

Slip-Op 11-82
UNITED STATES COURT OF INTERNATIONAL TRADE

ARCELORMITTAL STAINLESS	:	
BELGIUM N.V.,	:	
	:	
Plaintiff,	:	
	:	Before: Richard K. Eaton, Judge
v.	:	
	:	Court No. 08-00434
UNITED STATES,	:	
	:	
Defendant,	:	
	:	
and	:	
	:	
ALLEGHENY LUDLUM	:	
Def.-Int.	:	

OPINION

[The Department of Commerce's results of redetermination pursuant to remand are sustained.]

Dated: July 12, 2011

*Shearman & Sterling LLP (Robert LaRussa and Bryan Dayton),
for plaintiff ArcelorMittal Stainless Belgium N.V.*

*Tony West, Assistant Attorney General; Jeanne E. Davidson,
Director, Patricia M. McCarthy, Assistant Director, Commercial
Litigation Branch, Civil Division, United States Department of
Justice (Stephen C. Tosini); Office of Chief Counsel for Import
Administration, U.S. Department of Commerce, Daniel J. Calhoun,
of counsel, for defendant.*

*Kelley Drye & Warren, LLC (David Hartquist and Jeffrey S.
Beckington), for defendant-intervenor Allegheny Ludlum
Corporation.*

Eaton, Judge: Before the court is plaintiff ArcelorMittal
Stainless Belgium's ("ASB" or "plaintiff") challenge to the
Department of Commerce's (the "Department" or "Commerce") Final

Results of Redetermination Pursuant to Remand, dated July 29, 2010 (the "Remand Results"). This matter originally came before the court on plaintiff's challenge to Commerce's final scope ruling issued on December 3, 2008 concerning stainless steel plate in coils ("SSPC") from Belgium. See SSPC from Belgium: Final Scope Ruling, A-423-808 (Dep't of Commerce Dec. 3, 2008) (the "Final Scope Ruling"). It was remanded by order dated March 30, 2010, with instructions to Commerce to follow the three-step methodology established by the Court of Appeals for the Federal Circuit (the "Federal Circuit") and the Department's regulations, for deciding scope inquiries. *Arcelormittal Stainless Belgium N.V. v. United States*, Court No. 08-00434, Order (March 30, 2010). For the reasons stated below, the Remand Results are sustained.

BACKGROUND

Commerce's antidumping and countervailing duty orders on SSPC from Belgium¹ cover:

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

¹ Pursuant to 19 C.F.R. § 351.225(m) (2010), Commerce has determined that the Remand Results will govern the scope of all of the SSPC antidumping and countervailing duty orders. Remand Results at 1 n.1.

and annealed or otherwise heat treated and pickled or otherwise descaled. . . .

(emphasis added). SSPC from Belgium, Italy, and South Africa, 64 Fed. Reg. 25,288, 25,288 (Dep't of Commerce May 11, 1999) (notice of amended final determination of countervailing duties); See also Certain SSPC from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 64 Fed. Reg. 27,756 (Dep't of Commerce May 21, 1999) (antidumping duty orders); Certain SSPC from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 68 Fed. Reg. 11,520 (Dep't of Commerce March 11, 2003) (notice of amended antidumping duty orders); Certain SSPC from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 68 Fed. Reg. 11,524 (Dep't of Commerce March 11, 2003) (notice of amended countervailing duty orders)(collectively, the "Orders").

On May 11, 2007, ASB filed a scope inquiry request with the Department seeking a determination as to whether the Orders' language covers SSPC with a nominal thickness of "4.75 mm or more," but an actual thickness of less than 4.75 mm. See Final Scope Ruling at 2. In the Final Scope Ruling, Commerce determined that "4.75 mm or more in thickness" means "a nominal thickness of 4.75 mm, that is within the dimensional tolerances of stainless steel plate as indicated in the [American Society for Testing Materials ("ASTM")] standards, regardless of the actual thickness, is within the scope of these Orders." See

Final Scope Ruling at 13. Thus, Commerce determined that SSPC with an actual thickness of less than 4.75 mm could fall within the Orders.

On July 2, 2009, ASB filed a motion for judgment on the agency record pursuant to USCIT R. 56.2 challenging the Department's scope determination. In response to ASB's motion, defendant the United States, on behalf of Commerce, sought a voluntary remand, acknowledging that the Department failed to follow the required methodology in interpreting the scope of the Orders. Remand Results at 3. The court agreed, and the matter was remanded to Commerce to further develop the agency record in a manner consistent with the Federal Circuit's decisions in *Duferco Steel Inc. v. United States*, 296 F.3d 1087 (Fed. Cir. 2002) and *Tak Fat Trading Co. v. United States*, 396 F.3d 1378 (Fed. Cir. 2005), and 19 C.F.R. § 351.225(k) (2010). See *Arcelormittal Stainless Belgium N.V. v. United States*, Court No. 08-00434, Order (March 12, 2010); *Arcelormittal Stainless Belgium N.V. v. United States*, Court No. 08-00434, Order, (March 30, 2010).

On remand, the Department again determined that the scope of the Orders included merchandise with a nominal thickness of 4.75 mm, but an actual thickness of less than 4.75 mm. Remand Results at 25. Oral argument was held on March 3, 2011. See Tr. of Oral Argument (March 3, 2011) ("Oral Arg. Tr.").

STANDARD OF REVIEW

This Court must sustain a scope determination unless it is "unsupported by substantial evidence and otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2006); see *Eckstrom Indus., Inc. v. United States*, 254 F. 3d 1068, 1071 (Fed. Cir. 2001).

DISCUSSION

I. Legal Framework

Pursuant to 19 C.F.R. § 351.225, Commerce may initiate, either, on its own, or upon the application of an interested party, an inquiry into whether the scope of an antidumping or countervailing duty order covers particular merchandise. It is "well established" that, in resolving scope inquiries, Commerce's interpretation of its own antidumping and countervailing duty orders is accorded "significant deference." See *Duferco Steel Inc. v. United States*, 296 F.3d 1087, 1094-95 (Fed. Cir. 2002). Nevertheless, "Commerce cannot 'interpret' an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." See *Eckstrom Indus.*, 254 F.3d at 1072.

The language of the order determines the scope of an antidumping duty order. Scope orders are interpreted under 19 C.F.R. § 351.225(k) with the aid of the antidumping petition, investigation and preliminary order. But the petition and investigation 'cannot substitute for the language in the order itself.' The

Federal Circuit has said that 'it is the responsibility of the agency, not those who initiated the proceedings, to determine the scope of the final orders. Thus, a predicate for the interpretive process is language in the order that is subject to interpretation.' The scope of the order can be clarified but it cannot be changed by the interpretive process.

Tak Fat, 396 F.3d at 1382-83 (internal citations omitted). In accordance with these principles, Commerce is required to follow the three-step methodology set out by the Federal Circuit in *Duferco* and *Tak Fat*, in resolving scope inquiries. See *Duferco*, 296 F.3d at 1096-97; *Tak Fat*, 396 F.3d at 1382-83; 19 C.F.R. § 351.25(k).

Under this regime, Commerce must first analyze the language of the order at issue to determine if it is ambiguous and, therefore, subject to interpretation. Second, if Commerce determines that the language is ambiguous, it must, in accordance with 19 C.F.R. § 351.225(k)(1),² then consider the history of the proceedings, including the "descriptions of the merchandise contained in the petition, the initial investigations, and determinations of [Commerce] (including prior scope

² 19 C.F.R. § 351.25(k)(1) provides, in relevant part:

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

(1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.

determinations) and the [International Trade Commission]."

Third, if the orders are ambiguous and the factors found in § 351.225(k)(1) are "not dispositive," then Commerce is to consider the so-called *Diversified Products* factors set forth in 19 C.F.R. § 351.225(k)(2), including "(i) the physical characteristics of the product; (ii) the expectations of the ultimate purchasers; (iii) the ultimate use of the product; (iv) the channels of trade in which the product is sold; and (v) the manner in which the product is advertised and displayed." See also *Diversified Products Corp. v. United States*, 6 CIT 155, 572 F. Supp. 883 (1983).³

II. Commerce's Remand Results

In an effort to apply the three-step methodology outlined above, Commerce first concluded that the language in the Orders was ambiguous as it did not specify whether "4.75 mm or more" referred to "nominal" or "actual" thickness. The Department found that this omission rendered the Orders ambiguous because it

³ In *Diversified Products*, the plaintiff argued that in clarifying the scope of an antidumping duty order, Commerce was bound by the Customs Service's product classifications. The Court disagreed, holding that the Department "is responsible for clarifying, where necessary, the scope of . . . antidumping duty orders. . . . [I]t is equally clear that the [Department] is in no wise obligated to follow nor is it bound by the classification determinations of Customs when it does clarify the scope of a dumping finding." *Diversified Products*, 6 CIT at 160, 572 F. Supp. at 887.

is the industry practice to define SSPC thickness nominally.

According to the Department:

[O]ur experience administering the SSPC orders is that the application of scope dimension measurements is largely based upon the underlying industry practice. Stainless steel plate thickness cannot be maintained precisely in the steel forming process. For this product, the limitation of the machinery producing it, or further processing it, affects the accuracy of the dimensions. Thus, . . . the ASTM standard lists specific thicknesses and permitted variations for acceptable tolerance ranges in thickness. Hence, even if a customer orders SSPC with a nominal thickness of 4.75 mm or more, the customer will accept SSPC with an actual thickness that is less than 4.75 mm provided it is within the thickness tolerance range, which is consistent with the meaning of the term "nominal" which means "in name only". . . . Thus, based upon the language of the scope, which does not include the terms "actual" or "nominal" and whose understanding is informed by Department practice of taking into account product definitions and industry practice to interpret scope language, we are unable to make a definitive finding based on the language of the scope.

Remand Results at 7-8 (internal citations omitted).

Having determined that the language of the Orders was ambiguous, Commerce next considered each of the factors set forth in § 351.225(k)(1). Ultimately, the Department concluded that none of the factors under this subsection were dispositive. In reaching its conclusions, Commerce first found that the petitions were not conclusive "[b]ecause the scope description in the petition and the notice of initiation does not indicate whether thickness is to be measured on a nominal or actual basis."

Remand Results at 9.

The Department next found that its determinations during the

initial investigation and subsequent administrative reviews were not dispositive because "[t]he Department has never made an explicit finding in its prior determinations that the scope of its proceedings included nominal measurements. However, the Department has generally, but not consistently, acted as though nominal measurements were included within the scope." Remand Results at 9. In keeping with this observation, the Department conceded that it "has not consistently treated all SSPC with a nominal thickness greater than or equal to 4.75 mm regardless of the actual thickness as within the scope in its prior determinations." *Id.* at 11.

Thus, although its questionnaires throughout the course of the investigation and subsequent administrative reviews required respondents to report sales data for SSPC with a nominal thickness of 4.75 mm, but an actual thickness of less than 4.75 mm, the Department did not always enforce this requirement. *Id.* at 10. For instance, during the second and fourth administrative reviews, covering the periods from 2000-2001 and 2002-2003, respectively, the Department permitted ASB⁴ to exclude nominal SSPC sales from its home and United States market databases. During those reviews, the company reported, and the Department

⁴ ASB's predecessor, Ugine & ALZ Belgium N.V. ("Ugine"), was a respondent to the initial investigation, and participated in some of the earlier proceedings discussed herein. Because this succession of ownership has no bearing on the outcome of this case, the court will include Ugine in its reference to ASB.

accepted, only sales of SSPC with an actual thickness of 4.75 mm or more. Subsequently, however, Commerce applied facts available⁵ when ASB failed to provide information on nominal SSPC sales in the fifth administrative review. For the Department, the very fact of its inconsistent treatment of the 4.75 mm measurement in its initial investigation and in subsequent reviews demonstrates that the § 351.225(k)(1) factors do not resolve the scope inquiry.

Accordingly, in the Remand Results, Commerce found:

The Department has never made an explicit finding in its prior determinations that the scope of its proceedings included nominal measurements. However, the Department has generally, but not consistently, acted as though nominal measurements were included within the scope. . . . [I]n a variety of instances, the Department indicated to interested parties that the scope included nominal measurements; however, in making these indications, the Department did not explain the basis for its determinations or cite record evidence

⁵ Pursuant to 19 U.S.C. § 1677e(a), Commerce will use "facts otherwise available" in reaching its determinations with respect to "necessary information" that is unavailable or otherwise withheld or not timely provided by a respondent in an antidumping investigation. In other words, if Commerce requests, but does not receive, information it deems necessary to carrying out its investigation or review it will use information otherwise available from other sources, usually the petitioners. In connection with the fifth administrative review of the antidumping order on SSPC, Commerce applied facts available in determining ASB's sales of SSPC with a nominal thickness of 4.75 mm, but an actual thickness of less than 4.75 mm, because ASB did not report its nominal sales, and Commerce deemed this information necessary to calculate ASB's dumping margin. See Remand Results at 11. Accordingly, the Department's determination that information on sales of nominal SSPC was necessary in that review is an example of the Department's treatment of "4.75 mm" as a nominal measurement.

upon which these finding were based. . . . [B]ecause the basis for these indications was not explained, it is difficult for these indications to serve as a reliable basis for an affirmative finding under 19 CFR 351.225(k)(1).

Remand Results at 9.

Finally, with respect to the proceedings before the International Trade Commission ("ITC"), Commerce noted that the ITC referred to the ASTM⁶ standards in distinguishing the subject merchandise, SSPC, from similar products, such as stainless steel sheet and strip ("SSSS"). Commerce found, however, that the ITC made no specific findings regarding whether SSPC dimensions were nominal or actual. Remand Results at 11-12. Therefore, the Department concluded that "[b]ased on the ITC Report, we are unable to draw any conclusions that would clarify whether SSPC with a nominal thickness of 4.75 mm, but an actual thickness of less than 4.75 mm, is subject to the Orders." Remand Results at 12.

Having found, in accordance with the court's Remand Order, that neither the scope language itself nor the § 351.225(k)(1) factors were dispositive as to the meaning of the language, Commerce turned to the *Diversified Products* factors codified in § 351.225(k)(2), and determined that the scope language included

⁶ The American Society for Testing and Materials, now known as ASTM International, is an organization that, among other things, develops and publishes industry standards for a variety of products, including SSPC.

SSPC with a nominal thickness of 4.75 mm, but an actual thickness of less than 4.75mm. In reaching its determination, the Department found that

SSPC is ordered to a nominal thickness, with a tolerance range for each nominal thickness. The [ASTM] A480 Standard lists thicknesses (i.e., nominal thicknesses) and shows the permitted variations in thickness (i.e., actual thicknesses). . . . These industry standards mean that plate ordered to a nominal thickness of 0.1875 inches (4.75 mm), subject to standard ASTM tolerances, can be delivered with an actual thickness that ranges from 4.50 mm . . . to 5.25 mm . . . and still be within the nominal thickness of 4.75 mm.

Remand Results at 6-7. Therefore, Commerce determined that "the [antidumping duty] orders on SSPC from Belgium . . . and [countervailing duty] orders from Belgium . . . include stainless steel products with a nominal thickness of 4.75 mm, regardless of actual thickness." Remand Results at 25.

III. Analysis

ASB challenges Commerce's finding that the scope language itself and the § 351.225(k)(1) factors were not dispositive of the scope inquiry. In other words, ASB insists that either (1) the language of the Orders is unambiguous, and that SSPC with an actual thickness of less than 4.75 mm should be excluded from the scope of the Orders; or (2) the § 351.225(k)(1) factors are dispositive of the words' meaning, and that merchandise of less than 4.75 mm should be excluded. Under either theory, according

to ASB, reference to the *Diversified Products* analysis under § 351.225(k)(2) is unwarranted for purposes of determining the scope of the Orders.

A. Commerce's Determination that the Scope Language is Ambiguous

1. ASB Contends that the Scope Language Unambiguously Defines "4.75 mm" as an Actual Number

ASB first argues that Commerce's determination that the Orders are ambiguous is contrary to law because it failed to interpret "4.75 mm" in accordance with its common meaning. According to plaintiff, "4.75 mm" has a commonly understood meaning, and if the Orders were intended to give it a less common "industry meaning" they would have stated so explicitly. ASB asserts, therefore, that because qualifying language is absent from the Orders, "4.75 mm" can only refer to an actual measurement, and Commerce may not now change the Orders by injecting ambiguity where none exists. Pl.'s Cmnts. on the Dep't of Commerce's Rem. Res. ("Pl.'s Cmnts.") 7-8.

Second, ASB claims that Commerce violated its own regulations by considering "customers' expectations" and "industry practice" in reaching its finding that the language of the Orders is ambiguous. According to ASB, Commerce's actions violated § 351.225(k) because the Department considered the *Diversified Products* factors listed in subsection (k)(2) before

finding that the factors listed in subsection (k)(1) were not dispositive. In other words, plaintiff contends that the *Diversified Products* factors may only be used to interpret ambiguous language, not to demonstrate that the language at issue is ambiguous. For ASB, "[t]he consideration of the *Diversified Products* factors as part of its analysis of the plain language of the Orders turns the language of 19 C.F.R. § 351.225(k) on its head" Pl.'s Cmnts. 10.

Third, ASB argues that, even if Commerce were permitted to look to industry meanings to determine if the scope language is ambiguous, there is no industry meaning for "4.75 mm." Rather, ASB maintains, the ASTM standards define SSPC as products that are "'4.76 mm' and/or '5 mm' or more in thickness," and "[b]ecause 4.75 mm does not equate to 4.76 mm or 5 mm, the Orders' use of '4.75 mm' dispositively shows that Commerce, when adopting the scope language, did not address the Orders to an industry standard." Pl.'s Cmnts. 11. Therefore, plaintiff asserts that the use of a non-industry standard thickness demonstrates that the Orders unambiguously defined SSPC based on actual thickness.

Fourth, ASB submits that Commerce's ambiguity determination is contrary to law because it fails to follow the Department's prior usage regarding nominal versus actual measurements. ASB cites to Certain Cut-to-Length Carbon Steel Plate from South

Africa, 62 Fed. Reg. 61,731 (Dep't of Commerce Nov. 19, 1997) ("Carbon Steel Plate"), in which Commerce found that the term "4.75 mm or more in thickness" did not include merchandise with an actual thickness of less than 4.75 mm. Pl.'s Cmnts. 15-16. ASB maintains that "*Commerce specifically denied the request in Carbon [Steel] Plate to amend the scope to include nominal material because 'the original scope of the investigations did not include the products in question' and that the 'clarity of the original scope' was sufficient.*" Pl.'s Cmnts. 18. ASB contends that there is no meaningful distinction between the Carbon Steel Plate orders and the SSPC Orders at issue here, and "in no way does Commerce's reasoning and decision in Carbon [Steel] Plate imply that the language '4.75 mm or more in thickness' has an industry-or product-specific meaning." Pl.'s Cmnts. 19.

Fifth, ASB insists that the Orders are unambiguous because where Commerce has intended to include nominal measurements in the scope of an order, it has expressly done so. ASB cites a number of examples in which Commerce has specified dimensions in scope language as either "nominal" or "nominal or actual." Pl.'s Cmnts. 20; *see, e.g., Stainless Steel Butt-Weld Pipe Fittings from the Phillipines*, 65 Fed. Reg. 81,823, 81,823-824 (Dep't of Commerce Dec. 27, 2000) (notice of final determination of sales at less than fair value). According to plaintiff, Commerce has

never identified measurements as "actual," because "the word 'thickness,' unless otherwise modified, means 'actual thickness.'" Pl.'s Cmnts. 20.

Moreover, ASB claims that, in the past, Commerce has been explicit when it intended to refer to the ASTM standards in defining the scope of an investigation or order. To bolster this contention, ASB cites a number of orders that purportedly support this proposition. Pl.'s Cmnts. 20; *see, e.g., Circular Welded Carbon quality Steel Pipe from the People's Republic of China*, 73 Fed. Reg. 42,547 (Dep't of Commerce July 22, 2008) (notice of antidumping duty order). For ASB, "clearly Commerce knows how to invoke the ASTM when it intends to define subject merchandise using that criteria. Its failure to invoke the ASTM standards in the language of the scopes at issue here can lead to only one conclusion - that Commerce did not intend to include the products in question." Pl.'s Cmnts. 21.

Sixth, ASB maintains that Commerce's finding that "4.75 mm" is ambiguous conflicts with the remainder of the scope language. In describing the merchandise that is within the scope, the Orders provide that the merchandise may be further processed and remain within the scope so long as it retains the specified dimension of 4.75 mm in thickness. Pl.'s Cmnts. 21; *see, e.g., SSPC from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan*, 64 Fed. Reg. 27,756 (Dep't of Commerce May

21, 1999) (antidumping duty orders) ("[t]he subject plate may also be further processed (e.g., cold-rolled, polished, etc.) provided that it maintains the specified dimensions of plate following such processing") (the "further processing clause").

Plaintiff argues that the reference to "specified dimensions" in the further processing clause demonstrates that "4.75 mm" must refer to actual thickness. According to plaintiff, a "specified dimension" clearly refers to an actual number and, therefore, the requirement that further processed merchandise meet a "specified dimension" demonstrates that the Orders define SSPC based on actual thickness. Pl.'s Cmnts. 21-22. Put another way, ASB believes that nominal thickness cannot be a "specified dimension" and, thus, the further processing clause compels the conclusion that 4.75 mm unambiguously refers to actual thickness.

Seventh, ASB contends that a comparison of Commerce's SSPC and SSSS orders demonstrates that "4.75 mm" refers to actual thickness. Pl.'s Cmnts. 23-24. According to ASB, the language in these orders mirror each other, as SSSS includes products that are "less than 4.75 mm in thickness," and the Orders explicitly exclude SSSS from their scope. Pl.'s Cmnts. 23-24. ASB maintains that "4.75 mm" in the SSPC Orders cannot refer to nominal thickness because the Orders would then include products

with an actual thickness of less than 4.75 mm and, therefore, impermissibly conflict with the SSSS orders. Pl.'s Cmnts. 23-24. For ASB, "[a]s such, the products in question clearly fall within the Orders' exclusion of 'sheet and strip' products and cannot be covered on [sic] the SSPC Orders." Pl.'s Cmnts. 24.

Finally, ASB contends that Commerce's determination that the language is ambiguous is wrong because "4.75 mm" has an established meaning pursuant to the Harmonized Tariff Schedule (the "HTS") definition of SSPC. According to ASB, that definition is based on actual measurements, and Commerce adopted the HTS definition in formulating the scope of the Orders. In keeping with this argument, plaintiff maintains that "4.75 mm or more in thickness" "was not pulled out of the ether, it must have come from somewhere. . . . [T]he source is the HTS." Pl.'s Cmnts. 12.

2. Defendant Argues that the Scope Language is Ambiguous Because it is Unclear Whether "4.75 mm" is an Actual or Nominal Number

In disputing plaintiff's claims with respect to the threshold question of ambiguity, defendant⁷ first counters that it

⁷ The positions of defendant and defendant-intervenor Allegheny Ludlum ("Allegheny") are generally consistent and they will be treated together here under the label "defendant." Although Allegheny believes that Commerce's Remand Results should be affirmed in their entirety, it notes that Commerce could have determined that the scope language referred to nominal thickness based on its consideration of the § 351.225(k)(1) factors and,

is customary in the SSPC industry to define product thickness on a nominal basis and, therefore, the failure of the Orders to specify whether they refer to nominal or actual thickness renders them ambiguous. Def.'s Resp. to Pl.'s Cmnts. Upon the Rem. Res. ("Def.'s Resp.") 7. For defendant, ASB's argument that "4.75 mm" is clearly an actual dimension fails to take into account that nominal measurements may also be considered common in particular industries. According to defendant, "Commerce did not deprive the number '4.75' of its common meaning, but instead recognizes that '4.75' could be subject to different meanings, all of which can be considered 'common,' depending upon the product and industry in question." Def.'s Resp. 8.

Second, defendant asserts that ASB's argument that Commerce unlawfully used the *Diversified Products* factors to find ambiguity is misplaced because nothing in the regulations or judicial precedent precludes the Department from considering those factors in determining whether an ambiguity exists in the first instance. Def.'s Resp. 9-10. Defendant insists that it was reasonable for the Department to look at the language in context and, thus, it was entirely proper for Commerce to consider industry standards and practice when doing so. Further, the Department contends, that it was reasonable to consider matters such as purchaser expectations and the inability to

therefore, resort to the § 351.225(k)(2) factors was unnecessary.

measure SSPC thickness precisely in making its finding as to ambiguity, notwithstanding that they are included among the *Diversified Products* factors considered under § 351.225(k)(2) in interpreting ambiguous language. Def.'s Resp. 7-8.

Third, defendant argues that ASB's contention that the measurement "4.75 mm" is not itself a standard measurement under the ASTM is irrelevant to the issue at hand. For defendant, the ASTM standards guided its analysis, not because 4.75 mm is a standard measurement, but because they demonstrate that the industry measures "thickness" in nominal terms. Def.'s Resp. 10.

Fourth, defendant maintains that ASB's argument that Commerce's decision in *Carbon Steel Plate* is controlling of the meaning of "4.75 mm or more in thickness" in this case is wrong. Defendant notes that the issue in *Carbon Steel Plate* was whether the order in that determination included products with a nominal thickness of 4.7625 mm. According to defendant, "Commerce made a distinct finding that the scope included certain products with an actual thickness between 4.75 mm and 4.7625 mm. Thus certain products made to a nominal thickness of 3/16" but produced to slightly below 3/16" in thickness would already be included under the language of that case." Def.'s Resp. 11 (citations omitted). For defendant, *Carbon Steel Plate* does not control here because it was "silent as to merchandise with a nominal thickness of 4.75 mm." Def.'s Resp. 11.

Fifth, Defendant claims that ASB's contention that it is Commerce's practice to expressly identify when the scope of an order includes nominal terms misses the point. Rather, Defendant maintains that "[a]lthough Commerce has not been as precise and consistent as it could have been in specifying whether measurements should be considered as 'actual' or 'nominal,' those examples do not resolve the ambiguity created in this case by absence of either the word 'actual' or 'nominal.'" Def.'s Resp. 11 (citations omitted).

Sixth, defendant responds that ASB's attempt to show that Commerce's interpretation is internally inconsistent because it ignores the further processing clause is without merit. According to defendant, the further processing clause is not inconsistent with its interpretation of the scope language because both pertain to nominal thickness of 4.75 mm and, therefore, the term "specified dimensions" merely refers to the nominal dimensions specified in the order. Def.'s Resp. 11-12.

Seventh, defendant argues that ASB's reliance on an alleged inconsistency between Commerce's interpretation of the Orders and the SSSS orders is meritless because "both SSPC and SSSS adhere to the same industry standards which recognize tolerance ranges and which also recognize the limited interchangeability between SSPC and SSSS due to inherent differences in thickness and appearance." Def.'s Resp. 12. In other words, defendant

maintains that, although the SSSS and SSPC orders are mutually exclusive, these products are mutually exclusive based on nominal, rather than actual, thickness.

Finally, defendant insists that ASB's argument that the HTS definition should control is unconvincing because the Orders indicate that "HTS categories are provided only for 'convenience and Customs purposes,' whereas 'the written description of the scope of [the] order is dispositive' for its meaning." Def.'s Resp. 10.

3. Commerce's Ambiguity Determination is Sustained

Commerce's determination that the scope language is ambiguous is sustained. "Commerce need only meet a low threshold to show that it justifiably found an ambiguity in scope language, but it is not justifiable to identify an ambiguity where none exists." *Allegheny Bradford Corp. v. United States*, 28 CIT 830, 843, 342 F. Supp. 2d 1172, 1184 (2004) (citing *Novosteel SA v. United States*, 284 F.3d 1261, 1272 (Fed. Cir. 2002)) (internal citations omitted). This threshold is met whenever there is language in the orders that "specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco*, 296 F.3d at 1089 (emphasis added). Here, Commerce has met this threshold because the language of the Orders can reasonably be interpreted to include SSPC with a nominal

thickness of 4.75 mm, but an actual thickness of less than 4.75 mm.

At the outset, it should be noted that antidumping and countervailing duty orders are specific to a particular kind or class of merchandise and, therefore, unless otherwise specified, they must necessarily be interpreted in the context of the industry⁸ in which the merchandise at issue is manufactured, bought and sold. This being the case, ASB's argument that "4.75 mm" is unambiguous because it has but one common and ordinary meaning must be rejected. In everyday parlance, "4.75 mm" may have an established meaning. In the context of the SSPC industry, however, thickness of slightly more or slightly less than 4.75 mm is routinely acceptable to a purchaser who has

⁸ Courts have long recognized the importance of considering context, including industry custom, in interpreting written language. See, e.g., *Hurst v. Lake & Co., Inc.*, 16 P.2d 627, 629 (Ore. 1932) ("[O]ne is justified in saying that the language of the dictionaries is not the only language spoken in America. . . . [T]he different sciences and trades, in addition to coining words of their own, appropriate common words and assign to them new meanings. Thus it must be evident that one cannot understand accurately the language of such sciences and trades without knowing the peculiar meaning attached to the words which they use."); *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (Hand, J.) ("Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."); *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908) (Holmes, J.).

specified product that is 4.75 mm thick. See Remand Results at 7-8. This is true for several reasons, the first being that "stainless steel plate thickness cannot be maintained precisely in the steel forming process." Remand Results at 7. Indeed, no roll of SSPC is of uniform thickness throughout and, thus, Customs and Border Protection measures the thinnest part of a roll in order to classify such merchandise. Oral Arg. Tr. at 26:15-19.

Moreover, slight variations in thickness do not prevent SSPC coils from being suitable for their intended purposes. Thus, in practice, if certain rolls of SSPC are slightly more or less than 4.75 mm in thickness, but within a tolerance range acceptable in the industry, a purchaser of SSPC would accept it even if the contract or purchase order called for SSPC with a thickness of 4.75 mm. See Remand Results at 7-8. Therefore, to the extent that SSPC that actually measures something less than 4.75 mm may nonetheless be deemed to be nominally 4.75 mm, it could reasonably be covered by the Orders. Because the express terms of the Orders do not state whether this is the case, the Orders are ambiguous.

Further, plaintiff's contention that Commerce's Remand Results were contrary to law because the Department violated its own regulations by considering certain *Diversified Products* factors, such as "customer expectations" and "industry practice,"

in determining if an ambiguity existed in the scope language is unconvincing. Section 351.225(k) provides for the steps Commerce is to take in "considering whether a particular product is included within the scope of an order" In other words, in the context of § 351.225(k), the *Diversified Products* factors are applied by Commerce to resolve an ambiguity. Nothing in § 351.225(k), however, prevents Commerce from considering any factors in either subsection in determining whether an ambiguity exists.

Indeed, as noted above, it is reasonable for the Department to consider industry context to determine whether the scope of its orders are ambiguous. Commerce's use of the *Diversified Products* factors as a means of determining commercial usage when evaluating whether the language was ambiguous does not cause the Department's determination to be unlawful. This is because the factors are merely a tool for making a reasonable finding. Accordingly, Commerce did not act contrary to law by considering factors such as industry practice or customer expectations to determine if the language in the Orders was ambiguous.

ASB's contention that the industry practice of measuring SSPC in nominal terms could not render the language ambiguous because "4.75 mm" does not have an industry meaning is also without merit. It is true that the ASTM lists 0.1875 inches (or 3/16") as a standard thickness for SSPC, and recognizes that this

converts to the metric measurement of 4.7625 mm. However, the record also reflects that, although the exact metric conversion of the standard 0.1875 inch thickness is 4.7625 mm, it is industry custom to label the conversion as 4.75 mm. See Letter from Collier, Shannon, Rill & Scott, PLLC to Sec'y of Commerce, dated April 14, 1998, attached as Ex. 3 to plaintiff's Rule 56.2 Mot. J. Agency R., dated July 1, 2009 ("Pl.'s July 2009 Br."). If anything, this further supports Commerce's conclusion that the industry practice is to define the thickness of SSPC in nominal terms. In addition, Commerce's purpose in citing to the ASTM standards was to illustrate that the custom in the trade is for SSPC to be sold with a small range of thickness, not to identify 4.75 mm as an industry standard.

Commerce's findings in the Carbon Steel Plate⁸ proceedings

⁸ In Carbon Steel Plate, the petitioners sought to amend the scope of the order to include, among other things, cut-to-length carbon steel plate with a nominal thickness of 4.7625 mm, but an actual thickness of less than 4.75 mm. The Carbon Steel Plate order covered merchandise that was, inter alia, "4.75 mm or more in thickness." Carbon Steel Plate, 62 Fed. Reg. 61731, 61,731-32 (Dep't of Commerce Nov. 19, 1997). The Department ultimately concluded that it would not amend the scope of these orders because "[n]o information on the record indicates that respondents or other parties have been attempting to circumvent these proceedings by shifting to sales of the products in question. Consequently, given the clarity of the original scope [among other things] we recommend that petitioners' requested modifications to the scope not be made." Carbon Steel Plate Memo at 3. In so finding, Commerce determined that the order only included carbon steel plate with a nominal thickness of 4.7625 mm to the extent that the actual thickness of that merchandise was 4.75 mm or more. The court understands ASB's argument to be that Commerce's determination in Carbon Steel Plate was tantamount to

also do not compel a different result. The Carbon Steel Plate determination rejected the domestic manufacturers' *request to amend* the scope of Commerce's order to include merchandise with an actual thickness of less than 4.75 mm. As part of its reasoning for not amending the order, Commerce found that there was "no information on the record indicat[ing] that respondents or other parties have been attempting to circumvent these proceedings by shifting sales of the products in question. Consequently, given the clarity of the original scope, [among other things,] we recommend that petitioners' requested modifications to the scope not be made." Carbon Steel Plate Memo at 3.

Although, at least by implication, the Department in Carbon Steel Plate found that "4.75 mm in thickness" was an actual measurement that excluded merchandise with an actual thickness of less than 4.75 mm from its scope, that finding is not a determination that plaintiff can rely upon in this case. It is true, as ASB notes, that well-established principles of administrative law prohibit Commerce from acting in an arbitrary or capricious manner and, therefore, "[w]here . . . Commerce adopts a practice that substantially deviates from precedent, it must at least acknowledge the change and show that there are good

a finding that "4.75 mm in thickness" meant actual thickness and, thus, the Department cannot now find that "4.75 mm" refers to nominal thickness in the SSPC Orders.

reasons for the new policy" See *Pakfood Pub. Co. Ltd. v. United States*, 35 CIT __, __, Slip Op. 11-6 at 14 (Jan. 18, 2011). Commerce's determination in *Carbon Steel Plate*, however, was not based on any long standing methodology from which the Department has substantially deviated in finding that the Orders in this proceeding are ambiguous. Rather, the determination in *Carbon Steel Plate* was a factual finding conditioned on the questions presented and based on the administrative record before the Department.

Carbon Steel Plate did not squarely address the question before the court in this case. That is, no argument was made that the scope language was ambiguous because of the absence of the words "actual" or "nominal." Indeed, *Carbon Steel Plate* did not involve a dispute over the meaning of the scope language in the order at issue at all. To the contrary, that determination involved the petitioners' request to amend the scope of the order. Furthermore, the determination was based, at least in part, on the finding that no amendment to the order was needed because there was no evidence anyone was trying to circumvent the order. See *Carbon Steel Plate Memo* at 3.

Here, Commerce has made an independent determination concerning the scope of its Orders on SSPC, based on the record before it in this proceeding, and upon the precise question of whether ambiguity arises from the presence or absence of the

words "nominal" and "actual." So long as that conclusion is supported by substantial evidence in the record, rulings in other proceedings do not dictate a contrary result. "The primary source in making a scope ruling is the antidumping order being applied (and the prior scope determinations applying that order), not necessarily the scope rulings made in unrelated antidumping orders." *Walgreen Co. Of Deerfield, Il. v. United States*, 620 F.3d 1350, 1356 (Fed. Cir. 2010). That the Department's result in this case may not be consistent with its conclusions in Carbon Steel Plate, which resolved a different issue based on a different administrative record, is not a sufficient basis to find that its decision here is unreasonable. *See Nakornthai Strip Mill Pub. Co. Ltd. v. United States*, 32 CIT __, __, 587 F. Supp. 2d 1303, 1307 (2008) ("Commerce . . . may adapt its views and practices to the particular circumstances of the case at hand, so long as the agency's decisions are explained and supported by substantial evidence on the record.").

Nor is the court persuaded by ASB's contentions that the Orders must refer to actual thickness because they do not include the term "nominal" or expressly refer to the ASTM standards. For ASB, it is significant that previously Commerce has used the term "nominal" and expressly invoked those standards when it intended to incorporate them into orders. Neither the Department's use of the term "nominal" nor its reference to the ASTM standards,

however, prevent the Orders from being found to be ambiguous. The ambiguity here arises precisely because there is no reference to the ASTM standards, inclusion of the word "nominal," or any other indication of whether the scope of the Orders is defined in terms of nominal or actual product thickness, even though the product is commonly identified nominally in the industry. Had the Orders used the term "nominal" or expressly referred to the ASTM standards, no ambiguity would exist.

ASB's contention that the "specified dimensions" language in the further processing clause must refer to actual measurements, including the "4.75 mm" in thickness, is also unavailing. There is no reason why "specified dimensions" cannot refer to nominal dimensions. Thus, if merchandise maintains a nominal thickness of 4.75 mm following further processing then it is within the scope of the Orders. If further processing alters the dimensions of the merchandise such that it can no longer be considered nominally 4.75 mm, it is not within the scope of the Orders. Accordingly, the wording of the further processing clause does not demonstrate that the Orders unambiguously refer to actual, as opposed to nominal, dimensions.

Similarly, ASB's argument regarding the SSSS antidumping order is unpersuasive. According to ASB, the Orders must refer to actual thickness because the SSSS order defines SSSS as certain steel products with a thickness of less than 4.75 mm, and

both the SSSS and SSPC orders explicitly exclude the other from their scope. That nominal rather than actual dimensions are used in both orders does not mean that they are no longer mutually exclusive. A product that is nominally 4.75 mm thick excludes a product with a nominal thickness of less than 4.75 mm.

Accordingly, there is no reason why the dividing line between SSPC and SSSS cannot be a nominal, as distinct from an actual, measure of thickness.

Finally, the court is not persuaded by ASB's argument that the Orders incorporate the definition of SSPC found in the HTS. The Orders expressly provide that "[a]lthough the HTS subheadings are provided for convenience and Customs purposes, the written description of the merchandise subject to these orders is dispositive." *See, e.g., Certain SSPC from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan*, 68 Fed. Reg. 11,520, 11,521 (Mar. 11, 2003) (notice of amended antidumping duty orders). Accordingly, contrary to ASB's contention, the Orders plainly indicate that reference to the HTS was for convenience, and was not intended to incorporate the HTS definition of SSPC. *See Novosteel*, 284 F.3d at 1270.

Based on the foregoing, Commerce's determination that the Orders are ambiguous is supported by substantial evidence and otherwise in accordance with law. As noted, the Orders themselves do not specify whether thickness is to be measured in

actual or nominal terms. The administrative record before the Department supports its finding that no roll of SSPC is manufactured to a uniform thickness and that it is common in the SSPC industry to refer to product thickness in nominal terms. This industry practice supports Commerce's finding of ambiguity because it casts a reasonable doubt upon the intended meaning of the scope language in the Orders. It was within the discretion of the Department to consider that industry practice in interpreting the scope of the Orders, as the definition of "4.75 mm or more in thickness" cannot be divorced from the context of the relevant industry. Therefore, where, as here, the relevant industry generally defines product thickness in nominal terms, it is reasonable for Commerce to conclude that the Department's failure to specify whether "4.75 mm in thickness" was a nominal or actual measurement rendered the Orders ambiguous. Accordingly, Commerce's determination that the scope language in the Orders is ambiguous is sustained.

B. Commerce's Finding that the § 351.225(k)(1) Factors Were Not Dispositive of the Scope Inquiry

1. Plaintiff Argues that the § 351.225(k)(1) Factors Dispositively Demonstrate that "4.75 mm" Refers to an Actual Measurement

ASB asserts that, even if the language of the Orders is ambiguous, the § 351.225(k)(1) factors are dispositive of the scope inquiry because they conclusively demonstrate that "4.75

mm" was intended as an actual measurement. Therefore, plaintiff argues, the Department's use of the *Diversified Products* factors in § 351.225(k)(2) to find that "4.75 mm" was a nominal measurement was unlawful because the § 351.225(k)(1) factors conclusively demonstrate that it was intended to be an actual measurement. In other words, plaintiff contends that Commerce failed to follow its own regulations by going to the third step of the prescribed methodology, and considering the § 351.225(k)(2) factors when the ambiguity in the Orders could be resolved by the § 351.225(k)(1) factors. According to ASB, Commerce's conclusion that the § 351.225(k)(1) factors⁹ did not dispositively show that the scope of the Orders was limited to merchandise that is actually 4.75 mm in thickness or more is unsupported by substantial evidence for four reasons.

First, plaintiff argues that the petitioners in the investigation were clear that they intended the scope of the Orders to be defined in terms of actual thickness because they "rejected the use of tolerance ranges" in the proceedings leading to the formulation of the Orders' scope description. See Pl.'s Cmnts. 27-28. In other words, ASB argues that by declining to include tolerance ranges in the definition of SSPC in the

⁹ The factors considered under 19 C.F.R. § 351.225(k)(1) are (1) the descriptions of merchandise contained in the petition, (2) the initial investigation, (3) Commerce's determinations, and (4) the ITC determinations.

investigation, the petitioners sought to include only SSPC with an actual thickness of 4.75 mm or more within the scope of the Orders. According to ASB, "[g]iven the necessity of defining the subject merchandise according to tolerance ranges [in order to describe the merchandise in nominal terms], such an omission clearly shows that Petitioners did not intend to cover nominal merchandise." Pl.'s Cmnts. 28. For plaintiff, given the petitioners' intentions, allowing Commerce to revisit its initial decision not to include tolerance ranges "would be tantamount to permitting Commerce to amend the Orders years after they were issued." Pl.'s Cmnts. 27.

Second, ASB argues that the petitioners' statement to the Department regarding the further processing clause demonstrates that the scope of the Orders was intended to be defined based on actual thickness. ASB relies on a letter from petitioners' counsel in May 1998: "the scope of the investigation defines the dimensions of the subject coiled plate products to be 254 mm or over in width and 4.75 mm or more in thickness, without exception or exclusion." Pl.'s Cmnts. 28 (citing Letter from Collier, Shannon, Rill & Scott, PLLC to Secretary of Commerce, dated May 8, 1998 (attached as Ex. 4 to Pl.'s July 2009 Br)). Thus, according to plaintiff, the petitioners clarified that "coiled plate meeting *these minimum dimensions is included within the scope*" " Pl.'s Cmnts. 28 (citing Letter from Collier,

Shannon, Rill & Scott, PLLC to Secretary of Commerce, dated May 8, 1998 (attached as Ex. 4 to Pl.'s July 2009 Br)). For ASB, this statement "clearly reveal[s] that the products could be further processed and fall within the Orders so long as they 'maintain[ed] *dimensions* specified in the *Department's scope language*' - not unspecified dimensions (such as the ASTM standards)." Pl.'s Cmnts. 29 (citations omitted). Plaintiff, therefore, concludes that "Petitioners' comments at the time the scope was adopted are clearly inconsistent with interpreting 'thickness' to mean 'nominal thickness.'" Pl.'s Cmnts. 29.

Third, plaintiff contends that Commerce's request that ASB and other respondents report data based on nominal thickness does not alter the conclusion that nominal merchandise is not within the scope of the Orders. As noted, in its questionnaires, Commerce required respondents to report data concerning merchandise that was nominally 4.75 mm in thickness, but with an actual thickness of less than 4.75 mm. According to plaintiff, Commerce can request data from parties either to include the data collected in its calculation of the dumping margin, or to ensure that Commerce "understands the data that it will use in its calculations and that respondents have fully and accurately reported their data." Pl.'s Cmnts. 30. For plaintiff, the record demonstrates that Commerce's purpose in requiring nominal reporting was the latter. Specifically, ASB points to a

verification report¹⁰ for one respondent issued in connection with the second administrative review of the Orders. In that report, according to ASB, "[f]or products with 'an actual thickness of less than [4.75 mm]' Commerce 'verified' that the 'thickness noted on the invoices were not subject to this review.'" Pl.'s Cmnts. 30 (citing Memorandum from Case Analysts to File re: Sales Verification of TrefilARBED, Inc., dated May 30, 2002, at 4, attached as Ex. 8 to Pl.'s July 2009 Br.).

Finally, ASB argues that the ITC's injury determination demonstrates that the Orders were only intended to cover merchandise with an actual thickness of 4.75 mm or more because "[t]he ITC Report described the different 'conditions' and 'finishes' covered by its investigation and concluded that '[a]ll plate imported in this condition or after further processing is subject to these investigations *so long as it is not further reduced below 4.75 mm in thickness.*" Pl.'s Cmnts. 31. For plaintiff, the ITC determination demonstrates that the scope language includes only actual thickness because it described the phrase "maintains the specified dimensions" in the further processing clause as "not further reduced below 4.75 mm." Pl.'s Cmnts. 31.

¹⁰ Plaintiff cites this evidence even though the report was not contemporaneous with the investigation.

2. Defendant Argues that the § 351.225(k)(1)
Factors Do Not Resolve the Ambiguity in the Scope
Language

Defendant responds that its determination that the § 351.225(k)(1) factors did not resolve the ambiguity in the scope language of the Orders is supported by substantial evidence, notwithstanding the arguments raised by ASB.

Defendant first contends that the petitioners' arguments against the use of tolerance ranges in the scope language is not tantamount to a rejection of nominal measurements. According to defendant, the excerpt from the petitioners' correspondence cited by ASB "makes no mention of 'actual' or 'nominal' measurements, and clearly identifies petitioners' position that opposition to the express inclusion of tolerance ranges as part of the scope language is a 'separate' issue [from the question of] whether the orders should be interpreted as meaning 'actual' or 'nominal' measurements." Def.'s Resp. 14. In other words, for defendant, the fact that the petitioners sought to exclude tolerance ranges from the scope description is hardly the same as petitioners seeking an order that relies on actual rather than nominal terms.

According to defendant, petitioners' arguments against the inclusion of tolerance ranges in the scope language was based entirely on the difficulty entailed in deciding which set of tolerances would be used. After noting the variety of tolerances that might be employed, *i.e.*, the ASTM standards, specific

customer standards, etc., the petitioners commented that "[i]ndeed identifying all tolerance uses arguably would have been difficult if not impossible. Rather than go down this path, Petitioners (and the Department) reasonably declined such an approach." Def.'s Resp. 27 (quoting Letter from Kelley, Drye, Collier, Shannon to Secretary of Commerce, at 13-14 (Oct. 9, 2007), attached as Ex. 14 to July 2009 Br.).

Second, defendant counters that the petitioners' correspondence regarding the further processing clause does not establish their intent to include only actual measurement because "the letter referenced by [ASB] regarding 'further processing,' . . . merely discusses SSPC that was 'further processed,' but still within scope, so long as it met the specified dimensions. Again, nothing [in petitioners' correspondence] refers to 'nominal' or 'actual' measurements." Def.'s Resp. 14 (citations omitted). Put another way, for defendant, the requirement that merchandise subject to further processing maintain a "specified dimension" after processing does not indicate whether that "specified dimension" is defined in nominal or actual terms.

Third, defendant maintains that ASB's contention that the Department's requirement that data be reported on a nominal basis was merely for purposes of "ensur[ing] that [Commerce] fully underst[ood] the data that it will use in its calculation" does not comport with the facts. According to defendant, "[ASB]

downplays the reporting requirements for nominal SSPC established in the antidumping duty investigation, . . . misstates Commerce's intent and ignores [ASB's] own contemporaneous impression that the 'scope . . . include[s] material with a nominal thickness of 4.75 mm or greater.'" See Def.'s Resp. 14-15 (citations omitted). According to defendant, "[i]f anything, Commerce's reporting requirements support a conclusion under 19 C.F.R. § 351.225(k)(1) that Commerce understood the scope to include [nominal SSPC]." Def.'s Resp. 15. Defendant asserts that "[a]t the very least, however, Commerce's statement and the reporting practice initiated in the investigation viewed in light of its acceptance of sales data in two reviews that excluded nominal SSPC call into question whether the section 251.225(k)(1) criteria are dispositive." Def.'s Resp. 15. Stated differently, for defendant, while its nominal reporting requirements may not conclusively demonstrate that the Orders cover nominal SSPC, at the very least Commerce's requirement of reporting in nominal terms does not settle the question one way or the other. For defendant, this is demonstrated by plaintiff's own uncertainty as to whether these reporting requirements meant that the Orders referred to thickness in nominal or actual terms .

Finally, defendant argues that the ITC's report contains no indication as to whether the Orders included SSPC with a nominal or actual thickness of 4.75 mm or more. Def.'s Resp. 15. For

defendant, because the ITC did not specifically address whether the Orders included nominal SSPC, when addressing the further processing clause or otherwise, the ITC's report was not dispositive of the ambiguity found in the Orders.

3. Commerce's Conclusion Regarding the § 351.225(k)(1) Factors is Supported by Substantial Evidence

The § 351.225(k)(1) factors are only dispositive if they are "'controlling' of the scope inquiry in the sense that they definitively answer the scope question". See *Sango Int'l v. United States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007). That being the case, where, as here, Commerce reaches fact-intensive conclusions drawn from the record, its decision will only be overturned if it is unsupported by substantial evidence. *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1357 (Fed. Cir. 2006) ("Commerce's determinations of fact must be sustained unless unsupported by substantial evidence in the record. . . .")

Based on the record before it, the Department's determination that the § 351.225(k)(1) factors were not dispositive of the scope issue was reasonable. The court reaches this conclusion after considering the four objections to Commerce's determination posed by ASB. First, ASB's argument that, by declining to include specific tolerance ranges in the scope language, the petitioners must have intended actual measurements to control is not convincing. The evidence

demonstrates that the petitioners' decided not to propose specific tolerance ranges because they believed that there were such a variety of ranges in use in the industry that specified ranges would result in confusion.

Thus, while it is clear that the petitioners wished to exclude particular tolerance ranges, it is equally clear that this preference does not demonstrate that they sought Orders expressed in actual, rather than nominal terms. On the other hand, petitioners' correspondence does tend to prove that nominal thickness was the standard in the industry, and it provides some justification for Commerce's conclusion that the Orders covered SSPC with a nominal thickness of 4.75 mm or more in thickness, regardless of its actual thickness.

Second, ASB's claim that the petitioners' statements, during the initial investigation, that the further processing clause includes SSPC that is 4.75 mm or more in thickness "without exception or exclusion" demonstrates that the Orders were intended to cover only actual SSPC is also unconvincing. This declaration did no more than restate the scope language, and, because of the absence of the words actual or nominal, it sheds no light on the language's meaning. Indeed, as noted *supra*, the further processing clause does not state whether the required thickness, that further processed merchandise must maintain, is actual or nominal.

Third, ASB's argues that Commerce's requirement that SSPC sales be reported in nominal terms does not cast doubt on whether the Orders solely included SSPC with an actual thickness of 4.75 mm. This argument is not credible. To support its contention, ASB identifies one verification report for one respondent in a review, in which Commerce allegedly indicated that the Orders did not cover SSPC with a nominal thickness of 4.75 mm, but an actual thickness of less than 4.75 mm. Even if ASB's construction of this particular verification report is accepted, Commerce's determination that the § 351.225(k)(1) factors did not resolve the ambiguity in the Orders is reasonable. This is because the Department, during the investigation and subsequent reviews, was inconsistent in its treatment of the scope language as being in terms of actual or nominal thickness.

For instance, in 1998, during the course of the investigation, the Department sent letters to respondents instructing them to report sales of products with a nominal thickness of 4.75 mm or more. Remand Results at 9. In addition, in the appendix to the questionnaires issued in the investigation the Department indicated that it interpreted the scope measurements to be nominal. *Id.* Thus, the Department's conduct in its investigation indicates that it was treating the measurements as nominal.

In later reviews, however, Commerce seemed to lack a clear

understanding of the scope of the Orders. The verification report cited by ASB is one instance in which Commerce made a finding, contrary to its prior indications, suggesting that the scope included only actual SSPC. But the Department treated the Orders as covering nominal SSPC in other instances. For example, "in the July 1, 2002 through June 30, 2003, antidumping duty review of SSPC from Taiwan, the Department asked that respondents code the thickness variables according to actual thickness and to also include in their responses all sales of products for which the nominal thickness is greater than or equal to 4.75 mm." *Id.* at 9. In addition, Commerce applied facts available to arrive at ASB's dumping margin during the fifth administrative review because the company had failed to report sales of nominal SSPC. See Remand Results at 11. The Department, however, declined to apply adverse facts available¹¹ to ASB's failure to report nominal sales, acknowledging that it had accepted ASB's exclusion of nominal sales in prior reviews. See Issues and Decision Memorandum for the Final Results of the Fifth Administrative Review of the Antidumping duty Order on SSSP from Belgium ("Fifth Administrative Review Issues & Dec. Mem.") at 23.

Indeed, it is not at all clear that ASB itself was not of

¹¹ Pursuant to 19 U.S.C. § 1677e(b), in applying facts available, the Department may use an inference adverse to a respondent who it finds has failed to cooperate to the best of its ability in responding to requests for information.

the view that the scope language was expressed in nominal terms. See Fifth Administrative Review Issues & Dec. Mem. at 18 ("In the Department's October 8, 1998 scope clarification letter, we instructed Respondent to report all sales of 'products for which the nominal thickness is greater than or equal to 4.75 mm.' . . . The record shows that on October 14, 1998, Respondent protested the Department's instructions to report sales of nominal SSPC. In that letter, Respondent also acknowledged that the Department has now redefined the 'scope to include material with a nominal thickness of 4.75 mm or greater.' As such, Respondent was clearly aware of the Department's clarification of the scope to include nominal SSPC, as well as the Department's requirement that Respondent report sales of nominal SSPC. Indeed, as Respondent acknowledges, it complied with the Department's instructions and reported sales of nominal SSPC in the investigation."). Thus, as least as early as 1998, ASB was aware that it was the Department's view that the Orders were expressed in nominal terms.

It was this type of inconsistent treatment that led the Department to find that its own determinations were not dispositive of the scope inquiry under § 351.225(k)(1). As the Department found, it "has not consistently treated all SSPC with a nominal thickness greater than or equal to 4.75 mm regardless of the actual thickness as within the scope in its prior

determinations." Remand Results at 11. Accordingly, the Department's requirement that sales be reported for nominal SSPC, together with its conduct of the investigation and the reviews does not tend to definitively resolve the ambiguity in the Orders.

Finally, contrary to ASB's contention, the ITC's statement, relative to the further processing clause, that "[a]ll plate imported in this condition or after further processing is subject to these investigations so long as it is not further reduced below 4.75 mm in thickness" does not undermine the reasonableness of Commerce's determination that the § 351.225(k)(1) factors do not resolve the ambiguity. As the Department found, the ITC's report provides no indication as to whether the scope of the Orders included nominal merchandise because the ITC did not specify either nominal or actual thickness. There is nothing in the language cited by plaintiff that suggests the ITC only considered actual measurements.

Based on the foregoing, the court finds that the evidence considered in accordance with § 351.225(k)(1), particularly that having to do with Commerce's understanding of the meaning of the scope language during the conduct of the investigation and the various administrative proceedings, does not dispositively decide the meaning of the scope language.

CONCLUSION

Because an ambiguity in the scope language remained following application of the first two steps of the methodology set forth in *Duferco* and *Tak Fat*, resort to the methodology's third step was in accordance with law. As noted, plaintiff does not dispute the Department's analysis under step three. Therefore, the court finds that Commerce properly applied the three-step methodology for resolving scope inquiries in the Remand Results. The Remand Results are sustained, and judgment will be entered accordingly.

/s/ Richard K. Eaton
Richard K. Eaton

Dated: July 12, 2011
New York, New York