



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeals No. EA-2019-006 and
No. EA-2019-007

Western Alliance Tubulars Ltd. and
Victoria International Tubular
Corporation, and Algoma Tubes Inc.,
Prudential Steel ULC and Tenaris
Global Services (Canada) Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Thursday, September 2, 2021*

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IN THE MATTER OF appeals heard on November 20, 2020, pursuant to subsection 66(7) of the *Special Import Measures Act*, R.S.C., 1985, c. S-15;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated September 6, 2019, with respect to a request for re-determination pursuant to subsection 66(1) of the *Special Import Measures Act*.

BETWEEN

**WESTERN ALLIANCE TUBULARS LTD. AND
VICTORIA INTERNATIONAL TUBULAR CORPORATION, AND
ALGOMA TUBES INC., PRUDENTIAL STEEL ULC AND
TENARIS GLOBAL SERVICES (CANADA) INC.**

Appellant

AND

**THE PRESIDENT OF THE CANADA BORDER SERVICES
AGENCY**

Respondent

DECISION

The appeals are allowed.

Peter Burn

Peter Burn
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: November 20, 2020
Tribunal Panel: Peter Burn, Presiding Member
Support Staff: Anja Grabundzija, Senior Counsel
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STATEMENT OF REASONS

INTRODUCTION

[1] These are appeals filed by Western Alliance Tubulars Ltd. and Victoria International Tubular Corporation (collectively, WAT), and Algoma Tubes Inc., Prudential Steel ULC and Tenaris Global Services (Canada) Inc. (collectively, Tenaris), pursuant to subsection 61(1.1) of the *Special Import Measures Act*,¹ from a scope ruling made by the President of the Canada Border Services Agency (CBSA) on September 6, 2019, under subsection 66(1) of *SIMA*.

[2] The issue in these appeals is whether certain goods fall within the scope of the Tribunal's finding in *OCTG I*,² which covers certain types of oil country tubular goods (OCTG) originating in or exported from the People's Republic of China (China).

[3] The goods in issue are insulated tubing (IT) and vacuum-insulated tubing (VIT) (collectively, IT/VIT). These goods are used for thermal-enhanced oil recovery of extremely viscous crude oils. The CBSA described the goods in issue as follows in its statement of reasons for the scope ruling under appeal:

[8] The goods in question in this scope proceeding, IT and VIT, are known as insulated steam injected tubing and oil production tubing products, including double-walled tubing, with or without insulation, which are used for thermal-enhanced oil recovery of extremely viscous crude oils. IT/VIT are used in steam injection wells in Steam Assisted Gravity Drainage (SAGD) operations in the Oil Sands and also in Cyclic Steam Stimulation (CSS) in heavy oil fields.

[9] SAGD operations have a well pair consisting of steam injection and production wells. IT/VIT can be used in both the steam injection and production wells in place of American Petroleum Institute (API) 5CT casing and tubing. In CSS operations, IT/VIT can be used both for steam injection and oil production in place of API 5CT casing and tubing. The use of IT/VIT can result in a significant reduction of water volume requirements when used in a steam injection applications.

[10] IT/VIT can also be used in conventional deep oil producing wells in place of API 5CT casing and tubing. The product assists the oil in maintaining temperatures above 80 degrees Fahrenheit to avoid paraffin and wax deposition which causes the production well to plug.³

[Footnotes omitted]

¹ R.S.C., 1985, c. S-15 [*SIMA*].

² *Oil Country Tubular Goods* (23 March 2010), NQ-2009-004 (CITT) [*OCTG I*]. The Tribunal continued the finding without amendment on March 2, 2015, in Expiry Review No. RR-2014-003 [*OCTG I Expiry Review I*] and on December 10, 2020, in Expiry Review No. RR-2019-005 [*OCTG I Expiry Review II*]. The order and reasons in *OCTG I Expiry Review II* were issued after the record in this matter was closed. See Exhibit EA-2019-006-30.

³ Exhibit EA-2019-006-01 at paras. 8-10.

[4] Tenaris and WAT did not contest this description of IT/VIT and its use, subject to the qualification that the summary makes an “incorrect distinction” between IT/VIT and API 5CT casing and tubing, and should rather be understood to compare IT/VIT and bare or non-insulated casing and tubing.⁴

[5] The CBSA ruled that IT/VIT are not within the scope of the finding in *OCTG I*. WAT and Tenaris submit before the Tribunal that the CBSA erred in this ruling.

[6] For the reasons below, the Tribunal concludes that IT/VIT fall within the scope of the finding in *OCTG I*.

PROCEDURAL HISTORY

[7] On April 11, 2019, the CBSA received an application for a scope ruling from WAT as to whether IT/VIT are subject to the Tribunal’s findings in *OCTG I* and/or *Seamless Casing*.⁵

[8] On May 10, 2019, the CBSA initiated a scope proceeding with respect to IT/VIT, pursuant to subsection 63(8) of *SIMA*.

[9] On July 29, 2019, the CBSA issued the *Statement of Essential Facts*, which contained its preliminary assessment that IT/VIT are not subject to the Tribunal’s findings in *OCTG I* and *Seamless Casing*.

[10] On September 6, 2019, the CBSA made its scope ruling. The CBSA determined, pursuant to subsection 66(1) of *SIMA*, that IT/VIT are not subject to the Tribunal’s findings in *OCTG I* and *Seamless Casing*.⁶

[11] On December 4, 2019, WAT (Appeal No. EA-2019-006) and Tenaris (Appeal No. EA-2019-007) appealed the scope ruling pursuant to subsection 61(1.1) of *SIMA*.⁷

[12] On January 15, 2020, the Tribunal consolidated Appeals No. EA-2019-006 and No. EA-2019-007.⁸

[13] The Tribunal held a public videoconference hearing on November 20, 2020.

LEGAL FRAMEWORK

[14] These appeals are the first instance in which the Tribunal is tasked with an appeal from a scope ruling.

⁴ Exhibit EA-2019-006-05 at para. 11.

⁵ *Seamless Carbon or Alloy Steel Oil and Gas Well Casing* (10 March 2008), NQ-2007-001 (CITT) [*Seamless Casing*]. The Tribunal continued the finding without amendment on March 11, 2013, (Expiry Review No. RR-2012-002) and November 10, 2018 (Expiry Review No. RR-2017-006).

⁶ Exhibit EA-2019-006-01 at 6-23.

⁷ *Ibid.*; Exhibit EA-2019-007-01.

⁸ Exhibit EA-2019-006-04; Exhibit EA-2019-007-04.

[15] Subsection 2(1) of *SIMA* defines a “scope ruling” as follows:

. . . means a ruling made under subsection 66(1) as to whether certain goods are subject to an order of the Governor in Council imposing a countervailing duty made under section 7, an order or finding of the Tribunal or an undertaking in respect of which an investigation has been suspended under subparagraph 50(a)(iii).

[16] Scope rulings are further provided for in sections 63 to 70 of *SIMA*.

[17] Subsection 66(6) of *SIMA* provides that “[i]n making a scope ruling, the President shall take into account any prescribed factors and any other factor that the President considers relevant.”

[18] Subsection 54.6 of the *Special Import Measures Regulations*⁹ prescribes the factors to be taken into account. The factors depend on the type of scope ruling. The three types of scope rulings are: (1) scope ruling as to whether goods at issue are of the *same description* as goods to which an *order or finding* of the Tribunal applies; (2) scope rulings as to whether goods at issue are of the *same description* as goods to which an *undertaking* applies; and (3) scope rulings as to whether goods at issue originate in a country that is subject to the applicable order, finding or undertaking or originate in a third country.

[19] The scope ruling on appeal is of the first type. It concerns whether IT/VIT are of the same description as the goods to which the Tribunal finding in *OCTG I* or *Seamless Casing* applies. With respect to this type of scope ruling, subsection 54.6 of the *Regulations* provides as follows, in relevant part:

(a) in all cases,

(i) the physical characteristics of the goods in respect of which the scope proceeding has been initiated, including their composition,

(ii) their technical specifications,

(iii) their uses,

(iv) their packaging, including any other goods contained in the packaging, along with the promotional material and documentation concerning the goods in respect of which the scope proceeding has been initiated, and

(v) their channels of distribution;

(b) for a ruling as to whether goods in respect of which the scope proceeding has been initiated are of the same description as goods to which an order of the Governor in Council or an order or finding of the Tribunal applies,

(i) the description of the goods referred to in that order or that order or finding,

(ii) in the case of an order or finding of the Tribunal, the reasons for the order or finding, and

⁹ SOR/84-927 [*Regulations*].

(iii) any relevant decision by the Tribunal, the Federal Court of Appeal, the Supreme Court of Canada, or a panel under Part I.1 or II of the Act;

[20] Subsection 61(1.1) of *SIMA* provides a right to appeal a scope ruling made by the CBSA to the Tribunal. Regarding the jurisdiction of the Tribunal to make orders or findings, subsection 61(3) provides as follows:

On any appeal under subsection (1) or (1.1), the Tribunal may make such order or finding as the nature of the matter may require and, without limiting the generality of the foregoing, may declare what duty is payable or that no duty is payable on the goods with respect to which the appeal was taken, and an order, finding or declaration of the Tribunal is final and conclusive subject to further appeal as provided in section 62.

[21] The above provisions on scope rulings were added to *SIMA* through the *Budget Implementation Act*, 2017, No. 1.¹⁰ The preamble of this act provided the following summary of the relevant amendments: “Division 1 of Part 4 amends the Special Import Measures Act to provide for binding and appealable rulings as to whether a particular good falls within the scope of a trade remedy measure”

[22] Thus, in essence, the 2017 amendments to *SIMA* created a new mechanism, open to prescribed parties, to seek determinations from the CBSA as to whether certain goods are subject to a Tribunal finding or order, beyond the context of the CBSA’s determination of the duties applicable to specific import transactions.

[23] Both parties in these appeals submitted that these appeals proceed *de novo* and are not limited to evidence and arguments considered by the CBSA. The Tribunal agrees.

POSITIONS OF THE PARTIES

WAT and Tenaris

[24] WAT and Tenaris submitted that IT/VIT are covered by the Tribunal’s findings in *OCTG I* and/or *Seamless Casing*. However, WAT and Tenaris clarified at the hearing that their position is that IT/VIT are tubing products (covered by *OCTG I*). They indicated that the *Seamless Casing* finding is “very likely irrelevant to the hearing” and only an alternative argument,¹¹ and that the *OCTG I* finding is the one that they are asking for the Tribunal to apply.¹² Given this clarification, the Tribunal will not consider this alternative argument further.

¹⁰ S.C. 2017, c. 20.

¹¹ In this regard, the alternative argument put forward by WAT and Tenaris was that IT/VIT can be treated as its fundamental components, i.e. two pieces of API 5CT pipe. Following this argument, the simple welding of two pieces of API 5CT pipe should not remove the goods from coverage of a finding. As such, depending on the size of the individual pipes, and whether they are seamless or welded, each component pipe may fall under either the *Seamless Casing* or *OCTG I* findings. In response, the CBSA submitted that the determination of whether goods are of the same description as the goods to which a Tribunal finding applies must be based on an examination of the goods as a whole, in the manner in which they were presented at the time of importation, and that in any event, the splitting of IT/VIT into component pipes is neither an industry practice, nor economically feasible.

¹² *Transcript of Public Hearing* at 8, 133.

[25] WAT and Tenaris submitted that IT/VIT are subject OCTG because they are used to perform the same task as non-insulated or bare OCTG, i.e. they are used in downhole wells to convey fluids. As well, IT/VIT meet API specification 5CT, as the main components of IT/VIT are API 5CT casing or tubing, and the additional processing of the IT/VIT, including upgrading to another standard, does not negate compliance with API specification 5CT. In this regard, WAT and Tenaris submitted that the CBSA's scope ruling analysis proceeds on the erroneous assumption that OCTG meeting API specification 5CT is synonymous with bare OCTG. WAT and Tenaris also submitted that IT/VIT meet a standard equivalent to API specification 5CT, as envisioned by the description of the goods subject to *OCTG I*; specifically, WAT and Tenaris submitted that Chinese standard SY/T5324-2013, is an equivalent standard within the meaning of the product description of *OCTG I*.

[26] WAT and Tenaris submitted that if IT/VIT are considered as a whole, they are subject to *OCTG I* and not to *Seamless Casing*, since IT/VIT typically do not function as casing, but rather as tubing, even though they can have an outer diameter that is more typically associated with casing.

[27] Finally, WAT and Tenaris submitted that protecting the domestic industry requires IT/VIT to be covered by the findings. They submitted that IT/VIT are substitutable for and compete directly in the same applications as certain domestically produced OCTG. Some customers choose to use bare OCTG in SAGD or CSS or oil-producing wells, while other customers choose IT/VIT and some customers use a mix. WAT and Tenaris submitted that, to interpret the findings in a manner consistent with the purpose of *SIMA* of protecting a domestic industry, the Tribunal should find that IT/VIT are simply an improved form of OCTG with better insulation characteristics and are covered by the finding in *OCTG I*.

CBSA

[28] The CBSA requested that the appeals be dismissed. The CBSA highlighted that the sole question in these appeals is whether the goods in issue fall within the scope of the Tribunal's finding in *OCTG I*. The CBSA argued that IT/VIT are different from the goods subject to that finding, having regard to their physical characteristics, composition, technical specifications, uses, and product marketing.

[29] The CBSA submitted that, physically, IT/VIT are new and finished products which are distinct from the tubes that are components in its production. IT/VIT have been further worked beyond the fabrication and finishing processes defined in the Tribunal's finding, to produce a different product.

[30] The CBSA submitted that, contrary to the assertion made by WAT and Tenaris that IT/VIT and non-insulated OCTG are used by customers interchangeably, IT/VIT have no feasible use in standard drilling operations. The CBSA argued that given the enhanced cost of IT/VIT and the specialized environment in which they are intended to be used, it is not an economically feasible substitute for OCTG tubing and casing in a conventional well. It added that, in any event, the fact that two tools may be used in the same application does not mean that they are the same goods.

[31] The CBSA also submitted that the promotional material and documentation concerning IT/VIT demonstrate that IT/VIT are distinct products from the goods in issue.

[32] The CBSA further submitted that any arguments as to whether IT/VIT from China are causing injury to the domestic IT/VIT industry are inapposite. The CBSA submitted that the Tribunal has no jurisdiction to engage in an injury inquiry in the context of a scope proceeding.

ANALYSIS

[33] As noted above, the *Regulations* set out the factors to be considered in scope proceedings. The prescribed factors notably include: the product definition in the relevant order or finding, the Tribunal reasons, the physical characteristics of the goods, their technical specifications, their channels of distribution, and their uses. This list is non-exhaustive.¹³

[34] While, as noted above, scope proceedings are a relatively novel feature in Canadian law, the type of inquiry performed is similar to the type of analysis required in certain appeals brought pursuant to subsection 61(1) of *SIMA*,¹⁴ aiming to determine whether imported goods are of the same description as goods described in a Tribunal order or finding (i.e. subjectivity appeals). The factors prescribed in respect to this type of scope rulings track some of those that the Tribunal has historically considered in subjectivity appeals under subsection 61(1).

[35] A scope ruling (of the type discussed in this case) concerns only the question of whether the goods in issue are covered by the scope of an existing Tribunal order or finding. In particular, in this analysis the question of whether the goods in issue have caused injury or retardation or threaten to cause injury to a domestic industry is not relevant as such; the question is rather whether the goods in issue are of the *same description* as goods subject to a Tribunal order or finding. As well, given its specific purpose, a scope ruling requires a different analytical framework than questions such as classes of goods or product exclusions (in injury inquiries under *SIMA*), even though the factors relevant to each may overlap to some extent. These analyses and their different objectives should not be confused.

Description of the goods in the Tribunal's finding and reasons

[36] The finding in *OCTG I*¹⁵ describes the goods in issue as follows:

Oil country tubular goods including, in particular, casing and tubing, made of carbon or alloy steel, welded or seamless, heat-treated or not heat-treated, regardless of end finish, having an outside diameter from 2 3/8 inches to 13 3/8 inches (60.3 mm to 339.7 mm), meeting or supplied to meet American Petroleum Institute specification 5CT or equivalent standard, in all grades, excluding drill pipe, seamless casing up to 11 3/4 inches (298.5 mm) in outside diameter, pup joints, welded or seamless, heat-treated or not heat-treated, in lengths of up to 3.66 m (12 feet), and coupling stock, originating in or exported from the People's Republic of China.

[37] The statement of reasons for the Tribunal's finding in *OCTG I* provides additional information on the product, as follows:

23. Oil country tubular goods are carbon or alloy steel pipes used for the exploration and exploitation of oil and natural gas. The product definition includes non-prime and secondary

¹³ Subsection 66(6) of *SIMA*.

¹⁴ See, for example, *Colonial Élégance Inc. v. President of the Canada Border Services Agency* (11 September 2013), AP-2012-038 (CIIT) at para. 12.

¹⁵ Tribunal's finding in *OCTG I*, as continued in *OCTG I Expiry Review I* and *OCTG I Expiry Review II*.

pipes (limited service products). It also includes intermediate or in-process tubular goods (green tubes) that require additional processing, such as threading, heat treatment or testing, before they can meet the requirements of a particular API specification.

24. Casing is used to prevent the walls of an oil or gas well from collapsing, both during drilling and after completion of the well. Tubing is used within the casing to convey oil and gas to the surface. Both casing and tubing must be able to withstand outside pressure and internal yield pressures within an oil or gas well. They must also have sufficient joint strength to hold their own weight and must be equipped with threads sufficiently tight to contain the well pressure where lengths are joined.

25. Oil country tubular goods, including coupling stock, meet or are supplied to meet API specification 5CT, in all applicable grades, including but not limited to, H40, J55, K55, M65, N80, L80, L80 HC, L80 Chrome 13, L80 LT, L80 SS, C90, C95, C110, P110, P110 HC, P110 LT, T95, T95 HC, and Q125, or proprietary grades manufactured as substitutes for these specifications. The most common grades of low-strength casing and tubing are J55, K55 and H40. Heat-treated grades (e.g. N80, P110, and L80) are more sophisticated grades of pipes and are used in deeper wells and more severe environments, such as low-temperature services, sour service and heavy oil recovery. Pursuant to the ERCB's latest revision of Directive 010, issued on December 22, 2009, casing used in sour service wells above 0.3 kPa partial pressure of hydrogen sulphide in Alberta must meet certain material and testing specifications that are additional to those of API specification 5CT.¹⁶

[38] In *OCTG I Expiry Review I*, the Tribunal similarly described the goods in issue, as follows:

9. As explained in previous proceedings, OCTG are carbon or alloy steel pipes, either welded or seamless, used for the exploration and exploitation of oil and natural gas. The product definition includes non-prime and secondary pipes (limited service products). It also includes intermediate or in-process tubular goods (green tubes) that require additional processing, such as threading, heat treatment or testing, before they can meet the requirements of a particular API specification.

10. Casing is used to prevent the walls of an oil or gas well from collapsing, both during drilling and after completion of the well. Tubing is used within the casing to convey oil and gas to the surface. Both casing and tubing must be able to withstand outside pressure and internal yield pressures within an oil or gas well. They must also have sufficient joint strength to hold their own weight and must be equipped with threads sufficiently tight to contain the well pressure where lengths are joined.

11. OCTG meet or are supplied to meet API specification 5CT, in all applicable grades, including but not limited to H40, J55, K55, M65, N80, L80, L80 HC, L80 Chrome 13, L80 LT, L80 SS, C90, C95, C110, P110, P110 HC, P110 LT, T95, T95 HC and Q125, or proprietary grades manufactured as substitutes for these specifications. The most common grades of low-strength casing and tubing are J55, K55 and H40. Heat-treated grades (e.g. N80, P110 and L80) are more sophisticated grades of pipe and are used in deeper wells

¹⁶ *OCTG I* at paras. 23-25. As noted in the Tribunal's statement of reasons, this information was derived in part from the CBSA's statement of reasons for its preliminary determination of dumping and subsidizing.

and more severe environments, such as low-temperature services, sour service and heavy oil recovery.¹⁷

[39] The dispute between the parties in this case relates primarily to whether the goods in issue are OCTG and whether they are supplied to meet API specification 5CT or an equivalent standard, within the meaning of the Tribunal's finding.¹⁸ The Tribunal will therefore begin its analysis by considering these terms.

[40] WAT and Tenaris argued that the Tribunal defined OCTG as "carbon or alloy steel pipes, either welded or seamless, used for the exploration and exploitation of oil and natural gas," and elaborated that "[t]ubing is used within the casing to convey oil and gas to the surface."¹⁹

[41] Further, WAT and Tenaris argued that the API 5CT definition of tubing is "[p]ipe placed in a well to produce or inject fluids." They therefore argued that the product definition recognizes that tubing, a form of OCTG, can carry fluids (e.g. oil and gas) to the surface or take fluids to the formation (e.g. water vapour).

[42] WAT and Tenaris argued that the nature of API specification 5CT is a baseline specification, setting various minimum function requirements for OCTG; and that API specification 5CT permits enhancements beyond these minimums. For example, there is no provision in API specification 5CT that prohibits adding insulation around tubing; API specification 5CT is silent on the issue.

[43] As such, WAT and Tenaris argued that the scope of the finding covers goods that meet or are supplied to meet enhanced specifications that exceed API specification 5CT. WAT and Tenaris argued that the Tribunal has explained that the reference in its order to "equivalent standard, in all grades" includes "proprietary grades manufactured as substitutes for these [API] specifications."²⁰ They further noted that in *OCTG II*, finding covering goods of a similar description but originating in other countries, the Tribunal clarified that "these proprietary grades are not necessarily API certified, but, rather, are made to proprietary standards which exceed API specification 5CT."²¹

[44] In addition, WAT and Tenaris argued that, while there is no North American standard specific to the manufacturing of IT/VIT, Chinese standard SY/T5324-2013, which addresses VIT, is an equivalent standard within the meaning of the finding. Namely, this standard *requires compliance with* API specification 5CT *as a baseline* and then imposes additional, supplementary, requirements beyond those of API specification 5CT. WAT and Tenaris argued, on that basis, that the Chinese standard is an equivalent standard that exceeds the API specification 5CT requirements.

[45] The CBSA responded that the description of the goods subject to the finding makes no reference to IT/VIT.

¹⁷ *OCTG I Expiry Review I* at paras. 9-11.

¹⁸ As noted by WAT and Tenaris, there is no dispute between the parties that the goods in issue meet the following definition requirements: made of carbon or alloy steel; in outer diameters from 2 3/8 inches to 13 3/8 inches; not otherwise excluded from the definition; and originate in or are exported from China.

¹⁹ *OCTG I Expiry Review I* at para. 10.

²⁰ *Ibid.* at para. 11.

²¹ *Oil Country Tubular Goods* (17 April 2015), NQ-2014-002 [*OCTG II*] at fn. 10. WAT and Tenaris argued that although this statement was made in the context of *OCTG II*, it was equally applicable to *OCTG I* because the explanation concerned the same language as was used in *OCTG I*.

[46] The CBSA further argued that API specification 5CT also makes no reference to IT/VIT and does not set any standards for thermal insulation. Further, a distinct Chinese standard (i.e. SY/T5324-2013) for IT/ VIT exists. The CBSA argued that WAT and Tenaris’s argument that the tubes used in manufacturing IT/ VIT do not cease being compliant with API specification 5CT misses the point. They argued that while the Chinese standard incorporates API specification 5CT at a number of points, e.g. the standard that the component pipes must meet, i.e. straightness criteria for the finished product, it goes beyond API specification 5CT and prescribes standards specific to IT/VIT, including for various degrees of insulation.

[47] The Tribunal recalls, as set out above, that the finding applies to “[o]il country tubular goods including . . . tubing. . . .” Furthermore, according to the Tribunal’s statement of reasons, “[t]ubing is used within the casing to convey oil and gas to the surface.”

[48] Nothing in the Tribunal’s finding or statement of reasons appear to otherwise constrain the meaning of the word “tubing.” In addition, this application is consistent with the definition retained by API specification 5CT, which, as submitted by WAT and Tenaris, is “[p]ipe placed in a well to produce or inject fluids.”²²

[49] Furthermore, the Tribunal accepts on the evidence before it that the API specification 5CT is a minimum standard that contemplates a range of goods of increasing sophistication and that there is no maximum or different API standard that causes OCTG with enhanced properties to no longer be OCTG within the relevant 5CT standard.²³

[50] Mr. David McHattie explained in his oral testimony that API specification 5CT is mainly focused on the mechanical and chemical properties of the goods and that, when grades are enhanced, the intent is to exceed those properties. He further explained that these enhanced grades are proprietary to the company that developed them and that, as a result, the proprietary specifications of two different companies will never be exactly the same.²⁴ Mr. McHattie testified that, Tenaris develops new products that exceed API specification 5CT, but do not have another general standard that governs them.²⁵ Mr. McHattie also identified examples of OCTG products with enhancements (e.g. sour grade products) that exceed the minimum requirements of API specification 5CT.²⁶

[51] Moreover, this is consistent with the description of the goods subject to the Tribunal’s finding, which expressly recognizes that OCTG includes a range of pipe of increasing sophistication,

²² Exhibit EA-2019-006-05G (protected) at 30. See also Exhibit EA-2019-006-05 at para. 64.

²³ *Transcript of Public Hearing* at 35-37, 85. Furthermore, as identified in WAT and Tenaris’s written submissions, provisions of API specification 5CT standard envisage, in different respects, that OCTG may be enhanced beyond the requirements set out in the standard. These include the following: “By agreement between the purchaser and manufacturer, this standard can also be applied to other plain-end pipe sizes and wall thicknesses.” (Exhibit EA-2019-006-05G [protected] at 23); “This standard can also be applied to tubulars with connections not covered by API standards.” (Exhibit EA-2019-006-05G [protected] at 23); “Pipe with end-finish not specified in this standard may be furnished if specified in the purchase agreement.” (Exhibit EA-2019-006-05G [protected] at 60); “NOTE 2 The application of API connections or pipe at elevated temperature or in sour service conditions is beyond the scope of this standard.” (Exhibit EA-2019-006-05G [protected] at 309). All excerpts quoted on the public record are in Exhibit EA-2019-006-05 at para. 71.

²⁴ *Transcript of Public Hearing* at 39.

²⁵ *Ibid.* at 36-37, 39.

²⁶ *Ibid.* at 11.

that are used in deeper wells and more severe environments, such as heavy oil recovery.²⁷ Further, as noted by WAT and Tenaris in their submissions, the reference to “equivalent standard, in all grades” includes “proprietary grades manufactured as substitutes for these [API] specifications.”

[52] Having regard to the foregoing, the Tribunal also accepts WAT and Tenaris’s argument that Chinese standard SY/T5324-2013 is an “equivalent standard” to API specification 5CT within the meaning of the product definition. The evidence before the Tribunal indicates that this standard requires compliance with API specification 5CT as a baseline and then imposes additional requirements beyond those of API specification 5CT, in particular in regard to thermal insulation.²⁸ Finally, the evidence is clear that there is no North American standard specific to the manufacturing of IT/VIT.²⁹

Are the goods in issue “[o]il country tubular goods including . . . tubing . . . meeting or supplied to meet American Petroleum Institute specification 5CT or equivalent standard . . .”?

Physical characteristics and technical specifications

[53] WAT and Tenaris argued that IT/VIT are made to meet API specification 5CT or equivalent specifications, as is OCTG. They argued that IT/VIT are essentially a piece of API 5CT (or equivalent) casing or tubing, enclosed in an outer layer of insulation and an outer layer of pipe.

[54] WAT and Tenaris further submitted that there was no dispute whether the input pipes used to produce IT/VIT meet API specification 5CT and that even after the input tubes are combined into IT/VIT, the IT/VIT continue to meet the requirements of API 5CT, including the mechanical (yield and tensile strength), chemical and dimensional requirements.

[55] WAT and Tenaris argued that the insulation and outer layer of pipe does not detract from the API 5CT mechanical, dimensional, or chemical characteristics. They argued that these additional characteristics of IT/VIT do not mean it no longer meets API specification 5CT. For example, there is no provision in API specification 5CT that prohibits adding insulation around tubing; API 5CT is silent on the issue. Thus, according to WAT and Tenaris, IT/VIT meets the characteristics required by API specification 5CT, and IT/VIT have other characteristics that are not restricted or prohibited by API specification 5CT.

[56] WAT and Tenaris submitted that the primary purpose and use of IT/VIT, like bare OCTG tubing, is to convey fluids – IT/VIT are tubing that cycles between conveying fluids (like oil and gas) to the surface and conveying fluids downhole in CSS applications or is used to convey fluids downhole in SAGD operations. On this basis, they argued that IT/VIT meet this requirement of the product definition.

[57] WAT and Tenaris further argued that the characteristics of the processed API 5CT OCTG are not significantly altered by the production process of IT/VIT. WAT and Tenaris argued that the affixed parts (i.e. stabilizers, seal rings, vacuum valve, insulation liners) relied on in the CBSA’s

²⁷ See, for example, *OCTG I* at para. 25, which refers to “proprietary grades,” grades of different levels of sophistication, such as those used in deeper wells and more severe environments such as sour service and heavy oil recovery. This paragraph, *in fine*, also expressly suggests that subject OCTG may be subject to certain specifications that are additional to those of API specification 5CT.

²⁸ Exhibit EA-2019-006-05B at para. 3.

²⁹ *Ibid.*

decision to find that IT/VIT are an “altogether different good” are minor and optional, depending on the type of IT/VIT. They also argued that while there are differences in thermal conductivity between IT/VIT and OCTG, this does not change the essential element or purpose of the goods (i.e. to convey fluids).

[58] The CBSA argued that IT/VIT are different goods from the goods subject to the Tribunal’s finding in *OCTG I* because their physical characteristics are different from those of OCTG tubing. The CBSA indicated that it agrees that the two individual tubes used as components of IT/VIT, viewed prior to further production, would be subject to the finding. However, it submitted that the question is whether the IT/VIT manufacturing process creates a new product that is not subject to the finding. To this point, the CBSA noted that in the scope proceeding before the CBSA, producers/exporters and importers/resellers of IT/VIT provided evidence to confirm that manufacturing IT/VIT involves additional technology, know-how, and manufacturing process beyond those used in producing the goods in issue.

[59] The CBSA argued that it is significant that the descriptions of the goods in issue specify “heat-treated or non-heat-treated” and address the question of end finish but make no reference to additional manufacturing processes, including manufacturing processes that would increase the thermal resistance of the tubing material. The CBSA argued that manufacturing processes that transform steel tubing into a material having very low thermal conductivity and that is effective at retaining very high temperatures, effect a major change in the properties of the material. The CBSA submitted that the Tribunal has recognized, in *Aluminium Extrusions*³⁰ and subsequent cases that products that use subject goods as an input may be transformed to an extent that they become different products that are beyond the scope of the subject goods. The CBSA noted that, in these cases, the Tribunal considered whether the goods in issue maintained the same physical and technical characteristics as the subject goods. The CBSA submitted that IT/VIT are goods further processed beyond the scope of the finding as a result of their physical and technical transformation.

[60] The evidence indicates that the goods in issue are made of two OCTG pipes meeting API specification 5CT which are welded together and fitted with insulation and other parts. As explained by Mr. Larry Kryska, IT/VIT can be anything from a double walled casing/tubing with the annulus (i.e. the space between the two pipes) containing just air, to two pieces of casing/tubing being separated by various types of insulation or a vacuum with insulation.³¹

[61] In his testimony, Mr. Kryska explained that the IT production process does not change the mechanical or chemical properties of the goods.³² According to Mr. Kryska, IT/VIT continue to meet API specification 5CT such as the mechanical, chemical and dimensional requirements.³³

[62] Mr. Kryska also testified to how IT/VIT are manufactured, from the selection of the inner and outer tube that comply with API specification 5CT to the addition of various steps depending on

³⁰ *Aluminum Extrusions*, (17 March 2009), NQ-2008-003 (CITT) at para. 95.

³¹ Exhibit EA-2019-006-05B at paras. 4-5, 8; Exhibit EA-2019-006-05C (protected) at para. 8. See also *Transcript of Public Hearing* at 23, 47-48.

³² *Transcript of Public Hearing* at 76.

³³ Exhibit EA-2019-006-05B at para. 4; Mr. Kryska confirmed the same point in cross-examination, *Transcript of Public Hearing* at 88-89. See also the testimony of Mr. McHattie, *Transcript of Public Hearing* at 16.

the type of insulation chosen for the product.³⁴ Mr. Kryska also noted that the manufacturing process of IT/VIT is proprietary to each company that makes it.³⁵

[63] The Tribunal finds that the physical characteristics and technical specifications of IT/VIT are consistent with those of the goods described in the Tribunal's finding. IT/VIT consist of one API 5CT pipe inserted into another which are welded together. This, and the affixed parts (e.g. stabilizers, seal rings, vacuum valve, insulation liners) do not substantially transform the IT/VIT into something that is no longer OCTG. Indeed, based on the evidence on the record, nothing in the additional processing and enhanced thermal properties of IT/VIT suggests that they no longer meet the baseline API specification 5CT.³⁶ Further, the evidence indicates that IT/VIT from China may be made and marketed to the Chinese standard SY/T5324-2013,³⁷ which, as noted above, the Tribunal finds to be an "equivalent standard" to API 5CT for the purposes of the *OCTG I* finding.

[64] As such, the Tribunal finds no basis to conclude that IT/VIT products are different from the OCTG described in the Tribunal's finding. While the added processing and physical elements of IT/VIT bestow them with enhanced thermal properties and makes them relatively expensive speciality products,³⁸ the Tribunal does not agree that the nature of the goods is changed to such an extent that they fall outside of the Tribunal's finding.

[65] Finally, the Tribunal is of the view that the relevance of the transformation or further processing of the goods depends on the wording of the product definition and/or the Tribunal's reasons in the order at issue. The issue of further processing was a key one in *Aluminium Extrusions* because the product definition was worded in terms of manufacturing processes. In that case, the subject goods were defined specifically as having been produced via an extrusion process. By comparison, the manufacturing process of the subject goods is less relevant in the present case. While the product definition in *OCTG I* does reference aspects of the manufacturing process,³⁹ it does not define the subject goods in terms of a specific process, as in the case of *Aluminium Extrusions*. Rather, in the Tribunal's view, the main governing features of the description of the *OCTG I* goods relevant to this case is that they are tubing meeting API specification 5CT or an equivalent standard. The goods in issue satisfy these criteria, as also further discussed below.

Uses of the goods

[66] WAT and Tenaris argued that IT/VIT are OCTG because IT/VIT are tubular steel products used in downhole oil and gas wells to facilitate extraction of oil. They argued that IT/VIT are fully interchangeable with tubing and can be used in place of bare tubing. Likewise, they argued that, while IT/VIT have benefits over bare OCTG in CSS and SAGD wells, bare tubing can be used instead of IT/VIT in certain applications. They argued that the decision whether to use IT/VIT or bare OCTG is an economic decision based on a complex analysis taking into account the desired rate of extraction, the prices of the two types of OCTG, as well as other factors.

³⁴ Exhibit EA-2019-006-05C (protected) at paras. 16-20. See also *Transcript of Public Hearing* at 64-67.

³⁵ Exhibit EA-2019-006-05B at para. 4.

³⁶ Both Mr. Kryska and Mr. McHattie testified that IT meets the requirements of API specification 5CT; *Transcript of Public Hearing* at 16, 49-50, 75-76, 85-89.

³⁷ For example, *Transcript of Public Hearing* at 103.

³⁸ Exhibit EA-2019-006-10A (protected) at 6-8, 16, 23-27, 60-62; Exhibit-2019-006-10 at 26, 46-47, 49, 56; Exhibit EA-2019-006-05F at 8-12.

³⁹ See also *OCTG I* at paras. 26-29, which provides an additional description of the manufacturing process of OCTG.

[67] The CBSA argued that IT/VIT are many times more expensive than non-insulated OCTG, and are therefore unlikely to be used interchangeably with non-insulated OCTG as no company would use VIT in place of regular OCTG in wells where there is no steam injection, as doing so would be too expensive. The CBSA argued that IT/VIT are used when the thermal properties of the tubing used are important to the application and justify the additional cost. Those applications include steam injection wells in SAGD operations in the oil sands and CSS in heavy oil fields. In addition, the CBSA argued that evidence gathered during its scope proceeding indicated that a number of major Canadian oil sands producers have realized that regular OCTG is not the best technical approach for SAGD wells, as OCTG results in heat loss and using VIT is more energy efficient and has less of a carbon impact.

[68] Mr. McHattie testified before the Tribunal that IT/VIT are generally used in SAGD and CSS wells for their higher properties of thermal conductivity.⁴⁰ Further, Mr. Kryska and Mr. McHattie explained that while IT/VIT have benefits over bare casing and tubing in CSS and SAGD wells, IT/VIT and bare casing are generally interchangeable in these wells.⁴¹ To this point, they listed end users that run bare casing and tubing in their CSS and SAGD wells.⁴² Mr. Kryska also explained that IT/VIT can be used in fracking operations to absorb the shock of explosion, to preserve permafrost, and in conventional deep oil-producing wells in place of bare API 5CT tubing to carry the oil out of the well; in this case, IT/VIT will assist in maintaining oil temperatures above 80 degrees Fahrenheit to avoid paraffin and wax deposits which cause the production well to plug.⁴³ The Tribunal notes that the interchangeability of IT/VIT and non-insulated OCTG in CSS and SAGD wells and conventional deep oil-producing wells was recognized in the statement of reasons for the CBSA's scope proceeding.⁴⁴

[69] In the responses to requests for information received during the CBSA scope proceeding that were filed on the Tribunal's record by the parties, there were multiple respondents who indicated that non-insulated OCTG and IT/VIT are used for different purposes and are not interchangeable.

[70] Golden Ring Industrial Limited-Liability Company Liaohe Oilfield Panjin (Golden Ring) and Exceed (Canada) Oilfield Equipment Inc. (Exceed [Canada]) stated that many major oil companies in Canada, such as Cenovus, Husky, CNRL, Suncor, and CNOOC, have realized that "regular" OCTG is not the best technical approach for SAGD wells because most of the heat is lost into surface formations and cap rocks before reaching the targeted oil reservoirs.⁴⁵ Other respondents made similar statements regarding the function of OCTG relative to IT/VIT. Zibo Freet Thermal Tech Co., Ltd. (Zibo Freet) stated that OCTG is used for regular light oil production and IT/VIT is used as a heat insulation and steam injection tool for heavy oil, super heavy oil and Asphaltene heavy oil thermal recovery production.⁴⁶ Tianjin Pipe Corporation (TPCO) stated that OCTG brings oil down hole to the surface for further transportation or treatment and VIT provides temperature protection to reduce heat loss and increase production efficiency.⁴⁷ ANDMIR Group Canada Inc. stated that

⁴⁰ *Transcript of Public Hearing* at 13.

⁴¹ Exhibit EA-2019-006-05B at paras. 11-14; Exhibit EA-2019-006-05D at paras. 7-11; see also *Transcript of Public Hearing* at 26-31.

⁴² Exhibit EA-2019-006-5C (protected) at para. 14; Exhibit EA-2019-006-5E (protected) at para. 11.

⁴³ Exhibit EA-2019-006-5B at para. 15; *Transcript of Public Hearing* at 60-62.

⁴⁴ Exhibit EA-2019-006-01 at paras. 9-10.

⁴⁵ Exhibit EA-2019-006-05F at 42; Exhibit EA-2019-006-10 at 62. Golden Ring further noted that in China, CNPC and SNOPEC use only VIT in SAGD and CSS wells.

⁴⁶ Exhibit EA-2019-006-05F at 9.

⁴⁷ Exhibit EA-2019-006-10 at 26.

OCTG is used to convey fluids or gas in an oil well and IT/VIT's principal function is to insulate the medium fluid to save energy.⁴⁸ Imex Canada Inc. stated that OCTG is used to provide structure and/or simple flow conduit and IT/VIT is used to reduce heat losses to oil reservoirs and to guarantee the structural integrity of the wells.⁴⁹ Continental Steel Corporation stated that unlike OCTG, VIT is not to be used as general casing and tubing down hole and is primarily used in SAGD operations to make wells more efficient.⁵⁰

[71] In addition, Golden Ring and Exceed (Canada) stated that no company would use VIT in place of regular OCTG in wells where there is no steam injection because it would be too expensive.⁵¹ ANDMIR similarly noted that IT/VIT are approximately four or five times more expensive than similarly sized non-insulated tubing or casing.⁵²

[72] The Tribunal finds on the evidence that IT/VIT are used to perform the same fundamental task as non-insulated OCTG, i.e. they are used in downhole wells to convey fluids. IT/VIT essentially provide advantages and efficiencies in doing so, notably thermal insulation, which are economically justified in particular applications. At the same time, some customers choose to use non-insulated OCTG in SAGD, CSS or oil-producing wells, while other customers choose IT/VIT, and some customers use a mix. While the enhanced thermal properties and costs of IT/VIT may not be needed or economically justified in less exigent applications, such that, as put by counsel for the CBSA, they are used in "a subset of the world of OCTG for which it would make sense to use IT or VIT,"⁵³ the Tribunal does not find this situation to be inconsistent with the description of the goods subject to the Tribunal's *OCTG I* finding and statement of reasons; as noted above, the description of the goods subject to the finding envisions a range of sophistication between subject OCTG, with the more sophisticated grades being used in more severe environments.

Channels of distribution

[73] WAT and Tenaris argued that the channels of distribution for IT/VIT and non-insulated OCTG are the same. The CBSA did not make any arguments with respect to channels of distribution.

[74] Mr. McHattie testified that IT/VIT and other OCTG are sold through the same distributors to the same customers, and distributors commonly offer bundled packages of OCTG.⁵⁴ Mr. Kryska similarly identified examples of distributors that sell both non-insulated tubing and IT/VIT, and end users that buy these goods through distributors.⁵⁵

[75] In the responses to requests for information received during the CBSA scope proceeding, Zibo Freet indicated that distribution channels are different for non-insulated OCTG and IT/VIT. Zibo Freet stated that the main differences are manufacturers' technical support, customization as per

⁴⁸ *Ibid.* at 56.

⁴⁹ *Ibid.* at 76.

⁵⁰ *Ibid.* at 86.

⁵¹ Exhibit EA-2019-006-05F at 42; Exhibit EA-2019-006-10 at 61.

⁵² Exhibit EA-2019-006-10 at 56; see also Exhibit EA-2019-006-10A (protected) at 9-11, 27-28, 47-49, 24, 64-65, 100-105.

⁵³ *Transcript of Public Hearing* at 153.

⁵⁴ Exhibit EA-2019-006-05D at para. 14; *Transcript of Public Hearing* at 17-18.

⁵⁵ *Transcript of Public Hearing* at 81.

technical approval from engineers, threading support, and after-sales service, including training and installation.⁵⁶

[76] In considering the evidence before it, the Tribunal is not persuaded that the relevant channels of distribution are different for OCTG and IT/VIT. The Tribunal is of the view that the evidence that IT/VIT and non-insulated OCTG are sold through the same distributors to the same customers indicates that IT/VIT and non-insulated OCTG are sold through the same channels of distribution.

Promotional material and documentation

[77] WAT and Tenaris argued that promotional material from TMK Group, filed by TPCO as part of its response to a Request for Information in the CBSA's scope proceeding, demonstrates that VIT is considered to be a subset of OCTG.

[78] The CBSA argued that Victoria International Tubular Corporation's website and a product brochure from Western Alliance Tubulars demonstrate that IT/VIT are advertised as being separate products from OCTG. Regarding the website specifically, the CBSA argued that VIT is one of four separate product categories presented, the other three being "Tubing," "Casing," and "Premium Connection." The CBSA also noted that TMK Group's website page, as referred to by WAT and Tenaris, is followed by a brochure which is only about VIT and does not seem to have any mention of OCTG.

[79] In oral testimony, Mr. Kryska stated that there are not four separate product categories, but rather product lines that are used in combination with one another. As an example, Mr. Kryska explained that premium connections can be put on tubing and casing and that VIT works with tubing and casing.⁵⁷

[80] The parties also referred to promotional material from TMK Group.⁵⁸

[81] The Tribunal finds the arguments concerning promotional material and documentation and the differing opinions on the issue of "product categories" versus "product lines" to not be determinative, particularly relative to other factors such as physical characteristics, technical specifications and uses.

Other issues

Ownership by Moosomin First Nation

[82] Regarding the ownership interest in WAT by the Moosomin First Nation (signatory to Treaty 6), the Tribunal notes that, while it is sympathetic to the aspirations of indigenous peoples, the ownership of an appellant is not a relevant consideration in determining whether IT/VIT are subject to the Tribunal's finding in *OCTG I*.

⁵⁶ Exhibit EA-2019-006-05F at 10.

⁵⁷ *Transcript of Public Hearing* at 78.

⁵⁸ Exhibit EA-2019-006-10 at 36-51.

Conclusion

[83] Having regard to the foregoing, the Tribunal finds that the goods in issue are of the same description as goods subject to the Tribunal's finding in *OCTG I*.

DECISION

[84] The appeals are allowed.

Peter Burn

Peter Burn

Presiding Member