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DEPARTMENT OF COMMERCE

International Trade Administration

A-351-809, A-580-809, A-201-805, A-307-805

A-580-809

SCOPE

PUBLIC

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Final Negative Determination of Scope Inquiry on Certain Circular Welded Non-Alloy Steel Pipe and Tube from Brazil, the Republic of Korea, Mexico and Venezuela

AGENCY: Import Administration, International Trade Administration  
Department of Commerce

ACTION: Notice of Final Negative Determination of Scope Inquiry.

SUMMARY: On January 13, 1994, we preliminarily determined that (i) pipe certified to American Petroleum Institute (API) 5L line pipe specifications (API 5L line pipe or line pipe) and (ii) pipe certified to both the API 5L line pipe specifications and the less-stringent American Society for Testing and Materials (ASTM) A-53 standard pipe specifications (dual-certified pipe<sup>1</sup>), when actually used as certain circular welded non-alloy steel pipe (standard pipe), and falling within the physical parameters outlined in the scope of the orders, are within the scope of the antidumping duty orders on standard pipe from Brazil, the Republic of Korea, Mexico and Venezuela. *See Preliminary Affirmative Determination of Scope Inquiry*, 59 FR 1929 (January 13, 1994) (*Preliminary*). We gave interested parties an opportunity to comment.

After a thorough analysis of the comments received from the parties, as well as a review of the record evidence from the less-than-fair-value (LTFV) investigations which gave rise to these antidumping duty orders, we determine that i) pipe certified to the API 5L line pipe specification, and ii) pipe certified to both the API 5L line pipe specifications and the less-

<sup>1</sup>This merchandise, sometimes referred to as "dual-stenciled," may also include "multiple-stenciled" pipe.

stringent ASTM A-53 standard pipe specifications which fall within the physical parameters outlined in the scope of the orders and enter as line pipe of a kind used for oil and gas pipelines are outside the scope of the antidumping duty orders on certain welded carbon steel non-alloy pipe from Brazil, Korea, Mexico and Venezuela, irrespective of end use.

EFFECTIVE DATE: (Insert date of publication in the *Federal Register*)

FOR FURTHER INFORMATION CONTACT: Robert M. James at (202) 482-5222 or Zev Primor at (202) 482-5253, Office of Antidumping Compliance, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230.

SUPPLEMENTARY INFORMATION:

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute (the Tariff Act of 1930, as amended (the Tariff Act)) and to the Department's regulations are in reference to the provisions as they existed on December 31, 1994.

Background

On April 22, 1993, Allied Tube & Conduit Corporation, Sawhill Tubular Division, Tex-  
Tube Division American Tube Company, Century Tube Corporation, Laclede Steel Company,  
LTV Tubular Products Company, Sharon Tube Company, Western Tube & Conduit Corporation,  
Wheatland Tube Company, and CSI Tubular Products, Inc., petitioners in these cases, requested



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**UNITED STATES DEPARTMENT OF COMMERCE**  
**International Trade Administration**  
Washington, D.C. 20230

A-580-809 *sc. gpa*  
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February 7, 1996

Memorandum To: Stephen Powell, Chief Counsel  
Joseph Spetrini, DAS for Compliance

From: David Mueller, Director, Office of Policy *DM 2/7/96*

Subject: Dual Certified Pipe, Scope

I realize that the question of whether pipe certified as both standard and line pipe should be covered by the antidumping order on standard pipe has been a difficult one for this agency. I also realize that my views and yours on the merits of the issue are diametrically opposite. Nevertheless, I am so certain that our preliminary decision to include line pipe and dual certified pipe was wrong, that I felt compelled to prepare the attached memo in an attempt to convince the Assistant Secretary to make a final decision that dual certified pipe entered as line pipe is not included in the order at issue.

I do not expect you to agree with my reasoning on this issue, but I do want you to have a copy of my memo now.

Attachment: Memorandum of today's date from David Mueller to Sue Esserman



February 7, 1996

A-201-805

A-580-809

A-351-809

A-307-805

Scope Inquiry  
Public Document

MEMORANDUM

TO: Susan G. Esserman  
Assistant Secretary for Import Administration

FROM: David Mueller  
Director, Office of Policy *DM 2/7/96*

SUBJECT: Scope Inquiry on Circular Welded Non-Alloy Steel Pipe  
and Tube from Brazil, Korea, Mexico, and Venezuela

I am writing this in regard to the scope inquiry concerning the antidumping order on certain circular welded non-alloy steel pipe from Brazil, Korea, Mexico, and Venezuela. It's not often that I weigh in on scope matters, and I apologize for the length of this memo. However, after reviewing the documents in this case, I must urge you to issue a final negative ruling in this matter.

The heart of the matter is whether pipe that meets the specifications for line pipe and that appears to be specifically excluded from the order can be included within the order simply because the pipe happens to be used in less demanding standard pipe applications. The answer to me is an obvious "no." Furthermore, straining to find a way to say "yes" calls into question how any antidumping order would be administered, and just what products it would cover. Despite the unfortunate, even embarrassing, fact that the preliminary ruling did say that the classification of pipe at importation could be changed by its use after importation, the path taken in the preliminary ruling was so fundamentally flawed that we should not continue on it. Instead, I urge you to change course, and hold that line pipe and pipe that is dual-certified to meet specifications for both line

pipe and standard pipe is not covered by this antidumping order. In my opinion, a contrary (affirmative) ruling would be unambiguously wrong as a matter of policy, and would be contrary to U.S. law and the GATT.

### Background

The order in question covers what are generally known as standard pipes and tubes, and the narrow issue raised is whether (1) pipe certified to API 5L line pipe specifications ("line pipe") and (2) pipe certified to both the API 5L line pipe specifications and ASTM A-53 standard pipe specifications (dual-certified pipe) are covered by the order when actually used as standard pipe. Both line pipe and dual-certified pipe were imported at the time of the investigation. The parties and Commerce (as well as the Commission) discussed the issue during the investigation. Moreover, in the order itself, Commerce addressed the issue of the inclusion/exclusion of line pipe and dual-certified pipe. The question is whether Commerce's resolution of this issue, as set forth in the order, was clear or ambiguous.

In the order, the first paragraph of the "scope" section provides a general description of the covered merchandise:<sup>1</sup>

The products covered by these orders are circular welded non-alloy steel pipes and tubes, of circular cross-section, not more than 406.4 millimeters (16 inches) in outside diameter, regardless of wall thickness, surface finish (black, galvanized, or painted), or end finish (plain end, bevelled end, threaded, or threaded and coupled). These pipes and tubes are generally known as standard pipes and tubes and are intended for the low pressure conveyance of water, steam, natural gas, and other liquids and gases in plumbing and heating systems, air conditioning units,

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<sup>1</sup> 57 Fed. Reg. 49453 (1992) (emphasis added). According to the October 25, 1993 memo to the Acting Assistant Secretary ("October 25 memo"), while there were minor wording changes, the scope definition set forth in the order was essentially the same as that contained in the petition and the preliminary and final determinations.

automatic sprinkler systems, and other related uses, and generally meet ASTM A-53 specifications. Standard pipe may also be used for light load-bearing applications, such as for fence tubing, and as structural pipe tubing used for framing and support members for reconstruction or load-bearing purposes in construction, shipbuilding, trucking, farm equipment, and related industries. Unfinished conduit pipe is also included in these orders.

While the first paragraph describes what is included, the second paragraph of the scope section describes what is excluded:<sup>2</sup>

All carbon steel pipes and tubes within the physical description outlined above are included within the scope of these orders, except line pipe, oil country tubular goods, boiler tubing, mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished conduit. 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 also not included in these orders.

After the issuance of the order, petitioners claim to have experienced increasing competition from line pipe and dual-certified pipe sold for use in standard pipe applications. In response, the petitioners sought to have line pipe and dual-certified pipe included by means of an anti-circumvention inquiry. Commerce did not initiate an anti-circumvention inquiry, concluding that section 781 Act did not cover the type of situation described by petitioners. However, Commerce did determine that petitioners had raised issues regarding the scope of the order that warranted the instant scope inquiry.

The parties provided written comments, and had an opportunity to meet with the Acting Assistant Secretary. The Preliminary Scope Ruling then was issued, in which line pipe and dual-certified

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<sup>2</sup> *Id.* (emphasis added). The remaining two paragraphs of the scope section list the relevant tariff subheadings and reiterate the standard boilerplate that tariff subheadings are not dispositive regarding scope.

pipe were included in the order.<sup>3</sup> According to the Preliminary Scope Ruling, the key issue was the meaning of the phrase "are intended for" in the first paragraph of the scope definition, a phrase which, in one prior instance, Commerce had interpreted as requiring a consideration of "actual use."<sup>4</sup> The Preliminary Scope Ruling stated that because the meaning of the phrase "are intended for" was unclear, it could not be determined from the order whether line pipe and dual-certified pipe were included or excluded. Accordingly, the second prong of Commerce's standard scope analysis (the so-called "Diversified test") was applied to line pipe and dual-certified pipe. However, the outcome under the second prong was a foregone conclusion, because all parties had acknowledged from the outset that standard pipe, line pipe, and dual-certified pipe had overlapping physical characteristics. In addition, because the scope inquiry was limited to line pipe and dual-certified pipe actually used as standard pipe, it is hardly surprising that such pipe was found to have the same uses as standard pipe. Thus, it was ruled that line pipe and dual-certified pipe were covered by the order.<sup>5</sup>

At the time of the Preliminary Scope Ruling, I had serious reservations about including line pipe and dual-certified pipe, and I continue to have them. I set forth my concerns below.

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<sup>3</sup> 59 Fed. Reg. 1929 (1994) ("Preliminary Scope Ruling"). A preliminary ruling was issued because of the "significant difficulty presented by this scope inquiry." See 19 CFR 353.29(d)(3).

<sup>4</sup> The Department's interpretation in that instance was upheld in Ipsco, Inc. V. United States, 715 F. Supp. 1104 (CIT 1989).

<sup>5</sup> For the reasons set forth below, I believe that the Preliminary Scope Ruling never should have gotten to the Diversified test. Therefore, I do not discuss the application of that test any further in this memo. However, please do not construe the absence of discussion as agreement with the manner in which Diversified was applied.

Problem #1: The Order Is Not Ambiguous; "Actual Use" Is Not a Factor and Line Pipe and Dual-Certified Pipe Are Excluded

The first problem I see is that the order is not ambiguous. To the contrary, the order clearly indicates that line pipe and dual-certified pipe were excluded without qualification. Indeed, petitioners admitted in their anti-circumvention petition that the scope definition in the order "appears to specifically exclude the very product which is alleged herein to be circumventing the order."<sup>6</sup>

If one parses out the language of the exclusionary second paragraph of the scope definition, it is nonsensical to conclude that actual use was a dispositive factor in the scope definition. The first clause of the first sentence of that paragraph states: "All carbon steel pipes and tubes within the physical description outlined above are included within the scope of these orders. . . ." This clause indicates that actual use is irrelevant, because anything having the physical characteristics of standard pipe is covered regardless of whether it is used in a standard pipe application or a non-standard pipe application.

The second clause modifies the first clause by stating: ". . . except line pipe [and other types of pipes]." Thus, when one adds the second clause, the scope becomes any pipe that has the physical characteristics of standard pipe, except for the pipes named in the second clause. For actual use to have been a factor in this scope definition, there would have had to have been a third clause, so that the exclusionary paragraph would read:

All carbon steel pipes and tubes within the physical description . . . are included . . . except line pipe [and other types of pipe], except that if line pipe [or other types of pipe] are within the physical description and are used as standard pipe, they are included.

Alternatively, if "actual use" really had been intended to be a

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<sup>6</sup> Anticircumvention Petition on Circular Welded Non-Alloy Steel Pipe from Korea at 25 (April 22, 1993).



pivotal factor, a more sensible drafting approach would have been to omit the exclusionary language altogether, so that the first sentence of the second paragraph simply would have stated: "All carbon steel pipes and tubes within the physical description outlined above and used as standard pipe are included within the scope of these orders."

However, the order does not contain either one of these formulations. As drafted, the exclusionary language makes no sense if actual use was intended to be a factor in the scope definition.

Turning to dual-certified pipe, the second sentence of the exclusionary paragraph is as clear as the first sentence, stating: "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 also not included in these orders." The use of the word "entered" is significant, because it indicates that the key factor was the physical condition of the merchandise as it passed through Customs, and not the use of the merchandise after it cleared Customs. In addition, the use of "entered" indicates that, in this case, we intended customs classification to be controlling.

Furthermore, the phrase "of a kind used for oil or gas pipelines" is not ambiguous in the context of this case, because it is taken directly from the definition of line pipe in HTS item 7306.10.10.<sup>7</sup> Thus, the second sentence indicates that if dual-certified pipe enters the United States as line pipe (i.e., is entered under item 7306.10.10), it is not covered. The intended audience for the order (producers, exporters, and importers of pipe) would have had no doubt as to what this language meant.

Indeed, the language in the order regarding dual-certified pipe brings to mind the decision in Ericsson GE Mobile Communications, Inc. V. United States, 60 F.3d 778 (Fed. Cir. 1995). That case involved a scope ruling in the antidumping proceeding on cellular mobile telephones and subassemblies from Japan. The order in that case included certain subassemblies "dedicated exclusively for use in CMT transceivers or control units." The order further

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<sup>7</sup> HTS 7306.10.10 covers "Line pipe of a kind used for oil or gas pipelines: of iron or nonalloy steel."

defined the quoted phrase as encompassing only those subassemblies that "could not be used, absent alteration, in a non-CMT device." Years later, however, Compliance issued a scope ruling that held that a subassembly could be excluded only if, *inter alia*, it was incorporated into a non-CMT product after importation. The Federal Circuit, agreeing with the lower court, ruled "that it stretches the phrase 'could ... be used ... in a non-CMT device' considerably beyond the limits of interpretation to require that the subassembly be incorporated in a non-CMT device after its importation into the United States." *Id.* at 782. Accordingly, the Court held that in changing the standard from one of "could be used" to one of "actually used," Commerce crossed over the line between permissible clarification and impermissible amendment of the order.

In my view, the phrase "of a kind used for" is similar to the phrase "could ... be used" in *Ericsson*. Neither phrase connotes actual use, but instead they each suggest possible use. By imposing an actual use test, the Preliminary Scope Ruling, like the scope ruling at issue in *Ericsson*, goes beyond the limits of proper interpretation. To paraphrase the Court: "The problem is that by imposing the rigid requirements of proof of ... [non-standard pipe] use in the United States, the [Preliminary Scope Ruling] in effect abandoned one rule and adopted a different, more exacting one." *Id.* at 783.

Finally, it has been claimed that pipe is categorized based on its end use, and that the order simply was intended to reflect this fact. However, it is impossible to reconcile this claim with the sentence in the exclusionary paragraph pertaining to dual-certified pipe. If the intent was to exclude (as line pipe) pipe that is actually used as line pipe, this sentence becomes superfluous. Pipe used as line pipe would be line pipe, and, thus, would be excluded, regardless of whether it is single-, dual-, or triple-certified.

To summarize, the key issue in this case is the meaning of the exclusionary paragraph. In my opinion, that language is not ambiguous, but instead indicates that the Department did not intend for actual use to be a factor, and that line pipe and dual-certified pipe were excluded regardless of whether they were

actually used in standard pipe applications.<sup>8</sup>

Problem #2: An Examination of the Record Reinforces the Conclusion that Line Pipe and Dual Certified Pipe Were Excluded

As indicated above, the language of the order indicates that line pipe and dual-certified pipe were excluded. Other evidence in the record reinforces this conclusion.

In the case of line pipe, the record is replete with statements by petitioners' counsel that line pipe was excluded. For example, at the ITC preliminary conference, petitioners' counsel stated that the scope definition "excludes other products such as line pipe. . . ." <sup>9</sup>

In the case of dual-certified pipe, the Department asked petitioners to clarify their position. In a letter dated November 19, 1991, petitioners responded to this request. The letter acknowledged that dual-certified pipe "might be sold into either the line pipe or the standard pipe market by the importer." However, petitioners stated that dual-certified pipe "generally enters the United States under the separate tariff item HS

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<sup>8</sup> The Preliminary Scope Ruling states that the key issue in this case is the meaning of the phrase "intended for use" in the first paragraph of the scope definition. In this regard, one of the memos in this case implies that this reference to end use in the second sentence of the scope definition somehow proves that end use was an important consideration. See July 14 Memo from Steve Powell. In my thirty years in government service, I must have read thousands of scope descriptions in notices, and most of those descriptions have contained a reference to the uses of the merchandise in question, usually right after a description of the merchandise's physical characteristics. Therefore, there is no basis for claiming that the reference to use in this case proves that actual use was intended to be a factor in the scope definition. In my view, the order's list of uses for standard pipe was intended to be illustrative rather than a critical part of the scope definition.

<sup>9</sup> ITC Hearing Transcript at 27-28.