate that the petitioners intended to broadly exclude *all* pipes that "meet[] the API definition of line pipe[s]," regardless of whether they meet the specifications of other pipes. Appellee Br. 26. According to Saha, at the time of the initial investigation, dual-stenciled pipes would have entered under "TSUS num-

[19] The current scope language incorporates the phrase "commonly referred to in the industry as standard pipe," tracking the subject-merchandise description Commerce used when it initiated the initial investigation. *Compare* J.A. 40763, *with Commerce Initiation Notice*, 50 Fed. Reg. at 12069. Similarly, in the originally issued March 1986 Order, Commerce used the phrase "known as" standard pipes, tracking the description Commerce used in *the Final LTFV Determination* and the ITC's description in its *Final Injury Determination*. *Compare* 51 Fed. Reg. at 8341, *with Final LTFV Determination*, 51 Fed. Reg. at 3384 *and Final Injury Determination* at I-1–I-2. The historical context clarifies that these phrases describe pipes "produced to [various] ASTM specifications" and contain no limitation based on other criteria. *See, e.g.*, *Commerce Initiation Notice*, 50 Fed. Reg. at 12068–12069; *Final Injury Determination* at I-1–I-2.

bers 610.3208 and 3209." *Id.* at 28. Based on these propositions, Saha claims that the petitioners had intended to exclude dual-stenciled pipes from the initial investigation and the resulting Thailand Order. *Id.* We disagree.

It is Commerce, "not those who initiated the proceedings," that "determine[s] the scope of the final orders." *Duferco Steel*, 296 F.3d at 1097. As discussed above, while limiting the initial investigation to standard pipes, Commerce incorporated no restriction excluding standard pipes dually stenciled as line pipes. Further, as Commerce explained, in contrast to some later CWP investigations where the petitioners specifically excluded dual-stenciled pipes, the petitioners "made no similar statement or clarification" during the initial investigation underlying the Thailand Order. J.A. 40778. Here, the petitioners' partial-withdrawal statement made no reference to, let alone excluded, dual-stenciled pipes. J.A. 40612. We find no support in the petitioners' statement, or Saha's interpretation of the petitioners' statement, that Commerce excluded dual-stenciled pipes from the initial investigation or the scope of "standard pipe[s]" in the resulting Order.

For similar reasons, we reject Saha's attempt to extrapolate its interpretation of the petitioners' withdrawal of line pipes to how the ITC supposedly limited the merchandise underlying its injury investigation in 1985–86. *See* Appellee Br. 35–36. As explained above, in its injury investigation and the resulting affirmative determination, the ITC described the product under its investigation and causing injury as "standard pipes" produced to ASTM specifications. *Final Injury Determination* at I-1; *Preliminary Injury Determination* at 5, 7; J.A. 62 (Commerce explaining that the ITC "expressly found ASTM stenciled pipe (standard pipe) from Thailand injur[ed] the domestic industry"). The ITC did not reference or somehow carve out any subset of "standard pipes," based on other specification(s) these pipes might have simultaneously met. Nor did the ITC do so in defining "like product" or the domestic standard pipe industry that it determined to be injured by the imported standard pipes. *See Final Injury Determination* at 6–7; *Preliminary Injury Determination* at 6–9.

Saha's reliance on other investigations and CWP orders, as referenced in the ITC's sunset reviews, is similarly unavailing. As Commerce explained, the sunset reviews summarize the ITC's assessment of various CWP orders resulting from separate investigations. J.A. 40776–77; J.A. 64–65; *Fourth Sunset Review* at 6 (noting CWP orders under review "vary in terms of outside wall thickness specifications and product exclusions"). The various orders under the same sunset review have different scope terms: some explicitly exclude dual-

stenciled or triple-stenciled pipes, which the Thailand Order does not do. For instance, the 1992 CWP orders concerning imports from Brazil, Korea, Mexico, and Venezuela state that "Standard pipe that is *dual or triple certified/stenciled* that enters the U.S. as line pipe of a kind used for oil or gas pipelines is [] *not included in these orders*."[20] *Notice of Antidumping Orders: Certain Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea (Korea), Mexico, and Venezuela, and Amendment to Final Determination of Sales at Less Than Fair Value: Certain Circular Welded Non-Alloy Steel Pipe from Korea*, 57 Fed. Reg. 49453, 49453 (Nov. 2, 1992) (emphasis added). The Thailand Order, in contrast, does not contain similar exclusionary language, which Commerce properly gave effect in interpreting the Thailand Order. We reject Saha's attempt to read references to exclusions in other CWP orders as equally applying to the Thailand Order.

Saha's reliance on President Clinton's temporary safeguard duties imposed on line pipes fails for similar reasons. *See* Appellee Br. 43. The safeguard duties imposed by President Clinton represent a different trade remedy addressing *line pipes*, which came into effect in 2000 and expired in 2003.[21] It bears little relevance to, and little weight to control, how Commerce defined the scope of *standard pipes* in the 1986 Thailand Order or in the initial investigation leading up to it.

Accordingly, we conclude that the (k)(1) materials support Commerce's reasonable interpretation of the scope of standard pipes in the Thailand Order, and that Saha's proposed exclusion lacks support. The Court of International Trade reached a contrary conclusion that lacked support in the record and failed to give sufficient deference to Commerce under the substantial evidence standard of review and in matters "particularly within [Commerce's] expertise." *King Supply*, 674 F.3d at 1348. Even if two inconsistent yet reasonable conclusions could have been drawn from the record, the Court of International Trade cannot substitute its own judgment for that of Commerce. *Id.* at 1348, 1351; *Mitsubishi Heavy Indus., Ltd. v. United States*, 275 F.3d 1056, 1060 (Fed. Cir. 2001). Here we find one reasonable conclusion, Commerce's.

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[20] Saha's reliance on the *Wheatland* decision similarly fails. Appellee Br. 47 (citing *Wheatland*, 161 F.3d at 1366). In *Wheatland*, we addressed the same 1992 CWP orders and concluded that the scope language explicitly excluded dual-certified pipe. *Wheatland*, 161 F.3d at 1368–69.The same exclusion cannot be found in the Thailand Order.

[21] Proclamation No. 7274, 65 Fed. Reg. at 9193–9194; *see also* 19 U.S.C. §§ 2251, 2253.

CONCLUSION

We have considered Saha's remaining arguments and find them unpersuasive. There is no basis to exclude products covered by the plain text of the Order, notwithstanding that the same products have been given a different name or met additional specifications. *Mid Continent*, 725 F.3d at 1301 ("[M]erchandise facially covered by an order may not be excluded from the scope of the order unless the order can reasonably be interpreted so as to exclude it."). To conclude otherwise would allow foreign producers and exporters to circumvent antidumping duty orders by simply stamping their products with an additional mark. That would take the teeth out of antidumping duty orders, depriving the domestic industry of the very relief from harm posed by unfairly traded imports that is contemplated by the U.S. trade statutes. We reject such an approach.

For the foregoing reasons, we hold that Commerce's *Scope Ruling* that imports of dual-stenciled pipes fall within the scope of the Thailand Order is reasonable and supported by substantial evidence. We reverse the Court of International Trade's interpretation and judgment to the contrary.

REVERSED

COSTS

Costs against Appellee.

SAHA THAI STEEL PIPE PUBLIC COMPANY LIMITED, Plaintiff-Appellee v. UNITED STATES, Defendant WHEATLAND TUBE COMPANY, Defendant-Appellant

Appeal No. 2022–2181

Appeal from the United States Court of International Trade in No. 1:20-cv-00133-SAV, Judge Stephen A. Vaden.

CHEN, *Circuit Judge*, dissenting.

A 1986 antidumping order on pipes imported from Thailand covers "certain circular welded carbon steel pipes and tubes . . . , which are commonly referred to in the industry as 'standard pipe' or 'structural tubing.'" *Antidumping Duty Order on Circular Welded Carbon Steel Pipes & Tubes from Thailand: Final Scope Ruling on Line Pipe & Dual-Stenciled Standard & Line Pipe*, No. A-549–502 (June 30, 2020) (Final), J.A. 40763 (*Scope Ruling I*); *Antidumping Duty Order: Circular Welded Carbon Steel Pipes & Tubes from Thailand*, 51 Fed. Reg. 8341, 8341 (Mar. 11, 1986) (*Thailand Order*). This appeal raises the question of whether the *Thailand Order* encompasses dual-stenciled pipes and, in particular, whether "dual-stenciled pipe" is *also* "commonly referred to in the industry as 'standard pipe.'" *Scope Ruling I*, J.A. 40763. In my view, it is far from clear from the face of the *Thailand Order* whether people in the relevant industry refer to dual-stenciled pipe as standard pipe.

The record reflects the existence of three types of circular welded carbon steel pipes that are referred to as standard pipes, line pipes, and dual-stenciled pipes. Standard pipes typically satisfy American Society for Testing & Materials (ASTM) specifications A-53, A-120, or A-135, while line pipes typically satisfy the requirements of American Petroleum Institute (API) specifications API-5L or API-5X. *Certain Welded Carbon Steel Pipes & Tubes from Turkey & Thailand*, Inv. Nos. 701-TA-253, 731-TA-252, USITC Pub. 1810, at I-2 (Feb. 1986)(Final) (*Final Injury Determination*); *Scope Ruling I*, J.A. 40764. Compared to standard pipes, line pipes are made from higher grade steel, require additional testing to ensure they satisfy API specifications, and may contain a higher content of carbon and manganese. *Final Injury Determination* at II-1. To ensure compliance with ASTM and API specifications, respectively, standard pipes and line pipes are "inspected and tested at various stages in the production process." *Id.* at I-2, II-1. Dual-stenciled pipes—the products central to this dispute—are "stamped to indicate compliance with" both

ASTM and API specifications. *Certain Circular Welded Pipe & Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand & Turkey*, Inv. Nos. 701-TA-253, 731-TA-132, -252, -271, -273, -532 to -534, -536, USITC Pub. 4754, at 6 (Jan. 2018) (*Fourth Sunset Review*).

The Department of Commerce (Commerce) and the Court of International Trade (Trade Court) vigorously contest how to answer the question of whether the *Thailand Order* covers such dual-stenciled pipes, with Commerce insisting that the *Thailand Order*'s reference to "standard pipe" covers dual-stenciled pipes, and the Trade Court maintaining the opposite. *Scope Ruling I*, J.A. 40775–78; *Saha Thai Steel Pipe Pub. Co., Ltd. v. United States*, 547 F. Supp. 3d 1278, 1291–92 (Ct. Int'l Trade 2021) (*Saha I*); *Antidumping Duty Order on Circular Welded Carbon Steel Pipes*, No. A-549–502 (Jan. 6, 2022) (Final), J.A. 58–65 (*Scope Ruling II*); *Saha Thai Steel Pipe Pub. Co., Ltd. v. United States*, 592 F. Supp. 3d 1299, 1305 (Ct. Int'l Trade 2022) (*Saha II*). I agree with the Trade Court's position and thus would have affirmed its decisions in both *Saha I* and *Saha II*.

The plain language of the *Thailand Order* is unclear as to whether the relevant industry commonly refers to dual-stenciled pipes as standard pipes. That is, does dual-stenciled pipe go by two different names or just one? That ambiguity requires us to consider the interpretative materials under 19 C.F.R. § 351.225(k)(1) (2020), i.e., the (k)(1) materials. These (k)(1) materials contain substantial evidence supporting only the conclusion that the *Thailand Order* does not cover dual-stenciled pipes. For example, among numerous other pieces of evidence from the (k)(1) materials that support the Trade Court's conclusion that the *Thailand Order* excludes dual-stenciled pipes, the International Trade Commission's (ITC) reviews of antidumping orders for circular welded pipes—including the *Thailand Order*—indicated that the *Thailand Order* does not cover dual-stenciled pipes, expressly stating that "dual-stenciled pipe, which for U.S. customs purposes enters as line pipe under a different tariff subheading, *is not within the scope of the orders*." *Certain Circular Welded Pipe & Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand & Turkey*, Inv. Nos. 701-TA-253, 731-TA-132, -252, -271, -273, -532 to -534, -536, USITC Pub. 4333, at 8 (June 2012) (*Third Sunset Review*) (emphasis added); *see Fourth Sunset Review* at 6–7. I, therefore, respectfully dissent.

I. THE PLAIN LANGUAGE OF THE *THAILAND ORDER*'S SCOPE

"[T]he question of whether the unambiguous terms of [an antidumping order] control the inquiry, or whether some ambiguity ex-

ists, is a question of law that we review de novo." *OMG, Inc. v. United States*, 972 F.3d 1358, 1363 (Fed. Cir. 2020) (first alteration in original) (quoting *Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1382 (Fed. Cir. 2017)). "[W]e consider ambiguity in the context of the merchandise at issue in this case." *Id.* at 1364 (citing 19 C.F.R. § 351.225(a)).

The *Thailand Order* requires the covered merchandise to be "commonly referred to in the industry as 'standard pipe' or 'structural tubing'"—the "commonly referred to" requirement. *Scope Ruling I*, J.A. 40763. The appellant Wheatland Tube Company, Commerce, and the majority simply assume this requirement covers any pipe having the same certification as "standard pipe." Appellant's Opening Br. 21–22; *Scope Ruling I*, J.A. 40775; Maj. Op. 28; *see also* Oral Arg. 3:22–3:35 (available at https://oralarguments.cafc.uscourts.gov/default.aspx?fl=22–2181_11072023.mp3). But neither the "commonly referred to" requirement nor any part of the *Thailand Order* speaks directly to the certifications of the covered merchandise; instead, the *Thailand Order* simply mandates that the pipes are "commonly referred to in the industry as 'standard pipe.'" *Scope Ruling I*, J.A. 40763. Although I agree with the majority that one reasonable view is that this requirement encompasses any pipe *certified* as standard pipe, including dual-stenciled pipes, Maj. Op. 28, I believe an equally reasonable view is that this requirement encompasses only pipes *commonly called* "standard pipe" and that dual-stenciled pipes commonly go by a different naming convention: "dual-stenciled pipe." Moreover, it seems at least reasonably plausible that "standard pipe" would be a confusing misnomer for dual-stenciled pipe that provides an incomplete and misleading understanding of the nature of dual-stenciled pipe. I accordingly would have held that the *Thailand Order* is ambiguous as to whether dual-stenciled pipes are covered.

The majority says little as to the order's "commonly referred to" requirement, asserting that "meeting an additional specification, namely API line pipe specification(s), does not strip away the qualification of [dual-stenciled] pipes as standard pipes." Maj. Op. 28. It is true, as the majority notes, that the *Thailand Order* does not contain any language expressly excluding dual-stenciled pipes. *Id.* at 29. But this is not dispositive. *Cf. Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096 (Fed. Cir. 2002) ("Commerce cannot find authority in an order based on the theory that the order does not deny authority."). Though the *Thailand Order* does not expressly exclude dual-stenciled pipes, the "commonly referred to" requirement nonetheless is open to interpretation as to what types of pipes may be included. *Cf. Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1301 (Fed. Cir.

2013) ("[O]rders cannot be extended to *include* merchandise that is not within the scope of the order as reasonably interpreted . . . ."); *Duferco Steel*, 296 F.3d at 1095–96 (explaining that an order, which did not expressly exclude certain merchandise, could not "reasonably be interpreted to include" that merchandise).

The majority's interpretation of the *Thailand Order* disregards dual-stenciled pipes' additional certification to API specifications. Because this additional certification could change how the industry commonly refers to such pipes, I do not believe we can determine, as a matter of law, whether this interpretation is unreasonable from merely looking at the plain language of the *Thailand Order*. *Meridian Prods.*, 851 F.3d at 1381–82 (describing that while "we grant Commerce 'substantial deference' with regard to its interpretation of its own antidumping duty and countervailing duty orders," this deferential review is tempered by the fact that "the question of whether the unambiguous terms of a scope control the inquiry, or whether some ambiguity exists, is a question of law that we review de novo"). In the present case, Commerce could have characterized the covered pipes in terms of certifications, but, for whatever reason, it did not. The *Thailand Order* instead requires an inquiry into what "standard pipe" refers to in industry circles.

The tariff numbers listed in the *Thailand Order* call further attention to the ambiguity in its plain language. *See Scope Ruling I*, J.A. 40763. According to the majority, these tariff numbers cannot reasonably be read to exclude dual-stenciled pipes. Maj. Op. 29. This is because, the majority explains, the *Thailand Order* specifies that the "written description of the merchandise subject to the order is dispositive." *Id.* (quoting *Scope Ruling I*, J.A. 40763). Although I agree with the majority that these tariff numbers cannot override any dispositive written description elsewhere in the order, the *Thailand Order*, in my view, does not preclude the list of tariff numbers from being probative of whether the written description is ambiguous and of whether the "commonly referred to" requirement encompasses dual-stenciled pipes. *See Mid Continent Nail*, 725 F.3d at 1298, 1305 (permitting Commerce to interpret an antidumping order in light of the listed tariff numbers, notwithstanding the order expressly stating "[w]hile the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of [the order] is dispositive" (alterations in original) (quoting *Notice of Antidumping Duty Order: Certain Steel Nails from the People's Republic of China*, 73 Fed. Reg. 44961, 44961–62 (Aug. 1, 2008))). The listed tariff numbers do not cover dual-stenciled pipes, and this list does not include the numbers under which dual-stenciled pipes would have

been imported at the time the *Thailand Order* was issued. *Saha I*, 547 F. Supp. 3d at 1293. These tariff numbers further signify that the written description is unclear as to whether the *Thailand Order* encompasses dual-stenciled pipes.

Certification and name are two different concepts. An additional certification can change the name we call something.[1] The majority's perspective is that the "commonly referred to" requirement of the *Thailand Order* can only be reasonably understood to encompass dual-stenciled pipes in spite of the fact that dual-stenciled pipes possess API certifications that standard pipes do not have. But an equally reasonable perspective is that this requirement excludes dual-stenciled pipes because the industry does not commonly refer to dual-stenciled pipes as standard pipe in view of the additional API certifications of dual-stenciled pipes. The majority regards such a possibility as "unreasonable." Maj. Op. 29. I disagree and thus would have held that the *Thailand Order* is ambiguous as to whether it covers dual-stenciled pipes. *Meridian Prods*., 851 F.3d at 1381 n.7 ("The relevant scope terms are 'unambiguous' if they have 'a single clearly defined or stated meaning.'" (quoting *Unambiguous*, Webster's Third New International Dictionary of the English Language Unabridged (1986))). We therefore must consult the (k)(1) materials to determine whether the *Thailand Order* excludes or includes dual-stenciled pipes.

II. THE (K)(1) MATERIALS

If the language of an antidumping order is ambiguous, Commerce turns to the regulatory history of the order, i.e., the (k)(1) materials, including the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of Commerce and the ITC. 19 C.F.R. § 351.225(k)(1)(i); *Mid Continent Nail*, 725 F.3d at 1302. Commerce's analysis of the (k)(1) materials "produces 'factual findings reviewed for substantial evidence.'" *United Steel & Fasteners, Inc. v. United States*, 947 F.3d 794, 799 (Fed. Cir. 2020) (quoting *Meridian Prods.*, 851 F.3d at 1382). Here, substantial evidence does not support Commerce's determination in *Scope Ruling I* that the *Thailand Order* covers dual-stenciled pipes and instead supports only Commerce's determination in *Scope Ruling II* that the *Thailand Order* does not cover dual-stenciled pipes.

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[1] In an example relevant to the jurisdiction of this court, those who have completed the registration requirements of the U.S. Patent and Trademark Office (PTO) may be called "patent agents." When patent agents also complete the requirements of a state bar, they may be called "patent attorneys." But even though patent attorneys have completed the PTO registration requirements, patent attorneys are generally not called patent agents.

A.

Commerce in *Scope Ruling I* failed to offer any evidence from the (k)(1) materials affirmatively supporting a finding of inclusion. Commerce at best attacked the evidence proffered by the plaintiff Saha Thai Steel Pipe Public Company Ltd. (Saha) in support of a finding of exclusion. *See* J.A. 40776–78. But despite adducing no affirmative evidence supporting inclusion, Commerce found the *Thailand Order* encompassed dual-stenciled pipes. *Id.* at 40778.

The majority adopts the same erroneous line of reasoning, rebuffing each piece of evidence Saha and the Trade Court offered in support of a finding of exclusion but then failing to counter with any evidence in support of inclusion, short of a stray reference in the ITC's reviews of antidumping orders on circular welded pipes—discussed in greater detail below—that acknowledged the reviewed orders had varying express exclusions. *See* Maj. Op. 29–35. In doing so, the majority also overlooks clear evidence to the contrary in which the ITC unequivocally indicated that "dual-stenciled pipe, which for U.S. customs purposes enters as line pipe under a different tariff subheading, is not within the scope of the orders." *Third Sunset Review* at 8; *see Fourth Sunset Review* at 6–7. Despite the dearth of evidence in support of inclusion, the majority concludes "that the (k)(1) materials support Commerce's reasonable interpretation . . . and that Saha's proposed exclusion lacks support." Maj. Op. 35. This conclusion seems rooted in the majority's earlier determination that the "commonly referred to" requirement unambiguously covers dual-stenciled pipe. *See id.* at 31–32 ("The [(k)(1) materials] therefore support[] Commerce's interpretation of the scope of 'standard pipe[s]' in the [*Thailand Order*]." (third alteration in original) (quoting *Scope Ruling I*, J.A. 40763)). But as discussed above, I believe the plain language of the *Thailand Order* is ambiguous. Because nothing in the (k)(1) materials appears to affirmatively suggest the *Thailand Order* includes dual-stenciled pipes, I agree with the Trade Court's assessment that nothing in the (k)(1) materials supports Commerce's determination in *Scope Ruling I* that the *Thailand Order* covers dual-stenciled pipes. *Saha I*, 547 F. Supp. 3d at 1299 ("[T]he absence of evidence is indeed evidence of absence. Substantial evidence does not support the Commerce Department's scope determination.").

B.

The (k)(1) materials in fact provide numerous examples affirmatively supporting a finding that the *Thailand Order* excludes dual-stenciled pipes. To start, the initial investigation and injury determi-

nation for the *Thailand Order* provide substantial evidence backing a finding of exclusion. The majority contends that "the petitioners' partial-withdrawal statement [before Commerce issued the *Thailand Order*] made no reference to, let alone excluded, dual-stenciled pipes." Maj. Op. 33. I disagree with the majority's reading of these materials and, in fact, believe these materials affirmatively suggest the *Thailand Order* excludes dual-stenciled pipe imported as line pipe.

First, the petitioners' withdrawal of tariff codes under which dual-stenciled pipes were imported at the time of the final order—namely, Tariff Schedules of the United States (TSUS) (the precursor to the HTSUS) numbers 610.3208 and 610.3209—suggests that Commerce's deletion of these same tariff codes in the final antidumping order was deliberate. *Saha I*, 547 F. Supp. 3d at 1295. As the Trade Court recounted, the initial petition underlying the *Thailand Order* requested investigation of pipes imported under various TSUS numbers, including 610.3208 and 610.3209. *Id.* The petitioners subsequently withdrew their "petitions insofar as they concern[ed] line pipe, TSUS numbers 610.3208 and 3209." *Id.* (quoting J.A. 40612). As a result, the ITC exclusively evaluated injury resulting from standard pipe and did not evaluate injury from any pipes importable under the withdrawn tariff numbers—including both line pipe and dual-stenciled pipe imported as line pipe. *Id.* This backdrop indicates that Commerce intentionally omitted the tariff codes associated with dual-stenciled pipes in its final antidumping order, thereby supporting a finding that the *Thailand Order* excludes dual-stenciled pipes. *Id.*

Second, as evidenced by their subsequent investigations, Commerce and the ITC understood the difference between the given name for a pipe and the certifications associated with that pipe. Commerce described its investigation scope by stating that "[t]hese products, commonly referred to in the industry as standard pipe or structural tubing, are produced to various ASTM specifications, most notably A-152, A-53 or A-135," and the ITC described its investigation scope in a similar manner. *Certain Circular Welded Carbon Steel Pipes & Tubes from Thailand; Initiation of Antidumping Duty Investigation*, 50 Fed. Reg. 12068, 12069 (Mar. 27, 1985); *Final Injury Determination* at I-1 to I-2. Put differently, these scope descriptions referred to both a name of a pipe ("standard pipe") and ASTM specifications ("A-152," "A-53," "A-135"). Yet, Commerce's final antidumping order did not refer to the ASTM specifications, instead mentioning only the name of the covered pipe, i.e., "standard pipe." This omission suggests Commerce knew how to define the scope of the *Thailand Order* in terms of certifications to the ASTM specifications but declined to do so. The majority nevertheless interprets the "commonly referred to"

requirement in the *Thailand Order* as defining the certifications of the covered merchandise. This interpretation is contrary to the evidence from Commerce's and the ITC's investigations leading up to the final antidumping order.

For these reasons, as the Trade Court found, the (k)(1) materials for the initial investigation and the injury determination support the conclusion that the *Thailand Order* excludes dual-stenciled pipe imported as line pipe.

C.

The ITC's four subsequent sunset reviews of the *Thailand Order*—which no party disputes are (k)(1) materials—support a finding of exclusion. *See generally Certain Pipe & Tube from Argentina, Brazil, Canada, India, Korea, Mexico, Singapore, Taiwan, Thailand, Turkey & Venezuela*, Inv. Nos. 701-TA-253, 731-TA-132, -252, -271, -273, -276, -277, -296, -409, -410, -532 to -534, -536, -537, USITC Pub. 3316 (July 2000) (*First Sunset Review*); *Certain Pipe & Tube from Argentina, Brazil, India, Korea, Mexico, Taiwan, Thailand & Turkey,* Inv. Nos. 701-TA-253, 731-TA-132, -252, -271, -273, -409, -410, -532 to -534, -536, USITC Pub. 3867 (July 2006) (*Second Sunset Review*); *Third Sunset Review*; *Fourth Sunset Review*.

The *First Sunset Review* and *Second Sunset Review* reflect the ITC's understanding that standard pipes are distinct from dual-stenciled pipes. For example, in measuring the discernible adverse impact of potential revocation of the antidumping order for Mexican imports, the *Second Sunset Review* rejected the argument that multiple-stenciled line pipe that "satisfie[d] ASTM specifications for [circular welded pipe]" would affect the same industry as a "product that satisfie[d] ASTM specifications but not API specifications." *Second Sunset Review* at 13 n.66. According to the ITC, "multiple-stenciled line pipe requires [more] steel than [circular welded pipe] to meet [API] specifications applicable to line pipe. At current steel prices, this would require that a multiple-stenciled product be sold at a considerable price premium over a product that satisfies ASTM specifications but not API specifications." *Id.* As the Trade Court explained, this discussion demonstrates that the ITC recognized that dual-stenciled pipes and pipes singularly certified to ASTM specifications (i.e., standard pipes) affected different industries and thus considered dual-stenciled pipes to be distinct from standard pipes. *See Saha I*, 547 F. Supp. 3d at 1297.

Moreover, the *First Sunset Review* and the *Second Sunset Review* acknowledged that President Clinton's safeguard duties—imposed on imports of line pipes from certain countries—encompassed dual-

stenciled pipes even though President Clinton's proclamation initiating these duties expressly mentioned only line pipe, not dual-stenciled pipe. *See First Sunset Review* at 28; *Second Sunset Review* at OVERVIEW-5 n.16; *Proclamation 7274: To Facilitate Positive Adjustment to Competition from Imports of Certain Circular Welded Carbon Quality Line Pipe*, 65 Fed. Reg. 9193, 9193–94 (Feb. 18, 2000). While I agree with the majority that the safeguard duties "represent a different trade remedy addressing *line pipes*," Maj. Op. 35, the ITC's acknowledgement that these duties covered dual-stenciled pipes, notwithstanding the absence of express language in the proclamation, reflects the ITC's understanding that dual-stenciled pipes are closer in kind to line pipes than to standard pipes.

The *Third Sunset Review* and the *Fourth Sunset Review* further confirm that the ITC regarded dual-stenciled pipes to be distinct from standard pipes. The *Third Sunset Review*—in defining the scope of the orders under review—explicitly described that "dual-stenciled pipe, which for U.S. customs purposes enters as line pipe under a different tariff subheading, is not within the scope of the orders." *Third Sunset Review* at 8. The *Fourth Sunset Review* described the scope of the orders under review in a nearly identical manner. *Fourth Sunset Review* at 6–7. As the Trade Court determined, "[b]oth statements are unqualified and give no indication that the scope language does not apply to the Thailand Order." *Saha I*, 547 F. Supp. 3d at 1298.

The majority fails to engage with these statements, instead placing outsized weight on express exclusions that appear in other antidumping orders covered in the sunset reviews but that do not appear in the *Thailand Order*. Maj. Op. 34–35. For instance, as the majority observes, antidumping orders for Brazil, Korea, Mexico, and Venezuela expressly excluded dual-stenciled pipes, stating that "[s]tandard pipe that is dual or triple certified/stenciled that enters the U.S. as line pipe of a kind used for oil or gas pipelines is also not included in these orders." *Id.* at 34 (emphases omitted) (quoting *Notice of Antidumping Orders: Certain Circular Welded Non–Alloy Steel Pipe from Brazil, the Republic of Korea, Mexico & Venezuela*, 57 Fed. Reg. 49453, 49453 (Nov. 2, 1992)). But in addition to expressly excluding dual-stenciled pipes, these orders expressly excluded "line pipe, oil country tubular goods, boiler tubing, mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished conduit." *Notice of Antidumping Orders*, 57 Fed. Reg. at 49453. These other orders, as the

majority seems to acknowledge, at best confirm that the *Thailand Order* and these other orders do not contain the same express exclusions.[2] Maj. Op. 34–35. I fail to see, however, how these express exclusions preclude the *Thailand Order* from being interpreted to exclude dual-stenciled pipes, particularly in view of the ITC's direct statements in the *Third Sunset Review* and *Fourth Sunset Review* averring that the covered orders exclude dual-stenciled pipes.

For these reasons, I agree with the Trade Court that the ITC's sunset reviews further support a finding that the *Thailand Order* excludes dual-stenciled pipes.

D.

In view of the foregoing, I would have found that the (k)(1) materials do not provide substantial evidence supporting Commerce's view in *Scope Ruling I* that the *Thailand Order* includes dual-stenciled pipes. Furthermore, I would have found that the (k)(1) materials provide substantial evidence supporting Commerce's determination under protest in *Scope Ruling II* that the *Thailand Order* excludes dual-stenciled pipes.

CONCLUSION

Accordingly, I would have affirmed the Trade Court's decisions in both *Saha I* and *Saha II*. I respectfully dissent.

[2] To the extent the majority argues that the express exclusion of dual-stenciled pipes in these other orders affirmatively establish that the *Thailand Order* covers dual-stenciled pipes because the other orders expressly exclude dual-stenciled pipes while the *Thailand Order* contains no express exclusions, such an argument would be logically inconsistent with the undisputed understanding that the *Thailand Order* excludes line pipes. These other orders contain express exclusions of line pipes while the *Thailand Order* does not, but no one contends that the *Thailand Order* would accordingly include line pipes. Oral Arg. 23:20–23:27.

U.S. Court of International Trade

Slip Op. 24–58

AUXIN SOLAR, INC., AND CONCEPT CLEAN ENERGY, INC., Plaintiffs, v. UNITED STATES; UNITED STATES DEPARTMENT OF COMMERCE; GINA M. RAIMONDO, SECRETARY OF COMMERCE; UNITED STATES CUSTOMS AND BORDER PROTECTION; AND TROY A. MILLER, UNITED STATES CUSTOMS AND BORDER PROTECTION ACTING COMMISSIONER, Defendants.

Before: Timothy M. Reif, Judge
Court No. 23–00274

[Denying Defendants' Motion to Dismiss, granting the Joint Stipulation of Plaintiffs and Defendants, granting Proposed Defendant-Intervenors' Motions to Intervene and granting the Supplemental Protective Order of Defendant-Intervenors.]

Dated: May 9, 2024

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Gregory S. Menegaz, *Alexandra H. Salzman*, *James K. Horgan*, *Vivien J. Wang*, deKieffer & Horgan, PLLC, of Washington, D.C., for Defendant-Intervenor Risen Solar Technology Sdn. Bhd.

OPINION AND ORDER

Reif, Judge:

Before the court are: (1) the motions to dismiss under U.S. Court of International Trade ("USCIT" or the "Court") Rule 12(b)(1) of defendants the United States ("the government"), U.S. Department of Commerce ("Commerce"), Secretary of Commerce Gina M. Raimondo, U.S. Customs and Border Protection ("Customs") and Acting Customs Commissioner Troy A. Miller (collectively, "defendants"); (2) the motions to intervene of nine proposed defendant-intervenors[1] under Rule 24; (3) a supplemental protective order filed by proposed defendant-intervenors; and (4) the Joint Stipulation in lieu of preliminary injunction proposed by plaintiffs, Auxin Solar Inc. ("Auxin Solar") and Concept Clean Energy, Inc. ("CCE") (together, "plaintiffs"), and defendants. Plaintiffs invoke the Court's subject matter jurisdiction under 28 U.S.C. § 1581(i)(1)(B) and (D).[2] *See* Compl. (Dec. 29, 2023), ECF No. 2. Plaintiffs state that their cause of action arises under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), and they seek relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a), alleging that defendants failed to collect antidumping and countervailing duty cash deposits and failed to suspend liquidation on products circumventing the antidumping and countervailing duty orders concerning CSPV cells and modules from China. *See id* ¶¶ 19, 100, 116. Defendants filed a motion to dismiss for lack of subject matter jurisdiction, arguing that plaintiffs' invocation of

[1] Proposed defendant-intervenors include the American Clean Energy Power Association ("ACP"); the Solar Energy Industries Association ("SEIA"); Canadian Solar (USA) Inc. and Canadian Solar International Limited (collectively, "Canadian Solar"); JA Solar USA, Inc., JA Solar Vietnam Company Limited, JA Solar Malaysia Sdn. Bhd., and JA Solar International Limited (collectively, "JA Solar"); NextEra Energy, Inc. ("NextEra"); BYD (H.K.) Co., Ltd. ("BYD HK") and BYD America LLC ("BYD America") (collectively, "BYD"); Invenergy Renewables LLC and its affiliates, including Invenergy Solar Equipment Management LLC (collectively, "Invenergy"); Trina Solar (U.S.), Inc. ("TUS"), Trina Solar Science & Technology (Thailand) Ltd. ("TTL"), Trina Solar Energy Development Company Limited ("TEDC"), and Trina Solar (Vietnam) Science & Technology Co., Ltd. ("TVN") (collectively, "Trina"); and Risen Solar Technology Sdn. Bhd. ("Risen"). *See* ACP Mot. to Intervene (Jan. 26, 2024) ("ACP Br."), ECF No. 21; SEIA Mot. to Intervene (Jan. 26, 2024) ("SEIA Br."), ECF No. 24; Canadian Solar Mot. to Intervene (Jan. 26, 2024) ("Canadian Br."), ECF No. 25; JA Solar Mot. to Intervene (Jan. 26, 2024) ("JA Solar Br."), ECF No. 28; NextEra Mot. to Intervene (Jan. 26, 2024) ("NextEra Br."), ECF No. 29; BYD Mot. to Intervene (Jan. 26, 2024) ("BYD Br."), ECF No. 35; Invenergy Mot. to Intervene (Jan. 29, 2024) ("Invenergy Br."), ECF No. 44; Trina Mot. to Intervene (Jan. 29, 2024) ("Trina Br."), ECF No. 45–1; Risen Mot. to Intervene (Jan. 31, 2024) ("Risen Br."), ECF No. 50 (together collectively, "proposed defendant-intervenors").

[2] Further references to the U.S. Code are to the 2018 edition.

residual jurisdiction pursuant to 28 U.S.C. § 1581(i) is not available because jurisdiction is, or could have been, available under 28 U.S.C. § 1581(c). Defs.' Mot. to Dismiss, ECF No. 16 ("Defs. Mot. Dismiss"); Defs.' Reply Supp. Mot. Dismiss ("Defs. Reply Mot. Dismiss"), ECF No. 69. Plaintiffs and defendants filed a Joint Stipulation in Lieu of plaintiffs' Preliminary Injunction, stipulating to the Court's authority to grant reliquidation as a form of relief. Joint Stipulation in Lieu of Prelim. Inj. ("Joint Stipulation"), ECF No. 19.

Nine proposed defendant-intervenors filed motions to intervene in the instant action, arguing that they are importers who would be liable for the duties, which have been suspended pursuant to the rule suspending liquidation and collection of tariffs and duties issued by Commerce. *See supra* note 1. For the following reasons, the court denies defendants' motion to dismiss, and grants the joint stipulation of plaintiffs and defendants, the motions to intervene of proposed defendant-intervenors and the protective order filed by proposed defendant-intervenors.

BACKGROUND[3]

I. Factual background

On January 17, 2024, plaintiffs filed a complaint before the Court challenging the rulemaking, determinations and instructions issued by Commerce concerning the preliminary and final determinations in the circumvention inquiries covering Crystalline Silicon Photovoltaic ("CSPV") cells whether or not assembled into modules ("cells") imported from Cambodia, Malaysia, Thailand and Vietnam using parts and components from the People's Republic of China ("China"). *Procedures Covering Suspension of Liquidation, Duties and Estimated Duties in Accord with Presidential Proclamation 10414* ("*Duty*

[3] Certain facts addressed in this section are taken from the Complaint. Such facts constitute allegations at this stage of this matter notwithstanding that defendants and proposed defendant-intervenors admit certain of these facts in their proposed motions to dismiss. Nothing in this Opinion and Order shall be construed as the court accepting plaintiff's factual allegations as true or making any finding of fact where such facts are or may be disputed. *See, e.g., GreenFirst Forest Prods. v. United States*, 46 CIT __, __, 577 F. Supp. 3d 1349, 1351 n.3 (2022).

Suspension Rule"), 87 Fed. Reg. 56,868 (Dep't of Commerce Sept. 16, 2022);[4] Compl. ¶¶ 51–55, 65–71.

Since 2012, Commerce has applied antidumping and countervailing duty orders covering CSPV cells and modules from China. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order*, 77 Fed. Reg. 73,018 (Dep't of Commerce Dec. 7, 2012); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Countervailing Duty Order*, 77 Fed. Reg. 73,017 (Dep't of Commerce Dec. 7, 2012). On June 9, 2022, the president declared an emergency pursuant to 19 U.S.C.

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[4] Specifically, the *Duty Suspension Rule* provides the procedures governing the suspension of liquidation and estimated duties in accordance with Presidential Proclamation 10414:

> Commerce shall instruct U.S. Customs and Border Protection [Customs] to discontinue the suspension of liquidation and collection of cash deposits for any SA-Completed Cells and Modules that were suspended, in connection with initiation of the circumvention inquiries, pursuant to § 351.226(l)(1). If, at the time Commerce issues instructions to [Customs], the entries are suspended only for purposes of the circumvention inquiries, Commerce will direct [Customs] to liquidate those entries without regard to AD/CVD duties and refund those cash deposits collected pursuant to the circumvention inquiries.

Duty Suspension Rule, 87 Fed. Reg. at 56,868. The *Duty Suspension Rule* went into effect on November 15, 2022, as described *infra* n.6.

19 C.F.R. § 362.103 specifies procedural aspects related to liquidation:

> (a) *Importation of applicable entries free of duties and estimated duties.* The Secretary will permit the importation of Applicable Entries free of the collection of antidumping and countervailing duties and estimated duties under sections 701, 731, 751 and 781 of the Act until the Date of Termination. Part 358 of this chapter shall not apply to these imports.
> (b) *Suspension of liquidation and collection of cash deposits.* (1) To facilitate the importation of certain Southeast Asian-Completed Cells and Modules without regard to estimated antidumping and countervailing duties, notwithstanding § 351.226(l) of this chapter, the Secretary shall do the following with respect to estimated duties:" (i) "The Secretary shall instruct CBP to discontinue the suspension of liquidation of entries and collection of cash deposits for any Southeast Asian-Completed Cells and Modules that were suspended;" and (ii) "the Secretary will not, at th{e} time {of an affirmative circumvention determination}, direct CBP to suspend liquidation of Applicable Entries and collect cash deposits of estimated duties on those Applicable Entries."
> (c) *Waiver of assessment of duties.* "In the event the Secretary issues an affirmative final determination of circumvention in the Solar Circumvention Inquiries and thereafter, in accordance with other segments of the proceedings, pursuant to section 751 of the Act and § 351.212(b) of this chapter, issues liquidation instructions to CBP, the Secretary will direct CBP to liquidate Applicable Entries without regard to antidumping and countervailing duties that would otherwise apply pursuant to an affirmative final determination of circumvention."

19 C.F.R. § 362.103.

§ 1318(a)[5] with respect to threats to the availability of sufficient electricity generation capacity to meet expected customer demand in the United States. *Proclamation 10414: Declaration of Emergency and Authorization for Temporary Extensions of Time and Duty-Free Importation of Solar Cells and Modules from Southeast Asia* ("Proclamation 10414"), 87 Fed. Reg. 35,067, 35,068 (June 9, 2022).[6] Proclamation 10414 authorized Commerce to take action to permit CSPV cells into the United States "free of the collection" of antidumping and countervailing duties ("AD/CV duties"). *Id.*

On August 23, 2023, Commerce issued a final determination concluding that CSPV cells and modules from Cambodia, Malaysia, Thailand, and Vietnam were circumventing the AD/CV duty orders on CSPVs from China. *Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Scope Determination and Final Affirmative Determinations of Circumvention With Respect to Cambodia, Malaysia, Thailand, and Vietnam* ("*Final Determinations*"), 88 Fed. Reg. 57,419, 57,421–22 (Dep't of Commerce Aug. 23, 2023); *see Antidumping and Countervailing Duty Orders on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Preliminary Affirmative Determinations of Circumvention With Respect to Cambodia, Malaysia, Thailand, and Vietnam* ("*Preliminary Affirmative Determinations of Circumvention*"), 87 Fed. Reg. 75,221, 75,223–26 (Dep't of Commerce Dec. 8, 2022). Commerce relied on the *Duty Suspension Rule* to exempt from the collection and assessment of AD/CV duties all

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[5] Section 318 of the Tariff Act of 1930 delineates the trade measures that the president may adopt when a state of emergency exists:

> Whenever the President shall by proclamation declare an emergency to exist by reason of a state of war, or otherwise, he may authorize the Secretary of the Treasury to extend during the continuance of such emergency the time herein prescribed for the performance of any act, and may authorize the Secretary of the Treasury to permit, under such regulations as the Secretary of the Treasury may prescribe, the importation free of duty of food, clothing, and medical, surgical, and other supplies for use in emergency relief work. The Secretary of the Treasury shall report to the Congress any action taken under the provisions of this section.

19 U.S.C. § 1318(a).

[6] President Biden declared that an emergency existed due to the threat that there would be insufficient electricity generation capacity available to meet expected demand. Proclamation 10414. The proclamation identified multiple factors — including Russia's invasion of Ukraine and extreme weather events exacerbated by climate change — that contributed to the declaration of a state of emergency concerning access to electricity and energy. *Id*.

"applicable entries"[7] that were certified to be utilized within 180 days after the expiration of the emergency period. *See Final Determinations*, 88 Fed. Reg. at 57,419.

II. Procedural history

Plaintiffs declare unlawful the *Duty Suspension Rule* issued by Commerce along with Commerce's instructions to Customs to exempt CSPV cells from suspension of liquidation and cash deposit requirements, so long as the importers and exporters complied with Commerce's certification regime. Plaintiffs argue further that Commerce's rulemaking was unlawful and request that the court order vacatur of the *Duty Suspension Rule,* or in the alternative, suspend and remand the *Duty Suspension Rule* for further proceedings and order Customs to suspend liquidation of entries of CSPV cells and collect cash deposits. Compl. at 63.[8] According to plaintiffs, the *Duty Suspension Rule* has "precipitated a lawless CSPV cell and module marketplace characterized by a massive and sustained wave of cheap CSPV cells and modules from Malaysia, Thailand, Vietnam, and Cambodia that are made from components originating in the People's Republic of China." *Id.* ¶ 20.

On January 9, 2024, plaintiffs filed a motion for a preliminary injunction, requesting that the court order the suspension of liquidation of entries that would be subject to the Final Determinations. Pls.' Public Mot. for Prelim. Inj., ECF No. 8; Pls.' Confidential Mot. for Prelim. Inj. (Jan. 17, 2024), ECF No. 15. On January 22, 2024, defendants filed a motion to dismiss for lack of jurisdiction, stating that jurisdiction was available under 28 U.S.C. § 1581(c). Defs. Mot. Dismiss.

On January 25, 2024, plaintiffs and defendants filed a Joint Stipulation in Lieu of plaintiffs' motion for a preliminary injunction. *See* Joint Stipulation.

The court addresses first the threshold jurisdictional issue raised by defendants. Defs. Mot. Dismiss; Pls.' Resp. Opp'n Mot. to Dismiss. ("Pls. Resp. Opp'n Mot. Dismiss"), ECF No. 55; Defs. Reply Mot.

[7] "Applicable entries" are defined in the *Duty Suspension Rule* as "entries of Southeast Asian-Completed Cells and Modules that are entered into the United States, or withdrawn from warehouse, for consumption before the Date of Termination and, for entries that enter after November 15, 2022, are used in the United States by the Utilization Expiration Date." 19 C.F.R. § 362.102. The "Utilization Expiration Date" means "180 days after the Date of Termination" on "June 6, 2024, or the date the emergency described in Presidential Proclamation 10414 has been terminated, whichever comes first." *Id.*

[8] Specifically, plaintiffs ask the court to: (1) hold unlawful Commerce's *Duty Suspension Rule*; (2) vacate Commerce's *Duty Suspension Rule*; (3) direct Commerce to instruct Customs to suspend liquidation and collect cash deposits of AD/CV estimated duties on applicable entries; and (4) direct Customs to suspend liquidation and collect cash deposits of AD/CV estimated duties on applicable entries. Compl. at 63.

Dismiss; Mots. to Dismiss of Def.-Intervenors ("Mots. Dismiss of Def.-Ints."), ECF Nos. 32, 36, 39, 40, 41, 48, 49 53. The court addresses next the joint stipulation. Finally, the court addresses the motions to intervene filed by the nine proposed defendant-intervenors. *See* ACP Br., SEIA Br., Canadian Br., JA Solar Br., NextEra Br., BYD Br., Invenergy Br., Trina Br., Risen Br.

On January 29, 2024, SEIA, NextEra and ACP filed a consent motion for a supplemental protective order to govern the information submitted by proposed defendant-intervenors in the instant action. Mot. Supp. Protective Order ("Protective Order"), ECF No. 37.

On February 16, 2024, plaintiffs filed a consolidated response in opposition to the motions to intervene of proposed defendant-intervenors, arguing that they failed to meet the standing requirements, do not qualify for intervention of right and should not be permitted to intervene. Pls.' Resp. Opp'n Intervention ("Pls. Resp. Opp'n"), ECF No. 56.

On February 26, 2024, BYD, Canadian Solar, JA Solar, Risen and Trina filed a joint reply to plaintiffs' response in opposition to their motions to intervene. Prop. Def.-Intervenors' Consol. Reply ("Def.-Int. Reply I"), ECF No. 58. Also on February 26, 2024, ACP, Invenergy, NexEra and SEIA filed a joint reply to plaintiffs' response in opposition to their motions to intervene. Prop. Def.-Intervenors' Consol. Reply ("Def.-Int. Reply II"), ECF No. 59.

For the reasons set forth below, the court: (1) exercises jurisdiction under the Court's residual jurisdiction statute, 28 U.S.C. § 1581(i), and denies the motion to dismiss of defendants; (2) grants the motions to intervene of proposed defendant-intervenors; (3) grants the consent motion for a supplemental protective order governing the information of defendant-intervenors; and (4) grants plaintiffs' and defendants' Joint Stipulation in Lieu of plaintiffs' Preliminary Injunction.

JURISDICTION AND STANDARD OF REVIEW

Plaintiffs bring the action pursuant to 28 U.S.C. § 1581(i)(1)(B), which confers upon the Court exclusive jurisdiction over civil actions commenced against the United States, its agencies, or its officers arising out of any U.S. law providing for "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(1)(B). In the alternative, plaintiffs state that the Court has jurisdiction under 28 U.S.C. § 1581(i)(1)(D), which confers on this Court jurisdiction over disputes arising under the "administration and enforcement with respect to the matters referred to in subparagraphs (A) through (C) of this

paragraph and subsections (a)-(h) of this section." *Id*. § 1581(i)(1)(D). Plaintiffs argue that: (1) this action does not challenge Commerce's affirmative determinations that circumvention is in fact occurring; (2) plaintiffs' cause of action does not lie under 19 U.S.C. § 1516a; and (3) 28 U.S.C. § 1581(c)[9] does not provide an alternative jurisdictional basis for this action. Compl. ¶ 3.[10]

Section 1581(i) is the Court's "residual" jurisdictional provision. *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1371 (Fed. Cir. 2002) (citing *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1584 n.4 (Fed. Cir. 1994)), and allows the Court to "take jurisdiction over designated causes of action founded on other provisions of law." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992) (citing *Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1557 (Fed. Cir. 1988)). Defendants state that this Court lacks subject matter jurisdiction because the instant action should have been brought under 28 U.S.C. § 1581(c). Defs. Mot. Dismiss at 2.

Whether a court has subject matter jurisdiction to hear an action is a "threshold" inquiry. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* at 94 (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1869)); *accord Salmon Spawning & Recovery Alliance v. United States*, 33 CIT 515, 519, 626 F. Supp. 2d 1277, 1281 (2009) (citing *Ex parte McCardle*, 74 U.S. at 514). The party "seeking the exercise of jurisdiction . . . ha[s] the burden of establishing that jurisdiction exists." *Bush v. United States*, 717 F.3d 920, 924–25 (Fed. Cir. 2013) (citing *Keener v. United States*, 551 F.3d 1358, 1361 (Fed. Cir. 2009)).

"An inquiry into § 1581(i) jurisdiction thus primarily involves two questions. First, [the court] consider[s] whether jurisdiction under a subsection other than § 1581(i) was available. Second, if jurisdiction was available under a different subsection of § 1581, [the court] examine[s] whether the remedy provided under that subsection is 'manifestly inadequate.'" *Erwin Hymer Grp. N. Am., Inc. v. United*

[9] Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2018 edition.

[10] Plaintiffs challenge the *Duty Suspension Rule* that Commerce applied in four recently completed circumvention proceedings for which judicial review under 28 U.S.C. § 1581(c) currently is being sought. The issue is whether the complaint should be dismissed for lack of jurisdiction under 28 U.S.C. § 1581(i) because jurisdiction is, or could have been, available under 28 U.S.C. § 1581(c).

States, 930 F.3d 1370, 1375 (Fed. Cir. 2019) (citing *Ford Motor Co. v. United States*, 688 F.3d 1319, 1323 (Fed. Cir. 2012)). Rule 12(b)(1) provides that "a party may assert . . . by motion" the defense of "lack of subject-matter jurisdiction." USCIT R. 12(b)(1). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." USCIT R. 12(h)(3).

The court considers the questions of intervention in the instant action under USCIT Rule 24 and in accordance with the standard delineated by the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"). *See Cal. Steel Indus., Inc. v. United States,* 48 F.4th 1336, 1342 (Fed. Cir. 2022).

DISCUSSION

I. Whether the court has jurisdiction under 28 U.S.C. § 1581(i)

A. Legal framework

Under 28 U.S.C. § 1581(i), the USCIT has "exclusive jurisdiction of any civil action commenced against the United States, its agencies, or officers, that arises out of any law of the United States providing for . . . [the] administration and enforcement" of "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(1)(B), (D). Section 1581(i) expressly provides that "[t]his subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable by . . . the Court of International Trade under section 516A(a) of the Tariff Act of 1930" pursuant to 28 U.S.C. § 1581(c).[11] *Id.* § 1581(i)(2)(A).

Residual jurisdiction under § 1581(i) is "strictly limited" and may not be invoked "when jurisdiction under another subsection of § 1581 is or *could have been available*, unless the remedy provided under the other subsection would be manifestly inadequate." *Erwin Hymer Grp.*

[11] 28 U.S.C. § 1581(c) provides jurisdiction to the Court for challenges to Commerce's final determinations in circumvention inquiries, stating that this Court "shall have exclusive jurisdiction of any civil action commenced under" 19 U.S.C. § 1516a. Actions pursuant to 19 U.S.C. § 1516a provide "[j]udicial review in countervailing duty and antidumping duty proceedings," including final determinations by Commerce. 19 U.S.C. § 1516a(a)(2)(B)(vi). Judicial review covers "any factual findings or legal conclusions upon which the determination is based" and is available to "an interested party who is a party to the proceeding in connection with which the matter arises[.]" 19 U.S.C. § 1516a(a)(2)(A). An "interested party" is "a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise," 19 U.S.C. § 1677(9)(A), and a "party to the proceeding" is "any interested party that actively participates, through written submissions of factual information or written argument, in a segment of a proceeding." 19 C.F.R. § 351.102(b)(36).

N. America, Inc., 930 F.3d at 1374–75 (citations omitted); *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006) (citations omitted). In assessing jurisdiction under other subsections of § 1581, the court must "'look to the true nature of the action' brought before the CIT under § 1581(i) to determine whether the action could have been brought under another subsection." *Wanxiang Am. Corp. v. United States*, 12 F.4th 1369, 1374–75 (Fed. Cir. 2021); *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1293 (Fed. Cir. 2008); *cf. Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) ("[A] party may not expand a court's jurisdiction by creative pleading."); *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1191, 1193–94 (Fed. Cir. 2018) (concluding that the plaintiff's "characterization of its appeal . . . [was] unavailing" in view of the nature of the relief that the plaintiff sought in its complaint and, consequently, that the court lacked jurisdiction under 28 U.S.C. § 1581(i)).

B. Positions of parties

Defendants state that "[b]ecause jurisdiction is, or could have been, available pursuant to 28 U.S.C. § 1581(c), this Court cannot exercise its limited residual jurisdiction over the complaint pursuant to section 1581(i)." Defs. Mot. Dismiss at 11. Defendants state that plaintiffs challenge aspects of the final determinations and cite to plaintiffs' "numerous arguments regarding why [plaintiffs] believed that the Duty Suspension Rule was unlawful and should not [sic] applied to the liquidation instructions in that proceeding." Defs. Mot. Dismiss at 15 (citing *Final Determinations*, Cambodia IDM, Comment 26, at 113–22; Malaysia IDM, Comment 23, at 104–14; Thailand IDM, Comment 21, at 113–22; Vietnam IDM, Comment 24, at 111–20).

Defendants state that plaintiffs may invoke § 1581(i) to challenge Commerce's liquidation instructions only when alleging that the instructions are not consistent with Commerce's underlying final determination. Defs. Mot. Dismiss at 17–18 (quoting *Ugine and ALZ Belgium v. United States* ("*Ugine I*"), 452 F.3d 1289, 1296 (Fed. Cir. 2006) ("[A]n action challenging Commerce's liquidation instructions [as being inconsistent with the final results] is not a challenge to the final results, but a challenge to the 'administration and enforcement' of those final results,' and thus falls squarely within 28 U.S.C. § 1581(i)(4).") (quoting *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1305 (Fed. Cir. 2004)). Defendants argue that the instant action concerns liquidation instructions that take into account the *Duty Suspension Rule* and therefore does not present the inconsistencies between liquidation instructions and final results of *Ugine* and *Shinyei.* Defs. Mot. Dismiss at 18 (quoting Compl. ¶¶ 18, 86).

Plaintiffs invoke the residual jurisdiction of the court under 28 U.S.C. § 1581(i)(1)(B) or, in the alternative under 28 U.S.C. § 1581(i)(1)(D). Compl. ¶ 2. In October 2023, plaintiffs commenced four actions in this Court challenging various aspects of the final circumvention determinations and invoking this Court's jurisdiction pursuant to 28 U.S.C. § 1581(c). *Auxin Solar, Inc. v. United States*, Court Nos. 23–223, 23–224, 23–225. In those separate actions, unlike in the instant action, plaintiffs challenge certain aspects of the final determinations, but do not challenge Proclamation 10414 or the *Duty Suspension Rule*. *Id.*

Plaintiffs state further that the instant action "takes Commerce's affirmative circumvention determinations as-is [sic]." Pls. Resp. Opp'n Mot. Dismiss at 9. Plaintiffs "'seek application of those final results,' and challenge Defendants' unlawful failure to enforce the antidumping and countervailing duty laws in reliance on the [*Duty Suspension Rule*]." *Id.* (quoting *Consol. Bearings Co. v. United States,* 348 F.3d 997, 1002 (Fed. Cir. 2003)). Further, plaintiffs argue that defendants' reliance on *Ugine I* is "inapposite, as that opinion explicitly declined to 'decide the scope of *Shinyei* in a preliminary injunction context,' 452 F.3d at 1297, and was followed by a subsequent Federal Circuit decision that 'h[e]ld that the Court of International Trade had jurisdiction under 28 U.S.C. § 1581(i)' but which Defendants fail to acknowledge." *Id.* at 16–17 (quoting *Ugine and ALZ Belgium v. United States* ("*Ugine II*"), 551 F.3d 1339 (Fed. Cir. 2009) (alteration in original) (rehearing and rehearing *en banc* denied)).

C. Analysis

1. Whether subject matter jurisdiction "is or could have been available" under 28 U.S.C. § 1581(c)

The Court does not have and would not have had jurisdiction over the instant action under 28 U.S.C. § 1581(c). 28 U.S.C. § 1581(c) provides the Court with subject matter jurisdiction with respect to "any civil action commenced under [19 U.S.C. § 1516a]." Further, 19 U.S.C. § 1516a(a)(2)(B)(iii) provides that "[a] final determination . . . by [Commerce] . . . under [19 U.S.C. § 1675]" constitutes a "[r]eviewable determination[]" under 28 U.S.C. § 1581(c). 19 U.S.C. § 1516a(a)(2)(B)(iii).

Subject matter jurisdiction for the instant action, which involves plaintiffs' challenge to Commerce's authority to issue and apply the *Duty Suspension Rule* in respect of the administration and enforcement of the Final Determinations, could not have been available under 28 U.S.C. § 1581(c). That is because the *Duty Suspension Rule* relates to the "administration and enforcement," 28 U.S.C. §

1581(i)(1)(D), of those determinations — in particular, Commerce's cash deposit and liquidation instructions to Customs — rather than the lawfulness of Commerce's Final Determinations themselves.

The Federal Circuit has stated that the Court is to "look to the true nature of the action" to determine whether jurisdiction would be available under another subsection of 28 U.S.C. § 1581. *Hartford Fire*, 544 F.3d at 1293. As specified in plaintiffs' complaint, the underlying issue raised by plaintiffs concerns Commerce's *Duty Suspension Rule*, which Commerce issued pursuant to and under the authority of Proclamation 10414.[12] *See* Compl. ¶¶ 101, 108, 116, 127, 134, 138, 145; *see also Wanxiang Am. Corp.*, 12 F.4th at 1374–75 (directing the jurisdictional inquiry to look to the "true nature of the action"). The *Duty Suspension Rule* by its terms states explicitly that Commerce will direct CBP to take certain actions with respect to the "Applicable Entries" defined in section 362.102 and further states *explicitly* that these directions by Commerce to CBP are *despite* — not in furtherance of — Commerce's initiation of its circumvention inquiries and Commerce's final affirmative circumvention determinations:

> Commerce will direct [Customs] to discontinue the suspension of liquidation and collection of cash deposits that were ordered based on Commerce's initiation of these circumvention inquiries . . . [and] Commerce will not direct CBP to suspend liquidation, and require cash deposits, of estimated ADs and CVDs based on these affirmative determinations of circumvention on any "Applicable Entries."

Final Determinations, 88 Fed. Reg. at 57,421. Further, Commerce's directions to CBP as specified do not alter in any respect Commerce's circumvention findings in those determinations. *Id*.

[12] The *Duty Suspension Rule* provides:

> To respond to the emergency declared in the proclamation, and pursuant to the Proclamation and section 318(a) of the Act, in this final rule, Commerce is adding Part 362 to extend the time for, and waive, the actions provided for in 19 C.F.R. 351.226(l)(1) . . . .

87 Fed. Reg. at 56,869.

19 U.S.C. § 1516a(a)(2)(B) lists under subparagraph (B) the specific types of determinations[13] contestable under that provision. None of those listed determinations describes or encompasses the *Duty Suspension Rule*. Therefore, none is applicable in the instant action. In sum, the instant action does not concern a "reviewable determination" under 19 U.S.C. § 1516a(a)(2)(B), thereby precluding jurisdiction under 28 U.S.C. § 1581(c).

In contrast, the instant action deals with actions expressly described under 28 U.S.C. § 1581(i)(1): the non-collection of "tariffs, duties, fees, or other taxes on the importation of merchandise for *reasons other than the raising of revenue*," in this instance, the president's declared emergency to meet domestic electricity demands as per § 1581(i)(1)(B) (emphasis supplied) and the "administration and enforcement with respect to the matters referred to in subparagraphs (A) through (C) of this paragraph and subsections (a)-(h) of this section," which include circumvention determinations by Commerce such as the Final Determinations. *See, e.g., NLMK Pa., LLC v. United States*, 46 CIT __, 558 F. Supp. 3d 1401, 1405 (2022) (exercising jurisdiction pursuant ′to 28 U.S.C. § 1581(i)(1)(B) and (D)). As a consequence, the action falls squarely within the terms of § 1581(i).

This Court has stated — and the Federal Circuit has affirmed — that 28 U.S.C. § 1581(i) constitutes "a [c]ongressional fail-safe device"

[13] Section 1516a(a)(2)(B) delineates the types of determinations that allow for the invocation of § 1581(c) and judicial review:

> (B) Reviewable determinations
>
> The determinations which may be contested under subparagraph (A) are as follows:
>
> (i) Final affirmative determinations by the administering authority and by the Commission under section 1671d or 1673d of this title, including any negative part of such a determination (other than a part referred to in clause (ii)).
> (ii) A final negative determination by the administering authority or the Commission under section 1671d or 1673d of this title, including, at the option of the appellant, any part of a final affirmative determination which specifically excludes any company or product.
> (iii) A final determination, other than a determination reviewable under paragraph (1), by the administering authority or the Commission under section 1675 of this title.
> (iv) A determination by the administering authority, under section 1671c or 1673c of this title, to suspend an antidumping duty or a countervailing duty investigation, including any final determination resulting from a continued investigation which changes the size of the dumping margin or net countervailable subsidy calculated, or the reasoning underlying such calculations, at the time the suspension agreement was concluded.
> (v) An injurious effect determination by the Commission under section 1671c(h) or 1673c(h) of this title.
> (vi) A determination by the administering authority as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order.
> (vii) A determination by the administering authority or the Commission under section 3538 of this title concerning a determination under subtitle IV of this chapter.
> (viii) A determination by the Commission under section 1675b(a)(1) of this title.
>
> 19 U.S.C. § 1516A(B).

and that "[i]f the circumstances of a case are sufficiently unusual so that one may presume that Congress could not have provided for such a case under the general language of 19 U.S.C. § 1516a . . . 28 U.S.C. § 1581(i) is available to afford a means of vindication of statutory rights." *Hylsa, S.A. de C.V. v. United States*, 21 CIT 222, 227–28, 960 F. Supp. 320, 324 (1997), *aff'd sub nom. Hylsa, S.A. v. Tuberia Nat., S.A.*, 135 F.3d 778 (Fed. Cir. 1998). One such "unusual" circumstance exists in the instant action. Commerce took an unprecedented action to issue the *Duty Suspension Rule* under Proclamation 10414, which was issued under separate provision of the U.S. code. 19 U.S.C. § 1318; 19 U.S.C. § 1677j; 19 C.F.R. § 351.225; 19 C.F.R. § 351.226. The *Duty Suspension Rule* in turn contains express direction to Customs with respect to suspension of liquidation, collection of cash deposits and payment of estimated duties.

In addition, the Federal Circuit has provided a framework to confirm the proper exercise of residual jurisdiction. *Shinyei*, 355 F.3d at 1296–97;[14] *Ugine II*, 551 F.3d at 1339. The *Shinyei* decision addressed the administrative review of an AD order, in which Customs (due to Commerce's erroneous instructions) liquidated certain entries at a rate higher than that set in Commerce's final determination. *Shinyei*, 335 F.3d at 1303. Plaintiff Shinyei invoked jurisdiction pursuant to § 1581(i): (1) arguing that Commerce's instructions violated 19 U.S.C. § 1675(a)(2)(C) (with respect to the antidumping duty margin determination); and (2) seeking reliquidation. *Id.* at 1305–06. The USCIT dismissed Shinyei's action for lack of subject matter jurisdiction. *Id.* at 1304. Plaintiff appealed. Before the Federal Circuit, the government argued that no relief was available under APA § 702 because 19 U.S.C. § 1516a and the protest statute, 19 U.S.C. § 1514, barred the court from granting plaintiff's requested relief — reliquidation. *Id.* at 1306, 1308. The Federal Circuit reversed the USCIT and concluded that § 1516a was not applicable to Shinyei's APA challenge because § 1516a deals with "final determinations" of Commerce and not actions or directions related to Commerce's *implementation* of the final de-

[14] It is notable that the Federal Circuit in *Shinyei* expressly confirmed the authority of the USCIT to exercise residual jurisdiction and order reliquidation. *Shinyei,* 355 F.3d at 1311–12 (stating that "[t]he absence of an express reliquidation provision should not be read as a prohibition of such relief when the statute provides the Court of International Trade with such broad remedial powers"). It is parties' acknowledgement of and intention not to contest this authority to which plaintiffs and defendants stipulate in the Joint Stipulation in Lieu of Plaintiffs' Preliminary Injunction. Joint Stipulation ¶ 2. The Federal Circuit stated that no provision in the Tariff Act "provides that liquidations are final except within the narrow confines of section 1514." *Shinyei*, 355 F.3d at 1311. In *Shinyei*, the Federal Circuit remanded the action to the USCIT directing it to reach the merits of requested relief because the Tariff Act "does not '*impliedly forbid* the [reliquidation] relief which [Shinyei] sought' under the APA. . . ." *Id.* at 1312. In its remand, the Federal Circuit stated that "the requested relief [to grant reliquidation] is easily construed as 'any other form of relief that is appropriate in a civil action.'" *Id.*

termination. *Id.* at 1309. The instant action is analogous because it relates to Commerce's liquidation instructions and Commerce's failure therein to order the collection of duties consistent with Commerce's findings in the Final Determinations.[15]

Defendants argue that the holding in *Shinyei* is inapposite. Defendants maintain that plaintiffs in the instant action contest Commerce's failure to instruct Customs to suspend liquidation and collect duties according to an affirmative finding of circumvention in the Final Determinations, whereas plaintiff in *Shinyei* challenged its exclusion from Commerce's liquidation instructions that did not reflect the results of the administrative review and final determination. Defs. Reply Mot. Dismiss at 11 (citing *Shinyei*, 355 F.3d at 1301–04).

Defendants' argument is not persuasive. Plaintiffs in this action, as in *Shinyei* and *Ugine II*, were subject to liquidation instructions that did not reflect Commerce's Final Determinations. In particular, Commerce's liquidation and collection instructions to Customs in the instant action as specified in the *Duty Suspension Rule* are inconsistent with Commerce's affirmative circumvention determinations as set forth in the Final Determinations.[16] *See Ugine II,* 551 F.3d at 1347 ("If the party challenges the liquidation instructions issued by Commerce to implement a final order, review is available under 28 U.S.C.

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[15] The court notes that both plaintiffs and proposed defendant-intervenors have filed actions in this Court challenging the Final Determinations. *Auxin Solar Inc. v. United States*, Court No. 23–223; *Auxin Solar Inc. v. United States*, Court No. 23–224; *Auxin Solar Inc. v. United States*, Court No. 23–227; *BYD (H.K.) Co., Ltd. v. United States*, Court No. 23–221; *Canadian Solar Int'l Ltd. v. United States*, Court No. 23–222; *Trina Solar Science & Tech. (Thailand) Ltd. v. United States*, Court Nos. 23–227, 23–228; *Red Sun Energy Long An Co. Ltd v. United States*, Court No. 23–229. In those actions, Auxin Solar and CCE do not contest the *Duty Suspension Rule* and the consequent liquidation instructions that are the subject of this action.

[16] Commerce determined that the CPSV cells were circumventing AD/CVD Orders covering certain solar modules:

> As detailed in the Issues and Decision Memoranda for Cambodia, Malaysia, and Vietnam, and in the *Preliminary Determination* for Thailand, with the exception of certain U.S. imports from the exporters identified in Appendix III to this notice, we determine that U.S. imports of inquiry merchandise are circumventing the *Orders* on a country-wide basis. As a result, we determine that this merchandise is covered by the *Orders.*

Final Determinations, 88 Fed. Reg. at 57,420.

The *Duty Suspension Rule* is referenced in Commerce's analysis as pertaining to the liquidation and cash deposit instructions: (footnote continued)

> *See* the "Suspension of Liquidation and Cash Deposit Requirements" section below for details regarding suspension of liquidation and cash deposit requirements. *See* the "Certification" and "Certification Requirements" section below for details regarding the use of certifications.

Id.

§ 1581(i)[1][B], [D].").[17] As such, the Federal Circuit's decisions in *Shinyei* and *Ugine II* are on point. That Commerce chose to incorporate in the same document containing Commerce's Final Determinations of circumvention Commerce's liquidation and collection instructions to Customs is not determinative. Were it to be so, it would elevate form over substance rather than focus on "the true nature of the action" before the court. *Wanxiang Am. Corp. v. United States*, 12 F.4th at 1374–75; *Hartford Fire*, 544 F.3d at 1292–93.[18] [19]

In sum, the court concludes that the instant action could not have been brought under 28 U.S.C. § 1581(c) and falls within the residual jurisdiction of the Court under 28 U.S.C. § 1581(i)(1)(D) because it pertains to the "administration and enforcement" of Commerce's circumvention findings.

2. Whether the relief provided to plaintiffs would be "manifestly inadequate"

Jurisdiction was not available under 28 U.S.C. § 1581(c). Accordingly, the court need not and does not address parties' arguments concerning whether any such relief under § 1581(c) would have been "manifestly inadequate."

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[17] The version of the USCIT's jurisdictional statute at 28 U.S.C. § 1581(i)(2) and (4) analyzed in *Ugine II* corresponds in substance to the current 28 U.S.C. § 1581(i)(1)(B) and (D). *Compare* 28 U.S.C. § 1581(i)(2) and (4) (2020), *with* current version at 28 U.S.C. § 1581(i)(1)(B) and (D).

[18] As stated in the Final Determinations, Commerce determined that the subject CSPV cells were circumventing AD/CVD orders on solar cells and modules from China. *Final Determinations*, 88 Fed. Reg. at 57,419.

[19] Defendants maintain that "a party challenging two different aspects of *one* final determination [should not be required to] file *two separate* lawsuits, one pursuant to § 1581(c) and another pursuant to § 1581(i)." Defs. Reply Mot. Dismiss at 3. This argument is contrary to the decisions of this court and the Federal Circuit. For example, in *Ugine II*, the Federal Circuit expressly recognized that "[u]nfortunately . . . there is no single judicial review method for challenging the imposition of antidumping duties." 551 F.3d at 1347. The Federal Circuit elaborated:

> If the challenge is to the final order of an administrative review, the determination can be reviewed by the Court of International Trade under 28 U.S.C. § 1581(c) . . . . On the other hand, if the final order is unclear, 19 C.F.R. § 351.225 makes available a scope review under 28 U.S.C. § 1581(c). . . . If the party challenges the liquidation instructions issued by Commerce to implement a final order, review is available under 28 U.S.C. § 1581(i). . . . If the liquidation order is clear, but is being improperly applied by Customs, then Customs' actions can be challenged under 28 U.S.C. § 1581(a). . . .

Id. (citations omitted).

As noted, that Commerce chose to embed its instructions to Customs in the same notice containing Commerce's Final Determinations does not change the legal nature of those instructions. As in other actions decided by this Court and the Federal Circuit, instructions as to the implementation of a final determination are appropriately considered under § 1581(i).

II. Whether the Joint Stipulation in Lieu of Plaintiffs' Motion for a Preliminary Injunction should be granted by this court

Parties may stipulate to certain facts before the court and propose certain conclusions of law. *See, e.g., LDA Incorporado v. United States,* 39 CIT __, 79 F. Supp. 3d 1331 (2015); *United States v. Carnation Creations, Inc.,* 27 CIT 604 (2003). In the instant action, plaintiffs and defendants stipulate to the authority of the court to order reliquidation and direct the United States to reliquidate entries "for which liquidation was not suspended and cash deposits were not collected pursuant to *Procedures Covering Suspension of Liquidation, Duties and Estimated Duties in Accord with Presidential Proclamation 10414*, 87 Fed. Reg. 56,868 (Sept. 16, 2022)." Joint Stipulation ¶ 1.

Further, plaintiffs and defendants clarified for the court the purpose of the Joint Stipulation to support the availability of reliquidation as a remedial power, which defendants concede in the instant action. *See* Defs.' Resp. Order re: Joint Stipulation at 2, ECF No. 72; *see* Pls.' Resp. Order re: Joint Stipulation at 2, ECF No. 73 (stating that "Defendants obtain the benefit of mooting Solar Plaintiffs' Motion and avoiding a court-imposed injunction"); *Sumecht NA, Inc. v. United States*, 923 F.3d 1340 (Fed. Cir. 2019) (finding that the government would be judicially estopped from taking a contrary position regarding the USCIT's authority to order reliquidation due to the government's representation that reliquidation was available as a form of relief); *In re Section 301 Cases*, 45 CIT __, __, 524 F. Supp. 3d 1355, 1362–63 (2021).

As such, the court grants the Joint Stipulation proposed by plaintiffs and defendants.

III. Whether proposed defendant-intervenors have standing

A. Legal framework

The court addresses first whether proposed defendant-intervenors have standing under Article III of the Constitution. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) ("[S]tanding is an essential . . . part of the case-or-controversy requirement of Article III."). Article III limits the jurisdiction of federal courts to cases and controversies. U.S. Const. art. III, § 2. A justiciable Article III case or controversy requires a "party invoking federal court jurisdiction" to demonstrate, as "the irreducible constitutional minimum of standing": (1) that it has suffered "an injury in fact," that is, "an invasion of a legally protected interest which is (a) concrete and

particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) a "causal connection between the injury and the conduct complained of"; and (3) "it must be likely that the injury will be redressed by a favorable decision." *Lujan,* 504 U.S. at 560–61 (internal citations and quotations omitted).

The court begins by addressing issues of standing because standing is a threshold jurisdictional question. *California Steel Indus., Inc. v. United States,* 48 F.4th 1336, 1342 (Fed. Cir. 2022) (citing *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 581 U.S. 433, 434 (2017)). "For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right." *Town of Chester*, 581 U.S. at 434. This means that, "at the least, an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests." *Id.* Proposed intervenors have "the burden of demonstrating either . . . independent constitutional standing or. . . 'piggyback standing,' i.e., standing based on seeking the same relief sought by an existing party to the case." *N. Am. Interpipe, Inc. v. United States*, 45 CIT __, __, 519 F. Supp. 3d 1313, 1321–22 (2021).

The Federal Circuit has clarified the rationale for Article III standing of defendant-intervenors, stating that:

> A defendant-intervenor does not fit the same mold as the traditional unwilling defendant. Rather, a defendant-intervenor actively seeks to participate in the resolution of a case in which the plaintiff did not bring a claim against or request any relief from the proposed intervenor. Thus, "where a party tries to intervene as another defendant," that defendant-intervenor must "demonstrate Article III standing."

California Steel, 48 F.4th at 1343 (quoting *Crossroads Grassroots Pol'y Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 316 (D.C. Cir. 2015)). "[A]t least one party must demonstrate Article III standing for each claim for relief." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. __, 140 S. Ct. 2367, 2379 n.6, 207 L.Ed.2d 819 (2020) (citing *Town of Chester*, 581 U.S. at 434). "Article III standing is not a threshold determination that courts normally make before allowing a defendant to enter a case. The standing inquiry is generally 'directed at those who invoke the court's jurisdiction,' and most defendants are pulled into a case unwillingly." *Crossroads Grassroots*, 788 F.3d at 316 (citing *Roeder v. Islamic Republic of Iran,* 333 F.3d 228, 233 (D.C. Cir. 2003)). Where a putative intervenor seeks only the same relief as an existing party to the litigation, the proposed intervenor may "piggyback" on the existing party's stand-

ing. *See Caifornia Steel*, 48 F.4th at 1343; *HiSteel Co., Ltd. v. United States*, 47 CIT __, ___, 592 F.Supp.3d 1339, 1342 (2022).

USCIT Rule 24(c) requires that proposed intervenors state the grounds for their intervention and accompany their motions with "a pleading that sets out the claim or defense for which intervention is sought." USCIT R. 24(c)(1).

B. Positions of parties

Plaintiffs argue that none of the proposed intervenors has established Article III Standing. Pls. Resp. Opp'n at 9. Plaintiffs note that the USCIT "has previously denied motions that 'fail to even address, must less establish, either. . . independent constitutional standing or . . . piggyback standing as required by Article III.'" *Id.* (citing *N. Am. Interpipe*, 45 CIT at __, 519 F. Supp. 3d at 1322. Plaintiffs state that all proposed defendant-intervenors violate USCIT Rule 24(c) for failing to submit an accompanying pleading setting out a prayer for relief and the defense for which intervention is sought. Pls. Resp. Opp'n at 12 (citing USCIT Rule 24(c)).

All proposed defendant-intervenors address the elements of Article III standing in their initial or reply briefs, stating that "[i]t goes without saying that industry entities that intervene to defend a government rule pursue the same 'relief' as the government: for that rule to be upheld." Def.-Int. Reply I at 5; Mot. Leave to File Opp'n to Mot. Int. of Prop. Def.-Int. ("Def.-Int. Reply II") at 16, ECF No. 59.

C. Analysis

The court concludes that proposed defendant-intervenors demonstrate that they meet Article III piggyback standing requirements as set out by the Supreme Court and the Federal Circuit to intervene in the instant action because proposed defendant-intervenors seek the same relief as named defendants and filed their motions to intervene with sufficient pleadings. In the following analysis, the court does not address the issues concerning the independent constitutional standing[20] of proposed defendant-intervenors because they have demonstrated that they meet the requirements to establish piggyback standing alongside defendants.

[20] Standing requires that (1) the party invoking federal jurisdiction and asserting standing "shows that it has suffered an injury in fact — an invasion of a legally protected interest which is concrete and particularized," (2) there must be a "causal connection between the injury and the conduct complained of — the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court," and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal citations and quotations omitted).

1. Prayers for relief

In their motions to intervene, proposed defendant-intervenors request the same relief as the defendants named by plaintiffs: the enforcement and judicial upholding of the *Duty Suspension Rule* contested by plaintiffs in the instant action. *See* Mots. Dismiss, ECF Nos. 16, 32, 36, 39, 40, 41, 48, 49 53. In *California Steel,* the Federal Circuit held that the proposed intervenors' requested relief was largely identical to the government's prayer for relief and that the proposed intervenors therefore established the first element of piggyback standing. *California Steel*, 48 F.4th at 1343. Each of the proposed defendant-intervenors in the instant action shares the same prayer for relief as the government. Consistent with the *California Steel* holding, the court concludes that the proposed defendant-intervenors have demonstrated the first element of Article III piggyback standing because they share the same prayer for relief as the named defendants.

2. Pleadings

All proposed defendant-intervenors complied with Rule 24(c)(1) by filing motions to dismiss with their motions to intervene. Mots. Dismiss, ECF Nos. 32, 36, 39, 40, 41, 48, 49, 50, 53. Motions to dismiss for lack of subject matter jurisdiction constitute pleadings satisfying the requirements of Rule 24(c). Further, Rule 12 states that a defense for lack of subject matter jurisdiction "must be made before pleading if a responsive pleading is allowed." USCIT R. 12(b)(1). The court concludes that the motion to dismiss accompanying each motion to intervene of each proposed defendant-intervenor satisfies the pleading requirement of Rule 24. USCIT R. 24(c)(1).[21]

The shared prayers for relief and attached pleadings of proposed defendant-intervenors demonstrate that the proposed defendant-intervenors meet the threshold standing requirements set forth by this Court for intervention in the instant action.

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[21] Plaintiffs maintain that the *only* pleading that meets the requirement in Rule 24(c) is an Answer to plaintiffs' Complaint. Pls. Resp. Opp'n at 12 (citing USCIT R. 7(a)). The court in this case is called upon to apply Rules 7, 24 and 12, which states that a motion to dismiss "must be made before pleading if a responsive pleading is allowed." USCIT R.12. Rule 24(c) states in relevant part: "The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." In this case, defendants have not yet filed an Answer. Proposed defendant-intervenors cannot be expected to file an Answer prior to the defendants they seek to join. Further, to effectively preclude proposed defendant-intervenors from utilizing Rule 24 such that their motions to intervene may be considered would narrow the opportunities for intervention provided under Rule 24.

IV. Whether proposed defendant-intervenors are entitled to intervene as a matter of right

A. Legal framework

Pursuant to Rule 24(a), intervention as a matter of right is available to anyone who:

> in an action described in section 517(g) of the Tariff Act of 1930 . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

USCIT R. 24(a)(2).

This Court and the Federal Circuit have interpreted the clause of Rule 24(a)(2) that does not pertain to evasion cases under 19 U.S.C. § 1517 to provide for a four-part test:

> (1) [T]he motion must be timely; (2) the moving party must claim an interest in the property or transaction at issue that is "'legally protectable'—merely economic interests will not suffice"; (3) "that interest's relationship to the litigation must be 'of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment,'"; and (4) "the movant must demonstrate that said interest is not adequately addressed by the government's participation."

N. Am. Interpipe, 45 CIT __, 519 F. Supp. 3d at 1323 (quoting *Wolfsen Land & Cattle Co. v. Pac. Coast Fed'n of Fishermen's Ass'ns*, 695 F.3d 1310, 1315 (Fed. Cir. 2012)), *aff'd sub nom. Cal. Steel Indus., Inc. v. United States*, 48 F.4th 1336 (Fed. Cir. 2022); *California Steel*, 48 F.4th at 1340 (first quoting *N. Am. Interpipe*, 45 CIT at __, 519 F. Supp. 3d at 1323; then quoting *Wolfsen*, 695 F.3d at 1315).

B. Positions of parties

Plaintiffs argue that none of the proposed defendant-intervenors meets any of the four factors to be weighed by the court in deciding motions to intervene as a matter of right. Pls. Resp. Opp'n at 5–6. All proposed defendant-intervenors except for Risen Energy argue that they meet the requirements for intervention as of right.

C. Analysis

The court concludes that none of the proposed defendant-intervenors meets the second and third factors of the four-part test, thereby failing to meet the standard for intervention as of right under USCIT Rule 24(a). *See Wolfsen*, 695 F.3d at 1315. In denying intervention as of right under USCIT Rule 24(a), the court analyzes each of the four factors contested by plaintiffs.

1. Timeliness of the motions to intervene

The court concludes that each proposed defendant-intervenor filed its motion to intervene in the instant action in a timely manner.

The Federal Circuit has established the following test for timeliness under Rule 24(a):

> [T]he following factors must be weighed:
>
> (1) the length of time during which the would-be intervenor actually knew or reasonably should have known of his right to intervene in the case before he applied to intervene;
> (2) whether the prejudice to the rights of existing parties by allowing intervention outweighs the prejudice to the would-be intervenor by denying intervention. [sic]
> (3) existence of unusual circumstances militating either for or against a determination that the application is timely.

Sumitomo Metal Indus., Ltd. v. Babcock & Wilcox Co., 69 CCPA 75, 81, 669 F.2d 703, 707 (1982) (citations omitted).

The court concludes that the timing of the motions to intervene weighs in favor of proposed defendant-intervenors under the *Sumitomo* standard. *Id.* Plaintiffs argue that each proposed defendant-intervenor filed a motion to intervene prematurely "because no proposed defendant-intervenor has demonstrated that defendants inadequately represent a legally protectable interest in the subject of this litigation." Pls. Resp. Opp'n at 33. The court disagrees. The first factor for intervention does not depend on the second factor and the court iterates that the timeliness of intervention is considered in the context of the status of litigation of the case. In the instant action, the motions to intervene were filed within 30 days of the complaint and were accompanied with motions to dismiss for lack of subject matter jurisdiction. Mots. Dismiss of Def.-Ints.

All proposed defendant-intervenors filed to intervene in the instant action to argue the same position as the government and filed motions to dismiss for lack of subject matter jurisdiction. *Id.* Rule 12(b)(1) pleadings are proper in the early stages of the adjudication of the instant action. USCIT R. 12(b)(1).

As such, proposed defendant-intervenors meet the first factor required for intervention as a matter of right under Rule 24(a).

2. Legally protectable interests

The court addresses next whether proposed defendant-intervenors have a right to intervene under USCIT Rule 24(a) based on a "legally protectable" interest. *Wolfsen*, 695 F.3d at 1315 (citation omitted). Proposed defendant-intervenors do not explain how their interests in this action are "legally protectable" as opposed to "merely economic." *Id.*

In *California Steel*, the Federal Circuit made the distinction between parties with a "legally protectable interest" and parties that "participat[ed] in adversarial administrative proceedings." *California Steel,* 48 F.4th at 1344 (finding no "legally protectable interest[ ]" on the basis that proposed defendant-intervenors participated in administrative proceedings that could have revoked tariffs in which the proposed defendant-intervenors had an interest); *see Glob. Aluminum Distrib. LLC v. United States*, 45 CIT __, __, 579 F. Supp. 3d 1338, 1341 (2021) (quoting *N. Am. Interpipe*, 45 CIT at __, __, 519 F. Supp. 3d at 1323 (2021) (quoting *Wolfsen,* 695 F.3d at 1315)). Similar to proposed intervenors in *California Steel,* proposed defendant-intervenors in the instant action argue that their participation in the administrative proceedings and the potential effect of the court's ruling concerning the *Duty Suspension Rule* necessarily equate to a legally protectable interest. The court disagrees.

Plaintiffs in the instant action contest the underlying rulemaking procedure by Commerce when issuing the *Duty Suspension Rule*, which exempted the collection of AD/CV duties on the CSPV cells and Commerce's non-collection of AD/CV duties on the CSPV cells. Compl. ¶¶ 3–4. Proposed defendant-intervenors argue that they have "oriented their supply chains, imported subject products, executed legally binding contracts and invested capital in reliance on [the *Duty Suspension Rule*]." Def.-Int. Reply I at 11; Def.-Int. Reply II at 6. Proposed defendant-intervenors may be affected financially by the court's judgment concerning the *Duty Suspension Rule,* but the rulemaking process and the substance of the *Duty Suspension Rule* do not create legally protectable interests beyond "merely economic" ones. *Am. Mar. Transp., Inc. v. United States,* 870 F.2d 1559, 1562 (Fed. Cir. 1989) (citation omitted).

Intervention as a matter of right is not available in the instant action because proposed defendant-intervenors have not sufficiently shown that their financial interests rise above the "merely economic."

3. Direct relationship between litigation and proposed defendant-intervenors' interests

Proposed defendant-intervenors argue that whether the *Duty Suspension Rule* is upheld by the court "will have a demonstrable and significant impact" on them because they "stand to face immediate and direct economic harm as a result of this litigation." Def.-Int. Reply I at 2. The court concludes that the economic harm from which proposed defendant-intervenors may suffer does not constitute a legally protectable interest and the question of whether there is a direct relationship between the litigation and those interests turns on the second factor. In the instant action, because the court concludes that the second factor is not met, there can be no direct relationship between the litigation and the interests of proposed defendant-intervenors.

4. Adequacy of government's representation

Proposed defendant-intervenors demonstrate that their interests are not adequately protected by the government in the instant action. The burden of showing inadequacy of representation is "minimal," requiring a showing only that an existing party's representation of interests of proposed defendant-intervenors "may be" inadequate as to some aspect of the case at bar. *Wolfsen,* 695 F.3d at 1315 (citing *Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n.10 (1972) (permitting intervention by a union member notwithstanding participation of the Secretary of Labor because the Secretary's twin duties to represent both the aggrieved member and the public generally might engender an adversity of interest)). In the instant action, proposed defendant-intervenors have shown that the government will not adequately represent their financial and economic interests.

In sum, and as noted, proposed defendant-intervenors meet two of the four requirements for intervention as of right, but do not meet the second and third requirements. Accordingly, the court concludes that none of the proposed defendant-intervenors meets the standard for intervention as of right under USCIT Rule 24(a).

V. Whether proposed defendant-intervenors should be permitted to intervene

A. Legal framework

"Subject to the statutory provisions of 28 U.S.C. § 2631(j), permissive intervention is governed by Rule 24(b) of the Rules of this Court." *Manuli Autoadesivi, S.p.A. v. United States*, 9 CIT 24, 25, 602 F. Supp. 96, 98 (1985) (citing 28 U.S.C. § 2631(j)(1) ("Any person who

would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action . . . .")). The court may permit a party to intervene under USCIT Rule 24(b) if such a party "has a claim or defense that shares with the main action a common question of law or fact." USCIT R. 24(b)(1)(B). If proposed intervenors satisfy the requirements of USCIT Rule 24(b)(1)(B), the court may exercise its discretion to permit intervention. USCIT R. 24(b)(3). "In 28 U.S.C. § 1581(i) cases, intervention is left to the sound discretion of the court as stated in [USCIT] Rule 24(b) and 28 U.S.C. § 2631(j)." *Neo Solar Power Corp. v. United States*, Slip Op. 2016–60, 2016 Ct. Int'l. Trade LEXIS 58, at *2 (CIT June 9, 2016) (citing *Vivitar Corp. v. United States*, 7 CIT 165, 169, 585 F. Supp. 1415, 1419 (1984)). Further, "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." USCIT R. 24(b)(3).

B. Positions of parties

Plaintiffs state that proposed defendant-intervenors' motions cannot be treated as timely because they do not include answers or pleadings with their motions to intervene. Pls. Resp. Opp'n at 36. Plaintiffs state further that proposed defendant-intervenors reference 28 U.S.C. § 2631(j)(1) as creating a conditional right to intervene for purposes of Rule 24(b)(1)(A), but that none possesses that right because proposed defendant-intervenors need to establish independent Article III standing to support the position that they would be "adversely affected or aggrieved by a decision in this action." *Id.* at 37–39. Plaintiffs also maintain that proposed defendant-intervenors do not share a defense with the government because they do not demonstrate any defense in the instant action. *Id.* at 39–41. Finally, plaintiffs state that if the court "were to find a proposed intervenor theoretically eligible for intervention under Rule 24(b)(1), it should nevertheless decline to exercise its discretion to permit intervention. Proposed defendant-intervenors' participation in this action would unduly delay proceedings." *Id.* at 41–46. Plaintiffs add that proposed defendant-intervenors attack the Joint Stipulation in lieu of plaintiffs' preliminary injunction and that the many motions to intervene in the instant action have unduly prejudiced parties already. *Id.* at 42–44.

Proposed defendant-intervenors argue that, to the contrary, they meet each prong of the four-part permissive intervention inquiry. *See* ACP Br. at 13–15; SEIA Br. at 10–12; Canadian Br. at 7–11; JA Solar Br. at 12–14; NextEra Br. at 9–11; BYD Br. at 68; Invenergy Br. at

9–11; Trina Br. at 6–8; Risen Br. at 4–7. Consolidated Intervenors argue that they would be adversely affected or aggrieved by a decision in this case. Def.-Int. Reply I at 20.

C. Analysis

The court considers: (1) whether proposed defendant-intervenors have shown that they would be adversely affected or aggrieved by the outcome of the instant action; (2) whether proposed defendant-intervenors' defenses and arguments share a common question of law or fact with those of the government; (3) the timeliness of their motions to intervene; and (4) whether permitting intervention would unduly delay or prejudice plaintiffs in the instant action. The court concludes that proposed defendant-intervenors meet each of the four factors and, therefore, permissive intervention by them in the instant action is warranted.

1. Adversely affected or aggrieved

The court concludes that proposed defendant-intervenors have adequately demonstrated that they would be adversely affected or aggrieved within the meaning of 28 U.S.C. § 2631(j)(1). Plaintiffs state that proposed defendant-intervenors must demonstrate independent constitutional standing in the instant action to show that they "would be adversely affected or aggrieved by a decision in [the instant] action within the meaning of 28 U.S.C. § 2631(j)(1)." Pls. Resp. Opp'n at 37. No such requirement exists. *Cf. PrimeSource Bldg. Prod., Inc. v. United States*, 45 CIT __, __, 494 F. Supp. 3d 1307, 1329 (2021) (Baker, J., concurring) (stating that "a putative intervenor invoking 28 U.S.C. § 2631(j)(1) must demonstrate "injury in fact," i.e., constitutional standing.").

Further, each proposed defendant-intervenor references both its reliance on the *Duty Suspension Rule* in making business decisions and the potential financial ramifications of the instant action. ACP Br. at 9 ("ACP's project developers, electric utilities and project financing companies to varying extents bear contractual liability for duties that may be imposed on 'applicable entries' in the event plaintiffs' claims prevail."); SEIA Br. at 7 ("SEIA members imported and purchased CSPV cells and modules from Southeast Asia, based on the understanding that the imported CSPV cells and modules would not be subject to [AD/CV] duties."); Trina Br. at 7 ("[the *Duty Suspension Rule*] shaped Trina's decisions regarding the materials and production assets used to serve the U.S. market."); Def.-Int. Reply I at 21 ("Plaintiffs admit that potential AD/CVD duty liability arises from the circumvention Final Determinations, which are currently on ap-

peal under Section 1581(c). And the relief Plaintiffs seek *in this litigation* is the imposition of AD/CV duties."); Def.-Int. Reply II at 13 ("Proposed Intervenors, as importers and users of CSPV modules benefitting from the [*Duty Suspension Rule*], will suffer direct financial consequences if plaintiffs succeed, because the solar products they import and use (including . . . goods previously imported and used) will be subject to significant additional tariffs.").

Finally, this Court has explained that "[t]he phrase 'adversely affected or aggrieved,' which mirrors the language in numerous statutes, including the [APA], 5 U.S.C. § 702, represents a 'congressional intent to cast the [intervention] net broadly — beyond the common-law interests and substantive statutory rights' traditionally known to law." *Ont. Forest Indus. Assoc. v. United States*, 30 CIT 1117, 1130, 444 F.Supp.2d 1309, 1321–22 (2006) (quoting *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 19 (1998)).

As such, the court concludes that proposed defendant-intervenors have shown that they would be adversely affected or aggrieved by the outcome of the instant action.

2. Common question of law or fact

Proposed defendant-intervenors participated in the underlying administrative proceedings and their defenses share law and facts in common with those of the government. Proposed defendant-intervenors note that "the primary transaction at issue in this appeal is application of the [*Duty Suspension Rule*] and potential liability for AD/CV duties." Def.-Int. Reply II at 14. Proposed defendant-intervenors have shown that their "participation could add some material aspect beyond what is already present." *Wolfsen*, 695 F.3d at 1318.[22] Proposed defendant-intervenors represent a segment of the solar industry that is aligned with the position of defendants. Def.-Int. Reply II at 14. As such, and based on their filings, the court concludes that proposed defendant-intervenors have demonstrated that they share a common question of law or fact with defendants. In addition, proposed defendant-intervenors would defend their differentiated interests in this case. *Id*.

3. Timeliness

The motions to intervene of proposed defendant-intervenors are timely given that they were filed within 30 days of plaintiffs' com-

[22] Although Wolfsen considers intervention as of right, the court finds its reasoning — including as set forth by the Ninth Circuit Court of Appeals in *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) — relevant and persuasive in light of the discretionary standard in Rule 24(b)(1). 695 F.3d at 1318.

plaint and include motions to dismiss for lack of subject matter jurisdiction as discussed in Section IV.C.1, *supra*.

4. Undue delay or prejudice

The potential for undue delay or prejudice toward parties in the instant action requires particular consideration by the court given the number of proposed defendant-intervenors and the Joint Stipulation in Lieu of the Preliminary Injunction filed by plaintiffs. *See* Joint Stipulation. Plaintiffs argue that the sheer number of proposed defendant-intervenors will unduly delay and prejudice plaintiffs in the litigation of the instant action. Pls. Resp. Opp'n at 41–42.

The court has clarified that motions for intervention must be weighed against the principles of USCIT Rule 1 to promote the "just, speedy and inexpensive determination of every action and proceeding":

> [S]ix plaintiffs have expressed opposition to the Coalition's intervention. In exercising its discretion under § 2631(j)(2) and Rule 24(b), the court concludes that adding the Coalition as intervenors will burden the plaintiffs in all twelve actions with the need to respond to additional submissions and, unavoidably, also cause delays. These burdens and delays are not justified by broadening this litigation to allow the intervention that is sought here. In summary, allowing the intervention would not promote the principle expressed in USCIT Rule 1 that this Court's rules be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

PrimeSource, 45 CIT at __, 494 F. Supp. 3d at 1312–13 (2021) (quoting USCIT R. 1). The court weighs the burden presented by nine additional litigants in the instant action under Rule 1 against the effects (including potential reliquidation of entries that remain unliquidated) that the proposed defendant-intervenors may experience if the court decides in plaintiffs' favor. Joint Stipulation ¶ 3. These potential effects include that "if plaintiffs ultimately prevail upon the merits, the Court has the power to order reliquidation of entries that remain unliquidated as of the date that the Court enters an order upon [the Joint Stipulation]." See *id.*

The reliquidation of entries would affect not only defendants in the instant action, but also proposed defendant-intervenors. Weighing plaintiffs' rights under Rule 1 with the interests and rights of proposed defendant-intervenors and the court's motivation to receive a full understanding of the legal and factual issues presented and the

perspectives of interested parties, the court determines that the intervention of proposed defendant-intervenors would not "unduly delay or prejudice the adjudication of the original parties' rights." USCIT R. 24(b). Further, to ensure the most effective presentation of arguments given the number of proposed defendant-intervenors, the court orders duplicative arguments to be omitted from the briefs of proposed defendant-intervenors. The court notes also that the granting of defendants' and plaintiffs' Joint Stipulation and plaintiffs' subsequent withdrawal of its motion for a preliminary injunction will diminish further the chances for any such undue delay.

CONCLUSION

For the foregoing reasons, the court denies defendants' motions to dismiss for lack of subject matter jurisdiction and grants the Joint Stipulation of plaintiffs and defendants. The court grants the motions to intervene under Rule 24(b) of proposed defendant-intervenors. In consideration of the large number of defendant-intervenors and the potential that their participation will "unduly delay or prejudice the rights of the original parties," the court orders defendant-intervenors to omit duplicative arguments in all future submissions. Finally, the court grants the Supplemental Protective Order. Accordingly, it is hereby

ORDERED that the Motions to Dismiss of defendants and proposed defendant-intervenors are **DENIED**; it is further

ORDERED that the Motions to Intervene of proposed defendant-intervenors are granted; it is further

ORDERED that the Supplemental Protective Order is granted; it is further

ORDERED that the Joint Stipulation of plaintiffs and defendants is granted; and it is further

ORDERED that parties file a Joint Proposed Briefing Schedule within 14 days of this opinion and order.

SO ORDERED.

Dated: May 9, 2024
New York, New York

/s/ Timothy M. Reif
TIMOTHY M. REIF, JUDGE

Slip Op. 24–59

BEST MATTRESSES INTERNATIONAL COMPANY LIMITED AND ROSE LION FURNITURE INTERNATIONAL COMPANY LIMITED, Plaintiffs and Consolidated Defendant-Intervenors, v. UNITED STATES, Defendant, and BROOKLYN BEDDING, LLC; CORSICANA MATTRESS COMPANY; ELITE COMFORT SOLUTIONS; FXI, INC.; INNOCOR, INC.; KOLCRAFT ENTERPRISES INC.; LEGGETT & PLATT, INCORPORATED; THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS; AND UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, Defendant-Intervenors and Consolidated Plaintiffs.

Before: Gary S. Katzmann, Judge
Consol. Court No. 21–00281

[The *Remand Redetermination* is sustained in full. Judgment on the agency record is entered for Defendant.]

Dated: May 16, 2024

Sarah M. Wyss, Mowry & Grimson, PLLC, of Washington, D.C., argued for Plaintiffs and Consolidated Defendant-Intervenors Best Mattresses International Company Limited and Rose Lion Furniture International Company Limited. With her on the briefs were *Jeffrey S. Grimson*, *Jacob Reiskin*, *Kristin H. Mowry*, and *Wenhui (Flora) Ji*.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Ashlande Legin*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Chase J. Dunn, Cassidy Levy Kent (USA) LLP, of Washington, D.C., argued for Defendant Intervenors and Consolidated Plaintiffs Brooklyn Bedding, LLC; Corsicana Mattress Company; Elite Comfort Solutions; FXI, Inc.; Innocor, Inc.; Kolcraft Enterprises Inc.; Leggett &Platt, Incorporated; the International Brotherhood of Teamsters; and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO. With him on the briefs was *Yohai Baisburd*.

OPINION AND ORDER

Katzmann, Judge:

The instant matter springs back to the court following its decision and remand order in *Best Mattresses Int'l Co. v. United States* ("*Best Mattresses I*"), 47 CIT __, 622 F. Supp. 3d 1347 (2023), ECF No. 99. On remand, the U.S. Department of Commerce ("Commerce") reconsidered certain aspects of the final affirmative antidumping duty determination regarding mattresses from Cambodia arising from a less-than-fair-value investigation. *See Mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey, and*

the Socialist Republic of Vietnam: Antidumping Duty Orders and Amended Final Affirmative Antidumping Determination for Cambodia, 86 Fed. Reg. 26460 (Dep't Com. May 14, 2021) ("*Final Determination*"), P.R. 325.[1] The results of that redetermination are now before the court. *See Final Results of Redetermination Pursuant to Court Remand* (Dep't Com. July 17, 2023), ECF No. 105 ("*Remand Redetermination*"). Plaintiffs Best Mattresses International Company Limited and Rose Lion Furniture International Company Limited, foreign producers and exporters of the subject merchandise, argue that the *Remand Redetermination* is unsupported by substantial evidence, is contrary to law, and does not comply with the court's remand order. *See Best Mattresses I*, 622 F. Supp. 3d at 1397. Defendant the United States opposes. Defendant-Intervenors, domestic producers of mattresses,[2] do not challenge the *Remand Redetermination* and also oppose Plaintiffs' challenges.

The court concludes that the *Remand Redetermination* is lawful. Judgment on the agency record is entered for the United States.

BACKGROUND

The court presumes familiarity with the underlying facts and law of this case. *See Best Mattresses I*, 622 F. Supp. 3d at 1358–68. In its *Final Determination*, Commerce determined that mattresses from Cambodia were being imported into the United States at less than fair value and assessed a final amended dumping margin of 52.41 percent on imports of subject merchandise. *See* 86 Fed. Reg. at 26460. Plaintiffs and Defendant-Intervenors each brought suit alleging agency error, and their claims were later consolidated into this action. *See supra* note 2. Upon review of the parties' claims, the court sustained in part and remanded in part the *Final Determination* on February 17, 2023. *See Best Mattresses I*, 622 F. Supp. 3d at 1397. In

[1] Commerce had initially noticed its final antidumping duty determination on March 25, 2021. *See Mattresses from Cambodia: Final Affirmative Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 86 Fed. Reg. 15894 (Dep't Com. Mar. 25, 2021), P.R. 309. Commerce later amended that determination to correct two ministerial errors. *See Final Determination*, 86 Fed. Reg. at 26461. The court will refer to the amended final determination, *see id.*, as the *Final Determination*.

[2] Defendant-Intervenors are Brooklyn Bedding, LLC, Corsicana Mattress Company, Elite Comfort Solutions, FXI, Inc., Innocor, Inc., Kolcraft Enterprises Inc., Leggett & Platt, Incorporated, the International Brotherhood of Teamsters, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO. Their initial case, *see* Compl., *Brooklyn Bedding, LLC v. United States*, No. 21-cv-00282 (CIT July 12, 2021), ECF No. 13, was consolidated with Plaintiffs' case under case number 21-cv-00281 on September 21, 2021, *see* Order, Sept. 21, 2021, ECF No. 30.

particular, the *Final Determination* was remanded as to two of Defendant-Intervenors' challenges regarding surrogate data and two of Plaintiffs' challenges regarding financial statements:

> (1) Commerce's determination of the market price under the Transactions Disregarded Rule using Trademap data is not in accordance with law because it relies on an unreasonable interpretation of "market under consideration" to mean only the country under investigation;
>
> (2) Commerce's inclusion of imports from [non-market economy ("NME")] and export-subsidizing countries is unreasonable because Commerce did not justify why its presumption of NME unreliability applies in the affiliated supplier context but not in the unaffiliated supplier context;
>
> (3) Commerce did not adequately explain its determination that [Emirates Sleep Systems Private Limited's ("Emirates")] financial statements are publicly available; and
>
> (4) Commerce's determination that Emirates's financial statements are sufficiently complete is unreasonable.

Id. at 1397; *see also infra* Parts I–IV (describing each basis for remand in more detail). The court ordered "reconsideration or further explanation" of each issue on remand. *Best Mattresses I*, 622 F. Supp. 3d at 1397.

Commerce filed the *Remand Redetermination* with the court on July 17, 2023, assessing a new dumping margin of 103.79 percent for all respondents. *See Remand Redetermination* at 36. Commerce responded to each basis for remand. First, it continued to designate Cambodia as the "market under consideration" because the Cambodian Trademap data best replicated the experience of Cambodian mattress producers situated similarly to Plaintiffs. *See Remand Redetermination* at 21–23. Second, Commerce reversed course from the *Final Determination* and excluded all imports from NME and export-subsidizing countries from the Cambodian Trademap and six-country Global Trade Atlas ("GTA") datasets when calculating input cost of

production and market price under the Transactions Disregarded[3] and Major Input[4] Rules. *See Remand Redetermination* at 8–9, 26–28. Third and fourth, Commerce determined that the Emirates statements were publicly available but incomplete. *See id.* at 9, 15–16. Commerce accordingly averaged the Emirates statements with those of Grand Twins International (Cambodia) Plc ("GTI"), which were the only other financial statements on the record. *See id.* at 16. Commerce used that average to calculate constructed value profit and selling expense ratios,[5] which were then applied to Plaintiffs. *See Remand Redetermination* at 16.

On August 30, 2023, Plaintiffs filed their comments in opposition to the *Remand Redetermination* before this court. *See* Pls.' Cmts. on Final Results of Redetermination, Aug. 30, 2023, ECF No. 110 ("Pls.' Cmts."). Plaintiffs challenge three aspects of the *Remand Redetermination*: (1) Commerce's exclusion of imports from NME and export-subsidizing countries from the surrogate data that Commerce used to calculate input cost of production and market price pursuant to the Transactions Disregarded and Major Input Rules; (2) Commerce's use of a simple average of surrogate data in determining input cost of production pursuant to the Major Input Rule; and (3) Commerce's averaging of the Emirates and GTI financial statements in calculating constructed value profit and selling expense ratios. *See id.* at 1–2. Defendant and Defendant-Intervenors filed their responses in sup-

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[3] The Transactions Disregarded Rule states:

> A transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. If a transaction is disregarded under the preceding sentence and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated.

19 U.S.C. § 1677b(f)(2). *See generally Best Mattresses I*, 622 F. Supp. 3d at 1359.

[4] The Major Input Rule, operating somewhat similarly, states:

> If, in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input, then the administering authority may determine the value of the major input on the basis of the information available regarding such cost of production, if such cost is greater than the amount that would be determined for such input under paragraph (2).

19 U.S.C. § 1677b(f)(3). *See generally Best Mattresses I*, 622 F. Supp. 3d at 1359–60.

[5] As part of its constructed value calculation, Commerce must determine the value of a respondent's profit and selling expenses. *See* 19 U.S.C. § 1677b(e)(2). When it lacks the respondent's own home market or third-country sales, Commerce may choose one of three alternative methods, so long as its choice is reasonable. *See Best Mattresses I*, 622 F. Supp. 3d at 1360.

port of the *Remand Redetermination* on September 29, 2023. *See* Def.'s Resp. to Pls.' Cmts., Sept. 29, 2023, ECF No. 114; Def.-Inters.' Resp. to Pls.' Cmts., Sept. 29, 2023, ECF No. 117.[6]

On January 22, 2024, the court issued a letter to the parties requesting written responses before oral argument. *See* Letter re: Oral Arg. Qs., Jan. 22, 2024, ECF No. 121. The parties timely responded. *See* Pls.' Resp. to OAQs, Jan. 30, 2024, ECF No. 124; Def.'s Resp. to OAQs, Jan. 30, 2024, ECF No. 123; Def.-Inters.' Resp. to OAQs, Jan. 30, 2024, ECF No. 122. Oral argument was held on January 31, 2024. *See* Oral Arg., Jan. 31, 2024, ECF No. 127. The parties were invited to file briefs after argument, and all parties timely made such submissions. *See* Pls.' Post-Arg. Subm., Feb. 7, 2024, ECF No. 130; Def.'s Post-Arg. Subm., Feb. 7, 2024, ECF No. 129; Def.Inters.' Post-Arg. Subm., Feb. 7, 2024, ECF No. 128.

DISCUSSION

Jurisdiction remains proper under 28 U.S.C. § 1581(c) and 19 U.S.C. §§ 1516a(a)(2)(A)(i)(II), (a)(2)(B)(i). An agency's remand redetermination is sustained if it is supported by substantial evidence on the record and is otherwise in accordance with law, which includes compliance with the court's remand order. *See* 19 U.S.C. § 1516a(b)(1)(B)(i); *SMA Surfaces, Inc. v. United States*, 47 CIT __, __, 658 F. Supp. 3d 1325, 1328 (2023). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (internal quotation marks omitted) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Relatedly, to act in accordance with law, Commerce "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

I. Commerce's Decision to Select Cambodia as the Market Under Consideration Is Lawful

The court first remanded to Commerce for reconsideration or further explanation of its selection of Cambodia as the "market under consideration" under the Major Input and Transactions Disregarded

[6] Plaintiffs also filed comments in support of the *Remand Redetermination* insofar as Commerce determined that the Emirates statements are incomplete and that the GTI statements are part of the financial ratios. *See* Pls.' Cmts. in Supp., Sept. 29, 2023, ECF No. 115.

Rules. *Best Mattresses I*, 622 F. Supp. 3d at 1384. Commerce renewed its selection of Cambodia on remand, and no party contests that choice before the court. Commerce's decision is otherwise lawful and therefore sustained.

In its *Final Determination*, Commerce had chosen Cambodia as the "market under consideration," even though the affiliated suppliers of Plaintiffs were located outside Cambodia. *See Best Mattresses I*, 622 F. Supp. 3d at 1382. The court held that Commerce's decision to select Cambodia as the "market under consideration" was unlawful because Commerce did not "explain[] why the selection of Cambodia constituted a 'reasonable method' to confirm that the affiliated prices reflect arm's length transactions." *Id.* at 1384 (internal quotation marks and citation omitted). The court remanded for reconsideration or further explanation, making clear that Commerce was not prevented "from selecting Cambodia as the 'market under consideration' . . . on remand." *Id.*

Commerce adequately explained its selection of Cambodia as the "market under consideration" on remand. Commerce stated that the "market under consideration" is chosen "on a case-by-case basis" after "analyzing the factors involved and examining the available data." *Remand Redetermination* at 21–22. To replicate arm's length values in Plaintiffs' market, Commerce used Cambodian Trademap data, which reflected "what a party in Cambodia would pay to obtain such inputs—whether by importing them into Cambodia or otherwise." *Id.* at 23. While Defendant-Intervenors challenged that use of Trademap data on remand before the agency, *see Remand Redetermination* at 17–20, they do not present that challenge now before the court, *see* Def.'s Resp. at 11. Commerce's selection of Cambodia as the "market under consideration" is therefore sustained.

II. Commerce's Exclusion of Imports from NME and Export-Subsidizing Countries from the Trademap and GTA Data Is Lawful

The court next remanded to Commerce for reconsideration or further explanation of its decision to include imports from NME and export-subsidizing countries in the Cambodian Trademap and six-country GTA datasets when calculating input cost of production and market price under the Major Input and Transactions Disregarded Rules. *See id.* at 1385–86. On remand, Commerce reversed course and excluded such import data. *See Remand Redetermination* at 8–9, 26–28. Plaintiffs now challenge Commerce's reversal as inadequately explained. *See* Pls.' Cmts. at 3–8. The court sustains Commerce's exclusion of such imports from the surrogate data.

In the *Remand Redetermination*, Commerce stated that the court had explained "that there is a general presumption of NME unreliability which is derived from the statute as a whole and affirmed by Commerce practice." *Remand Redetermination* at 27; *see also Best Mattresses I*, 622 F. Supp. 3d at 1385 (citing 19 U.S.C. § 1677(18)(A); *Notice of Final Determination of Sales at Less than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 Fed. Reg. 29310 (Dep't Com. May 22, 2006), and accompanying IDM cmt. 12). Commerce also noted the court's conclusion "that Commerce failed to justify why its presumption of NME unreliability applies in the affiliated supplier context but not in the unaffiliated supplier context." *Remand Redetermination* at 8; *see also Best Mattresses I*, 622 F. Supp. 3d at 1385–86. Commerce relatedly explained that its practice is to "not use export prices from a market economy for the valuation of surrogate values when [it] [has] a reasonable basis to believe or suspect that the product benefits from broadly available export subsidies." *Remand Redetermination* at 28 (citing *Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Final Results and Final Partial Recission of Antidumping Duty Administrative Review*, 70 Fed. Reg. 12651 (Dep't Com. Mar. 15, 2005), and accompanying IDM cmt. 4).[7]

Commerce's references to prior practice and reliance on the court's reasoning constituted adequate explanation of its decision on remand. "An explicit explanation is not necessary . . . where the agency's decisional path is reasonably discernible." *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369–70 (Fed. Cir. 1998). Here, the court had asked Commerce to "provide affirmative reasons to explain" why the presumptive exclusion of data from NME countries—and, by extension, from export-subsidizing countries, *see supra* note 7—would "not apply with equal force in the unaffiliated supplier versus affili-

[7] Commerce cited to other instances of similar analysis. *See also Utility Scale Wind Towers from the Socialist Republic Vietnam: Final Results of Antidumping Administrative Review 2013–2014*, 80 Fed. Reg. 55333 (Dep't Com. Sept. 15, 2015), and accompanying IDM cmt. 3 (disregarding input purchases from Korea because broadly available export subsidies existed in Korea); *Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 70 Fed. Reg. 12651 (Dep't Com. Mar. 15, 2005), and accompanying IDM cmt. 3 ("Consistent with our practice, we do not use export prices from a market economy for the valuation of surrogate values when we have a reasonable basis to believe or suspect that the product benefits from broadly available export subsidies.").
The court's remand order did not expressly address the presumptive exclusion of price data from export-subsidizing countries. *Best Mattresses I*, 622 F. Supp. 3d at 1385–86. Commerce was correct to treat similarly the presumptive exclusions of price data from NME countries and from export-subsidizing countries, and no party disputes that analogous treatment.

ated supplier contexts." *Best Mattresses I*, 622 F. Supp. 3d at 1386. By reversing course on remand, Commerce applied such presumptions with equal force in both contexts. Commerce did not, then, need to articulate affirmative reasons to deviate from its practice. *See, e.g.*, *Huvis Corp. v. United States*, 570 F.3d 1347, 1354 (Fed. Cir. 2009) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)); *Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 494 F.3d 1371, 1378 n.5 (Fed. Cir. 2007); *see also Goodluck India Ltd. v. United States*, 47 CIT __, __, 670 F. Supp. 3d 1353, 1374 (2023) ("Agency action that deviates from prior policy decisions or established practice without reasoned justification is arbitrary and capricious.").

Commerce's exclusion of imports from NME and export-subsidizing countries from the surrogate country data was therefore adequately explained and in accordance with law. And to the extent that Plaintiffs challenge the reasonableness of Commerce's exclusion on remand, *see* Pls.' Cmts. at 6–7, the court had already considered those arguments in holding, in the remand order, that such exclusion is a reasonable extension of the general presumption of NME and export-subsidizing unreliability, *see Best Mattresses I*, 622 F. Supp. 3d at 1386.

III. Commerce's Use of a Simple Average in Its Surrogate Value Calculation Is Lawful

Plaintiffs next contend that Commerce erred when it used a simple average, rather than a weighted average, of the six-country GTA data to calculate input cost of production values under the Major Input Rule. *See* Pls.' Cmts. at 8. That argument is dismissed as waived.

Plaintiffs raise the issue of simple averaging for the first time in its administrative case brief on the draft remand results. *See Remand Redetermination* at 28. Per Plaintiffs, Commerce's simple average methodology resulted in distortions that violated its obligation to calculate dumping margins "as accurately as possible." *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001); *see also* Pls.' Cmts. at 10–11. But Commerce's cost memoranda for the *Final Determination* and the *Remand Redetermination* both appear to use a simple-average method to calculate per-unit cost.[8] *Compare* Mem. from S. Medillo to

[8] The only difference between Commerce's calculations appears to be that Commerce excluded imports from NME and export-subsidizing countries from its *Remand Redetermination* calculation, which the court today holds is lawful. *See supra* Part I. Best Mattresses maintains that Commerce's approach differed in the *Final Determination* and the *Remand Results* cost calculations but offers little support beyond stating that the "calculation changes are evident." Pls.' OAQ Resp. at 4.

N. Halper, re: Cost of Production and Constructed Value Calculation Adjustments for the Final Determination (Dep't Com. Mar. 18, 2021), C.R. 276, *with* Mem. from S. Medillo & P. Cox, re: Cost of Production and Constructed Value Calculation Adjustments for the Court Remand (Dep't Com. June 5, 2023), C.R.R. 5. Plaintiffs could have raised the simple-average challenge in the agency proceedings leading to the *Final Determination*, but they did not.

"Commerce regulations require the presentation of all issues and arguments in a party's administrative case brief." *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010) (citing 19 C.F.R. § 351.309(c)(2)). And parties are generally required to raise their arguments "at the time Commerce was addressing the issue." *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008); *see also Dorbest*, 604 F.3d at 1375 (explaining that, "as a general rule," "courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice" (quoting *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952))). It follows that "arguments that are not raised in a party's opening brief, or that are raised in the first instance on remand, are generally waived." *Shandong Rongxin Imp. & Exp. Co. v. United States*, 42 CIT __, __, 331 F. Supp. 3d 1390, 1406 (2018), *aff'd*, 779 F. App'x 744 (Fed. Cir. 2019); *see also Dorbest*, 604 F.3d at 1375–77 (concluding that challenges to Commerce's final determination that were first raised on remand were unexhausted and waived); *Hyatt v. Dudas*, 551 F.3d 1307, 1313 (Fed. Cir. 2008) (holding, in an appeal from the Board of Patent Appeals, that "[u]nder well-established rules of waiver, the Board is not required on remand to consider grounds of rejection that were not contested by [the applicant] in his initial appeals to the Board," so long as such arguments did not newly "become relevant on remand"); *NEXTEEL Co. v. United States*, 44 CIT __, __, 461 F. Supp. 3d 1336, 1345 (2020) (finding waiver where a challenge to Commerce's action, present in the final results, was first raised on second remand).

Plaintiffs did not raise their simple-average challenge in their initial administrative case brief but instead first raised the argument on remand. *See Dorbest*, 604 F.3d at 1375–77; *Mittal Steel*, 548 F.3d at 1383. Nor did Plaintiffs establish that the simple-average challenge became newly relevant on remand. *See Hyatt*, 551 F.3d at 1313; *see also supra* note 8 and accompanying text. Plaintiffs' argument is therefore untimely raised. The court deems it waived and does not reach its merits.

IV. Commerce's Averaging of the Emirates and GTI Financial Statements Is Lawful

The court next remanded for reconsideration or further explanation Commerce's decision to use the Emirates financial statements for calculating constructed value profit and selling expenses. *See Best Mattresses I*, 622 F. Supp. 3d at 1389. In addition to other criteria that Commerce must weigh when selecting surrogate financial statements, Commerce prefers financial statements that are publicly available and complete. *See, e.g.*, *CP Kelco U.S., Inc. v. United States*, 949 F.3d 1348, 1359 (Fed. Cir. 2020); *Since Hardware (Guangzhou) Co. v. United States*, 37 CIT 803, 805, 911 F. Supp. 2d 1362, 1366 (2013). The court in its remand order concluded that (1) Commerce did not adequately explain its determination that the Emirates statements were publicly available, and that (2) substantial evidence did not support Commerce's determination that the Emirates statements were complete. *See Best Mattresses I*, 622 F. Supp. 3d at 1389.

On remand, Commerce reopened the factual record so that Defendant-Intervenors would submit more information concerning how the Emirates statements were obtained. *See* Letter from M. Song, Dep't of Com., to Brooklyn Bedding, re: Remand Redetermination (Mar. 30, 2023), Bar Code No. 4359906–01 ("Suppl. Questionnaire"). Following its review of the record, Commerce determined that the Emirates statements were publicly available but not complete. *See Remand Redetermination* at 15. Assessing flaws in both the Emirates and GTI statements, and with no other financial statements on the record, Commerce used an average of the two statements to determine the profit and selling expense ratios applicable to Plaintiffs. *See id.* at 16. Plaintiffs now dispute that decision, arguing that Commerce's continued reliance on Emirates is unlawful and requesting that Commerce use only the GTI statements. *See* Pls.' Cmts. at 11–12. The court sustains Commerce's decisions to reopen the record, to determine that the Emirates statement was public but incomplete, and to average both statements.

A. Commerce's Determination to Reopen the Record Was Lawful

In its remand order, the court concluded that Commerce had "not grounded the specific finding of using a subscription service [to obtain the Emirates statements] in any part of the factual record before the court." *Best Mattresses I*, 622 F. Supp. 3d at 1394–95 (emphasis omitted). That lack of substantial evidence warranted remand for

"reconsideration or further explanation." *Id.* at 1391. On remand, Commerce issued a supplemental questionnaire requesting that Defendant-Intervenors file information and screenshots demonstrating how the Emirates statements were obtained. *See* Suppl. Questionnaire at 3–4. Commerce also provided interested parties an opportunity to submit factual information to rebut, clarify, or correct Defendant-Intervenors' submission. *See Remand Redetermination* at 34.

The decision to reopen the record is in accordance with law. Plaintiffs request that the court bar Commerce from reopening the record on remand, relying on the principle that the burden to develop the record lies with particular parties, not Commerce. *See* Pls.' Cmts. at 13–14. But that proposed bar on reopening the record would be applicable to any remand for lack of substantial evidence. That, of course, is not the rule. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F.3d 1379, 1382 (Fed. Cir. 2003) ("Whether on remand the Commission reopens the evidentiary record, while clearly within its authority, is of course solely for the Commission itself to determine."); *Gold E. Paper (Jiangsu) Co. v. United States*, 38 CIT __, __, 991 F. Supp. 2d 1357, 1362 (2014) ("[R]eopening the record was one of two apparent consequences of a record that lacked the substantial evidence necessary to support the legal viability of the presumed fact."). Perhaps Commerce could have chosen Plaintiffs' preferred route and rejected Defendant-Intervenors' factual contention about public availability on the basis that they failed to develop the record. That decision would be subject to its own review for being in accordance with law. But to hold that Commerce was *required* not to reopen the record on remand, as Plaintiffs propose, would turn a judicial remand for reconsideration into an order that functionally directs an outcome for Plaintiffs. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (counseling remand to agencies for their reasoned consideration of issues rather than directed outcomes). To avoid that result, "[t]he decision to reopen the record is best left to the agency." *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1278 (Fed. Cir. 2012). Commerce's decision to reopen the record was otherwise reasonable in light of this court's remand order, which found a lack of evidence relevant to public availability on the agency record. Commerce's reopening of the record on remand was therefore lawful.

B. Commerce's Determination That the Emirates Statement Was Publicly Available Is Lawful

The court next concluded in its remand order that the *Final Determination*, in which Commerce determined that the Emirates state-

ments were publicly available, had "not grounded the specific finding of using a subscription service [to obtain the Emirates statements] in any part of the factual record before the court." *Best Mattresses I*, 622 F. Supp. 3d at 1394–95 (emphasis omitted). Having reviewed the submissions of additional information from Defendant-Intervenors and Plaintiffs on remand, Commerce continued to find that the Emirates statements were publicly available. *Remand Redetermination* at 9. The court sustains that determination on remand.

In the *Remand Redetermination*, Commerce found that the Emirates statements were available on the websites of the Indian Ministry of Corporate Affairs ("MCA") and Zauba Corp., which is "a private provider of commercial information that is all a matter of public record, and is sourced from the official registers, and from published government data." *Id.* at 14, 32 (internal quotation marks and footnote omitted). Commerce was able to replicate screenshots, provided to the agency in Defendant-Intervenors' factual submission on remand, that showed step-by-step how the public could obtain the Emirates statements from either website. *See id.* at 10–11. Commerce then found that "all interested parties are capable of obtaining the financial statements and commenting on the reliability and the relevance of the information." *Id.* at 10.

Commerce also made findings to date the timing of Defendant-Intervenors' information, filed in 2023, to August 17, 2020—the date that Defendant-Intervenors submitted the Emirates statement to the agency record. The Zauba Corp. database showed that the Emirates statements were uploaded to the website on December 16, 2019. *Id.* at 15. Commerce also found that Zauba Corp.'s information is "sourced from the official registers, and from published government data," including the MCA. *Id.* at 33. Commerce then concluded that the Emirates statements were available on both databases by December 16, 2019, which is approximately eight months before August 17, 2020. *See id.* Consistent with that timeline, the Emirates statements on the agency record reflected the fiscal year ending on March 31, 2019. *See id.* at 14. The Emirates statements also included an independent auditor's report dated September 29, 2019, and a board report dated December 12, 2019. *See id.* at 14–15. And Commerce found that the documents uploaded by December 16, 2019, to the online databases were, "indeed, the financial statements covering the year ending March 31, 2019." *Id.* at 15.

None of Plaintiffs' challenges are availing. First, Plaintiffs argue that Commerce's conclusion was unreasonable because Defendant-Intervenors did not supply evidence of certain facts: the actual MCA user information for the Indian consultant that Defendant-

Intervenors used to access the filings, the identity of the Indian consultant, and payment for the Emirates statements via the MCA website. *See* Pls.' Cmts. at 15–17. That information may well be relevant to "'a detailed step-by-step explanation' by the submitter 'of how they obtained the . . . financial statements.'" *Best Mattresses I*, 622 F. Supp. 3d at 1393 (quoting *Since Hardware (Guangzhou) Co. v. United States*, 37 CIT 803, 807, 911 F. Supp. 2d 1363, 1367 (2013)). But the particulars of Defendant-Intervenors' consultant information and payment receipts do not constitute information that meaningfully addresses Commerce's underlying concern, when evaluating public availability, "that a lack of transparency about the source of the data could lead to proposed data sources that lack integrity or reliability." *Id.* (quoting *Since Hardware*, 37 CIT at 807, 911 F. Supp. 2d at 1367). Whether or not the specific consultant's information and receipt is on the record, the publicly available steps to accessing the Emirates statements on the MCA website are the same. Accordingly, under the substantial evidence standard, *see Nippon Steel*, 337 F.3d at 1379, the absence of that information did not compel Commerce to conclude that its findings were flawed, that the statements were not publicly available, or that Defendant-Intervenors' representations about accessing the Emirates statement were otherwise not credible.

Second, Plaintiffs argue that Defendant-Intervenors failed to substantiate their assertion that the statements were publicly available on August 17, 2020—the date that Defendant-Intervenors submitted the Emirates statement to the agency record. *See* Pls.' Cmts. at 17–19. But Commerce reasonably concluded that the documents uploaded online eight months earlier on December 16, 2019 on Zauba Corp., were, "indeed, the financial statements covering the year ending March 31, 2019" that were on the record. *Remand Redetermination* at 15. Moreover, Commerce found that Zauba Corp.'s information is "sourced from the official registers, and from published government data." *Id.* at 33. No information on the record suggests otherwise. Commerce's findings therefore constitute substantial evidence for the conclusion that the statements were publicly available on both websites on August 17, 2020.

For the same reason, Plaintiffs' attempt to distinguish prior Commerce determinations cited in the *Remand Redetermination*, which did not involve later-filed evidence of earlier public availability like in this case, is unavailing. *See* Pls.' Cmts. at 18–19. The timing of the evidence of public availability is not material where, as here, the later filing reasonably supports a finding that the statement's public availability can be dated to the initial filing date. Relatedly, Plaintiffs also

fault Commerce for accepting Defendant-Intervenors' new information on Zauba Corp. when Defendant-Intervenors had used the MCA website rather than the Zauba website. *See* Pls.' Cmts. at 20–21. But it was well within Commerce's discretion to accept the Zauba Corp. information because, as previously explained, the Zauba Corp. information was substantial evidence establishing the presence of the Emirates statement on the MCA website on August 17, 2020. *See* Questionnaire at 3 (requiring that Defendant-Intervenors demonstrate how they obtained the financial statements as "submitted to the record . . . on August 17, 2020"). The record therefore supports Commerce's determination that the Emirates statements were publicly available on August 17, 2020.

C. Commerce's Decision to Average the GTI and Emirates Statements Is Lawful

Finally, Plaintiffs challenge Commerce's decision to average the Emirates and GTI statements, arguing that Commerce should have rejected the Emirates statements entirely. The court disagrees and sustains Commerce's decision.

In *Best Mattresses I*, the court remanded Commerce's determination that the Emirates statements were complete because a missing annexure of the financial statements, which shows Emirates's "[b]alances with government authorities," could hypothetically include an Indian tax credit receivable that may be evidence of a countervailable subsidy ("Annexure 5"). 622 F. Supp. 3d at 1396. On remand, Commerce explained:

> Based on the Court's statements, we find that, without Annexure 5 on the record, we cannot definitively determine the nature of the "balances with government authorities" and whether or not they pertain to government subsidies. Those balances may not pertain to subsidies, but because we do not have a copy of Annexure 5, we cannot with certainty determine what those balances represent. Therefore, we cannot determine that the financial statements are not likewise flawed.

Remand Redetermination at 16. Commerce concluded that both the Emirates statements, for their missing annexure, and the GTI statements, for their lack of comparability to the subject merchandise, were flawed. *See id.* Commerce decided to average both statements to calculate constructed value profit and selling expense ratios. *See id.*

That decision is lawful. Commerce is not compelled to reject incomplete financial statements unless the "missing information" is "vital .

. . and of critical importance." *CP Kelco*, 949 F.3d at 1359; *see also Ashley Furniture Indus., LLC v. United States*, 46 CIT __, __, 607 F. Supp. 3d 1210, 1227–28 (2022) ("Commerce does not invariably reject incomplete financial statements, but instead looks to whether the missing information is vitally important or key." (internal quotation marks and citation omitted)). While the court did state that the "missing annexure may have deprived Commerce of key information," *Best Mattresses I*, 622 F. Supp. 3d at 1396, Emirates's balances with government authorities were not so vital and critically important as to compel Commerce's rejection of the statements. In *CP Kelco*, Commerce similarly chose between two flawed financial statements, and the Federal Circuit reinstated Commerce's determination to use the Thai Ajinomoto financial statements, which contained evidence of receipt of countervailable subsidies. 949 F.3d at 1358–59. If Commerce in that case was not compelled to reject the Thai Ajinomoto statements where subsidies were clear on the record, it is difficult to see why Commerce would be compelled here to reject the Emirates statements where the presence of subsidies is uncertain. Commerce's decision to average the Emirates and GTI statements to account for flaws in both datasets is therefore supported by substantial evidence and otherwise in accordance with law.

CONCLUSION

The *Remand Redetermination* is sustained in full as supported by substantial evidence and in accordance with law, which includes compliance with the court's remand order. Judgment on the agency record will accordingly enter for Defendant the United States.

Dated: May 16, 2024
New York, New York

/*s*/ *Gary S. Katzmann*
JUDGE

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