

U.S. Customs and Border Protection



19 CFR PART 177

MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A PORTABLE FOOD ALLERGEN DETECTION DEVICE, SINGLE-USE PODS AND A STARTER KIT FROM CHINA AND VARIOUS OTHER COUNTRIES

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

ACTION: Notice of modification of one ruling letter, and of revocation of treatment relating to the tariff classification of a Portable Food Allergen Detection Device, Single-Use Pods and a Starter Kit.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying one ruling letter concerning tariff classification of a Portable Food Allergen Detection Device, Single-Use Pods and a Starter Kit under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 22, on June 9, 2021. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 14, 2021.

FOR FURTHER INFORMATION CONTACT: Patricia Fogle, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade Branch, at (202) 325–0061.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 22, on June 9, 2021, proposing to modify one ruling letter pertaining to the tariff classification of a Portable Food Allergen Detection Device, Single-Use Pods and a Starter Kit. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N305614, dated August 30, 2019, CBP classified a Portable Food Allergen Detection Device, Single-Use Pods and a Starter Kit in heading 9027, HTSUS, specifically in subheading 9027.50.80, HTSUS, which provides for "Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes; parts and accessories thereof: Other instruments and apparatus using optical radiations (ultraviolet, visible, infrared): Other: Other." In NY N305614, CBP

explicitly stated that the Section 301 remedy set forth in U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, does not apply to the Portable Food Allergen Detection Device and the Starter Kit.

In addition, CBP classified the Single Use Pods in heading 3822, HTSUS, specifically in subheading 3822.00.5090, HTSUS Annotated, which provides for “Diagnostic or laboratory reagents on a backing and prepared diagnostic or laboratory reagents, whether or not on a backing, other than those of heading 3002 or 3006; certified reference materials: Diagnostic or laboratory reagents on a backing, prepared diagnostic or laboratory reagents, whether or not on a backing, other than those of heading 3002 or 3006: Other.”

CBP has reviewed NY N305614 and has determined the ruling letter to be in error with respect to the applicability of the Section 301 remedy set forth in U.S. Note 20 to Subchapter III, Chapter 99, HTSUS. It is now CBP’s position that the Portable Food Allergen Detection Device and a Starter Kit (constituting of a Portable Food Allergen Detection Device and Single-Use Pods), which are classified in heading 9027, HTSUS, specifically subheading 9027.50.80, HTSUS, are subject to the Section 301 remedy pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, and therefore must also be entered under subheading 9903.88.01, HTSUS.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N305614 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H316429, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

GREGORY CONNOR
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachment

HQ H316429

August 31, 2021

OT:RR:CTF:EMAIN: H316429 PF

CATEGORY: Classification

TARIFF NO.: 9027.50.8015, 3822.00.5090,
9903.88.01

LINDA WEINBERG

BARNES & THORNBURG LLP

1717 PENNSYLVANIA AVENUE, NW, SUITE 500

WASHINGTON, DC 20006

Re: Modification of NY N305614; Tariff Classification of a Portable Food Allergen Detection Device, Single-Use Pods and a Starter Kit from China and various other countries

DEAR Ms. WEINBERG:

This is to inform you that U.S. Customs and Border Protection (“CBP”) has reconsidered New York Ruling Letter (“NY”) N305614, dated August 30, 2019, which you requested on behalf of your client, DOTS Technology Corp. NY N305614 involves the classification of a Portable Food Allergen Detection Device, Single-Use Pods and a Starter Kit when imported separately. We have determined that this ruling is incorrect with respect to the applicability of the Section 301 remedy set forth in U.S. Note 20 to Subchapter III, Chapter 99, Harmonized Tariff Schedule of the United States (HTSUS). Accordingly, for the reasons set forth below, CBP is modifying NY N305614.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 22, on June 9, 2021. No comments were received in response to this notice.

In NY N305614, the Portable Food Allergen Detection Device, Single-Use Pods and a Starter Kit were described as follows:

The food allergen detection device is a device used by consumers to test food for the presence of certain common food allergens. The food allergen detection device consists of numerous components including a detector unit, which contains an optical detection mechanism, lithium-ion battery and homogenization motor to drive the rotor in the pod. The fluorescent detection mechanism detects signals generated by the Signaling Polynucleotides (SPN) chemical reaction in the pod. The detector includes a light-emitting diode (LED) that excites fluorescent SPN, optical components that guide the LED to the detection chamber, lenses that collect the fluorescence, an imaging printed circuit board assembly, a fluorescence detector for measuring the emitted light, and a signal processor that analyzes fluorescence signals and transmits the identity of the allergen of interest to the visual display panel.

The DOTS’ single-use pod consists of a stadium-shaped plastic base and top, a fluidics panel, a rotor, and other components and is filled with SPN and a buffer solution. The fluidics panel component contains the assay that binds the active molecule, which detects the presence of the allergen protein. The chemical reaction between the SPN and assay yields a

detectable signal indicating the presence of the target allergen. In use, the pod is inserted into the food allergen device. The pod's rotor "blends" a cut food sample and releases protein from the food. The protein is then mixed with the SPN and buffer. When the SPN is bound to the assay via DNA: DNA interactions, a signal is produced that indicates the absence of the allergen protein in the protein extracted from the food sample. If the allergen protein is present in the protein extracted from the food sample, the binding interaction does not occur and no signal is produced. The user is alerted to the test results on the device.

The Starter Kits consist of one food allergen device packaged together with one or more pods.

In NY N305614, CBP classified the Portable Food Allergen Detection Device and the Starter Kit in subheading 9027.50.8015, HTSUS Annotated, which provides for "Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes; parts and accessories thereof: Other instruments and apparatus using optical radiations (ultraviolet, visible, infrared): Other: Other: Chemical analysis instruments and apparatus." In addition, CBP classified the Single-Use Pods in subheading 3822.00.5090, HTSUSA, which provides for "Diagnostic or laboratory reagents on a backing and prepared diagnostic or laboratory reagents, whether or not on a backing, other than those of heading 3002 or 3006: Other: Other."

CBP also determined, without clarifying the country of origin of the subject merchandise, that the Portable Food Allergen Detection Device, the Starter Kits (constituting the Portable Food Allergen Detection Device and Single-Use Pods), and Single-Use Pods, would not be subject to section 301 trade remedies.

ISSUE:

Whether the Portable Food Allergen Detection Device, Single-Use Pods and a Starter Kit are subject to the Section 301 Trade Remedy?

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation ("GRIs") and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation ("AUSR"). The GRIs and the AUSR are part of the HTSUS, and are considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

There is no dispute that the Portable Food Allergen Detection Device is classified in subheading 9027.50.80, HTSUS, which provides for "Instruments and apparatus for physical or chemical analysis (for example, pola-

rimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes; parts and accessories thereof: Other instruments and apparatus using optical radiations (ultraviolet, visible, infrared): Other: Other.” There is also no dispute that the Starter Kit, constituting the Portable Food Allergen Device and Single-Use Pods, constitute a set with the Portable Food Allergen Device being the item which provides the essential character pursuant to GRI 3(b). Accordingly, the Starter Kit is also classified in 9027.50.80, HTSUS. Moreover, when imported separately, the Single-Use Pods are classified in subheading 3822.00.50, HTSUS, which provides for “Diagnostic or laboratory reagents on a backing and prepared diagnostic or laboratory reagents, whether or not on a backing, other than those of heading 3002 or 3006: Other.”

The issue in this case is whether the Portable Food Allergen Detection Device, the Starter Kit and the Single-Use Pods are subject to the 301 Trade Remedy pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS. Since the Portable Food Allergen Device and the Starter Kit are classified in subheading 9027.50.80, HTSUS and goods of subheading 9027.50.80, HTSUS, are expressly included in U.S. Note 20 to Subchapter III, Chapter 99, the subject Portable Food Allergen Detection Device and the Starter Kit are subject to the 301 Trade Remedy *if the Portable Food Allergen Device is a product of China*.

HOLDING:

By application of GRIs 1 and 6, the Single-Use Pods are classified in subheading 3822.00.50, HTSUS, which provides for “Diagnostic or laboratory reagents on a backing and prepared diagnostic or laboratory reagents, whether or not on a backing, other than those of heading 3002 or 3006: Other.” The general, column one rate of duty for goods of subheading 3822.00.50, HTSUS, is Free.

By application of GRIs 1 and 6, the Portable Food Allergen Detection Device is classified in subheading 9027.50.80, HTSUS, which provides for “Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes; parts and accessories thereof: Other instruments and apparatus using optical radiations (ultraviolet, visible, infrared): Other: Other.”

By application of GRIs 1, 3(b), and 6, the Starter Kits consisting of one Portable Food Allergen Detection Device and one or more Single-Use Pods are also classified in subheading 9027.50.80, HTSUS. The general, column one rate of duty for goods of subheading 9027.50.80, HTSUS, is Free.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 9027.50.80, HTSUS, unless specifically excluded, are subject to an additional 25 percent ad valorem rate of duty. At the time of importation, such products must be reported under the relevant Chapter 99 subheading, i.e., 9903.88.01, in addition to subheading 9027.50.80, HTSUS, listed above.

The HTSUS is subject to periodic amendment, so you should exercise reasonable care in monitoring the status of goods covered by the Note cited above and the applicable Chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, including information on exclusions and their effective dates, you may refer to the relevant parts of the USTR and CBP websites, which are available at <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions> and <https://www.cbp.gov/trade/remedies/301-certain-products-china>, respectively.

EFFECT ON OTHER RULINGS:

NY N305614, dated August 30, 2019, is hereby MODIFIED.

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

Sincerely,

GREGORY CONNOR

for

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

DECLARATION ZONE TEST

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: General notice.

SUMMARY: This document announces that U.S. Customs and Border Protection (CBP) will conduct a Declaration Zone test at cruise terminal facilities at participating sea ports of entry (POEs) to fulfill a regulatory declaration requirement and allow for streamlined processing. Current CBP regulations require each traveler to provide an oral or written declaration of all articles brought into the United States to a CBP officer. The test will provide arriving travelers with an alternative method to meet this requirement by allowing a demonstrative initial declaration. During the test, CBP will establish two queues for travelers entering the country to choose from: Items to Declare or No Items to Declare. Known as Declaration Zones, these queues will allow travelers entering the country to make their initial declaration simply by choosing which queue to enter. This notice describes the test, while setting forth requirements for participating in the test, the duration of the test, and how CBP will evaluate the test. This notice also invites public comment on any aspect of the test.

DATES: The test will begin no earlier than September 27, 2021, and will run for approximately two years. The start date may vary at each location in accordance with the resumption of passenger operations suspended due to COVID-19.

ADDRESSES: Written comments concerning program, policy, and technical issues may be submitted at any time during the test period via email to *simplifytravel@cbp.dhs.gov*. Please use “Comment on Declaration Zone Test” in the subject line of the email.

FOR FURTHER INFORMATION CONTACT: Sung Hyun Ha, Acting Director, Sea Innovation, Mobility, and Biometric Advancement, Office of Field Operations, *sung.hyun.ha@cbp.dhs.gov* or (202) 215-9429.

SUPPLEMENTARY INFORMATION:

Background and Purpose

Current CBP regulations require each traveler to provide an oral or written declaration of all articles brought into the United States to a CBP officer. See part 148, subpart B of title 19 of the Code of Federal Regulations (19 CFR part 148, subpart B). At a sea POE cruise terminal facility, travelers collect their luggage and subsequently proceed through a queuing process (dependent on the facility). A CBP

officer then verifies the traveler's identity against the traveler's travel documents. The CBP officer also takes an oral declaration or collects a written declaration via CBP Form 6059B if a traveler completes one. *See* 19 CFR 148.12 and 148.13. The CBP officer then determines whether the declaration requires a payment of duty or further examination. If either are required, the CBP officer refers the traveler to secondary inspection. When personnel are available, CBP officers also perform roving enforcement operations within the baggage area and egress area. At any point prior to exiting the facility, a traveler may be questioned by a CBP officer and referred for secondary inspection. Travelers referred to secondary inspection may be directed to complete CBP Form 6059B.

In recent years, cruise ship capacities have increased to over 8500 passengers and crew per ship. Accordingly, new and innovative methods of processing are necessary. CBP has partnered with cruise lines to deploy facial comparison technology to verify biometrically the identities of expected travelers and crew upon arrival to the United States. The voluntary facial biometric debarkation (FBD) program replaces manual comparisons between travelers and their travel documents. To participate in the FBD program, cruise lines must provide enhanced data including select reservation, manifest, and voyage information directly to CBP that will be used for targeting and enforcement vetting. Enhanced targeting coupled with biometric verification of identity facilitates the ability for CBP officers to shift focus from administrative tasks to roving enforcement operations. This shift allows for amplified enforcement operations while enabling the growing flow of travelers through size-constrained facilities.

The greater capacity for enforcement that results from participation in the FBD program would also allow for further streamlining processing through the implementation of declaration zones. Declaration zones are an established concept in several countries whereby travelers provide an initial declaration via selection of a departure queue. Declaration zones facilitate the processing of travelers by separating those who need to go directly to a CBP officer for additional processing from those who do not. With declaration zones, travelers select from one of two clearly marked departure queues, either that they have items to declare or no items to declare. This selection acts as travelers' initial declaration simply through the queue that they choose. This addition of a physical, demonstrative form of declaration would allow CBP officers to shift focus from conducting administrative tasks such as taking oral declarations from compliant, low-risk, and highly vetted travelers to roving enforcement operations. Roving officers would be able to use their ob-

servation skills, as well as their knowledge of trends and smuggling techniques, to actively monitor and select individuals for inspection.

The Declaration Zone Test

CBP will conduct a Declaration Zone Test to fulfill the declaration requirement under CBP regulations, while also allowing for streamlined processing. Current CBP regulations require each traveler to provide an oral or written declaration of all articles brought into the United States to a CBP officer. *See* 19 CFR part 148, subpart B. The test will provide arriving travelers with an alternative method to meet this requirement by allowing a demonstrative initial declaration through the use of declaration zones at cruise terminal facilities at certain sea POEs.

Description and Procedures

Within a cruise terminal facility, two distinct customs declaration zone queues will be established for entering the egress area: one for *No Items to Declare* and another for *Items to Declare*. Signage will be posted to clearly label the queues at the entrance to the egress area after travelers collect their luggage. The physical act of selecting the *No Items to Declare* queue or the *Items to Declare* queue in and of itself will constitute an initial demonstrative declaration. CBP officers will conduct roving enforcement operations within the baggage collection and egress area to ensure traveler compliance.

No Items To Declare Queue

Travelers who determine they have nothing to declare will enter the *No Items to Declare* queue and proceed through the egress area to the facility exit. CBP officers will conduct roving operations in the *No Items to Declare* zone to affirm traveler compliance, receive oral declarations, and make referrals to secondary inspection as necessary. Travelers who are not questioned by CBP officers conducting roving operations proceed to the exit.

Items To Declare Queue

Travelers with items to declare will enter the *Items to Declare* queue and will present before a CBP officer to make an oral declaration. The CBP officer will make a determination if duty is owed by the traveler or if additional inspection is warranted. The CBP officer will then direct the traveler accordingly.

Referral to Secondary Inspection

If a traveler is referred to secondary inspection at any point, CBP officers will follow standard procedures, including collecting oral and/or written declarations during the referral and inspection. CBP officers will also follow current agency policy on declaration amendment opportunities.

Eligibility and Participation Requirements

The test allowing demonstrative declaration to be an acceptable declaration method will begin at two sea POEs: Miami, Florida, and Bayonne, New Jersey. CBP may choose to expand this test to other sea POEs during the two-year test period. Any such expansion will be announced on the CBP website, <https://www.cbp.gov>. The test will be restricted to closed loop cruises participating in FBD.

CBP will provide directional signage for use in the implementation of the declaration zones. Port management will coordinate with the port authority/ terminal managers for the printing and posting of the directional signage and establishing the corresponding queues. The signage is ancillary to the statutory signage currently posted within cruise terminal facilities and the Federal Inspection Services (FIS) area. These directional signs will facilitate the declaration zone process and help travelers understand the expectation when entering a specific queue.

CBP will also work with each cruise line at eligible POEs to develop educational materials to provide to travelers regarding U.S. customs declaration responsibilities and how travelers should navigate both the FBD process and declaration zones.

Authorization for the Test

The test described in this notice is authorized pursuant to 19 CFR 101.9(a), which allows the Commissioner of CBP to impose requirements different from those specified in the CBP Regulations for purposes of conducting a test program or procedure designed to evaluate the effectiveness of new operational procedures regarding the processing of passengers. This test is authorized pursuant to this regulation as it is designed to evaluate whether allowing a demonstrative initial declaration is a feasible way to fulfill the declaration requirement and allow for streamlined processing.

Waiver of Certain Regulatory Requirements

CBP regulations require each traveler to provide an oral or written declaration of all articles brought into the United States to a CBP officer. *See* 19 CFR 148.12 and 148.13. The test will provide arriving travelers with an alternative method to meet this requirement by allowing a demonstrative initial declaration. All other requirements of 19 CFR part 148, subpart B, regarding declarations, including those provided by 19 CFR 148.18, regarding failure to declare, and 19 CFR 148.19, regarding false or fraudulent statements, still apply.

Duration of Test

This test will run for approximately two years, beginning no earlier than September 27, 2021. The start date may vary at each location in accordance with the resumption of passenger operations suspended due to COVID-19. While the test is ongoing, CBP will evaluate the results and determine whether the test will be extended or otherwise modified. CBP reserves the right to discontinue this test at any time in CBP's sole discretion. CBP will announce any modifications to the duration of the test by notice in the **Federal Register**.

Evaluation of Declaration Zone Test

CBP will use the results of this test to assess the operational feasibility of allowing an initial demonstrative declaration to be an acceptable declaration method. CBP will evaluate this test based on a number of criteria, including:

- Evaluation of cruise line customer satisfaction surveys gathering feedback on the debarkation process; and
- Comparison of year-over-year enforcement statistics for each test period to ensure no impact to duty collection or to the frequency of enforcement activities.

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3507(d)) requires that CBP consider the impact of paperwork and other information collection burdens imposed on the public. As there is no new collection of information required in this document, the provisions of the PRA are inapplicable.

Signing Authority

Troy A. Miller, the Acting Commissioner, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the

Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

Dated: August 25, 2021.

ROBERT F. ALTNEU,
Director,
Regulations & Disclosure Law Division,
Regulations & Rulings, Office of Trade,
U.S. Customs and Border Protection.

[Published in the Federal Register, August 30, 2021 (85 FR 48436)]

EXTENSION OF THE SECTION 321 DATA PILOT

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

ACTION: General notice.

SUMMARY: This notice announces that U.S. Customs and Border Protection (CBP) is extending the Section 321 Data Pilot through August 2023.

DATES: The voluntary pilot initially began on August 22, 2019, and will run for an additional 24 months through August 2023. At this time, the pilot is limited to a maximum of nine participants.

ADDRESSES: Prospective pilot participants should submit an email to ecommerce@cbp.dhs.gov. In the subject line of your email please state “Application for Section 321 Data Pilot.” For information on what to include in the email, see section II.D (Application Process and Acceptance) of the notice published in the **Federal Register** on July 23, 2019 (84 FR 35405).

FOR FURTHER INFORMATION CONTACT: Laurie Dempsey, Director, IPR & E-Commerce Division at laurie.b.dempsey@cbp.dhs.gov or 202–615–0514 and Daniel Randall, Director, Manifest & Conveyance Security at daniel.j.randall@cbp.dhs.gov or 202–344–3282.

SUPPLEMENTARY INFORMATION:

I. Background

Section 321 of the Tariff Act of 1930, as amended, provides for an exemption from duty and taxes for shipments of merchandise imported by one person on one day having an aggregated fair retail value in the country of shipment not less than \$800. 19 U.S.C. 1321(a)(2)(C). On July 23, 2019, CBP published a general notice in the **Federal Register** (84 FR 35405) (hereafter referred to as the “July 2019 notice”) introducing a voluntary Section 321 Data Pilot. Pilot participants agree to transmit electronically certain data in advance for shipments potentially eligible for release under Section 321 of the Tariff Act of 1930 (“section 321 shipments”). The data pilot tests the feasibility of collecting data elements, beyond those required by current regulations, and from non-traditional entities, such as online marketplaces. The purpose of this data pilot is to improve CBP’s ability to target efficiently and assess the security risks posed by section 321 shipments.

The July 2019 notice provided a comprehensive description of the program and its purpose, eligibility requirements, and the application process for participation. 84 FR 35405. Specifically, the July 2019

notice stated that the data pilot applied only to section 321 shipments arriving by air, truck, or rail and was set to conclude on August 22, 2020. 84 FR 35405. On December 9, 2019, CBP published another notice in the **Federal Register** (84 FR 67279) (hereafter referred to as the “December 2019 notice”). This notice expanded the pilot to include section 321 shipments arriving by ocean and international mail covered in 19 CFR part 145, extended the pilot through August 2021, and provided clarification with respect to the misconduct portion of the data pilot. 84 FR 67279.

II. Extension of the Section 321 Data Pilot Period

CBP will extend the test for another two years to continue further evaluation of the 321 Data Pilot program and the risks associated with section 321 shipments. The pilot will now run through August 2023.

III. Applicability of Initial Test Notice

All provisions found in the July 2019 notice remain applicable, subject to the time period extension herein and the amendments provided in the December 2019 notice. Furthermore, CBP reiterates that it is not waiving any regulations for purposes of the pilot. All existing regulations continue to apply to pilot participants.

IV. Signing Authority

Troy A. Miller, the Acting Commissioner, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

Dated: August 25, 2021.

ROBERT F. ALTNEU,
Director,
Regulations & Disclosure Law Division,
Regulations & Rulings, Office of Trade,
U.S. Customs and Border Protection.

[Published in the Federal Register, August 30, 2021 (85 FR 48435)]

**COPYRIGHT, TRADEMARK, AND TRADE NAME
RECORDATIONS**

(No. 06 2021)

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

SUMMARY: The following copyrights, trademarks, and trade names were recorded with U.S. Customs and Border Protection in June 2021. A total of 116 recordation applications were approved, consisting of 2 copyrights and 114 trademarks. The last notice was published in the Customs Bulletin Vol. 55 No. 32

Corrections or updates may be sent to: Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street, NE., 10th Floor, Washington, D.C. 20229-1177, or via email at iprrquestions@cbp.dhs.gov.

FOR FURTHER INFORMATION CONTACT: Christopher Hawkins, Paralegal Specialist, Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade at (202) 325-0295.

ALAINA VAN HORN

Chief,

*Intellectual Property Enforcement Branch
Regulations and Rulings, Office of Trade*

CBP IPR RECORDATION — JUNE 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 00-00557	06/14/2021	08/23/2030	G209	THE CROSBY GROUP LLC	No
TMK 02-00233	06/01/2021	03/30/2031	AUGMENTIN	GLAXOSMITHKLINE LLC	No
TMK 02-00415	06/15/2021	12/08/2031	CARDINALS	ST. LOUIS CARDINALS, LLC	No
TMK 02-00513	06/17/2021	06/13/2031	BARTOLINI	Olem Shoe Corp.	No
TMK 02-00747	06/02/2021	03/29/2031	PUMA	PUMA SE European Stock Corporation	No
TMK 03-00968	06/02/2021	09/24/2027	LIPITOR	U/JOHN MANUFACTURING IRELAND UNLIMITED COMPANY	No
TMK 05-00960	06/01/2021	10/21/2031	YANKEES (STYLIZED)	NEW YORK YANKEES	No
TMK 07-00502	06/16/2021	07/03/2031	Clarks (Stylized)	C. & J. CLARK	No
TMK 08-00393	06/29/2021	06/30/2031	MARLBORO FILTER CIGARETTES PM USA 20 CLASS A CIGARETTES & DE-SIGN	PHILIP MORRIS USA INC.	Yes
TMK 08-00651	06/14/2021	06/27/2031	GC FUJII	TRADEMARK HOLDINGS OF ILLINOIS LLC	No
TMK 10-00540	06/01/2021	08/08/2031	TONY HAWK	TONY HAWK, INC.	No
TMK 10-00764	06/01/2021	07/22/2030	ZINACEF	GLAXO GROUP LIMITED	No
TMK 11-00633	06/09/2021	03/26/2031	SOLIDEA	CALZIFICIO PINELLI S.R.L.ITALY	No
TMK 11-00649	06/17/2021	06/12/2031	PING	KARSTEN MANUFACTURING CORPORA TION	No
TMK 11-00945	06/24/2021	05/15/2031	GLAD AND DESIGN	The Glad Products Company	No

CBP IPR RECORDATION — JUNE 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 11-01052	06/28/2021	07/03/2031	Skunk design	Lockheed Martin Corporation	No
TMK 12-00663	06/29/2021	06/22/2031	BUTRANS	Purdue Pharma L.P.	No
TMK 12-00692	06/17/2021	01/19/2031	Green and Yellow Color Combination applied to Toy Vehicles and Machines	Deere & Company CORPORATION	No
TMK 12-01099	06/14/2021	05/04/2027	MCM & DESIGN	TRIAS HOLDING AG	No
TMK 12-01241	06/14/2021	05/04/2027	MCM & Design	TRIAS HOLDING AG	No
TMK 12-01399	06/15/2021	06/08/2031	TWIC	United States of America, as represented by the Department of Homeland Security	No
TMK 12-01401	06/15/2021	08/17/2031	NETCC	United States Department of Homeland Security	No
TMK 13-00258	06/16/2021	06/08/2031	APPLE	Apple Inc.	No
TMK 13-00743	06/29/2021	04/06/2031	SWOOSH DESIGN	NIKE, INC.	No
TMK 14-00498	06/01/2021	09/27/2031	EXCEDRIN	GSK CONSUMER HEALTHCARE SWITZERLAND	No
TMK 14-00715	06/14/2021	07/02/2031	GLOCK PERFECTION	Glock, Inc.	No
TMK 14-01258	06/01/2021	04/11/2031	H & Design	BBC INTERNATIONAL LLC	No
TMK 14-01259	06/01/2021	08/10/2031	H X2 (Stylized)	BBC INTERNATIONAL LLC	No
TMK 16-01085	06/29/2021	06/20/2031	GEM	POLARIS INDUSTRIES INC.	No
TMK 17-00598	06/03/2021	08/26/2029	MAGIC JUMP	Magic Jump, Inc. AKA Magic Jump Inflatables, Magic Jump Rentals	No

CBP IPR RECORDATION — JUNE 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 17-00897	06/24/2021	06/29/2031	A (STYLIZED)	SONY CORPORATION	No
TMK 17-00898	06/10/2021	06/01/2031	A (STYLIZED)	SONY CORPORATION JAPAN	No
TMK 17-01028	06/24/2021	03/21/2031	SNAPDRAGON	QUALCOMM Incorporated	No
TMK 19-00266	06/14/2021	10/12/2031	LOS ANGELES (STYLIZED)	Los Angeles Dodgers LLC	No
TMK 19-00308	06/01/2021	07/12/2031	NEW YORK (STYLIZED)	New York Yankees	No
TMK 20-00670	06/24/2021	05/01/2031	BLUHALE	MannKind Corporation	No
TMK 20-01129	06/14/2021	07/12/2031	OAKLAND (STYLIZED)	Athletics Investment Group LLC	No
TMK 20-01243	06/01/2021	07/26/2031	DETROIT (STYLIZED)	Detroit Tigers, Inc.	No
TMK 21-00520	06/01/2021	11/15/2030	BETTY BOOP AND HEART DESIGN	FLEISCHER STUDIOS, INC.	No
TMK 21-00521	06/01/2021	11/08/2030	BETTY BOOP	FLEISCHER STUDIOS, INC.	No
TMK 21-00522	06/01/2021	11/22/2030	BETTY BOOP	FLEISCHER STUDIOS, INC.	No
TMK 21-00523	06/01/2021	08/04/2031	GAC & DESIGN	Thomas J. Dietz	No
TMK 21-00524	06/01/2021	01/01/2030	GRAPES & GRAINS	Candleberry Company	No
TMK 21-00525	06/01/2021	06/07/2027	SOUTHERN HOME	Candleberry Company	No
TMK 21-00526	06/01/2021	07/12/2026	HOT MAPLE TODDY	Candleberry Company	No
TMK 21-00527	06/01/2021	09/30/2030	RBP	E & P INVESTMENTS LLC	No
TMK 21-00528	06/01/2021	10/28/2025	HOT MAPLE TODDY	Candleberry Company	No
TMK 21-00529	06/01/2021	07/28/2025	KENTUCKY BOURBON	Candleberry Company	No
TMK 21-00530	06/01/2021	12/29/2030	PIXELBOOK	Google LLC	No
TMK 21-00531	06/01/2021	10/19/2026	TENNESSEE WHISKEY	Candleberry Company	No

CBP IPR RECORDATION — JUNE 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 21-00532	06/01/2021	09/07/2031	IT'S A PIECE OF CAKE	Candleberry Company	No
TMK 21-00533	06/01/2021	06/02/2030	EMERGEN-C	ALACER CORPORATION	No
TMK 21-00534	06/01/2021	06/18/2023	ROTARIX	GlaxoSmithKline Biologicals S.A.BEL-GIUM	No
TMK 21-00535	06/02/2021	12/22/2030	POLYGON IN OVAL DESIGN	TONG YANG INDUSTRY CO. TAIWAN	No
TMK 21-00536	06/02/2021	12/22/2030	POLYGON IN SQUARE DESIGN	TONG YANG INDUSTRY CO.TAIWAN	No
TMK 21-00537	06/02/2021	08/25/2031	Atlantis School For Gifted Youngsters & DESIGN	Allah, Saladin Quanaah	No
TMK 21-00538	06/02/2021	09/02/2025	THE PATIENT ALWAYS COMES FIRST	AM PM Medical	No
TMK 21-00539	06/02/2021	08/25/2031	Shield Design	ROTHYS, INC.	No
TMK 21-00540	06/02/2021	08/25/2031	ROTHYS	ROTHYS, INC.	No
TMK 21-00541	06/07/2021	06/12/2029	PURE AIR CARE	The Candleberry Company	No
TMK 21-00542	06/07/2021	11/22/2027	WE DELIVER FUN	MAGIC JUMP RENTALS, INC.	No
TMK 21-00543	06/07/2021	12/22/2030	Oblongs in Square Design	TONG YANG INDUSTRY CO., LTD.	No
TMK 21-00544	06/07/2021	02/20/2029	FRESH CARGO	The Candleberry Company	No
TMK 21-00545	06/07/2021	08/08/2028	UNEARTHED	Candleberry Company	No
TMK 21-00546	06/07/2021	12/26/2027	BLACK SAND BEACHES	Candleberry Company	No
TMK 21-00547	06/07/2021	06/25/2024	ANGEL'S SHARE	Candleberry Company	No
TMK 21-00548	06/07/2021	10/26/2026	DISTILLER'S CHARRED OAK	Candleberry Company	No
TMK 21-00549	06/07/2021	03/22/2031	MAGIC INFLATABLE PARKS	Magic Jump Inc.	No

CBP IPR RECORDATION — JUNE 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/Tm	Owner Name	GM Restricted
TMK 21-00550	06/07/2021	05/02/2031	HULLABALLOO	Hullabaloo Sales Inc.	No
TMK 21-00551	06/07/2021	11/23/2026	BATES	Bates Industries, Inc.	No
TMK 21-00552	06/08/2021	08/11/2031	IRECUPE	Irecpupe, LLC	No
TMK 21-00553	06/09/2021	01/20/2031	WILD HARE SHOOTING GEAR	Peregrine Outdoor Products, LLC	No
TMK 21-00554	06/09/2021	11/30/2031	TREASURE BAY JEWELRY	Baybutt, Theresa Nehmer	No
TMK 21-00555	06/10/2021	04/12/2031	TROPICAL VIBES & DESIGN	Tropical Vibes LLC	No
TMK 21-00556	06/10/2021	07/13/2031	HOLE LOTTA DOUGHNUTS	Hole Lotta Doughnuts, LLC	No
TMK 21-00557	06/10/2021	06/26/2029	KIM+ONO	Old Shanghai Online, LLC	No
TMK 21-00558	06/10/2021	06/02/2031	SEARPRO	Sear Pro LLC	No
TMK 21-00559	06/10/2021	12/22/2030	DESIGN. CHEVRON SHAPE IN CIRCLE.	TONG YANG INDUSTRY CO.TAIWAN	No
TMK 21-00560	06/14/2021	01/23/2029	COTTON CLOUD	Neon Brands LLC	No
TMK 21-00561	06/14/2021	09/30/2030	Sovran Alkaline Water & Design	Sovran Water LLC	No
TMK 21-00562	06/14/2021	06/04/2028	WARIOWARE	Nintendo of America Inc.	No
TMK 21-00563	06/14/2021	03/25/2029	CARETTA	Caretta, LLC	No
TMK 21-00564	06/14/2021	08/11/2031	COFFEE BOSS	Coffee Boss, Inc	No
TMK 21-00565	06/14/2021	05/09/2031	SMOOTHSKIN	Cyden Limited UNITED KINGDOM	No
TMK 21-00566	06/14/2021	12/04/2028	Grenachista & DESIGN	C R Graybehl Wine Company	No
TMK 21-00567	06/14/2021	12/22/2030	Stacked Triangle-Like Shapes Design	TONG YANG INDUSTRY CO. TAIWAN	No

CBP IPR RECORDATION — JUNE 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 21-00568	06/14/2021	09/07/2031	TEMPTOOTH	Steven James Howard DBA temptooth-.com	No
TMK 21-00569	06/15/2021	01/08/2030	FPS	U.S. Department of Homeland Security Agency of the United States government	No
TMK 21-00570	06/15/2021	05/16/2031	PROCUREMENT INNOVATION LAB P/L & DESIGN	United States Department of Homeland Security AKA DHS agency of the United States government	No
TMK 21-00571	06/15/2021	06/16/2031	BEE CLEAN	CleanSpot, Inc.	No
TMK 21-00572	06/15/2021	12/22/2030	Oblong Shapes in Oval Design	TONG YANG INDUSTRY CO., LTD.	No
TMK 21-00573	06/15/2021	01/08/2030	FEDERAL PROTECTIVE SERVICE	U.S. Department of Homeland Security Agency of the United States government	No
TMK 21-00574	06/15/2021	06/24/2030	FEDERAL PROTECTIVE SERVICE	U.S. Department of Homeland Security Agency of the United States government	No
TMK 21-00575	06/16/2021	08/11/2031	MYTSA	United States Department of Homeland Security	No
TMK 21-00576	06/16/2021	08/11/2031	SURFACE TRANSPORTATION SECURITY ADVISORY COMMITTEE & DESIGN	United States Department of Homeland Security	No
TMK 21-00577	06/16/2021	06/09/2031	THE ADVENTURE OF LINK	Nintendo of America Inc.	No
TMK 21-00578	06/16/2021	06/16/2031	THE LEGEND OF ZELDA	Nintendo of America Inc.	No

CBP IPR RECORDATION — JUNE 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 21-00579	06/17/2021	09/08/2031	MACAVITA!	DIAGRACO LLC	No
TMK 21-00580	06/17/2021	08/14/2029	HIMS	HIMS, INC.	No
TMK 21-00581	06/17/2021	04/07/2030	CREASE PIECE	Beaufifoles LLC	No
TMK 21-00582	06/22/2021	09/01/2031	Air Jordan 1 Low OG	Nike, Inc.	No
TMK 21-00583	06/22/2021	08/14/2029	HIMS	HIMS, INC.	No
TMK 21-00584	06/22/2021	09/16/2030	HERS	HIMS, INC.	No
TMK 21-00585	06/22/2021	09/16/2030	HERS	HIMS, INC.	No
TMK 21-00586	06/22/2021	09/30/2030	LONGCHAMP & DESIGN	S.A.S. JEAN CASSEGRAIN CORPORATION FRANCE	No
TMK 21-00587	06/25/2021	08/25/2031	ANELA	BOZKURT JEWELRY INC	No
TMK 21-00588	06/25/2021	01/27/2031	FUTURO TAX	Futuro Tax DBA Futuro Tax	No
TMK 21-00589	06/28/2021	12/15/2030	BARKING KITTENS	Exploding Kittens, Inc.	No
TMK 21-00590	06/29/2021	04/17/2027	MAKRITE	MAKRITE INDUSTRIES INC.	No
TMK 21-00591	06/29/2021	09/01/2031	Configuration of a Nike Shoe	Nike, Inc.	No
TMK 21-00592	06/29/2021	04/07/2030	Design mark without words or letters ("Punchman" design)	Grant Group, Inc.	No
TMK 21-00593	06/30/2021	07/08/2024	TRUE-STREAK	SCHNEIDER OPTICS, INC.	No
TMK 21-00594	06/30/2021	08/04/2031	DERRY DERMATOLOGY	Derry Dermatology, PLLC DBA Derry Dermatology	No
TMK 21-00595	06/30/2021	04/12/2031	Four Hands & DESIGN	Four Hands, LLC	No

CBP IPR RECORDATION — JUNE 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
COP 21-00050	06/17/2021	06/16/2041	SimpliSafe design v 2008.	SimpliSafe, Inc.	No
COP 21-00051	06/28/2021	06/23/2041	STEEL DIVER	Nintendo of America Inc.	No

U.S. Court of Appeals for the Federal Circuit

WANXIANG AMERICA CORPORATION, Plaintiff-Appellant v. UNITED STATES,
Defendant-Appellee

Appeal No. 2020–1044

Appeal from the United States Court of International Trade in No. 1:18-cv-00120-GSK, Judge Gary S. Katzmann.

Decided: September 2, 2021

MICHAEL EDWARD ROLL, Roll & Harris LLP, Los Angeles, CA, argued for plaintiff-appellant. Also represented by BRETT HARRIS, Washington, DC.

STEPHEN CARL TOSINI, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by JEFFREY B. CLARK, JEANNE DAVIDSON, PATRICIA M. MCCARTHY; NIKKI KALBING, United States Department of Commerce, Washington, DC.

Before MOORE, *Chief Judge*^{*}, REYNA and TARANTO, *Circuit Judges*.

REYNA, *Circuit Judge*.

Appellant Wanxiang America Corporation appeals a judgment of the United States Court of International Trade determining that it lacks jurisdiction over Appellant’s action under 28 U.S.C. § 1581(i), and that Appellant’s claims concerning a United States Department of Commerce memorandum are not ripe for judicial review because the memorandum is not a final agency action. We hold that the Court of International Trade does not have jurisdiction under § 1581(i) because Appellant could have sought relief under another subsection of § 1581, and Appellant has not shown that such relief would have been manifestly inadequate. We do not reach the issue on finality of the memorandum. Affirmed.

BACKGROUND

This appeal involves a complicated and technical administrative record concerning how antidumping duties are determined, assessed, and collected. The record also involves Pre-Penalty and Penalty Notices issued to U.S. importers whom the U.S. Customs and Border Protection (“Customs”) has determined are in violation of U.S. customs laws and regulations governing imports of goods that are subject to antidumping duties. The United States Court of International Trade (“CIT”) provided a thorough and detailed review of the record,

^{*} Chief Judge Kimberly A. Moore assumed the position of Chief Judge on May 22, 2021.

so we forgo repeating that recitation here and reference only those aspects of the record that are pertinent to the main issue on appeal, the jurisdiction of the CIT.

Plaintiff-Appellant Wanxiang America Corporation (“Wanxiang”) is a U.S. importer for its parent corporation, Wanxiang Group Corporation (“Wanxiang Group”), an automotive parts manufacturing company headquartered in China. J.A. 141. The history leading to this appeal involves additional Wanxiang Group subsidiaries, including two of its Chinese exporters, Wanxiang Import and Export Co., Ltd. (“Wanxiang IE”), and Wanxiang Qianchao Co., Ltd. (“Wanxiang Q”). J.A. 42–43.

From 1994 to 2001, Wanxiang Group and Wanxiang IE participated in annual administrative reviews conducted by the U.S. Department of Commerce (“Commerce”) that covered entries of first-generation wheel hub assemblies that were subject to a 1987 antidumping duty order on tapered roller bearings (“TRBs”) from China. J.A. 40–42; *see* Tapered Roller Bearings From the People’s Republic of China; Final Determination of Sales at Less Than Fair Value, 52 Fed. Reg. 19,748 (May 27, 1987) (“TRB Antidumping Duty Order”). As a result of those reviews, Wanxiang Group and Wanxiang IE were assigned company-specific antidumping duty rates of zero percent. J.A. 41, 60. This means that although imports from those two related companies were subject to the TRB Antidumping Duty Order, they were found not to be dumping and, therefore, received zero-percent dumping rates. Wanxiang Q, on the other hand, did not receive a company-specific antidumping duty rate because, as the record shows, it did not participate in the reviews. J.A. 60.

Wanxiang later imported second- and third-generation wheel hub assemblies from Wanxiang Q, and on the customs entry forms, it classified the entries as not subject to any antidumping duty order. *See* J.A. 43–44; Appellant’s Opening Br. 14. It is undisputed that a 2010 scope inquiry conducted by Commerce determined the second- and third-generation wheel hub assemblies were within the scope of the TRB Antidumping Duty Order. J.A. 574–75; *see also* *Power Train Components, Inc. v. United States*, 911 F. Supp. 2d 1338 (Ct. Int’l Trade 2013), *aff’d mem.*, 565 F. App’x 899 (Fed. Cir. 2014).

In June 2012, Customs initiated an audit of Wanxiang’s entries of wheel hub assemblies during the five-year period of October 1, 2007, to September 30, 2012. J.A. 141–42, 575–76. Due to the large number of entries made by Wanxiang during the review period, Customs chose to analyze a statistical sample of 100 entries. J.A. 137, 142.

During the audit, Wanxiang suggested that Wanxiang Q was subject to Wanxiang Group's zero-percent antidumping duty rate.¹ J.A. 44–45, 151. On February 25, 2015, Commerce sent Customs a report titled "Guidance to CBP." J.A. 59–60. The report was sent "[i]n response to [Customs'] inquiry" and was based on Commerce's "review" of "documents previously sent to [Customs]," which had been submitted during the annual administrative review periods from 1994–2001. J.A. 60. Commerce explained that none of the documents from the relevant review periods "clearly identified [Wanxiang Q] itself as being a manufacturer or exporter of subject merchandise." *Id.* Commerce further confirmed that upon its examination of the records from the reviews, "no evidence . . . suggested that [Wanxiang Q] exported the subject merchandise during the relevant [periods of review]." *Id.*

On September 2, 2015, Customs issued its final audit report, finding that some of the audited entries were imports of wheel hub assemblies from Wanxiang Q. *See* J.A. 143, 148–49, 577. But since Wanxiang Q did not participate in the relevant annual reviews (as indicated in the Guidance to CBP), it never received a company-specific dumping rate. J.A. 148–49. As a result, Customs determined that the Wanxiang Q imports were subject to the China country-wide rate of 92.84% *ad valorem*, the rate applicable to Chinese companies that otherwise did not receive a company-specific rate. *Id.* Customs also determined, based on the sampling results and a projection over the sampling frame, that Wanxiang had underpaid dumping duties by a significant amount. J.A. 143, 148. After the final audit report was issued, representatives from Wanxiang and the Wanxiang Group met with the Secretary of Commerce and the Under Secretary of Commerce for International Trade to discuss the audit. J.A. 70.

On May 25, 2016, Customs Liaison Unit placed a memorandum on the record ("CLU Memo"). J.A. 58. Three documents were attached to the CLU Memo: (1) Commerce's February 2015 Guidance to CBP; (2) a corporate organizational chart provided by Wanxiang Group that was previously attached to the Guidance; and (3) a June 2013 announcement in which Commerce noted that two Wanxiang Group subsidiaries² (but not Wanxiang Q) were subject to the zero-percent rate. J.A. 58–64. The CLU Memo described the Guidance to CBP as providing guidance "regarding the entities in the 1994–2001 administrative review periods that were entitled to the Wanxiang Group[s]"

¹ It also appears that Wanxiang maintained, alternatively, that it had no reason to believe that the newer-generation wheel hub assemblies were subject to the TRB Antidumping Duty Order. *See* Appellant's Opening Br. 7–15.

² Those entities are not relevant to this appeal.

cash deposit rate” of zero percent. J.A. 58. The CLU Memo also stressed that the information provided therein did “not constitute new factual information on the record of this closed segment of the proceeding.” *Id.*

Almost two years later, in January 2018, Customs issued a Pre-Penalty Statement notifying Wanxiang that it may be liable for paying lost revenue (antidumping duties) and a substantial penalty for misclassification of entries and failure to pay antidumping duties. J.A. 107–10. In April 2019, Customs issued a Penalty Notice demanding that Wanxiang pay specific amounts in lost revenue and penalties. Appellant’s Opening Br. 20–21. Notably, Wanxiang did not protest the Penalty Notice pursuant to 19 U.S.C. § 1514, and Wanxiang has not made payment on the dumping duties or the penalty. Oral Arg. 7:40–59, http://oralarguments.cafc.uscourts.gov/default.aspx?fl=201044_11032020.mp3. Instead, Wanxiang chose to challenge the Penalty Notice by suing Commerce.

CIT ACTION

On May 23, 2018, Wanxiang filed a complaint before the CIT, asserting jurisdiction under 28 U.S.C. § 1581(i)(2) and (4).³ J.A. 37. Specifically, Wanxiang alleged that the Guidance to CBP issued by Commerce violated Due Process and was otherwise contrary to law or unsupported by substantial evidence. J.A. 51–54. Wanxiang sought a remand for Commerce to “reconsider[]” whether Wanxiang Q was entitled to the Wanxiang Group zero-percent dumping rate. J.A. 55.

The government moved to dismiss for lack of subject-matter jurisdiction. *See Wanxiang Am. Corp. v. United States*, 399 F. Supp. 3d 1323, 1330 (Ct. Int’l Trade 2019). The CIT granted the motion after concluding, among other things, that it lacked jurisdiction under § 1581(i) because the relief sought by Wanxiang “could have been available under a . . . § 1581(c) action.” *Id.* at 1331–32. The CIT held that because Wanxiang could have sought relief through § 1581(c), Wanxi-

³ Congress later amended 28 U.S.C. § 1581(i) to redesignate subparagraphs (1) through (4) as subparagraphs(1)(A) through (1)(D), respectively. *See* United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116–113, § 423(a)(1), 134 Stat. 11, 65 (2020). The relevant § 1581(i) subsections, now (1)(B) and (1)(D), provide:

- (i) (1) In addition to the jurisdiction conferred upon the [CIT] by subsections (a)–(h) of [§ 1581] . . . , the [CIT] shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for— . . .
 - (B) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; . . . or
 - (D) administration and enforcement with respect to the matters referred to in [§ 1581].

ang could not now assert residual jurisdiction through § 1581(i). *Id.* Wanxiang appeals the dismissal. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

DISCUSSION

We review the CIT's grant of a motion to dismiss *de novo*. *Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1345 (Fed. Cir. 1995). This court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the claimant. *Hartford Fire Ins. Co. v. United States*, 772 F.3d 1281, 1284 (Fed. Cir. 2014). A party invoking the CIT's jurisdiction has the burden of establishing that jurisdiction. *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006).

This court has long held that § 1581(i) is a statute of residual jurisdiction that may not be invoked where jurisdiction is or could have been available under any other subsection of § 1581, unless such other relief would be manifestly inadequate. *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) (collecting cases); *accord, e.g., Ford Motor Co. v. United States*, 688 F.3d 1319, 1323 (Fed. Cir. 2012). Thus, when assessing jurisdiction under § 1581(i), we primarily consider (1) whether jurisdiction under a subsection other than § 1581(i) was available, and (2) if so, whether the remedy provided under that subsection is “manifestly inadequate.” *Erwin Hymer Grp. N.A., Inc. v. United States*, 930 F.3d 1370, 1375 (Fed. Cir. 2019).

As a threshold matter, we note that Wanxiang does not argue in its opening brief that relief under another subsection of § 1581 would be manifestly inadequate. Nor did Wanxiang raise a “manifestly inadequate” argument at the CIT. *Wanxiang*, 399 F. Supp. 3d at 1331 n.10. Given these circumstances, we find that Wanxiang has waived or forfeited the argument that any other relief that may have been available to it was manifestly inadequate. *See Optimus Tech., Inc. v. Ion Beam Applications S.A.*, 469 F.3d 978, 989 (Fed. Cir. 2006) (“An issue not raised by an appellant in its opening brief is waived.” (citation and alterations omitted)); *see also Indus. Chems., Inc. v. United States*, 941 F.3d 1368, 1373 n.3 (Fed. Cir. 2019) (deeming § 1581(i) argument waived on appeal where appellant did not raise issue before the CIT). Therefore, the only question we must decide is whether jurisdiction “is or could have been available” under any other subsection of § 1581. *Miller & Co.*, 824 F.2d at 963.

We hold that the CIT lacks subject-matter jurisdiction under § 1581(i) because Wanxiang could have sought relief under another subsection of § 1581. In essence, Wanxiang is protesting having to pay antidumping duties and penalties on entries identified during the

customs audit. *See* J.A. 55. But Wanxiang could have challenged the assessments by pursuing a protest under 19 U.S.C. § 1514 (“Protest Against Decisions of Customs Service”) and then, if unsuccessful, by challenging unfavorable results before the CIT under § 1581(a).⁴ Alternatively, Wanxiang could have initiated a test shipment and sought, as a new shipper, an administrative review of the entries. During the review, Wanxiang would have had the opportunity to argue the issues it raised in its complaint before the CIT. In addition, the results of the administrative review could have been challenged before the CIT pursuant to 19 U.S.C. § 1516a, invoking jurisdiction of the CIT under § 1581(c).⁵

Wanxiang concedes it could have sought administrative review and then challenged unfavorable results at the CIT under § 1581(c). Oral Arg. at 4:15–46; 4:54–5:03; 5:28–6:30. Wanxiang, however, asserts § 1581(i) jurisdiction because, in its view, it was not legally compelled to take that route. *Id.* at 6:22–30 (“Yes, [Wanxiang] could have done all of that. There’s no question they could have done all of that. The question, though, is: Were they required to do all of that?”). But Wanxiang misapprehends the § 1581(i) standard, which asks only whether another route under § 1581 existed that was not manifestly inadequate. It is true that Wanxiang had the choice of whether or not to file a protest or seek an administrative review, but having made the choice not to do so, the relief it seeks now under § 1581(i) is foreclosed. An importer may not simply “elect to proceed under [§] 1581(i), without having first availed himself of the remedy provided by [§] 1581(c).” *Sunprime Inc. v. United States*, 892 F.3d 1186, 1193 (Fed. Cir. 2018) (quoting *JCM, Ltd. v. United States*, 210 F.3d 1357, 1359 (Fed. Cir. 2000)).

An importer cannot successfully assert § 1581(i) jurisdiction via “creative pleading.” *Id.* (quoting *Norsk*, 472 F.3d at 1355). This court will “look to the true nature of the action” brought before the CIT under § 1581(i) to determine whether the action could have been brought under another subsection of § 1581. *Id.* (quoting *Norsk*, 472

⁴ Subsection 1581(a), which governs the CIT’s jurisdiction to review Customs’ treatment of protests, sets forth an express scheme for administrative and judicial review of Customs’ penalty actions. Under this statutory scheme, an aggrieved party must first file a protest with Customs under 19 U.S.C. § 1514 before it can file suit in the CIT under § 1581(a) to contest denials. *Int’l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1326–27 (Fed. Cir. 2006).

⁵ Subsection 1581(c) grants the CIT exclusive jurisdiction over any civil action commenced under 19 U.S.C. §§ 1516a or 1517. *See* 28 U.S.C. § 1581(c). This includes the “jurisdiction to consider challenges to Commerce’s assessment of antidumping duties based on its determination during administrative reviews.” *Juancheng Kangtai Chem. Co. v. United States*, 932 F.3d 1321, 1329 (Fed. Cir. 2019).

F.3d at 1355). For instance, in *Sunpreme*, the importer sought a refund of cash deposits, an end of suspension of liquidation, and release from having to make future cash deposits, all of which we found to be “the very relief associated with a scope ruling determination.” *Id.* Despite its pleading, it was clear that Sunpreme sought “a decision that its products [we]re not subject to the scope of the [antidumping duty] orders,” so we reversed the CIT’s exercise of § 1581(i) jurisdiction because Sunpreme had available to it relief under § 1581(c). *Id.* at 1193–94.

Similarly, in *Juancheng Kangtai Chemical Co. v. United States*, we affirmed the CIT’s dismissal for lack of jurisdiction because jurisdiction was available to Kangtai under § 1581(c). 932 F.3d 1321, 1328–29 (Fed. Cir. 2019). Although Kangtai asserted jurisdiction under § 1581(i)(2) and (4)—as Wanxiang does here—we observed that the “true nature” of Kangtai’s action was to protest Commerce’s assessment of antidumping duties on entries, and it could have sought relief under § 1581(c). *Id.* at 1328. Further, we determined that Kangtai failed to demonstrate such relief would have been manifestly inadequate. *Id.* at 1329–30. Thus, despite Kangtai’s attempt to base its action in § 1581(i), we held that such jurisdiction was unavailable.

Here, the true nature of Wanxiang’s complaint is that Wanxiang seeks to avoid paying antidumping duties and a penalty assessed against it via a Penalty Notice. *See* J.A. 55. The bases of its complaint are issues routinely first brought up and challenged in protest proceedings and administrative reviews. *See, e.g., Guizhou Tyre Co. v. United States*, No. 17–00100, 2021 WL 1944431 (Ct. Int’l Trade May 14, 2021); *Husteel Co. v. United States*, No. 19–00107, 2021 WL 1740367 (Ct. Int’l Trade May 3, 2021).

CONCLUSION

We agree with the CIT that Wanxiang chose to forgo available avenues to administrative relief that could have resulted in the CIT’s proper exercise of jurisdiction under § 1581(a) or (c). Wanxiang does not argue that such relief under those subsections would have been manifestly inadequate. As a result, Wanxiang cannot now avail itself of the CIT’s residual jurisdiction under § 1581(i). The CIT therefore properly dismissed this case for lack of subject-matter jurisdiction. Because the CIT lacked jurisdiction under § 1581(i), we do not reach the questions concerning the finality of the CLU Memo. The judgment of the CIT is affirmed.

AFFIRMED

GOODLUCK INDIA LIMITED, Plaintiff-Appellee v. UNITED STATES, Defendant ARCELORMITTAL TUBULAR PRODUCTS, MICHIGAN SEAMLESS TUBE, LLC, PLYMOUTH TUBE CO. USA, PTC ALLIANCE CORP., WEBCO INDUSTRIES, INC., ZEKELMAN INDUSTRIES, INC., Defendants-Appellants

Appeal No. 2020–2017

Appeal from the United States Court of International Trade in No. 1:18-cv-00162-GSK, Judge Gary S. Katzmann.

Decided: August 31, 2021

NED H. MARSHAK, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, New York, NY, argued for plaintiff-appellee. Also represented by BRUCE M. MITCHELL; MICHAEL SCOTT HOLTON, JORDAN CHARLES KAHN, Washington, DC.

ROBERT ALAN LUBERDA, Kelley Drye & Warren, LLP, Washington, DC, argued for defendants-appellants. Also represented by MELISSA M. BREWER, DAVID C. SMITH, JR.

Before REYNA, CLEVINGER, and STOLL, *Circuit Judges*.

REYNA, *Circuit Judge*.

Defendants-Appellants appeal the judgment of the United States Court of International Trade affirming a remand determination by the United States Department of Commerce in an antidumping duty investigation on U.S. imports of cold-drawn mechanical tubing from India. In the underlying investigation, Commerce rejected Plaintiff-Appellee Goodluck India’s submission of supplemental data and relied on “adverse facts available” under 19 U.S.C. § 1677e(b) for its less-than-fair-value analysis, which resulted in an antidumping margin of 33.8% *ad valorem* applicable to Goodluck India’s imports of mechanical tubing. Goodluck India appealed to the Court of International Trade, arguing that its submission was a permissible correction of a minor clerical error and that it was entitled to submit supplemental information up to the day of verification. The Court of International Trade agreed with Goodluck India and remanded to Commerce. Commerce, under protest, conducted a new less-than-fair-value analysis resulting in a zero-percent antidumping margin for Goodluck India. Defendants-Appellants challenged the remand determination, but the Court of International Trade affirmed. Defendants-Appellants now appeal to this court.

We hold that Commerce’s initial determination—rejecting Goodluck India’s supplemental submission on grounds that it constituted new factual information and not a minor or clerical correction of the record, and that the submission was unverifiable as it was submitted on the eve of verification—is supported by substantial evidence and not otherwise contrary to law. We reverse.

BACKGROUND

Antidumping Duty Investigation

Defendants-Appellants ArcelorMittal Tubular Products, Michigan Seamless Tube, LLC, Plymouth Tube Company USA, PTC Alliance Corp., Webco Industries, Inc., and Zekelman Industries, Inc. (together, “Petitioners”) are U.S. domestic producers of cold-drawn mechanical tubing made from carbon and alloy steel (“mechanical tubing”). J.A. 58. In basic terms, mechanical tubing is metal piping sold in various diameters, lengths, and thicknesses suited for various mechanical applications. *See generally* J.A. 559.

On April 19, 2017, Petitioners filed an antidumping duty petition with the United States Department of Commerce (“Commerce”) on imports of mechanical tubing. J.A. 58. On May 9, 2017, Commerce initiated an antidumping duty investigation on mechanical tubing from several countries, including India. *See id.* (Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the Federal Republic of Germany, India, Italy, the Republic of Korea, the People’s Republic of China, and Switzerland: Initiation of Less-Than-Fair-Value Investigations, 82 Fed. Reg. 22,491 (May 16, 2017)).

Plaintiff-Appellee Goodluck India Ltd. (“Goodluck”) manufactures mechanical tubing in India, which it sells in both India and the United States. J.A. 2656–64. On June 19, 2017, Commerce selected Goodluck as a respondent in the investigation and issued Goodluck a mandatory questionnaire. J.A. 103–213. Relevant here, the questionnaire solicited data regarding Goodluck’s sales of mechanical tubing in its home market, India (Section B), its sales of mechanical tubing in the United States (Section C), and cost data specific to each product (Section D) applicable during the period of investigation (April 1, 2016, to March 31, 2017). *Id.*; *see also* J.A. 58 (defining period of investigation).

The questionnaire required Goodluck to create a control number (“CONNUM”)¹ for each product identified in its submitted sales and cost databases. J.A. 142, 169. It also required Goodluck to use the same CONNUM for any “products with identical physical characteristics reported” across all of its submitted database files. *Id.*

¹ *See Union Steel v. United States*, 823 F. Supp. 2d 1346, 1349–50 (Ct. Int’l Trade 2012) (“A ‘CONNUM’ is a contraction of the term ‘control number,’ and is simply Commerce’s term for a unique product (defined in terms of a hierarchy of specified physical characteristics determined in each antidumping proceeding). All products whose product hierarchy characteristics are identical are deemed to be part of the same CONNUM and are regarded as ‘identical’ merchandise for purposes of the price comparison. The hierarchy of product characteristics defining a unique CONNUM varies from case to case depending on the nature of the merchandise under investigation.” (citation omitted)).

When Commerce issued the questionnaire, it had not yet determined which physical characteristics would comprise the CONNUMs, so it left those fields blank in its instructions. *See id.* On July 6, 2017, Commerce issued a letter filling in those blanks, identifying which product characteristics should be used in forming each CONNUM. J.A. 440–52 (Letter from the Department, *CONNUM Letter*, dated July 6, 2017 (“July Letter”)).²

The July Letter directed Goodluck to report, among other things, wall thickness information for its products in two questionnaire fields—Fields 2.5 and 3.5. *Id.* Field 2.5 called for a nominal wall thickness value, in millimeters. J.A. 443. Field 3.5, in turn, called for a two-digit code that corresponded to a range within which the nominal wall thickness fell. J.A. 450. The July Letter set forth nine codes to be used in Field 3.5 as follows:

- 01 = < 1.00 mm
- 02 = 1.00 mm to 1.09 mm
- 03 = 1.10 mm to 1.59 mm
- 04 = 1.60 mm to 3.60 mm
- 05 = 3.61 mm to 6.35 mm
- 06 = 6.36 mm to 12.00 mm
- 07 = 12.01 mm to 20.00 mm
- 08 = 20.01 mm to 40 mm
- 09 = > 40 mm

Id. Thus, for example, if a product had a nominal wall thickness of 1.5 mm, then Goodluck was meant to enter “1.5 mm” in Field 2.5 and “03” in Field 3.5. J.A. 443, 450.

Shortly after Commerce issued the July Letter, Petitioners wrote to Commerce arguing that the ranges set forth in the July Letter were too broad to accurately capture cost and expense differences. J.A. 457 (Letter to the Department, *re: Petitioners’ Comments on the Department’s Release of Product Matching Criteria and Request for Expansion of Certain Criteria Fields*, dated July 12, 2017). In particular, Petitioners asked Commerce to create more ranges for use in Field 3.5 of the questionnaire. J.A. 459–60. Interested parties, including Goodluck, were invited to comment on or rebut Petitioners’ request for more ranges and the need for more particularized wall thickness information. Goodluck did not comment or raise any rebuttal. J.A. 566 (Letter to All Interested Parties, *re: Revised Product Characteristics*, dated August 7, 2017 (“August Letter”)).

² The July Letter was withdrawn and reissued the following day due to an error. J.A. 439.

On August 7, 2017, Commerce issued another letter with an updated coding chart that included fourteen ranges (instead of nine) for use in Field 3.5, as follows:

- 01 = < 1.00 mm
- 02 = 1.00 mm to 1.09 mm
- 03 = 1.10 mm to 1.59 mm
- 04 = 1.60 mm to 3.60 mm
- 05 = 3.61 mm to 5.00 mm
- 06 = 5.01 mm to 6.35 mm
- 07 = 6.36 mm to 8.00 mm
- 08 = 8.01 mm to 10.00 mm
- 09 = 10.01 mm to 12.00 mm
- 10 = 12.01 mm to 15.88 mm
- 11 = 15.89 mm to 20.00 mm
- 12 = 20.01 mm to 30.00 mm
- 13 = 30.01 mm to 40.00 mm
- 14 = > 40 mm

J.A. 566, 577.

On August 25, 2017, Goodluck submitted its initial responses to questionnaire Sections B–D.³ J.A. 585. In those responses, Goodluck confirmed that it reported wall thickness codes according to the fourteen ranges specified in Commerce’s August Letter. J.A. 613.

On November 15, 2017, Commerce issued a *Preliminary Determination*, tentatively assigning Goodluck a zero-percent antidumping duty rate based on its questionnaire responses. J.A. 1810–14 (Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel From India: Preliminary Affirmative Determination of Sales at Less Than Fair Value, in Part, Postponement of Final Determination, and Extension of Provisional Measures, 82 Fed. Reg. 55,567 (Nov. 22, 2017)).⁴

On November 22, 2017, Commerce sent Goodluck a Sales Verification Agenda outlining the plan for verifying the data in Goodluck’s responses to questionnaire Sections B and C. J.A. 1816. Per standard procedure, Commerce warned Goodluck that new information would only be accepted at verification if “(1) the need for that information

³ Though not relevant for purposes of this appeal, Goodluck submitted its initial Section A response in July 2017 and its supplemental Section A responses in September 2017. J.A. 525–65, 580–84, 1208–28. Goodluck also submitted responses to supplemental Sections B–D in October 2017. J.A. 1275–76, 1320–21.

⁴ On January 3, 2018, Commerce revised Goodluck’s rate to 4.2% based on a clerical error that Petitioners flagged. J.A. 1787–92, 2847–49 (Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel From India: Amended Preliminary Determination of Sales at Less Than Fair Value, 83 Fed. Reg. 1021 (Jan. 9, 2018)).

was not evident previously; (2) the information makes *minor corrections* to information already on the record; or (3) the information corroborates, supports, or clarifies information already on the record.” *Id.* (emphasis added).

On November 27, 2017, Commerce sent Goodluck a Cost Verification Agenda, outlining the plan for verifying the data in Goodluck’s Section D responses. J.A. 1833–34. Again, Commerce warned Goodluck that only the correction of “minor errors” would be allowed at verification. J.A. 1834. Commerce also specified, “Minor errors are minor mistakes in addition, subtraction, or other arithmetic function, minor data entry mistakes, clerical errors resulting from inaccurate copying, duplication, or the like, and minor classification errors. Minor errors do not include items such as methodology changes.” J.A. 1836 n.1.

On December 14, 2017, the first day of cost verification, Goodluck wrote to Commerce to identify and correct 682 misreported values in its Section B database, calling them “minor corrections.” J.A. 1867–68 (Letter to the Department, *Goodluck Verification Minor Corrections*, dated December 14, 2017); J.A. 1873–74 (identifying Goodluck’s coding errors); J.A. 2655 (counting 682 sales affected by misreported CONNUMs). Specifically, Goodluck explained that it prepared its Section B, Field 3.5 responses using the nine wall thickness codes provided in the July Letter, not the fourteen codes provided in the August Letter. J.A. 1873–74. Goodluck also explained that this mistake resulted in errors in its Section D database, which relied on CONNUMs already created for the Section B responses. *Id.*

On January 17, 2018, Commerce issued its Cost Verification Report, which acknowledged Goodluck’s coding errors but noted that “[c]orrections of these errors would cause changes to the reported physical characteristics of 24 CONNUMs and the addition of 13 CONNUMs.” J.A. 2633. On February 7, 2018, Commerce issued its Sales Verification Report, which further noted: “[T]he values in Field 3.5 do not correspond to the Field 2.5 Nominal Wall Thickness. As a result, 682 [values] in the home database are affected by this issue.” J.A. 2655.

On February 15, 2018, Goodluck filed its administrative case brief in Commerce’s investigation.⁵ J.A. 2770–72. Commerce rejected that case brief, however, because it found that the brief contained new factual information—e.g., “corrected worksheets” and a new database reflecting changes in Goodluck’s reporting of wall thicknesses. J.A.

⁵ Petitioners also submitted their administrative case brief on February 15, 2018. J.A. 2689–712.

2725–26 (Letter from the Department, *re: Rejection of New Factual Information*, dated Feb. 20, 2018). Commerce instructed the parties not to reference this rejected material in their rebuttal briefs. J.A. 2726.⁶

On February 21, 2018, Goodluck submitted a redacted case brief that was similarly rejected on March 7, 2018, again for containing new factual information. J.A. 2764–65. On March 8, 2018, Goodluck submitted a second redacted case brief, removing some language regarding the missing CONNUMs and wall thickness errors. J.A. 2766–67.

Commerce’s *Final Determination*

On April 16, 2018, Commerce published its *Final Determination*, assigning Goodluck an antidumping duty rate of 33.8%. J.A. 2835–37 (Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from India: Final Affirmative Determination of Sales at Less Than Fair Value, 83 Fed. Reg. 16,296 (Apr. 16, 2018) (“*Final Determination*”)); *see also* J.A. 2805–25 (Issues and Decision Memorandum for the [*Final Determination*], dated Apr. 9, 2018).

Commerce found that Goodluck’s 682 misreported values, which resulted in 24 misreported CONNUMs and 13 unreported CONNUMs, were not due to “clerical” or “minor” errors. *See* J.A. 2655–56, 2812. Commerce reasoned that Goodluck’s mistakes “entailed more than copying, duplicating, or the like,” as coding wall thicknesses entailed “analyzing the nominal tube wall thickness[es] and assigning the corresponding codes as directed by Commerce.” J.A. 2812. Commerce also noted that “this systemic error render[ed] the entire dumping calculation inaccurate[] because the control number is fundamental to Commerce’s calculation, as it controls the allocation of costs and determines the product matches between U.S. and home markets.” J.A. 2811. Moreover, Commerce found that “any attempts to correct these errors would involve both extensive SAS programming and complex calculations to Goodluck’s cost database,” and it was “impossible to assess whether such a large-scale revision [wa]s appropriate.” J.A. 2816. Thus, Commerce determined that “Goodluck’s cost and home market sales databases [we]re unreliable” for calculating an estimated dumping margin. J.A. 2809–10.

Additionally, Commerce found that Goodluck “failed to cooperate by not acting to the best of its ability to comply with Commerce’s requests for information” because “the scope of the errors and omissions identified at verification . . . [we]re the result of both inattentiveness

⁶ The parties submitted their rebuttal briefs on February 23, 2018. J.A. 2728–51, 2753–63.

and carelessness.” J.A. 2817; *see Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382–83 (Fed. Cir. 2003) (“While the [‘best of ability’] standard does not require perfection, and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.”). Consequently, Commerce based its margin calculation for Goodluck on all facts available, using an adverse inference. J.A. 2818; *see* 19 U.S.C. § 1677e. Commerce therefore relied on the “highest dumping margin contained in the petition” and assigned Goodluck an antidumping duty rate of 33.8%. J.A. 2818.

CIT Action

Goodluck challenged Commerce’s *Final Determination* before the United States Court of International Trade (“CIT”). J.A. 39; *see Goodluck India Ltd. v. United States*, 393 F. Supp. 3d 1352, 1361 (Ct. Int’l Trade 2019) (“*Goodluck I*”). The CIT reversed, finding that Commerce abused its discretion by not accepting Goodluck’s corrected information, as Goodluck’s coding errors “could have been addressed through a ‘straightforward mathematical adjustment’ even though the ‘effect of these mistakes was compounded’ by how Commerce used the incorrect CONNUMs.” *Goodluck I*, 393 F. Supp. 3d at 1364 (quoting *NTN Bearing Corp. v. United States*, 74 F.3d 1205 (Fed. Cir. 1995)).

The CIT also noted: “[T]his is not a situation where a company was unresponsive, provided fraudulent information, or clearly ignored Commerce’s instructions; rather, Goodluck believed it had reported the correct information in accordance with Commerce’s instructions—and largely did so—but made a mistake.” *Id.* at 1366 n.11. Reasoning further that “[c]lerical errors are by their nature not errors in judgment but merely inadvertencies,” the CIT found that Goodluck’s coding errors were clerical. *See id.* at 1368 (quoting *NTN Bearing*, 74 F.3d at 1208). Thus, the CIT held that Goodluck’s coding errors were “correctible importer mistake as opposed to untimely new factual information” and remanded for Commerce to consider the corrected information. *Id.* at 1370.⁷

On December 23, 2019, Commerce issued its *Final Results of Redetermination Pursuant to Court Remand* (“*Remand Results*”) under respectful protest, assigning Goodluck a revised antidumping duty rate of 0%. J.A. 3384. Petitioners challenged that determination before the CIT, and the CIT sustained the *Remand Results*. J.A. 27–30; *see Goodluck India Ltd. v. United States*, 439 F. Supp. 3d 1366, 1367

⁷ The CIT also directed Commerce to “explain why it . . . departed from its general practice for calculating cash deposit offset rates in this case.” *Goodluck I*, 393 F. Supp. 3d at 1363. Goodluck does not raise this issue on appeal.

(Ct. Int'l Trade 2020) (“*Goodluck II*”). Now, Petitioners appeal to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

STANDARD OF REVIEW

We review decisions by the CIT de novo, reviewing final determinations by Commerce under the same standard applied by the CIT. *ABB, Inc. v. United States*, 920 F.3d 811, 820 (Fed. Cir. 2019). Accordingly, we affirm Commerce’s rulings unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” *Id.*; 19 U.S.C. § 1516a(b)(1)(B)(i). We consider whether “the administrative record contain[s] substantial evidence to support” Commerce’s decision and whether that decision was “rational.” *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

DISCUSSION

Petitioners argue that (1) the CIT improperly substituted its judgment to find that Goodluck’s submitted corrections were not “minor”; (2) substantial evidence supports Commerce’s finding that Goodluck’s submitted corrections were not “minor”; and (3) the CIT legally erred by relying on *NTN Bearing*. For reasons stated below, we reverse.

Commerce has discretion to accept or reject corrective information on a case-by-case basis. *Deacero S.A.P.I. de C.V. v. United States*, 353 F. Supp. 3d 1303, 1307 (Ct. Int'l Trade 2018) (citing *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353 (Fed. Cir. 2006)). For example, as in investigations, Commerce has discretion to establish and enforce time limits for submitting information in an administrative review. *Reiner Brach GmbH & Co. KG v. United States*, 206 F. Supp. 2d 1323, 1334 (Ct. Int'l Trade 2002) (“Commerce clearly cannot complete its own work unless it is able at some point to freeze the record and make calculations and findings based on that fixed and certain body of information.” (internal quotation marks and citation omitted)); *see also NTN Bearing*, 74 F.3d at 1207 (“[I]t is within the discretion of [Commerce] to promulgate appropriate procedural regulations.”). Commerce’s discretion in establishing and enforcing its procedures, in particular the correction of clerical errors, is grounded in the trade statute, 19 U.S.C. § 1673d(e) (“The administering authority shall establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the determinations are issued . . .”).

Commerce’s discretion has limits. *See Goodluck I*, 393 F. Supp. 3d at 1358; *see also Borlem S.A.-Empreedimentos Industriais v. United States*, 913 F.2d 933, 937 (Fed. Cir. 1990) (“Congress’ desire for speedy determinations on dumping matters should not be interpreted as

authorizing proceedings that are based on inaccurate data.”). Commerce abuses its discretion, for instance, if it departs from a consistent practice without reasonable explanation. See *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003). Commerce can also abuse its discretion by “refusing to accept updated data when there [i]s plenty of time for Commerce to verify or consider it.” *Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1384 (Fed. Cir. 2016) (collecting cases); see, e.g., *NTN Bearing*, 74 F.3d at 1207–08 (holding Commerce abused its discretion by refusing, at the preliminary results stage, to accept information correcting reporting errors); *Fischer S.A. Comercio v. United States*, 700 F. Supp. 2d 1364, 1370–71 (Ct. Int’l Trade 2010) (same); *Timken*, 434 F.3d at 1353 (explaining that “Commerce is free to correct any type of importer error” if the request is timely and justified).

Relevant here, the untimely submission of corrective information at verification results in “a tension between finality and correct result.” *Timken*, 434 F.3d at 1353 (citing *NTN Bearing*, 74 F.3d at 1208). In such a case, Commerce must determine whether the need for finality outweighs the need for accuracy, or vice versa. See generally *Civ. Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 321–22 (1961) (“Since these policies are in tension, it is necessary to reach a compromise in each case . . .”). To that end, Commerce’s typical practice is to accept corrective information at verification only for “minor corrections to information already on the record.” J.A. 1816; see 19 C.F.R. §§ 351.301, 351.302(d)(1)(i); 19 U.S.C. § 1673d(e). A minor correction is one that rectifies “minor mistakes in addition, subtraction, or other arithmetic function, minor data entry mistakes, clerical errors resulting from inaccurate copying, duplication, or the like, [or] minor classification errors.” J.A. 1836 n.1 (“Minor errors do not include items such as methodology changes.”); see also 19 C.F.R. § 351.224(f). This practice, as applied at verification, strikes an appropriate balance between finality and accuracy. And, importantly, it is within Commerce’s discretion to decide which interest outweighs the other on a case-by-case basis. See *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997) (“Congress has implicitly delegated to Commerce the latitude to derive verification procedures ad hoc.”); *Am. Alloys, Inc. v. United States*, 30 F.3d 1469, 1475 (Fed. Cir. 1994) (“[T]he statute[s] give[] Commerce wide latitude in its verification procedures.”).

We hold that Commerce acted within its discretion in rejecting Goodluck’s revised submissions on the day of verification because substantial evidence supports Commerce’s determination that Goodluck’s revisions were not minor. Goodluck’s revisions were a systemic

change to the entire reported database. The revisions were not singular, such as a missing word or an error in arithmetic. The record reflects that Goodluck's coding errors resulted in 24 misreported CONNUMs and 13 unreported CONNUMs, thereby resulting in misreported CONNUMs for 682 sales in Goodluck's home market database. J.A. 2810. It also appears generally undisputed that Goodluck's errors "render[ed] the entire dumping calculation inaccurate[] because the control number is fundamental to Commerce's calculation, as it controls the allocation of costs and determines the product matches between U.S. and home markets." J.A. 2811. It was therefore rational for Commerce to find that "any attempts to correct these errors would involve both extensive SAS programming and complex calculations to Goodluck's cost database." J.A. 2816. Such corrections are not "minor." See J.A. 2812.

The record belies Goodluck's argument that it should be excused because it acted to the best of its ability. Substantial evidence supports Commerce's finding that Goodluck "failed to cooperate by not acting to the best of its ability to comply with Commerce's requests for information." J.A. 2817. Despite receiving clear instructions in the August Letter, Goodluck failed to update its Field 3.5 responses to reflect the new coding ranges ordered by Commerce. Notably, Goodluck was *aware* of the August Letter instructions, as Goodluck represented to Commerce that it coded wall thicknesses according to the fourteen ranges set forth in that letter. J.A. 613. This evidence supports Commerce's conclusion that Goodluck's errors were "the result of both inattentiveness and carelessness." J.A. 2817. Thus, Commerce did not abuse its discretion in applying all facts available with an adverse inference. See *Nippon Steel*, 337 F.3d at 1380–84; 19 U.S.C. § 1677e(b).

The cases relied on by Goodluck do not compel a different outcome. Those cases—namely, *NTN Bearing*, *Fischer*, and *Timken*—all stand for the proposition that Commerce cannot reject corrective information at a *preliminary* determination stage (where there are no finality concerns), provided that the corrections are otherwise justifiably necessary. See *Papierfabrik*, 843 F.3d at 1384 (discussing *NTN Bearing*, 74 F.3d at 1207–08, and *Timken*, 434 F.3d at 1353). Here, in contrast, Goodluck submitted its revised databases at verification. Verification represents a point of no return. The purpose of verification is "to test information provided by a party for accuracy and completeness." *Micron Tech.*, 117 F.3d at 1396 (quoting *Bomont Indus. v. United States*, 733 F. Supp. 1507, 1508 (Ct. Int'l Trade 1990)). At that stage, Commerce enjoys "broad discretion" to promulgate and enforce its

procedural rules. *Stupp Corp. v. United States*, 5 F.4th 1341, 1350–51 (Fed. Cir. 2021) (“Short of a showing that Commerce’s enforcement of its procedural rules is so haphazard or unreasonable as to be arbitrary or capricious[,] . . . Commerce’s failure to apply those rules with Procrustean consistency in every case does not deprive it of the authority to enforce those rules in any case.”); see also 19 U.S.C. §§ 1673d(e), 1677e; 19 C.F.R. §§ 351.301, 351.302(d)(1)(i).

Lastly, we agree with Petitioners that the CIT improperly substituted its judgment for that of Commerce when it determined, for instance, that Goodluck’s reporting errors “could have been addressed through a straightforward mathematical adjustment.” *Goodluck I*, 393 F. Supp. 3d at 1364 (internal quotation marks and citation omitted). Under the substantial evidence standard of review, a reviewing court “must affirm [Commerce’s] determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from [Commerce’s] conclusion.” *Hitachi Metals, Ltd. v. United States*, 949 F.3d 710, 716 (Fed. Cir. 2020) (quoting *Altix, Inc. v. United States*, 370 F.3d 1108, 1121 (Fed. Cir. 2004)). “Even if it is possible to draw two inconsistent conclusions from evidence in the record, such a possibility does not prevent Commerce’s determination from being supported by substantial evidence.” *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001).

In this case, the CIT noted: “[Goodluck] necessarily has the correct information on hand, but inadvertently reports the wrong information instead and thus seeks to correct that mistake. . . . It is thus unclear . . . what renders Goodluck’s error here a failure to follow instructions rather than a correctible error.” *Goodluck I*, 393 F. Supp. 3d at 1366 n.11. But notwithstanding the CIT’s own observations, the record clearly supports a finding that Goodluck failed to follow instructions. The information that Goodluck “inadvertently” miscoded was addressed by Commerce on two occasions prior to verification, and Goodluck raised no objection when given the chance to rebut Petitioners’ request for expanded wall thickness criteria. Nor, apparently, was Goodluck incentivized by those factors to revisit its submissions to ensure compliance and consistency with Commerce’s request for data. Moreover, despite receiving the August Letter and affirmatively representing to Commerce that its reported data complied with the reporting criteria, Goodluck failed to code product wall thicknesses as instructed until the eleventh hour, when it attempted to submit hundreds of revisions at the verification door. This record shows that Goodluck knew, or had reason to know, of its reporting errors. More importantly, it supports Commerce’s conclusion that Goodluck failed to follow instructions and did not merely commit a

minor error. The CIT cannot impose its own contrary finding over a determination by Commerce that is supported by substantial evidence.

CONCLUSION

Commerce's determination to reject Goodluck's revisions to the record is supported by substantial evidence and is otherwise not contrary to law. The judgment of the CIT is reversed. The action is remanded for further proceedings consistent with our ruling.

REVERSED AND REMANDED

COSTS

No costs.

U.S. Court of International Trade

Slip Op. 21–108

VOESTALPINE USA CORP. AND BILSTEIN COLD ROLLED STEEL LP, Plaintiffs,
v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 20–03829

[Granting Defendant’s motion to dismiss for lack of subject matter jurisdiction upon finding that Plaintiffs’ claim is moot.]

Dated: August 26, 2021

Lewis E. Leibowitz, The Law Office of Lewis E. Leibowitz, of Washington, DC, for Plaintiffs.

Aimee Lee, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief were *Anthony Saler*, Assistant Division Chief, and *Kenneth S. Kessler*, Senior Counsel, Office of the Chief Counsel, Bureau of Industry and Security, U.S. Department of Commerce, of Washington, DC, and *Yelena Slepak*, Senior Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of Washington, DC.

OPINION AND ORDER

Barnett, Chief Judge:

In this consolidated action, Plaintiffs VoestAlpine USA Corp. (“VoestAlpine”) and Bilstein Cold Rolled Steel LP (“Bilstein”) seek a court order requiring reliquidation of two entries of steel merchandise exclusive of duties imposed pursuant to section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 (2018).¹ *See* Am. Compl. pp. 4–5 (prayer for relief), ECF No. 8; Compl. p. 5, *VoestAlpine USA Corp. and Bilstein Cold Rolled Steel LP v. United States*, Court No. 20-cv-03840 (“Ct. No. 20–3840”) (CIT Nov. 23, 2020). Plaintiffs claim that reliquidation is merited based on the U.S. Department of Commerce’s (“Commerce” or “the agency”) approval of an exclusion request containing an invalid 10-digit subheading of the Harmonized Tariff Schedule of the United States (“HTSUS”). *See* Am. Compl. ¶¶ 10–14.

¹ Citations to the U.S. Code are to the 2018 version, unless otherwise stated.

Plaintiffs allege jurisdiction pursuant to 28 U.S.C. § 1581(i)(2) and (4) (2018).² *See id.* ¶ 4.

Defendant United States (“the Government”) moves to dismiss the consolidated action pursuant to U.S. Court of International Trade (“CIT”) Rules 12(b)(1) and 12(b)(6). Def.’s Mot. to Dismiss (“Def.’s Mot.”), ECF No. 19; *see also* Def.’s Reply Br. in Supp. of its Mot. to Dismiss (“Def.’s Reply”), ECF No. 23. The Government presents several grounds for dismissal. Most relevant here, the Government argues that the court lacks jurisdiction pursuant to 28 U.S.C. § 1581(i) (referred to as “(i) jurisdiction”) because Plaintiffs had a remedy pursuant to 28 U.S.C. § 1581(a) (referred to as “(a) jurisdiction”)³ under which they could have sought a refund of section 232 duties by first filing a protest with U.S. Customs and Border Protection (“CBP” or “Customs”). Def.’s Mot. at 2–3, 16–22; Def.’s Reply at 8–14. The Government also argues that, to the extent the court finds (i) jurisdiction appropriate, any challenge to Commerce’s exclusion decision is moot because Commerce has approved a second exclusion containing a valid HTSUS subheading with retroactive application. Def.’s Mot. at 22–24; Def.’s Reply at 15–16.⁴

Plaintiffs oppose the motion. Pls.’ Resp. to Def.’s Mot. to Dismiss Compls. (“Pls.’ Resp.”), ECF No. 21; Pls.’ Surreply to Def.’s Mot. to Dismiss (“Pls.’ Surreply”), ECF No. 25.

For the following reasons, the court finds that Plaintiffs’ claim is moot and therefore grants the Government’s motion to dismiss for lack of subject matter jurisdiction.

STANDARD OF REVIEW

To adjudicate a case, a court must have subject-matter jurisdiction over the claims presented. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998). “[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the complaint must be dismissed in

² Section 1581(i) grants the court jurisdiction to entertain “any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for— . . . (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue,” and “(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.” 28 U.S.C. § 1581(i)(2),(4).

³ Section 1581(a) grants the court “exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930,” 19 U.S.C. § 1515. 28 U.S.C. § 1581(a).

⁴ The Government argues in the alternative that Plaintiffs failed to state a claim upon which relief may be granted because Commerce’s original exclusion decision was not the proximate cause of Plaintiffs’ alleged injury, Plaintiffs were not prejudiced by Commerce’s alleged error, and Plaintiffs’ claim against Commerce is time-barred. *See* Def.’s Mot. at 22–28; Def.’s Reply at 14–23. Because the court dismisses the action on mootness grounds, it need not address these arguments.

its entirety.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

Plaintiffs bear the burden of establishing subject-matter jurisdiction. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). When, as here, the plaintiff asserts jurisdiction pursuant to 28 U.S.C. § 1581(i), it “bears the burden of showing that another subsection is either unavailable or manifestly inadequate.” *Erwin Hymer Group N. Am., Inc. v. United States*, 930 F.3d 1370, 1375 (Fed. Cir. 2019) (citation omitted). Because the pending motion to dismiss rests on the availability of (a) jurisdiction and therefore challenges the existence of (i) jurisdiction, “the factual allegations in the complaint are not controlling and only uncontroverted factual allegations are accepted as true.” *Shoshone Indian Tribe of Wind River Rsrv., Wyo. v. United States*, 672 F.3d 1021, 1030 (Fed. Cir. 2012). To resolve the pending motion to dismiss, the “court is not restricted to the face of the pleadings” and may, if necessary, “review evidence extrinsic to the pleadings.” *Id.* (citation omitted).

Article III of the U.S. Constitution also limits the court to resolving “legal questions only in the context of actual ‘Cases’ or ‘Controversies.’” *Alvarez v. Smith*, 558 U.S. 87, 92 (2009) (quoting U.S. Const., Art. III, § 2). Thus, “[i]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant ‘any effectual relief whatever’ to a prevailing party, the appeal must be dismissed as moot.” *Nasatka v. Delta Scientific Corp.*, 58 F.3d 1578, 1580 (Fed. Cir. 1995) (quoting *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)); *see also Jem D Int’l (Michigan) Inc. USA v. United States*, 44 CIT __, __, 470 F. Supp. 3d 1374, 1380 (2020) (mootness precludes the court’s consideration of a claim “when ‘events have so transpired that the [court’s] decision will . . . [not] affect the parties’ rights”) (first alteration in original) (quoting *Clarke v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990) (en banc)).

BACKGROUND

I. The Imposition of Section 232 Duties and the Exclusion Process

“Section 232 of the Trade Expansion Act of 1962 authorizes the President to restrict imports of goods to ‘[s]afeguard[] national security.’” *N. Am. Interpipe, Inc. v. United States*, Slip Op. 21–66, 2021 WL 2106427, at *1 (CIT May 25, 2021) (alterations in original) (quoting 19 U.S.C. § 1862). Pursuant to that authority, on March 8, 2018, the President announced a 25 percent tariff on imports of certain steel articles, effective March 23, 2018. *See Proclamation 9705* (Mar. 8, 2018) (“Proc. 9705”), cl. 1–2, 83 Fed. Reg. 11,625 (Mar. 15, 2018). Proclamation 9705 identified certain six-digit tariff provisions that

would be subject to section 232 duties. *Id.*, cl. 1.⁵ In order to implement the increased duty rates, Proclamation 9705 modified subchapter III of chapter 99 of the HTSUS to add a new subheading, 9903.80.01, which provided for an additional 25 percent tariff on “all entries of iron or steel products from all countries, except products of Canada and of Mexico, classifiable in the headings or subheadings enumerated in this note.” *Id.*, Annex (U.S. Note 16(a)).

Proclamation 9705 authorized Commerce “to provide relief from the additional duties . . . for any steel article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality” and “to provide such relief based upon specific national security considerations.” *Id.*, cl. 3.⁶ Commerce must convey all exclusion determinations “to [CBP] for implementation . . . at the earliest possible opportunity.” *Id.*, Annex (U.S. Note 16(c)). Importers are required to “report information concerning any applicable exclusion granted by Commerce in such form as CBP may require.” *Id.*, Annex (U.S. Note 16(d)).

In 2018, Commerce’s Bureau of Industry and Security (“BIS”) amended 15 C.F.R. pt. 705 to include rules for the administration of the exclusion process. *See generally Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum Into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum*, 83 Fed. Reg. 12,106 (Dep’t Commerce Mar. 19, 2018) (interim final rule) (“*March Regulations*”); *Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum*, 83 Fed. Reg. 46,026 (Dep’t Commerce Sept. 11, 2018) (interim final rule) (“*September Regulations*”); *see also* 15 C.F.R. pt. 705, Suppl. 1 (2019).

Relevant here, exclusion requests must be filed by an individual or organization “using steel in business activities . . . in the United States” and include “the submitter’s name, date of submission, and

⁵ The subheadings included “7206.10 through 7216.50, 7216.99 through 7301.10, 7302.10, 7302.40 through 7302.90, and 7304.10 through 7306.90, including any subsequent revisions to these . . . classifications.” Proc. 9705, cl. 1; *see also id.*, Annex (U.S. Note 16(b) (enumerating the affected tariff provisions)). The covered articles are subject to section 232 duties in addition to other applicable duties. *Id.*, cl. 2.

⁶ The President twice amended clause three. *See* Proclamation 9711 (Mar. 22, 2018) (“Proc. 9711”) cl. 7, 83 Fed. Reg. 13,361 (Mar. 28, 2018) (amending clause three to provide, *inter alia*, that “[f]or merchandise entered on or after the date the directly affected party submitted a request for exclusion, such relief shall be retroactive to the date the request for exclusion was posted for public comment”); Proclamation 9777 (Aug. 29, 2018) (“Proc. 9777”) cl. 5, 83 Fed. Reg. 45,025 (Sept. 4, 2018) (further amending clause three to state, *inter alia*, that “[f]or merchandise entered for consumption, or withdrawn from warehouse for consumption, on or after the date the duty established under this proclamation is effective and with respect to which liquidation is not final,” an exclusion from the tariff “shall be retroactive to the date the request for relief was accepted by [Commerce]”).

the 10-digit [HTSUS] statistical reporting number.” *March Regulations*, 83 Fed. Reg. at 12,110. Commerce’s approval of an exclusion is limited to the product specified in the request and the “individual or organization that submitted the specific exclusion request, unless Commerce approves a broader application of the [exclusion].” *Id.* Companies may “submit[] a request for exclusion of a product even though an exclusion request submitted for that product by another requester or that requester was denied or is no longer valid.” *Id.* Additionally, “[e]xclusions will generally be approved for one year.” *Id.* at 12,111. Commerce will deny “[e]xclusion requests that do not satisfy the [specified] reporting requirements.” *Id.*

The *September Regulations* revised the exclusion process set forth in the *March Regulations* “to improve the fairness, transparency and efficiency of the exclusion and objection process” and to “add a rebuttal and surrebuttal process.” 83 Fed. Reg. at 46,048. In the preamble, Commerce explained that it “will not issue a decision granting an exclusion until CBP confirms that the exclusion is administrable, meaning the exclusion request designates the correct HTSUS statistical reporting number.” *Id.* at 46,046. When “a request is denied for HTSUS issues, companies are encouraged to work with CBP to confirm the proper classifications and resubmit.” *Id.* at 46,047. The *September Regulations* also provide that “[a]ny questions on the refund of duties should be directed to CBP.” *Id.* at 46,059–60.

Both Customs and Commerce issued guidance to importers seeking exclusions. Customs issued several Cargo Systems Messaging Service (“CSMS”) messages on the proper submission of approved exclusions. On May 21, 2018, Customs issued CSMS # 18–000352, which stated that “[o]nly products from importer(s) designated in the product exclusion approved by [Commerce] are eligible for exclusion from the Section 232 measures.” U.S. Customs and Border Prot., CSMS # 18–000352 -Submitting Imports of Products Excluded from Duties on Imports of Steel or Aluminum, <https://content.govdelivery.com/accounts/USDHSCBP/bulletins/1f1986e> (May 21, 2018, 8:41 AM) (“CSMS # 18–000352”). CSMS # 18–000352 further stated that “[e]xclusions granted by [Commerce] are retroactive on imports to the date the request for exclusion was posted for public comment at Regulations.gov.” *Id.* Thus, “[t]o request an administrative refund for previous imports of excluded products granted by [Commerce], importers may file a [post summary correction (“PSC”)].” *Id.* If, however, “the entry has already liquidated, importers may protest the liquidation.” *Id.* Subsequent CSMS messages reiterated that exclusions may be applied retroactively to unliquidated entries and to entries that have liquidated when the liquidation is nonfinal and the protest period has

not expired. See U.S. Customs and Border Prot., CSMS # 42566154 – Section 232 and Section 301 – Extensions Requests, PSCs, and Protest, <https://content.govdelivery.com/accounts/USDHSCBP/bulletins/289820a> (May 1, 2020, 5:05 PM) (“CSMS # 42566154”); U.S. Customs and Border Prot., CSMS # 39633923 - UPDATE: Submitting Imports of Products Excluded from Duties on Imports of Steel or Aluminum, <https://content.govdelivery.com/accounts/USDHSCBP/bulletins/25cc403> (Sept. 3, 2019, 11:08 AM) (“CSMS # 39633923”); U.S. Customs and Border Prot., CSMS # 18–000378 - UPDATE: Submitting Imports of Products Excluded from Duties on Imports of Steel or Alumin, <https://content.govdelivery.com/accounts/USDHSCBP/bulletins/1f6cce3> (June 5, 2018, 3:37 PM) (“CSMS # 18–000378”).

In June 2019, Commerce published guidance on the section 232 exclusion process. See *232 Exclusion Process Frequently Asked Questions (FAQs)*, Bureau of Indus. and Sec., U.S. Dep’t Commerce (June 19, 2019), <https://www.bis.doc.gov/index.php/documents/section-232-investigations/2409-section-232-faq/file> (“Commerce FAQs”); see also *Pls.’ Resp., Ex. 2* (providing excerpts from Commerce FAQs). Therein, Commerce explained that a company in receipt of an approved exclusion should provide CBP with information concerning the importer of record listed in the exclusion and the “product exclusion number.” Commerce FAQs at 12. Commerce indicated that “an exclusion is granted for one year from the date of signature, or until all excluded product volume is imported (whichever comes first).” *Id.* Companies “cannot make substantive changes to their exclusion request after submission” but may make “non-substantive changes,” such as changes to the importer of record. *Id.* at 18. Commerce further stated that it could revoke a granted exclusion “if there was a technical issue that resulted in an inadvertent approval.” *Id.* at 13.

Commerce also provided guidance on the resubmission of denied exclusion requests, including requests that were denied for HTSUS errors. *Id.* at 25. Resubmissions may include changes to the importer of record and be tied back “to [the] original submission date for refund purposes.” *Id.* An exclusion request that is withdrawn because of an incorrect tariff provision is not eligible for resubmission but must instead “be processed as a new request.” *Id.* at 27.

II. Factual and Procedural History

On July 10, 2018, Bilstein, the purchaser of steel imported by VoestAlpine, submitted an exclusion request to Commerce that contained a nonexistent ten-digit HTSUS provision and identified the

incorrect importer of record. *See* Def.’s Mot., Ex. A at 1 (the exclusion request). Bilstein’s exclusion request listed 7225.30.0000, HTSUS, as the tariff provision applicable to the steel article covered by the request. *Id.* (box 1.a)⁷ It further listed “Peter Wittwer North America” as the importer of record. *Id.* (box 1.b). Commerce approved this exclusion request on September 28, 2018, with the invalid tariff provision. *See* Def.’s Mot., Ex. B (Commerce’s decision memorandum on exclusion request number BIS-2018–0006–25363) (“Exclusion 25363”); Am. Compl. ¶ 10.

VoestAlpine, the importer of record for the relevant entries, made two entries of steel products on November 17, 2018, referred to herein as “the subject entries.” Def.’s Mot., Ex. C (entry documentation).⁸ VoestAlpine entered the merchandise under subheadings 7208.39.0090⁹ and 9903.80.01, HTSUS, thereby indicating that the subject entries were subject to section 232 duties. *Id.* at ECF pp. 13, 15. VoestAlpine paid the applicable duties on or around the time of entry. Am. Compl. ¶¶ 6–8; Compl., ¶¶ 6, 8, Ct. No. 20–3840. CBP liquidated the subject entries on October 18, 2019. Def.’s Mot., Ex. C at ECF pp. 13, 15.¹⁰

Plaintiffs assert that they “sought advice from Customs and BIS” regarding the error(s) in Exclusion 25363 after “becom[ing] aware of the problem in September 2019.” Pls.’ Resp. at 15. On September 2, 2020, BIS informed counsel for Bilstein that in order to obtain

retroactive relief on a request that lists an erroneous tariff classification, they must file an exclusion request that is functionally identical to the original request except for the corrected [HTSUS] Code. If the new request is granted, the requestor may then contact the 232 Help Desk via email to declare their intention to open a resubmission case. [BIS] will review the filings to determine whether the resubmitted request is functionally iden-

⁷ Bilstein identified the “class of steel product for which the Exclusion [was] sought” as “Carbon and Alloy Flat,” Def.’s Mot., Ex. A at 1, and described the product as “Hot Rolled Black C15M Steel,” *id.* at 2. Subheading 7225.30, HTSUS, covers “Flat-rolled products of other alloy steel, of a width of 600 mm or more; Other, not further worked than hot-rolled, in coils: Of a thickness of 4.75 mm or more.” However, the remaining four digits do not exist in the HTSUS.

⁸ The entry documentation lists the importation date as November 10, 2018, and the entry date as November 17, 2018. Def.’s Mot., Ex. C at ECF pp. 13, 15. Plaintiffs allege the date of entry as November 12, 2018. *See* Am. Compl. ¶ 1; Compl. ¶ 1, Ct. No. 20–3840.

⁹ Subheading 7208.39.0090, HTSUS, covers “Flat-rolled products of iron or nonalloy steel, of a width of 600 mm or more, hot-rolled, not clad, plated or coated: Of a thickness of less than 3 mm: Other.”

¹⁰ Liquidation is defined as “the final computation or ascertainment of duties on entries,” 19 C.F.R. § 159.1, notwithstanding the availability of a protest and judicial review that can affect the assessed rate of duties, *see Thyssenkrupp Steel N. Am., Inc. v. United States*, 886 F.3d 1215, 1218 (Fed. Cir. 2018).

tical to the original request and, if approved, issue a new decision memo that allows the requestor to receive retroactive relief dating back to the submission date of the original request.

Id., Ex. 3 at 1 (email correspondence between Bilstein and BIS); *see also* Am. Compl. ¶ 13.

On November 2, 2020, Bilstein filed an exclusion request for products covered by HTSUS subheading 7208.39.0090 designated as a renewal of its original exclusion request, and which listed VoestAlpine as the importer of record. Def.'s Mot., Ex. D at 1, 3. On or around November 2, 2020, BIS "informed Bilstein that it would not approve a 'resubmission' of the exclusion request unless the protest period under 19 U.S.C. § 1514 was available." Am. Compl. ¶ 14; *see also* Pls.' Resp., Ex. 3 at 4 (referring to a BIS email, dated November 4, 2020, in which BIS apparently indicated "that entries already liquidated may not be reliquidated to accomplish refunds").

On November 10, 2020, Plaintiffs commenced this lead action through the concurrent filing of a Summons and Complaint. Summons, ECF No. 2; Compl., ECF No. 1. Plaintiffs filed the Amended Complaint on November 12, 2020. Am. Compl. Plaintiffs commenced the member action on November 23, 2020. Summons, Ct. No. 20–3840 (CIT Nov. 23, 2020); Compl., Ct. No. 20–3840).

On December 11, 2020, Commerce granted Bilstein's second exclusion request. Def.'s Mot., Ex. E. Notwithstanding Commerce's guidance that resubmissions would not be approved when liquidation was final, on January 15, 2021, Commerce made Bilstein's resubmitted exclusion retroactive to July 10, 2018, the date on which Bilstein submitted the original exclusion request. Def.'s Mot., Ex. F (Commerce's decision memorandum on exclusion request number 155507) ("Exclusion 155507"); *see also* Pls.' Resp., Ex. 3 at 5 (email dated January 20, 2021 from BIS to counsel for Plaintiffs regarding BIS's approval of Bilstein's resubmission).

On January 28, 2021, the court consolidated the cases. Order (Jan. 28, 2021), ECF No. 14. On April 26, 2021, the court afforded Plaintiffs the opportunity to "file a surreply addressing arguments for dismissal raised for the first time in Defendant's Reply Brief." Order (Apr. 26, 2021), ECF No. 24. Plaintiffs filed a surreply on May 17, 2021. *See* Pls.' Surreply.

DISCUSSION

I. The Court's Subject Matter Jurisdiction

A. Parties' Contentions

The Government contends that the “true nature of the action is a challenge to the assessment of duties at liquidation” and, thus, “[t]he appropriate remedy . . . [was] a timely protest of the liquidation.” Def.’s Mot. at 17; *see also* Def.’s Reply at 8–9. The Government relies on Proclamation 9777 and Customs’ guidance, both of which indicate that filing a protest is necessary “to benefit from exclusion decisions” because exclusions may only apply to entries for which liquidation is nonfinal. Def.’s Mot. at 21 (citing Proc. 9777, cl. 5; CSMS # 18–000352; CSMS # 18–000378; CSMS # 39633923; CSMS # 42566154). Thus, the Government contends, Plaintiffs should have protested the liquidation of its entries to “prevent[] liquidation from becoming final while [P]laintiffs sought to correct the exclusion request with Commerce,” and, had they done so and “CBP denied the protests,” Plaintiffs could have commenced an action pursuant to 28 U.S.C. § 1581(a). Def.’s Mot. at 22.

Plaintiffs contend that “the true nature of this action is a challenge to the approval by BIS of a fatally flawed and therefore useless steel product exclusion.” Pls.’ Resp. at 24–25. Plaintiffs liken the approval of an exclusion with an invalid tariff provision to an exclusion denial, arguing that neither situation is redressable by a protest because there is no Customs decision at issue. *Id.* at 25; *see also id.* at 26–27 (arguing that section (a) jurisdiction is manifestly inadequate because “Customs cannot remedy the situation”). Plaintiffs contend that “Customs’ obligation was and is to collect the [s]ection 232 duties,” *id.* at 25, and presenting Exclusion 25363 to CBP would have been futile because CBP would not have applied the exclusion to the subject entries, *id.* at 25–26. Plaintiffs contend that “the only effective recourse . . . was to seek” Commerce’s assistance “in correcting the HTSUS number in the exclusion.” *Id.* at 26.

The Government counters that Customs’ decision to assess section 232 duties on the subject entries was amenable to protest. Def.’s Reply at 10–14. The Government contends that “a granted exclusion does not automatically apply to an entry and CBP’s role in deciding whether the imported merchandise falls within an approved exclusion is not ministerial.” *Id.* at 10; *see also id.* at 13 (explaining that “CBP . . . decides whether the conditions of the exclusion are met and whether the exclusion applies to the merchandise covered by the entries or whether [s]ection 232 duties should be assessed”). The

Government also contends that, “in the absence of a valid exclusion,” CBP “made a decision as to the ‘tariff classification and applicable rate of duty,’” *id.* at 12, or in other words, that CBP decided “to assess [s]ection 232 duties at liquidation,” *id.* at 13

B. Analysis

It is well settled that “[a] party may not expand a court’s jurisdiction by creative pleading.” *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1193 (Fed. Cir. 2018) (quoting *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006)). Instead, as the Parties have indicated, the court must “look to the true nature of the action . . . in determining jurisdiction of the appeal.” *Id.* (quoting same).

In seeking to identify the “true nature of the action,” the Government relies on Plaintiffs’ requested relief—a refund of section 232 duties to be accomplished through reliquidation of the subject entries. Def.’s Mot. at 17; Def.’s Reply at 9. Thus, the Government asserts, “the true nature of the action is a challenge to [CBP’s] assessment of duties at liquidation.” Def.’s Mot. at 17. While Plaintiffs indeed seek a refund of section 232 duties, that relief is predicated on Plaintiffs’ request for a court order retroactively applying Exclusion 25363 to the subject entries, which, in turn, is based on Plaintiffs’ claim against Commerce. *See, e.g.*, Am. Compl. ¶¶ 11–14, 20–22; *id.*, pp. 4–5 (prayer for relief). The operative complaint indicates that Plaintiffs contest Commerce’s decision to approve Exclusion 25363 with an invalid HTSUS provision. *See id.* ¶ 3 (identifying BIS as the entity responsible for “evaluating, approving and administering the product exclusion mechanism”); *id.*, ¶¶ 9–14 (discussing the exclusion and Bilstein’s attempts to work with BIS to “secure a refund” using BIS’s procedures for resubmission); *id.* ¶ 21 (alleging that “BIS has refused to assist in securing refund of the duties”).

Plaintiffs therefore seek to challenge final agency action in the form of Commerce’s approval of Exclusion 25363 with the non-existent HTSUS number,¹¹ which is analogous to actions contesting Commerce’s denials of exclusion requests. The court reviews such actions pursuant to 28 U.S.C. § 1581(i)—not 28 U.S.C. § 1581(a). *See, e.g.*, *JSW Steel (USA) Inc. v. United States*, 44 CIT __, __, 466 F. Supp. 3d 1320, 1327 (2020); *cf. Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304 (Fed. Cir. 2004) (stating that “sections 514 and 515 [of the Tariff Act of 1930] do not apply” when “the alleged agency error . . . is on the part of Commerce, and not Customs”). The Government’s arguments in favor of (a) jurisdiction are not persuasive.

¹¹ The Government concedes that Commerce’s approval of Bilstein’s exclusion request constituted “final agency action” pursuant to 5 U.S.C. § 704. *See* Def.’s Reply at 14.

Section 1581(a) confers on the CIT “exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515].” 28 U.S.C. § 1581(a). Section 1515 governs Customs’ review of protests. 19 U.S.C. § 1515. Section 1514 sets forth various rules concerning the filing of protests. 19 U.S.C. § 1514. Pursuant to section 1514(a),

decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to— . . . (2) the classification and rate and amount of duties chargeable; [or] . . . (5) the liquidation or reliquidation of an entry . . . shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade.

19 U.S.C. § 1514(a)(2), (5) (emphasis added).

Jurisdiction pursuant to 28 U.S.C. § 1581(a) is available for judicial review of “the denial of a timely, valid protest.” *Indus. Chems., Inc. v. United States*, 941 F.3d 1368, 1373 (Fed. Cir. 2019) (citing *Thyssenkrupp*, 886 F.3d at 1227). “[I]n order for there to be a protestable decision,” however, and, thus, a valid protest giving rise to (a) jurisdiction, “Customs must [have] engage[d] in some sort of decision-making process.” *U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1569 (Fed. Cir. 1997) (“*U.S. Shoe CAFC*”), *aff’d sub nom. United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998) (“*U.S. Shoe*”).

It is well settled that “Customs’ ‘merely ministerial’ actions are not protestable under 19 U.S.C. § 1514.” *Indus. Chems.*, 941 F.3d at 1371 (quoting *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994)). A non-ministerial action “require[es] genuine interpretive or comparable judgments as to what is to be done.” *Thyssenkrupp*, 886 F.3d at 1224–25 (citations omitted). Thus, Customs acts in a ministerial capacity when it “passively collects” duties and “performs no active role, . . . undertakes no analysis [or adjudication], issues no directives, [and] imposes no liabilities.” *U.S. Shoe*, 523 U.S. at 365 (second alteration in original). A protest is therefore unnecessary when a plaintiff seeks to challenge some aspect of the duties imposed on its entries over which Customs has no control or authority to correct. *See, e.g., id.* (Customs’ collection of the harbor maintenance tax did not render a protest necessary to challenge the constitutionality of the tax before the CIT); *Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1276–77 (Fed. Cir. 2006) (protest not required when the plaintiff challenged the duties imposed on imported merchandise

by the U.S. Trade Representative (“USTR”) pursuant to section 301 of the Trade Act of 1974 and sought either termination of a section 301 retaliation list or the removal of its products from that list).

The Government’s contention that CBP acts in a non-ministerial capacity when it decides whether to apply an exclusion to an entry, *see* Def.’s Mot. at 17–18; Def.’s Reply at 10, 13, even if correct generally, does not support the existence of (a) jurisdiction in this case. As the Government is aware, Plaintiffs “never claimed an exclusion from [s]ection 232 duties” at or before the time of entry. Def.’s Reply at 13. Thus, there was no Customs decision regarding the applicability of an exclusion to form the basis for the court’s (a) jurisdiction. *See* Def.’s Mot., Ex. C (entry summary reflecting the collection of section 232 duties).

To the extent the Government argues that Plaintiffs *should have* submitted Exclusion 25363 prior to making the subject entries such that Plaintiffs *would have* had a remedy pursuant to 28 U.S.C. § 1581(a) in the event Customs rejected the exclusion and denied Plaintiffs’ protest, *see* Def.’s Reply at 13–14, that argument overlooks that Plaintiffs were not in possession of a facially valid exclusion. Even if the Government’s approach might prevail when an importer possesses a facially valid exclusion and affords CBP no opportunity to consider it, here, Customs would have been constrained “to reject the application of [the] exclusion” because the tariff provision in Exclusion 25363 did not match the provision listed on the entry documentation and was otherwise invalid. Pls.’ Resp. at 25; *see also March Regulations*, 83 Fed. Reg. at 12,110 (stating that exclusions are product-specific). There would have been nothing to contest via protest or to litigate before the CIT.

In sum, a Commerce error in a section 232 exclusion is not redressable by a Customs protest because Customs has no control over—or authority to alter—the contents of an exclusion. *See* Proc. 9705, cl. 3 (locating authority over exclusions within Commerce). Because a protest was incapable of affording Plaintiffs the relief they seek, it would have been a manifestly inadequate remedy to the extent it was available. *See Sunprime*, 892 F.3d at 1193–94 (“[T]o be manifestly inadequate, the protest must be an ‘exercise in futility, or incapable of producing any result; failing utterly of the desired end through intrinsic defect; useless, ineffectual, vain.’” (quoting *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1294 (Fed. Cir. 2008))).¹²

¹² The Government impliedly concedes this argument through its representation that a protest “would have prevented liquidation from becoming final while [P]laintiffs *sought to correct the exclusion request with Commerce*.” Def.’s Mot. at 22 (emphasis added). While the Government argues that “[s]uch a remedy would not have been manifestly inadequate,” *id.*, that argument overlooks that the protest itself would not provide the remedy but that filing

The Government's second argument is equally unconvincing. The Government argues that, "in the absence of a valid exclusion being presented by an eligible importer," Customs "made a decision as to the 'tariff classification and applicable rate of duty.'" Def.'s Reply at 12 (quoting *U.S. Shoe CAFC*, 114 F.3d at 1569). According to the Government, CBP's role in "issu[ing] directives as to what an importer needed to do to claim a duty exclusion" rendered CBP "no mere passive collector of duties." *Id.* CBP's provision of guidance as to how to claim an exclusion is, however, immaterial to the identification of an actual protestable decision when no exclusion is presented. The Government fails to reconcile its conclusory assertion that "CBP made a decision to assess [s]ection 232 duties," Def.'s Reply at 13, with the entry documentation demonstrating that VoestAlpine imported the steel merchandise as subject to section 232 duties and deposited the duties before Customs liquidated the entries *as entered*, see Def.'s Mot., Ex. C; *id.* at 12–13 (recognizing that VoestAlpine deposited the section 232 duties "[c]onsistent with" the representations in the entry documentation and "CBP liquidated the entries as entered"). Thus, Customs' collection of section 232 duties is analogous to Customs' collection of the harbor maintenance tax ("HMT") at issue in *U.S. Shoe*. See *U.S. Shoe CAFC*, 114 F.3d at 1569 (finding (i) jurisdiction when Customs "passively collect[ed]" the HMT "in the amount required by statute," Customs did not need to "notify exporters of the need to pay the HMT," and an "exporter [paid] all accumulated fees on a quarterly basis by simply mailing a check or money order to Customs along with appropriate forms").

Similarly, in *Xerox Corp. v. United States*, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") held that when an importer failed to claim a duty preference pursuant to the North American Free Trade Agreement ("NAFTA") at the time of importation, and failed to claim such a preference within the allotted time before or after the entry was liquidated "as entered," such "as entered" liquidation did not involve a Customs decision susceptible to protest as to the NAFTA preference. 423 F.3d 1356, 1363–65 (Fed. Cir. 2005).

a protest could have given Plaintiffs the time to obtain a remedy *from Commerce*. Therein lies the distinction between the protest mechanism being used by Customs purely as an administrative mechanism for preventing finality and a protest that functions as a predicate for (a) jurisdiction; the two are not necessarily the same. See *Indus. Chems.*, 941 F.3d at 1371–73 (emphasizing that the CIT does not have (a) jurisdiction to review any protest denial, but only "the denial of a timely, valid protest"). The court need not consider whether, in this case, a denied protest regarding an exclusion, used as an administrative mechanism to prevent finality, would be sufficient to vest the court with (a) jurisdiction. Rather, the court finds that any possibility of (a) jurisdiction over such a claim does not divest the court of (i) jurisdiction in this case because Plaintiffs' case is dependent upon Plaintiffs' claim against Commerce.

Stated more directly, the court found that Customs could not have made a protestable decision to deny the NAFTA duty preference in the absence of Customs receiving a claim for such treatment. *Id.* at 1365; *cf.*, *ARP Materials, Inc. v. United States*, Slip Op. 21–73, 2021 WL 2396329, at *8–13 (CIT June 11, 2021) (denying (i) jurisdiction because (a) jurisdiction was available when Customs had granted protests covering parallel entries and importer possessed a facially applicable exclusion from section 301 duties). Here, when Customs liquidated as entered VoestAlpine’s entries, inclusive of section 232 duties and absent any claim or request for exclusion, Customs could not be said to have made a protestable decision to deny such an exclusion.

As previously noted, section 1581(i) grants the court jurisdiction to entertain “any civil action commenced against the United States . . . that arises out of any law of the United States providing for-- . . . (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue,” and “(4) [the] administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.” 28 U.S.C. § 1581(i)(2), (4). The instant action arises out of the “administration and enforcement” of the section 232 exclusion process. *See* Am. Compl. ¶¶ 9–22. In the absence of any explicit or otherwise apparent argument as to why the court should not exercise (i) jurisdiction in the absence of (a) jurisdiction, the court finds that it has statutory jurisdiction to review Plaintiffs’ claims against Commerce pursuant to 28 U.S.C. § 1581(i)(4).

II. Mootness

A. Parties’ Contentions

The Government contends that Plaintiffs’ claim against Commerce for granting Exclusion 25363 with an invalid tariff provision “is now moot” given Commerce’s grant of Exclusion 155507. Def.’s Mot. at 22–23; *see also* Def.’s Reply at 15–16. According to the Government, the “corrected and retroactive exclusion is the only relief that this [c]ourt could order” as relief to Plaintiffs’ challenge because “Commerce does not administer approved exclusions, collect duties, or make refunds.” Def.’s Mot. at 24. The Government further contends that Plaintiffs’ inability “to obtain the benefit of that exclusion with respect to the two entries in this case [is] due to their own failure to preserve their remedies.” *Id.*

Plaintiffs contend that this case is not moot because the court retains the “authority to order reliquidation of entries notwithstanding final liquidation” in a case arising under the court’s (i) jurisdiction. Pls.’ Resp. at 28.

B. Analysis

An action is mooted when “an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief.” *Nasatka*, 58 F.3d at 1580 (citation omitted). “Mootness is a jurisdictional question because the [c]ourt is not empowered to decide moot questions or abstract propositions.” *North Carolina v. Rice* 404 U.S. 244, 246 (1971) (citations omitted). Thus, the court must address whether Plaintiffs will be entitled to any relief in addition to the relief obtained through Commerce’s approval of Exclusion 155507 in the event they prevail on their claim.

The full scope of the CIT’s remedial authority is set forth in complementary statutory provisions in Title 28 of the U.S. Code. Pursuant to section 1585, “[t]he [CIT] shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.” 28 U.S.C. § 1585. Section 2643 provides that “[t]he [CIT] may enter a money judgment . . . for or against the United States in any civil action commenced under section 1581 or 1582 of this title,” *id.* § 2643(a)(1), or may order “any other form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition,” *id.* § 2643(c)(1).

While Plaintiffs’ Amended Complaint does not explicitly identify the statutory basis for their cause of action, *see* Am. Compl. ¶¶ 17–22, “the cause of action generally is considered to arise under the [Administrative Procedure Act (“APA”)]” when the court exercises (i) jurisdiction,¹³ *Nat’l Fisheries Inst., Inc. v. U.S. Bureau of Customs and Border Prot.*, 33 CIT 1137, 1148, 637 F. Supp. 2d 1270, 1281 (2009) (citation omitted). In a case arising under the APA, the court may—and generally will—remand for reconsideration an agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *see also*, *e.g.*, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172 (1962) (faulting the lower court for failing to remand unlawful agency

¹³ The APA provides a cause of action for “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. Pursuant to 5 U.S.C. § 706, the court must “hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *see also* 28 U.S.C. § 2640(e) (providing for judicial review pursuant to 5 U.S.C. § 706).

action “for further consideration”); *Nat’l Org. of Veterans’ Advocs., Inc. v. Sec’ of Veterans Affairs*, 260 F.3d 1365, 1379–80 (Fed. Cir. 2001) (remanding agency action for further consideration); *Comm. Overseeing Action for Lumber Int’l Trade Investigations or Negots. v. United States*, 44 CIT __, __, 483 F. Supp. 3d 1253, 1271–73 (2020) (same).

Accordingly, the appropriate remedy for Commerce’s alleged improper grant of Exclusion 25363 would be to remand that determination to Commerce for reconsideration consistent with the agency’s regulations and procedures. *See, e.g.*, 28 U.S.C. § 2643(c)(1) (providing for orders of remand); *Burlington*, 371 U.S. at 172. The relevant regulations and procedures indicate that Commerce should have denied Bilstein’s original request so that Bilstein could avail itself of Commerce’s resubmission process in order to obtain an approved exclusion retroactive to the date of Bilstein’s original submission. *See March Regulations*, 83 Fed. Reg. at 12,110–11; Commerce FAQs at 25. Bilstein has, however, already obtained exactly that relief from Commerce in the form of Exclusion 155507. *See Def.’s Mot., Ex. F; Pls.’ Resp., Ex. 3* at 5. Commerce can provide no further relief.

Plaintiffs argue, nevertheless, that the case is not moot because the court has the authority to order reliquidation “notwithstanding final liquidation.” Pls.’ Resp. at 28. To support their argument, Plaintiffs cite to *Shinyei*, among other cases. *See id.* While *Shinyei* recognizes the CIT’s authority to order reliquidation as a form of relief under certain circumstances, 355 F.3d at 1312,¹⁴ Plaintiffs fail to develop any arguments addressing reliquidation as a “form of relief that is appropriate in [this] civil action,” 28 U.S.C. § 2643(c)(1) (emphasis added); *see also In re Section 301 Cases*, Slip Op. 2181, 2021 WL 2799979, at *17 n.14 (CIT July 6, 2021) (Barnett, C.J., dissenting) (“What constitutes ‘appropriate relief’ is a case-specific determination.”).

Plaintiffs’ failure to pursue available remedies compels the court to conclude that reliquidation would not constitute an appropriate form

¹⁴ *Shinyei* held that the CIT retained (i) jurisdiction over Shinyei Corporation of America’s (“Shinyei”) APA claim challenging Commerce’s liquidation instructions issued after litigation regarding an administrative review of the antidumping duty order notwithstanding Customs’ liquidation of Shinyei’s entries. 355 F.3d at 1305–12. In recognition of the CIT’s “broad remedial powers,” *id.* at 1312 (citing 28 U.S.C. § 2643 (2000)), the Federal Circuit concluded that, in that case, reliquidation was “easily construed” as an appropriate form of relief, *id.*

of relief.¹⁵ First, Plaintiffs did not seek to apply Exclusion 25363 to the subject entries, Def.’s Mot., Ex. C, suggesting they were aware the exclusion could not have applied to their entry, and yet they took no immediate remedial action. While CBP would have been required to reject the exclusion, that rejection would have alerted Plaintiffs to the error and afforded Plaintiffs time to address the issue.¹⁶ Instead, Plaintiffs failed to take any steps concerning Exclusion 25363 until roughly one year after Commerce’s approval of that exclusion and the exclusion was set to expire—or already had expired. *See id.*, Ex. B (Exclusion 25363, dated September 28, 2018); Pls.’ Resp. at 15 (stating that Plaintiffs sought advice from Commerce after discovering the error in “September 2019”);¹⁷ *March Regulations*, 83 Fed. Reg. at 12,111 (exclusions approved for one year); Commerce FAQs at 12 (exclusions granted for one year “or until all excluded product volume is imported (whichever comes first”). Plaintiffs therefore bear at least substantial responsibility for their failure to secure a valid exclusion within the time necessary for the exclusion to apply to the subject entries. Additionally, Plaintiffs failed either to request an extension of liquidation or to protest administratively the liquidation of the subject entries in order to prevent finality of liquidation while they sought to work with BIS to resolve the error. *See, e.g.*, CSMS # 18–000352 (explaining that importers must protest liquidation in order to benefit from an exclusion approved post-entry); *supra* note 12 (discussing Customs’ use of protests as an administrative mechanism to avoid finality); 19 C.F.R. § 159.12(a)(1)(ii) (2017) (permitting an

¹⁵ Plaintiffs assert that “[i]f BIS had denied the exclusion at the outset, . . . Bilstein would have filed a new exclusion request before the November 12, 2018 entr[ies].” Pls.’ Resp. at 31. It is, however, unclear whether the denial would have apprised Bilstein of the need to correct the entirety of the provision or merely to fix the final four digits appended to an otherwise valid six-digit subheading covering flat-rolled and hot-rolled steel. *See March Regulations*, 83 Fed. Reg. at 12,110 (amending 19 C.F.R. pt. 705 to make exclusions product-specific). Further, had Bilstein been diligent in uncovering its error in the months prior to entry, it could have submitted a new exclusion request with correct information and subsequently requested retroactive application via PSC or protest in the event Commerce failed to approve the new request before entry. *See* Proc. 9711, cl. 7 (amending Proclamation 9705 to provide for retroactive relief for exclusions requested on or before, but granted after, the date of entry); CSMS # 18–000352 (providing information consistent with Proclamation 9711).

¹⁶ Plaintiffs state that they did not attempt to apply Exclusion 25363 to the subject entries “because the HTSUS number in the exclusion did not and could not match the HTSUS number in . . . the entries.” Pls.’ Resp. at 15. This statement contradicts Plaintiffs’ assertion that they did not learn of the error in Exclusion 25363 until 10 months later, in September 2019. *See id.* In any case, Plaintiffs’ awareness of the need to obtain a valid exclusion no later than November 2018 underscores their lack of diligence.

¹⁷ Plaintiffs do not specify when they contacted BIS following their discovery of the error in September 2019. *See id.*; Pls.’ Surreply at 6 (stating generally that “Plaintiffs attempted to rectify the error in the exclusion when they learned of it in 2019”).

importer to request a one-year extension of liquidation for good cause).¹⁸ These steps were available given Plaintiffs' discovery of the error in Exclusion 25363 before liquidation, *see* Pls.' Resp. at 15, and therefore well before the end of the 180-day protest period, *see* 19 U.S.C. § 1514(c)(3)(A).

Plaintiffs' clear lack of diligence stands in contrast to the plaintiff in *Shinyei*. There, the Federal Circuit observed that "Shinyei cannot be described as a party that has slept on its rights" because it first sought "a writ of mandamus ordering liquidation of its entries at the [lower] rate it thought it was entitled to" and, following liquidation at the higher rate, amended its complaint" to assert a claim against Commerce for violating 19 U.S.C. § 1675(a)(2)(B) in the agency's preparation of the liquidation instructions. *Shinyei*, 355 F.3d at 1309. The Federal Circuit rejected the CIT's concern that "allowing Shinyei's action to proceed" would permit "the revival of 'otherwise moot' claims." *Id.* at 1310. But that is precisely what would happen here if the court permitted Plaintiffs' action to proceed notwithstanding Plaintiffs' failure to take all steps necessary to secure its rights to an exclusion and to do so in a timely fashion.¹⁹

In sum, Plaintiffs commenced an action contesting allegedly unlawful final agency action by Commerce. Am. Compl. ¶¶ 11–22. Plaintiffs have obtained all the relief available to them from Commerce. *See* Def.'s Mot., Ex. F. Plaintiffs' failure to pursue its available administrative remedies renders reliquidation an inappropriate form of relief, obviating Plaintiffs' claims against mootness. Plaintiffs' claim is moot because the court could not provide any relief beyond that already obtained from Commerce and the case must be dismissed.

¹⁸ CSMS # 42566154 also informed importers of the availability of a one-year extension of liquidation for pending exclusion requests. Although CBP issued CSMS # 42566154 in May 2020, roughly one month after CBP's liquidation of the subject entries became final in April 2020, CBP's regulation was in effect at all relevant times.


¹⁹ Since *Shinyei*, the Federal Circuit has concluded that an importer is not entitled to reliquidation by way of a writ of mandamus when the importer "failed to avail itself of . . . alternative remedies." *Mukand Int'l Ltd. v. United States*, 502 F.3d 1366, 1369 (Fed. Cir. 2007). In *Mukand*, an importer, Mukand International, Ltd. ("Mukand") sought "a writ of mandamus requiring Commerce (1) to issue a scope determination, (2) to suspend any further liquidation, and (3) to reliquidate the entries of stainless steel . . . and refund all of Mukand's antidumping duties on those entries." *Id.* at 1368. During the pendency of the action, Commerce initiated a scope inquiry and found "that Mukand's entries were not covered by the antidumping duty order." *Id.* In finding that Mukand was not entitled to reliquidation, the Federal Circuit distinguished the case from the facts of *Shinyei*, where "the importer [had] diligently pursued its rights." *Id.* at 1370. Mukand, in contrast, slept on its rights when it failed to "compel Commerce to institute a scope ruling for more than one year from the date it claims to have had a right to continued suspension" or "file[] a mandamus action to compel Commerce to institute a scope inquiry and order the continued suspension." *Id.* at 1369. So too here, for all the reasons discussed above, Plaintiffs slept on their rights and those failings are relevant to the court's finding that reliquidation would not be an appropriate form of relief pursuant to 28 U.S.C. § 2643(c)(1).

CONCLUSION AND ORDER

For the foregoing reasons, the Government's motion to dismiss for lack of subject matter jurisdiction is **GRANTED**. Judgment will be entered accordingly.

Dated: August 26, 2021
New York, New York

/s/ Mark A. Barnett
MARK A. BARNETT, CHIEF JUDGE



Slip Op. 21–109

MCC HOLDINGS DOING BUSINESS AS CRANE RESISTOFLEX, Plaintiff, v.
UNITED STATES, Defendant, and ANVIL INTERNATIONAL, LLC,
Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 18–00248

[Remanding a determination issued in response to court order in litigation contesting an agency ruling that certain merchandise is within the scope of an antidumping duty order on cast iron pipe fittings from the People's Republic of China]

Dated: August 26, 2021

Peter Koenig, Squire Patton Boggs (US) LLP, of Washington, D.C., for plaintiff. With him on the brief were *Jeremy Dutra* and *Christopher D. Clark*.

L. Misha Preheim, Assistant Director, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief was *Michael Granston*, Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Joshua E. Kurland*, Trial Attorney. Of counsel on the brief was *Ian McInerney*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Daniel L. Schneiderman, King & Spalding LLP, of Washington D.C., for defendant-intervenor. With him on the brief was *J. Michael Taylor*.

OPINION AND ORDER

Stanceu, Judge:

Plaintiff MCC Holdings dba Crane Resistoflex (“Crane”), an importer of certain ductile iron lap joint flanges (“Crane’s flanges”) commenced this litigation to contest an administrative decision by the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) that its imported merchandise is within the scope of an antidumping duty order.

Before the court is a decision (the “First Remand Redetermination”) that the Department submitted in response to the court’s order in this litigation. *Final Results of Redetermination Pursuant to Ct. Order*

(Apr. 3, 2020), ECF No. 39 (Rem. P.R. Doc. 34)¹ (“*First Remand Redetermination*”).

Concluding that Commerce failed to consider certain material evidence on the record and reached some conclusions that were unsupported by substantial evidence on that record, the court orders that Commerce reconsider its decision and correct the errors identified herein.

I. BACKGROUND

A. Administrative Proceedings Culminating in the Antidumping Duty Order

In April 2003, Commerce issued an antidumping duty order on non-malleable cast iron pipe fittings from China (the “Order”). *Notice of Antidumping Duty Order: Non-Malleable Cast Iron Pipe [Fittings] From the People’s Republic of China*, 68 Fed. Reg. 16,765 (Apr. 7, 2003) (“Order”). The Order resulted from an antidumping duty petition (the “Petition”) filed in 2002. *Petition for Imposition of Antidumping Duties: Non-Malleable Cast Iron Pipe Fittings from the People’s Republic of China* (Feb. 21, 2002) (Rem. P.R. Docs. 18–21, Attach. I) (“Petition”).

In response to the Petition, the U.S. International Trade Commission (the “ITC”) initiated its “injury or threat” investigation (Inv. No. 731-TA-990) in February 2002. *Non-Malleable Cast Iron Pipe Fittings From China*, 67 Fed. Reg. 9,004 (Int’l Trade Comm. Feb. 27, 2002). Commerce published a notice (the “Initiation Notice”) announcing its parallel antidumping duty “less-than-fair-value” (“LTFV”) investigation in March 2002. *Notice of Initiation of Antidumping Duty Investigation: Non-Malleable Cast Iron Pipe Fittings From the People’s Republic of China*, 67 Fed. Reg. 12,966 (Mar. 20, 2002). The ITC issued the preliminary results of its investigation in April of that year, *Non-Malleable Cast Iron Pipe Fittings From China*, 67 Fed. Reg. 18,635 (Int’l Trade Comm. Apr. 16, 2002), concluding “that there is a reasonable indication that an industry in the United States is materially injured by reason of imports from China of non-malleable cast iron pipe fittings . . . that are alleged to be sold in the United States at less than fair value (LTFV),” *id.* at 18,635.

Commerce issued an affirmative preliminary determination of sales at less than fair value, *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination:*

¹ All citations to documents from the administrative record are to public documents. References cited as “P.R. Doc. ___” are to documents on the original agency record; references cited as “Rem. P.R. Doc. ___” are to documents placed on the record during Commerce’s redetermination proceeding.

Non-Malleable Cast Iron Pipe Fittings From the People's Republic of China, 67 Fed. Reg. 60,214 (Sept. 25, 2002) and in early 2003 issued its final affirmative LTFV determination, *Notice of Final Determination of Sales at Less Than Fair Value: Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China*, 68 Fed. Reg. 7,765 (Feb. 18, 2003). The ITC reached a final affirmative “threat” determination. See *Order*, 68 Fed. Reg. at 16,765 (“On March 24, 2003 . . . the International Trade Commission (the ITC) notified the Department of Commerce (the Department) of its final determination that the industry in the United States producing non-malleable cast iron pipe fittings is threatened with material injury by reason of import of the subject merchandise from the People's Republic of China (PRC)”). Issuance of the Order followed. *Id.*

B. The Scope Ruling Proceeding before Commerce

Crane filed a request with Commerce for a scope ruling (the “Scope Ruling Request”) on August 29, 2018, advocating that Commerce determine Crane’s flanges, imported from a supplier in China, to be outside the scope of the Order. *Non-Malleable Cast Iron Pipe Fittings from China: Ductile Iron Lap Joint Flanges, Scope Request* (Aug. 29, 2018) (P.R. Doc. 1) (“*Scope Ruling Request*”).

Commerce issued the decision contested in this litigation (the “Final Scope Ruling”) on November 19, 2018, which concluded that the Order included Crane’s flanges. *Final Scope Ruling on the Antidumping Duty Order on Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China: MCC Holdings dba Crane Resistoflex* (Nov. 19, 2018) (P.R. Doc. 16) (“*Final Scope Ruling*”).

Crane commenced this action on December 19, 2018. Summons (Dec. 19, 2018), ECF No. 1; Compl. (Dec. 19, 2018), ECF No. 2. On January 10, 2019, Anvil International, LLC (“Anvil”), a domestic manufacturer and a petitioner in the antidumping duty investigation culminating in the Order, filed a motion to intervene, which the court granted. Mot. to Intervene as a Matter of Right (Jan. 10, 2019), ECF No. 7; Order [Granting Mot. to Intervene] (Feb. 1, 2019), ECF No. 15. Crane moved for judgment on the agency record on August 23, 2019. Pl. MCC Holdings dba Crane Resistoflex’s Rule 56.2 Mot. for J. on the Agency R. (Aug. 23, 2019), ECF No. 27.

In response to Crane’s motion for judgment on the agency record, defendant filed an unopposed motion on December 30, 2019 that this case be remanded to Commerce in light of this Court’s decision in *Star Pipe Prods. v. United States*, 43 CIT ___, 365 F. Supp. 3d 1277 (2019) (“*Star Pipe I*”). Def.’s Unopposed Mot. to Stay Briefing Schedule and to Grant Voluntary Remand (Dec. 27, 2019), ECF No. 32. The court

granted defendant’s motion in part and, considering the scope of the Department’s requested remand too narrow, issued an order to remand the scope determination to Commerce for reconsideration in the entirety. [Remand] Order 2 (Jan. 7, 2020), ECF No. 33 (directing Commerce to “reconsider on remand all aspects of its scope ruling, including all findings of fact and conclusions of law”).

During the remand proceeding, Commerce placed new factual information on the administrative record, including excerpts from the Petition, and provided interested parties the opportunity to “rebut, clarify, or correct” the new factual information. *Antidumping Duty Order on Non-Malleable Cast Iron Pipe Fittings from the People’s Republic of China: MCC Holdings dba Crane Resistoflex Scope Remand Redetermination 1* (Jan. 17, 2020) (Rem. P.R. Docs. 18–21). Crane and Anvil filed responses to the Department’s new factual information and placed additional new factual information on the record. *Non-Malleable Cast Iron Pipe Fittings From The People’s Republic Of China/Submission Of Factual Information* (Jan. 24, 2020) (Rem. P.R. Doc. 23); *Non-Malleable Cast Iron Pipe Fittings from China: Ductile Iron Lap Joint Flanges, Scope Request* (Jan. 27, 2020) (Rem. P.R. Doc. 27).

Commerce submitted the First Remand Redetermination on April 3, 2020, in which it concluded that Crane’s flanges were within the scope of the Order. *First Remand Redetermination 4–14*. Crane and Anvil filed comments in response to the First Remand Redetermination. Pl. MCC Holdings dba Crane Resistoflex’s Comments on Commerce’s Final Remand Redetermination (May 27, 2020), ECF No. 43 (“Crane’s Comments”); Def.-Int.’s Comments in Support of the Final Remand Redetermination (Aug. 5, 2020), ECF No. 48 (“Anvil’s Comments”). Defendant responded to Crane’s comments on August 7, 2020. Def.’s Resp. to Pl.’s Comments on Commerce’s Remand Redetermination (Aug. 7, 2020), ECF No. 49 (“Def.’s Resp.”).

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants this Court jurisdiction over civil actions brought under section 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a(a)(2)(B)(vi).² In reviewing a contested scope ruling, the court will uphold the Department’s determinations, findings, and conclusions unless they are “un-

² All statutory citations herein are to the 2012 edition of the United States Code and all regulatory citations herein are to the 2020 edition of the Code of Federal Regulations.

supported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).

B. Interpretation of Scope Language in an Antidumping Duty Order

The Department’s regulation governing scope determinations, 19 C.F.R. § 351.225(k), provides that Commerce “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 [of Commerce] (including prior scope determinations) and the [United States International Trade] Commission.” 19 C.F.R. § 351.225(k)(1). If this inquiry fails to resolve the issue, Commerce applies additional criteria. *Id.* § 351.225(k)(2).

The Department’s regulation is not properly interpreted as identifying the *only* factors Commerce is to consider, or may consider, in acting on a scope ruling request. Commerce must, of course, analyze the scope language of the relevant antidumping or countervailing duty order. *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1302 (Fed. Cir. 2013). The Department’s role in issuing a scope ruling is to interpret, not modify, the scope language. *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1095 (Fed. Cir. 2002) (“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.” (internal quotation marks and citation omitted)). Moreover, to be sustained upon judicial review, a scope ruling must be supported by the record evidence considered as a whole. As a practical matter, this must include consideration of the record information contained in the scope ruling request, which ordinarily will include, *inter alia*, “[a] detailed description of the product, including its technical characteristics and uses.” 19 C.F.R. § 351.225(c)(1)(i).

C. Crane’s Flanges as Described in the Scope Ruling Request

Crane’s Scope Ruling Request sought a ruling on nine models of “Ductile Iron Lap Joint Flanges” (“Crane’s flanges”). *Scope Ruling Request 1*; see also *Final Scope Ruling 1–2*. Each model is a single disc-shaped article made of ductile iron with a large, unthreaded center hole. *Scope Ruling Request Ex. 1*. Surrounding the center hole are smaller, equally spaced, unthreaded holes that are present to accommodate bolts used in assembling a joint between the ends of two plastic-lined pipes. *Id.* at 1, 3, Ex. 1. The pipes joined by Crane’s flanges are used in the United States in assemblies of “process piping primarily for the chemical process industry.” *Id.* at 1.

The Scope Ruling Request describes an assembled joint (the “lap joint”) as consisting of two mating flanges, a gasket placed between the flanges, and a set of bolts and nuts that are used as the means of clamping the two flanges together. *Id.* at 2. The Scope Ruling Request describes the lap joint assembly as follows:

The subject Flanges transmit the clamping force of the bolts to independent gaskets that are the sealing surface to the pipe end. This type of subject Flange (lap joint) is unique from all other types of standard flange types because it rotates loosely around the pipe behind a “lap”, which is a portion of the pipe which is flared outward. Two mating laps, with the addition of a gasket (a shaped piece or ring of rubber or other material sealing the junction between two surfaces of the pipe) are clamped by the bolts between the two subject Flanges.

Id. The Scope Ruling Request adds that “[t]here is no pipe fitting attached to the subject Flanges.” *Id.* The Flanges are described by industry standard ASME B16.42. *Id.* at 3.

D. The Court’s Prior Order and *Star Pipe I*

The *Star Pipe* litigation, which is ongoing, presents the issue of whether the scope of the Order includes certain ductile iron flanges that featured, instead of a lap joint system, threaded center holes to accommodate attachment to threaded pipe ends. *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1279. *Star Pipe I* held that Commerce, in ruling that *Star Pipe*’s flanges were within the scope of the Order, did not comply with its regulation, 19 C.F.R. § 351.225(k)(1), because it failed to consider, as the regulation requires, the merchandise descriptions in the Petition. *Id.* at __, 365 F. Supp. 3d at 1282. The court also ruled that Commerce did not address relevant portions of the document setting forth the affirmative threat determination of the ITC. *Id.* at __, 365 F. Supp. 3d at 1283–86. *Star Pipe I* held that the scope ruling at issue in that case, not being based on an analysis consistent with the Department’s regulations and on substantial record evidence, was contrary to law. *Id.* at __, 365 F. Supp. 3d at 1282.

E. The Department’s Decision in the Final Scope Ruling

The scope language of the Order describes as follows the merchandise that is within the scope:

[F]inished and unfinished non-malleable cast iron pipe fittings with an inside diameter ranging from 1/4 inch to 6 inches, whether threaded or un-threaded, regardless of industry or pro-

prietary specifications. The subject fittings include elbows, ells, tees, crosses, and reducers as well as flanged fittings. These pipe fittings are also known as “cast iron pipe fittings” or “gray iron pipe fittings.” These cast iron pipe fittings are normally produced to ASTM A-126 and ASME B.16.4 specifications and are threaded to ASME B1.20.1 specifications. Most building codes require that these products are Underwriters Laboratories (UL) certified. The scope does not include cast iron soil pipe fittings or grooved fittings or grooved couplings.

Fittings that are made out of ductile iron that have the same physical characteristics as the gray or cast iron fittings subject to the scope above or which have the same physical characteristics and are produced to ASME B.16.3, ASME B.16.4, or ASTM A-395 specifications, threaded to ASME B1.20.1 specifications and UL certified, regardless of metallurgical differences between gray and ductile iron, are also included in the scope of this petition. These ductile fittings do not include grooved fittings or grooved couplings. Ductile cast iron fittings with mechanical joint ends (MJ), or push on ends (PO), or flanged ends and produced to the American Water Works Association (AWWA) specifications AWWA C110 or AWWA C153 are not included.

Order, 68 Fed. Reg. at 16,765.

Commerce determined that five of the nine models of Crane’s flanges are described by the first sentence of the second paragraph of the Order, *First Remand Redetermination* 3–5, which Commerce interpreted to incorporate the physical characteristics listed in the first sentence of the first paragraph, *id.* at 5, specifically, an inside diameter ranging from one-fourth inch to six inches, whether threaded or unthreaded. Commerce found, and plaintiff does not dispute, that the flanges have unthreaded inside diameters and that the inside diameters of five of the models were within the size range—one-fourth inch to six inches—specified in the first paragraph.³ *Id.* On that basis, Commerce concluded that Crane’s flanges have the same physical characteristics as the gray iron fittings subject to the first paragraph of the Order. *Id.* at 4–5. Commerce then concluded that Crane’s flanges are “pipe fittings” within the meaning of that term as used in

³ The five models Commerce found to be in-scope had inside diameters, in inches, of 1.938, 1.985, 2.46, 3.6, and 4.615; the inside diameters of the models Commerce found to be outside the scope had inside diameters, in inches, of 6.75, 8.75, 10.92, and 12.92. *Non-Malleable Cast Iron Pipe Fittings from China: Ductile Iron Lap Joint Flanges, Scope Request [Supplement]* Ex. 2 (Sept. 17, 2018) (P.R. Doc. 13).

the scope language. *Id.* at 13–14. Commerce relied for its conclusion on the three sources of information listed in 19 C.F.R. § 351.225(k)(1): the Petition, the pertinent report of the ITC, and prior scope rulings. *Id.* at 6–14.⁴

F. Commerce Did Not Consider All Relevant Evidence, and Reached Unsupported Conclusions, in Ruling that Crane’s Flanges Are Within the Scope of the Order

1. The Petition

The First Remand Redetermination relies upon brochures of Anvil and Ward Manufacturing, Inc. (“Ward”), included as exhibits to the Petition, to conclude that the petitioners “intended to cover flanges in the scope of the *Order*.” *First Remand Redetermination* 6. The evidence in the brochures lends support to a finding that Anvil and Ward, who were producers of pipe fittings and the two petitioners in the investigation, considered flanges, in general, to be pipe fittings. It is, therefore, probative on the question of whether the two petitioners intended that flanges would be included in the scope of the investigation that they proposed. But it is not determinative on this point. Neither the body of the Petition, nor the scope language of the Order that culminated from the investigation it launched, specifically addresses flanges.

In addition, certain language in the Petition can be interpreted to indicate that the petitioners meant for the proposed investigation to be limited to goods produced for two applications: fire prevention/sprinkler systems and steam conveyance systems. The Petition proposed an investigation with a scope it described as follows:

The scope of this petition covers finished and unfinished non-malleable cast iron pipe fittings (including ductile fittings) with an inside diameter ranging from 1/4 inch to 6 inches whether threaded or unthreaded, regardless of industry or proprietary specification, used in, or intended for use in, non-malleable cast iron pipe fittings applications described in subsection 2 below.

⁴ Commerce also placed on the record for the First Remand Redetermination a publication by U.S. Customs and Border Protection, “What Every Member of the Trade Community Should Know About Classification and Marking of Pipe Fittings under Heading 7307.” *First Remand Redetermination* 12. Commerce clarified in the First Remand Redetermination that it did not rely on this publication in reaching its conclusion. *Id.* The publication quotes the Explanatory Notes to the Harmonized Commodity Description and Coding System, EN 73.07, which includes “flanges” as an example of articles within the scope of international heading 7307 (“Tube or pipe fittings (for example couplings, elbows, sleeves), of iron or steel”). *Antidumping Duty Order on Non-Malleable Cast Iron Pipe Fittings from the People’s Republic of China: MCC Holdings dba Crane Resistoflex Scope Remand Redetermination* Attach. II at 7 (Jan. 17, 2020) (Rem. P.R. Docs. 18–21).

Petition 3. “Subsection 2” stated, in pertinent part, that:

Virtually all subject fittings are used in fire protection systems and in the steam heat conveyance systems used in old inner cities. The fire protection/sprinkler market is by far the dominant use, accounting for approximately 90 percent of shipments. The steam heating market represents another 5 percent of shipments, with other uses constituting less than 5 percent of shipments.

Id. at 4. It is possible to interpret the term “applications described in subsection 2 below” as intended to encompass unnamed “other uses constituting less than 5 percent of shipments” as well as the named applications, i.e., fire protection sprinkler and steam heating systems, but this interpretation leads to an interpretive difficulty. *Id.* at 3–4. If the *Petition* is interpreted in that way, then the words “used in, or intended for use in” as they appear in the first paragraph do not limit the proposed scope of the investigation being sought and therefore can have no meaning. *Id.* at 3. This difficulty is avoided if the reference in the first paragraph to “applications described in subsection 2 below” is limited to applications that actually are *described* there, as opposed to merely referenced there. *Id.* At best, the *Petition* is ambiguous, the petitioners not having elaborated on the “other uses constituting less than 5 percent.” *Id.* at 4.

2. The ITC’s Report of its Final Decision in the Antidumping Duty Investigation

Commerce relied in part on evidence in the ITC’s report of its final affirmative determination of threat to the domestic industry (the “ITC Report”). Non-Malleable Cast Iron Pipe Fittings From China, Inv. No. 731-TA-990 (Final), USITC Pub. No. 3586 (Mar. 2003) (Rem. P.R. Docs. 18–21, Attach. IV) (“*ITC Report*”). The evidence in the ITC Report does not support the conclusions Commerce drew from it.

In the First Remand Redetermination, Commerce concluded that “[a]n initial matter, although the ITC considered all flanged ductile cast iron fittings to be excluded from the scope, it did not exclude ductile iron *flanges* from the scope or the domestic like product.” *First Remand Redetermination* 8. It concluded, further, that “Crane has provided no evidence demonstrating that the ITC excluded flanges from its analysis in its investigation.” *Id.* at 9–10. These conclusions are misleading and erroneous. In discussing the scope, the ITC did not identify flanges as within the scope of either its investigation or the scope of its domestic like product. Because it omits this critical context, the statement that the ITC did not “exclude” flanges is

misleading. Moreover, evidence in the ITC Report supports a reasonable inference that ductile iron flanges were not within the scope of the ITC's injury and threat investigation.

The ITC Report, in the section entitled Views of the Commission, stated as follows:

Domestic producers did not report domestic production of ductile flanged fittings that would otherwise correspond to merchandise within the scope. Accordingly, there is no data on domestic ductile flanged fittings that could be included in any broadened like product analysis. Any issue regarding possible broadening of the domestic like product to include ductile flanged fittings is therefore moot.

ITC Report 7–8 (internal citation omitted). As indicated in the quoted language, the ITC declined to broaden the scope of the domestic like product to include flanged fittings made of ductile iron. At the same time, the ITC defined the scope of the domestic like product as corresponding to the scope of its injury and threat investigation. *Id.* at 8 (“For the reasons stated above, we find the domestic like product to be non-malleable and ductile cast iron pipe fittings corresponding to the scope.”). The First Remand Redetermination concludes, in response, that “[w]e disagree with the ITC’s interpretation of the exclusionary language in the scope pertaining to ductile flanged fittings because the ITC’s interpretation is contradicted by the plain language of the scope,” referring to the scope exclusion for certain ductile cast iron fittings that conform to specified AWWA standards, i.e., AWWA C110 and C153. *First Remand Redetermination* 8 n.29. This conclusion misses the point. It overlooks the significance of the ITC’s discussion of its domestic like product and the scope of the ITC’s investigation. The ITC was aware of the specific exclusion Commerce provided for certain AWWA-conforming goods, and the ITC expressed no disagreement with respect to it. *See ITC Report I–8–9*. But apart from that, the ITC, based on its own investigation, still determined that *all* ductile flanged fittings were outside the scope of the domestic like product, and therefore also outside the scope of its own injury/threat investigation. Noteworthy is evidence showing that ductile iron flanges share a defining physical characteristic with ductile iron flanged fittings, i.e., a flange. It is also noteworthy that the ITC Report does not discuss flanges (as opposed to flanged fittings) in describing the merchandise it considered to be within the scope of its own investigation.

The Department's regulation, 19 C.F.R. § 351.225(k)(1), required Commerce to consider the ITC Report, and it may not do so in a way that disregards probative evidence therein on the limits of the scope of the ITC investigation and like product. In *Star Pipe I*, this Court identified this problem, questioning "how, if ductile iron flanged *fittings* were excluded from the scope of the antidumping duty investigation, ductile iron *flanges* nevertheless were intended to be treated as subject merchandise during that investigation . . . even though the ITC Report makes no mention of ductile iron flanges (or non-malleable iron flanges, for that matter) and even though the ITC Report presents a detailed discussion of the various types of merchandise that are within the scope." 43 CIT at __, 365 F. Supp. 3d. at 1286. The First Remand Redetermination errs in misinterpreting the significance of the ITC's discussion of like product and scope and in failing to address the negative implications it poses for the Department's ultimate conclusion. It is axiomatic that under the antidumping duty statute as it applies in this case, Commerce may impose antidumping duties on a good only following a determination by Commerce that the good is "unfairly traded," i.e., that it was the subject of an affirmative less-than-fair-value determination by Commerce and also was included within the goods investigated by the ITC and thereby found to have resulted in material injury or the threat of material injury to the domestic industry. See 19 U.S.C. § 1673. By requiring Commerce to consider "the descriptions of the merchandise contained in . . . the determinations of . . . the Commission," 19 C.F.R. § 351.225(k)(1), when ruling on a scope issue, the Department's regulations embody this principle.

The First Remand Redetermination states that "[t]he ITC report . . . defines a pipe fitting as an iron casting 'generally used to connect the bores of two or more tubes, connect a pipe to another apparatus, change the direction of fluid flow, or close a pipe.'" *First Remand Redetermination* 8 (quoting *ITC Report* 4). Commerce relied on this language in concluding that flanges are "pipe fittings" within the meaning of the scope language of the Order, but this conclusion is unwarranted by the record evidence in the ITC Report. See *id.* at 8–10. The language in the ITC Report is not stated as a definition of the term "pipe fitting" and instead is a general description of the uses of pipe fittings. There is no indication in the text of the ITC Report that the ITC was addressing in the quoted language the specific issue of whether a flange—a good it did not discuss—is, generally speaking, a pipe fitting or whether the ITC considered flanges in general, or ductile iron flanges in particular, to be within the scope of its own injury and threat investigation. Also, as the court has noted, the scope

language did not change between the Initiation Notice published by Commerce and the final scope language in the Order, and the ITC Report occurred in the interim.

The First Remand Redetermination concludes, further, that “the ITC report also specifically references certain types of flanges as being included within its definition of a pipe fitting.” *Id.* at 9. To support this finding, the First Remand Redetermination relies upon “[a] footnote on page I-6 of the ITC Report” stating that “[a]nother use for these {subject} non-malleable flanged fittings is as so-called floor flanges to affix pipes as hand (or other) railings to floors or other surfaces.” *Id.* (quoting *ITC Report I-6 n.28*). From this, the First Remand Redetermination concludes that “[c]learly, the ITC considered at least one type of flange to be a type of pipe fitting.” *Id.* Here also, the Department’s conclusions are unsupported by the evidence it cited. The language in the ITC Report’s footnote refers expressly to a use of a flanged fitting, not a flange, and it provides no support for a conclusion that the ITC considered flanges, which it did not discuss, to be pipe fittings or a conclusion that they were within the scope of its own investigation.

3. Prior Scope Rulings

The First Remand Redetermination relies upon three of the Department’s prior scope rulings: “The UV Ruling,” “Napac Ruling,” and “Taco Ruling.”⁵ *Id.* at 11–13. As this Court ruled in *Star Pipe I*, neither the Taco Ruling nor the Napac Ruling supports a determination that flanges are pipe fittings within the meaning of the Order. See 43 CIT at ___, 365 F. Supp. 3d at 1285 n.8.

The Taco Ruling involved merchandise called “black and green ductile flanges,” which Commerce determined were flanged fittings: “as fittings cast with an integral rim, or flange, at the end of the fitting, Taco’s black and green ductile flanges can properly be classified as flanged fittings, as defined by the ITC.” *Taco Ruling* 9 (citing *ITC Report I-9*). The First Remand Redetermination states, “[w]e continue to rely on the *Taco Ruling* for the proposition that Commerce has previously found some types of flanges to be included in the scope

⁵ See *Final Scope Ruling on the Antidumping Duty Order on Non-Malleable Cast Iron Pipe Fittings from the People’s Republic of China: Request by U.V. International LLC* (May 12, 2017) (“UV Ruling”); see also *Final Scope Ruling on the Antidumping Duty Order on Finished and Unfinished Non-Malleable Cast Iron Pipe Fittings from the People’s Republic of China: Request by Napac for Flanged Fittings* (Sept. 19, 2016) (“Napac Ruling”); *Final Scope Ruling on the Black Cast Iron Flange, Green Ductile Flange, and the Twin Tee* (Sept. 19, 2008) (“Taco Ruling”), appended to *Final Scope Ruling on the Antidumping Duty Order on Non-Malleable Cast Iron Pipe Fittings from the People’s Republic of China: MCC Holdings dba Crane Resistoflex* (Nov. 19, 2018) (P.R. Doc. 16), as Attach. IV, V, and VII, respectively.

of the *Order*.” *First Remand Redetermination* 11. This logic ignores the distinction Commerce made, in other sections of the First Remand Redetermination, that flanges and flanged fittings are different products. *See id.* at 8, 9. Because Commerce identified the good at issue in the *Taco Ruling* as a “flanged fitting” rather than a flange, the *Taco Ruling* is not an evidentiary basis upon which Commerce validly could find that Crane’s flanges are pipe fittings within the scope of the *Order*.

The relevant merchandise at issue in the *Napac Ruling* was “gray iron flanged fittings.” *Id.* at 11. Commerce relied on the ruling for the proposition that Commerce “has previously found that ductile iron fittings are covered by the scope of the *Order* unless they meet AWWA C110 or AWWA C153 specifications.” *Id.* at 11–12. Based on the descriptions of the product at issue in the *Napac Ruling*, the court is unable to conclude that any of those products resemble Crane’s flanges. The Department’s stated reasons for reliance on this ruling do not support a conclusion that the *Order* covers Crane’s flanges. Further, the underlying premise is erroneous because not every ductile iron pipe fitting is within the scope of the *Order* even if not meeting AWWA C110 or C153 specifications. The *Order* includes “[f]ittings that are made out of ductile iron that have the same physical characteristics as the gray or cast iron fittings subject to the scope above.” *Order*, 68 Fed. Reg. at 16,765. Also, the *Order* excludes ductile iron grooved fittings and couplings *in addition* to products that meet the two specifications above. *Id.* Without further specification as to the characteristics of the products in the *Napac Ruling*, the ruling does not support a finding that Crane’s flanges are within the scope of the *Order*, or that all ductile iron fittings are covered by the *Order* unless they meet either specification.

Commerce stated in the First Remand Redetermination that it “continue[s] to rely on the *UV Ruling* for the proposition that Commerce has previously found that some ductile iron flanges similar to Crane’s flanges are within the scope of the *Order*.” *First Remand Redetermination* 12. The *UV Ruling* appears to be on point, but the support it provides is limited by an erroneous analysis. The products at issue in the *UV Ruling* were flat-faced ductile iron flanges. *UV Ruling* 3. The ruling states:

In reviewing the product documentation submitted by U.V. International, the Department finds that U.V. International’s flanges conform to the ITC’s definition of pipe fittings. Specifically, as demonstrated in U.V. International’s original submission, its flanges can be threaded onto the ends of two pipes, and then those flanges can be bolted together so as to connect the

pipes. Alternatively, a flange may be threaded onto one pipe and then used to connect that pipe to an apparatus with a compatible connector. Moreover, the Department has found that flanges are fittings in both the *Taco* and *Napac* scope rulings.

Id. at 8. This excerpt demonstrates the same reliance on the ITC Report's description of "pipe fittings" that the court finds to be misguided. The First Remand Redetermination's strained interpretation of the ITC Report cautions against a conclusion that the ITC considered ductile iron flanges to be within the scope of its investigation. The erroneous statement in the *UV Ruling* that Commerce found that "flanges" are fittings in the *Taco* and *Napac* rulings is another reason to question the analysis therein. Neither of those rulings was pertinent to the issue posed in this litigation.

III. CONCLUSION AND ORDER

The Department's regulation, 19 C.F.R. § 351.225(k)(1), instructs that Commerce will consider "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission," in deciding whether merchandise is within the scope of an order. Commerce permissibly found certain evidentiary support for its determination in the Petition and in its past scope ruling, the *UV Ruling*, but concluded, contrary to record evidence, that certain other rulings supported its decision.

Overall, Commerce failed to base its First Remand Redetermination on findings supported by substantial evidence, when that record is considered on the whole. Most notably, Commerce misinterpreted the evidence it cited from the ITC Report, evidence which does not support a determination that Crane's flanges are subject merchandise and failed to address evidence in the ITC Report detracting from the Department's ultimate conclusion, which was evidence that ductile iron flanged fittings were outside the scope of the ITC's investigation.

The court does not hold that Crane's flanges are, or are not, within the scope of the Order. That is a determination for Commerce to make upon remand. The court holds instead that Commerce must reconsider its decision in light of the deficiencies the court has identified. Therefore, upon consideration of the First Remand Redetermination and all papers and proceedings herein, it is hereby

ORDERED that Commerce, within 90 days of the issuance of this Opinion and Order, shall submit a second decision upon remand ("Second Remand Redetermination") conforming to this Opinion and Order; it is further

ORDERED that plaintiff and defendant-intervenor shall have 30 days from the filing of the Second Remand Redetermination in which to submit comments to the court; and it is further

ORDERED that defendant shall have 15 days from the date of filing of the last comment on which to submit a response to the comments that have been submitted.

Dated: August 26, 2021

New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, JUDGE

Slip Op. 21–110

STAR PIPE PRODUCTS, Plaintiff, v. UNITED STATES, Defendant, and ANVIL INTERNATIONAL, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 17–00236

[Remanding a decision issued in response to court order in litigation contesting an agency determination interpreting the scope of an antidumping duty order on certain cast iron pipe fittings]

Dated: August 26, 2021

Francis J. Sailer, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, D.C., for plaintiff. With him on the brief were *Ned H. Marshak* and *Kavita Mohan*.

L. Misha Preheim, Assistant Director, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Joshua E. Kurland*, Trial Attorney. Of counsel was *David W. Richardson*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Daniel L. Schneiderman, King & Spalding LLP, of Washington, D.C., for defendant-intervenor. With him on the brief was *J. Michael Taylor*.

OPINION AND ORDER

Stanceu, Judge:

Plaintiff Star Pipe Products (“Star Pipe”) commenced this action to contest a decision of the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) placing a group of imported products, certain “flanges” made of ductile cast iron, within the scope of an antidumping duty order. Before the court is the Department’s second determination issued in response to court remand (the “Second Remand Redetermination”), submitted to the court in response to the court’s opinion and order in *Star Pipe Prods.*

v. United States, 44 CIT __, 463 F. Supp. 3d 1366 (2020) (“*Star Pipe II*”). Concluding that Commerce reached certain findings that are unsupported by substantial evidence on the record considered as a whole and failed to address certain information detracting from its conclusion, the court remands the Second Remand Redetermination to Commerce for reconsideration.

I. BACKGROUND

Background is set forth in the court’s prior opinions, which is summarized and supplemented herein. *See id.* at __, 463 F. Supp. 3d at 1368–70; *Star Pipe Prods. v. United States*, 43 CIT __, __, 365 F. Supp. 3d 1277, 1278–79 (2019) (“*Star Pipe I*”).

A. The Agency Decision Contested in this Litigation

The contested administrative decision is entitled *Final Scope Ruling on the Antidumping Duty Order on Non-Malleable Cast Iron Pipe Fittings from the People’s Republic of China: Request by Star Pipe Products* (Aug. 17, 2017) (P.R. Doc. 13) (“*Final Scope Ruling*”). *See Notice of Scope Rulings*, 84 Fed. Reg. 9,295, 9,296 (Int’l Trade Admin. Mar. 14, 2019).¹

B. Administrative Proceedings Culminating in the Issuance of the Order

Commerce issued the Final Scope Ruling in response to a request for a ruling (the “Scope Ruling Request”) that Star Pipe filed with Commerce on June 21, 2017, *Star Pipe Products Scope Request: Ductile Iron Flanges* (P.R. Docs. 1–3) (“*Scope Ruling Request*”), to seek a determination that certain flanges made of ductile iron that it imported from China were outside the scope of an antidumping duty order (the “Order”) Commerce issued in 2003 on non-malleable cast iron pipe fittings from China. *See Notice of Antidumping Duty Order: Non-Malleable Cast Iron Pipe [Fittings] From the People’s Republic of China*, 68 Fed. Reg. 16,765 (Apr. 7, 2003) (“*Order*”). The Order resulted from an antidumping duty petition (the “Petition”) filed in 2002. *See Petition for Imposition of Antidumping Duties: Non-Malleable Cast Iron Pipe Fittings from the People’s Republic of China* (Feb. 21, 2002) (Rem. P.R. Docs. 30–32, Ex. 1) (“*Petition*”).

In response to the Petition, the U.S. International Trade Commission (the “ITC”) initiated its “injury or threat” investigation (Inv. No.

¹ All citations to documents from the administrative record are to public documents. References cited as “P.R. Doc. __” are to documents that were on the record in *Star Pipe Prods. v. United States*, 43 CIT __, 365 F. Supp. 3d 1277 (2019) (“*Star Pipe I*”), while references cited as “Rem. P.R. Doc. __” and “Sec. Rem. P.R. Doc. __” are to documents placed on the agency record during the Department’s first and second redetermination proceedings, respectively.

731-TA-990) in February 2002. *Non-Malleable Cast Iron Pipe Fittings From China*, 67 Fed. Reg. 9,004 (Int'l Trade Comm. Feb. 27, 2002). Commerce published a notice (the "Initiation Notice") announcing its parallel antidumping duty "less-than-fair-value" ("LTFV") investigation in March 2002. *Notice of Initiation of Antidumping Duty Investigation: Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China*, 67 Fed. Reg. 12,966 (Mar. 20, 2002) ("*Initiation Notice*"). The ITC issued the preliminary results of its investigation in April of that year, *Non-Malleable Cast Iron Pipe Fittings From China*, 67 Fed. Reg. 18,635 (Int'l Trade Comm. Apr. 16, 2002), concluding "that there is a reasonable indication that an industry in the United States is materially injured by reason of imports from China of non-malleable cast iron pipe fittings . . . that are alleged to be sold in the United States at less than fair value (LTFV)."

In September 2002, Commerce issued an affirmative preliminary determination of sales at less than fair value, *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Non-Malleable Cast Iron Pipe Fittings From the People's Republic of China*, 67 Fed. Reg. 60,214 (Sept. 25, 2002), and in early 2003 issued its final affirmative LTFV determination, *Notice of Final Determination of Sales at Less Than Fair Value: Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China*, 68 Fed. Reg. 7,765 (Feb. 18, 2003). The ITC reached a final affirmative "threat" determination. *See Order*, 68 Fed. Reg. at 16,765 ("On March 24, 2003 . . . the International Trade Commission (the ITC) notified the Department of Commerce (the Department) of its final determination that the industry in the United States producing non-malleable cast iron pipe fittings is threatened with material injury by reason of import of the subject merchandise from the People's Republic of China (PRC)"). Issuance of the Order followed. *Id.*

C. Proceedings Before the Court

Star Pipe commenced this action in 2017. Summons (Sept. 15, 2017), ECF No. 1; Compl. (Sept. 15, 2017), ECF No. 4. Following the court's decision in *Star Pipe I*, which resulted in an order to Commerce to reconsider the Final Scope Ruling, Commerce placed new factual information on the record and invited interested parties to comment and submit additional information. *See Antidumping Duty Order on Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China: Star Pipe Prod[ucts] Scope Remand Redetermination* (May 9, 2019) (Rem. P.R. Doc. 25). The information Commerce

added included excerpts from the Petition. *See id.* at Attach. I. On May 20, 2019, Star Pipe and defendant-intervenor, Anvil International, LLC (“Anvil”), submitted comments on the new information and placed other new information on the record. *See Star Pipe’s New Factual Information in the Scope Inquiry on Non-Malleable Cast Iron Pipe Fittings from the People’s Republic of China* (May 20, 2019) (Rem. P.R. Docs. 30–32); *Non-Malleable Cast Iron Pipe Fittings From The People’s Republic Of China / Submission Of Factual Information* (May 20, 2019) (Rem. P.R. Doc. 33).

In its first redetermination upon remand (the “First Remand Redetermination”), Commerce again concluded that Star Pipe’s ductile iron flanges are within the scope of the Order. *Final Results of Redetermination Pursuant to Ct. Order 3–14* (June 27, 2019) (Rem. P.R. Doc. 39) (“*First Remand Redetermination*”). The court again ordered Commerce to reconsider its decision. *Star Pipe II*, 44 CIT at ___, 463 F. Supp. 3d at 1379. In response, Commerce filed the instant Second Remand Redetermination on November 16, 2020. *Final Results of Redetermination Pursuant to Ct. Order* (Nov. 16, 2020) (Sec. Rem. P.R. Doc. 9) (“*Second Remand Redetermination*”).

Anvil filed comments in support of the agency’s decision. Def.-Inter.’s Comments on Commerce’s Second Remand Redetermination (Jan. 8, 2021), ECF No. 83. Star Pipe filed comments in opposition. Star Pipe Prods.’ Comments on Second Final Remand Redetermination (Jan. 8, 2021), ECF No. 84 (“Star Pipe’s Comments”). Defendant filed a response to these comment submissions. Def.’s Resp. to Comments on the Second Remand Results (Feb. 10, 2021), ECF No. 87.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction according to 28 U.S.C. § 1581(c).² If consistent with the court’s remand order, the determinations, findings, and conclusions in the Second Remand Redetermination will be upheld upon judicial review unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).

B. Description of Star Pipe’s Flanges

According to the Scope Ruling Request, “[t]he products that are the subject of this scope request are flanges imported by Star Pipe that are made from ductile iron, and meet the American Water Works

² All statutory citations herein are to the 2012 edition of the United States Code and all regulatory citations herein are to the 2020 edition of the Code of Federal Regulations.

Association (“AWWA”) Standard C115.” *Scope Ruling Request 3*. It added that “[a] flange is an iron casting used to modify a straight end pipe to enable its connection either to a flanged pipe, a flanged pipe fitting or another flange attached to the otherwise straight end of another pipe, in order to connect pipes, valves, pumps and other equipment to form a piping system.” *Id.* The *Scope Ruling Request* states that the flanges “are for the water and wastewater industries.” *Id.* at 10; *see also id.* at 18 (“Star Pipe’s ductile iron flanges are sold for use in water or waste waterworks projects. The majority of sales . . . are sold to fabricators to fabricate the products into flanged pipes.”).

Each Star Pipe flange, which is disc-shaped, has in the thicker center portion (the “hub”) a large hole with tapered thread allowing threading of the flange onto the end of a threaded pipe. *See id.*, Ex. 1. The outer, thinner portion of each flange is drilled with holes, either tapped or untapped, arranged in a circle for insertion of fasteners. *Id.* Photographs in the *Scope Ruling Request* illustrate how two pipes to which flanges have been assembled can be joined using bolts and nuts through the eight holes, with a gasket fitted between the two flanges to seal the joint. *Id.*, Ex. 8.

C. The Scope Language of the Order

The Order addresses non-malleable cast iron pipe fittings in the first paragraph of the scope language, as follows:

The products covered by this order are finished and unfinished non-malleable cast iron pipe fittings with an inside diameter ranging from 1/4 inch to 6 inches, whether threaded or unthreaded, regardless of industry or proprietary specifications. The subject fittings include elbows, ells, tees, crosses, and reducers as well as flanged fittings. These pipe fittings are also known as “cast iron pipe fittings” or “gray iron pipe fittings.” These cast iron pipe fittings are normally produced to ASTM A-126 and ASME B.16.4 specifications and are threaded to ASME B1.20.1 specifications. Most building codes require that these products are Underwriters Laboratories (UL) certified. The scope does not include cast iron soil pipe fittings or grooved fittings or grooved couplings.

Order, 68 Fed. Reg. at 16,765. Star Pipe’s flanges, which are made from ductile cast iron, and not from non-malleable cast iron (“gray iron”), are not described by this paragraph. *See Star Pipe I*, 43 CIT at ___, 365 F. Supp. 3d at 1281. The second paragraph addresses ductile iron fittings, as follows:

Fittings that are made out of ductile iron that have the same physical characteristics as the gray or cast iron fittings subject to the scope above or which have the same physical characteristics and are produced to ASME B.16.3, ASME B.16.4, or ASTM A-395 specifications, threaded to ASME B1.20.1 specifications and UL certified, regardless of metallurgical differences between gray and ductile iron, are also included in the scope of this petition.³ These ductile fittings do not include grooved fittings or grooved couplings. Ductile cast iron fittings with mechanical joint ends (MJ), or push on ends (PO), or flanged ends and produced to American Water Works Association (AWWA) specifications AWWA C110 or AWWA C153 are not included.

Order, 68 Fed. Reg. at 16,765.

D. The Court's Opinion and Order in *Star Pipe I*

In *Star Pipe I*, the court ruled that the Final Scope Ruling rested on an analysis inconsistent with the Department's regulations. Then, as now, the Department's regulations required Commerce to "take into account . . . [t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary [of Commerce] (including prior scope determinations) and the [U.S. International Trade] Commission." 19 C.F.R. § 351.225(k)(1). The court held that Commerce failed to consider the merchandise descriptions in the Petition and, indicative of that failure, placed no part of the Petition on the record. *Star Pipe I*, 43 CIT at ___, 365 F. Supp. 3d at 1282 (citing 19 C.F.R. § 351.225(k)(1)).

Further, the court concluded that Commerce erred in relying upon certain language in the injury determination of the U.S. International Trade Commission (the "ITC Report") and made no mention of other, detracting evidence in the ITC Report. *Id.* at ___, 365 F. Supp. 3d at 1282; see *Scope Ruling Request Ex. 7, Non-Malleable Cast Iron Pipe Fittings From China, Inv. No. 731-TA-990 (Final)*, USITC Pub. No. 3586 (Mar. 2003) (the "*ITC Report*"). The court reasoned that "[r]ead in the entirety, the ITC Report contains evidence lending weight to a conclusion that *Star Pipe's* flanges are not subject merchandise." *Star Pipe I*, 43 CIT at ___, 365 F. Supp. 3d at 1286. That evidence included language in the ITC Report indicating that the ITC considered all flanged fittings made of ductile cast iron to be excluded from the scope of the ITC's investigation, which suggested that ductile cast iron flanges also could have been considered to be outside

³ The court reiterates that "[t]he reference to 'this petition' appears to be incorrect and probably should read 'this order.'" See *Star Pipe I*, 43 CIT at ___, 365 F. Supp. 3d at 1281 n.4.

that scope. *Id.* at __, 365 F. Supp. 3d at 1285. The court opined, further, that “[t]he absence of any mention of ductile iron flanges, as opposed to ductile flanged fittings, in the ITC Report (and, according to plaintiff, in the petition) casts doubt on the premise that ductile iron flanges were contemplated as part of either the scope of the investigation or the scope of the domestic like product.” *Id.* at __, 365 F. Supp. 3d at 1286.

The court also took issue with the Department’s conclusion that Star Pipe’s flanges were within the scope of a description of a “pipe fitting” in the ITC Report. *Id.* at __, 365 F. Supp. 3d at 1283. The ITC Report stated that “[p]ipe fittings generally are used to connect the bores of two or more pipes or tubes, connect a pipe to another apparatus, change the direction of fluid flow, or close a pipe.” *ITC Report* 4. The court noted that the Final Scope Ruling did not address the previous sentence in the ITC Report, which at least suggested that the pipe fittings subject to the Order are those used in pipe fitting applications. *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1283. The court pointed to record evidence, not addressed by Commerce in the Final Scope Ruling, that Star Pipe’s flanges, in the form in which they were imported, were produced solely for the purpose of enabling pipe fabricators to modify a straight end pipe to add a flange enabling subsequent connection to a flange on another pipe or apparatus or to a flanged fitting. *Id.* at __, 365 F. Supp. 3d at 1284. The court identified record evidence, which Commerce also failed to mention in the Final Scope Ruling, that this modification is performed by pipe fabricators in a process that, according to an applicable industry standard, is required to be performed at the point of fabrication and not in the field. *Id.* at __, 365 F. Supp. 3d at 1284.

The court ordered Commerce to submit a redetermination that gives full and fair consideration to the merchandise descriptions in the Petition and to all relevant evidence contained in the ITC Report. *Id.* at __, 365 F. Supp. 3d at 1286.

E. The First Remand Redetermination

In the First Remand Redetermination, Commerce again concluded that Star Pipe’s flanges are merchandise subject to the Order. Commerce relied on information included in exhibits to the Petition to conclude that the petitioners intended for flanges to be within the scope of the term “pipe fittings” as used in the language they proposed for the scope of the investigation and, therefore, within the scope of the term “pipe fittings” (or “fittings”) as used in the scope language of the Order. *See First Remand Redetermination* 5–7.

F. The Court's Opinion and Order in *Star Pipe II*

In *Star Pipe II*, the court ruled that the First Remand Redetermination, “unlike the Final Scope Ruling, considered all three sources of information that its regulation, 19 C.F.R. § 351.225(k)(1), required it to consider.” 44 CIT at ___, 463 F. Supp. 3d at 1379. The opinion concluded, further, “that Commerce committed errors in analyzing the evidence in one of those sources, the ITC Report” and that the First Remand Redetermination “permissibly found certain evidentiary support for its determination in the other two sources of information, the Petition and one of its own past scope rulings, the UV Ruling.” *Id.* at ___, 463 F. Supp. 3d at 1379; see *Final Scope Ruling on the Antidumping Duty Order on Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China: Request by U.V. International LLC* (May 12, 2017) (“UV Ruling”), appended to *Final Scope Ruling* as Attach. 1.

The court opined in *Star Pipe II* that brochures illustrating the products of the two petitioners, Anvil and Ward Manufacturing, Inc. (“Ward”) and attached as exhibits to the Petition “are evidence that the petitioners considered ‘flanges’ to be pipe fittings, and nothing in the Petition expressly excludes flanges from the proposed scope of the investigation.” 44 CIT at ___, 463 F. Supp. 3d at 1373.

The court concluded that Commerce, while permissibly finding support for its conclusion in the UV Ruling, erred in relying on two other past rulings, the “Taco Ruling” and the “Napac Ruling.” *Id.* at ___, 463 F. Supp. 3d at 1376–77; see *Final Scope Ruling on the Antidumping Duty Order on Finished and Unfinished Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China: Request by Napac for Flanged Fittings* (Sept. 19, 2016) (“Napac Ruling”); *Final Scope Ruling on the Black Cast Iron Flange, Green Ductile Flange, and the Twin Tee* (Sept. 19, 2008) (“Taco Ruling”), appended to *Final Scope Ruling* as Attach. 2, and 4, respectively. As it had in *Star Pipe I*, the court noted that the products at issue in the Taco Ruling were flanged fittings, a product Commerce itself considered distinct from flanges, that some of the products at issue in the Napac Ruling also were flanged fittings, and that the court was unable to conclude from the Napac Ruling that the remaining products were identical to *Star Pipe*’s flanges. *Star Pipe II*, 44 CIT at ___, 463 F. Supp. 3d at 1376.

In ordering Commerce to reach a new decision, the court instructed that “the new decision must recognize that the ITC Report does not contain evidence supporting a conclusion that *Star Pipe*’s flanges are within the scope of the Order and contains some evidence that detracts from such a conclusion.” *Id.* at ___, 463 F. Supp. 3d at 1379. The opinion added that “[a]t this point in the litigation, the court declines

to decide the question of whether or not the record evidence Commerce found in the Petition and the UV Ruling is sufficient to support such a conclusion in light of all record evidence, including the record evidence detracting from such a conclusion,” and, “[u]pon correcting the errors the court identifies, Commerce must make that determination in the first instance.” *Id.* at ___, 463 F. Supp. 3d at 1379.

G. The Second Remand Redetermination

In the Second Remand Redetermination, Commerce again determined that Star Pipe’s flanges were subject merchandise. Commerce based its decision that Star Pipe’s flanges are within the scope of the Order on the following principal conclusions: (1) the Petition contains evidence supporting a finding that the petitioners considered flanges to be “pipe fittings” for purposes of the proposed antidumping duty investigation culminating in the Order; (2) Star Pipe’s flanges meet the technical specifications of the scope language for pipe fittings made of ductile iron because they have the same physical characteristics as the non-malleable pipe fittings the Order expressly includes; (3) the ITC Report does not contain contrary evidence sufficient to alter the Department’s conclusion; and (4) the claimed conformance of Star Pipe’s flanges with AWWA specification C115 does not place Star Pipe’s flanges outside of the Order. *Second Remand Redetermination* 4–24. On the last finding, Commerce determined that the exclusion in the scope language applies only to flanged fittings (and not flanges) produced to AWWA specification C110 or C153, to which, according to Commerce, AWWA C115 has not been shown to be equivalent, and because the exclusion was drafted to effectuate the intent of the petitioners that goods such as Star Pipe’s flanges would not be excluded from the scope of the proposed investigation. *Id.* at 20–24.

H. Methodology for Scope Determinations

According to the Department’s regulations, “in considering whether a particular product is included within the scope of an order . . . the Secretary [of Commerce] 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 [International Trade] Commission.” 19 C.F.R. § 351.225(k)(1).⁴ The provision is not written so as to

⁴ If the “criteria” of § 351.225(k)(1) “are not dispositive, the Secretary will further consider: (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.” 19 C.F.R. § 351.225(k)(2). Star Pipe argued previously in this litigation that Commerce should have considered the (k)(2) sources but has not preserved that argument in its comments on the Second Remand Redetermination.

identify the *only* sources of information Commerce is permitted to consider. The Department's inquiry must center on the scope language of the antidumping or countervailing duty order, for the Department's role in issuing a scope ruling is to interpret, not modify, the scope language. *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1095 (Fed. Cir. 2002) ("Commerce cannot interpret an anti-dumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." (internal quotation marks and citation omitted)). Moreover, to be sustained upon judicial review, the determination must be supported by the record evidence considered on the whole. As a practical matter, this must include consideration of the record information contained in the scope ruling request, which ordinarily will include, *inter alia*, "[a] detailed description of the product, including its technical characteristics and uses." 19 C.F.R. § 351.225(c)(1)(i).

I. Certain Findings in the Second Remand Redetermination Are Not Supported by Substantial Evidence on the Record Considered on the Whole, which Also Contains Certain Evidence Detracting from the Department's Determination

1. The Meaning of the Term "Pipe Fittings" as Used in the Scope Language

The scope language of the Order does not define the term "pipe fittings" (or the term "fittings," used synonymously in the scope language). Commerce looked to the criteria of 19 C.F.R. § 351.225(k)(1) for guidance on interpreting these terms.

In response to the court's rulings in *Star Pipe I* and *Star Pipe II*, Commerce, under protest, disclaimed in the Second Remand Redetermination any reliance on the aforementioned description in the ITC Report. *Second Remand Redetermination 9*. The ITC Report's description is not written as a definition of the term "pipe fitting," but instead is a general identification of the uses of pipe fittings in piping systems. As the court explained in *Star Pipe I*, Commerce reached a conclusion, unsupported by the record evidence, that Star Pipe's flanges necessarily would answer to that description. 43 CIT at __, 365 F. Supp. 3d at 1284–86.

In contrast, the Petition contains some evidence, consisting of the product brochures of Anvil and Ward, supporting a finding that, as a general matter, flanges used in piping systems are described by the term "pipe fitting" or "fitting." More specifically, this evidence lends support to a finding that Anvil and Ward, who were producers of pipe fittings and the two petitioners in the investigation, *considered*

flanges, in general, to be pipe fittings. See *Star Pipe II*, 44 CIT at ___, 463 F. Supp. 3d at 1373; see also *Second Remand Redetermination 9* (“The inclusion of flanges in the product catalogues indicates that the petitioners considered flanges to be pipe fittings, as a type of product that is similar to and is produced by the same industry as other subject pipe fittings.”). Because the scope of an antidumping duty investigation is substantially influenced by the investigative scope proposed in the petition, it was reasonable for Commerce to accord weight to this evidence in interpreting the meaning of the term “pipe fittings” in the scope language. Moreover, interpreting this term as used in the scope language as generally encompassing flanges is not *per se* unreasonable.⁵

Nevertheless, the fact that flanges are listed in the Anvil and Ward brochures, standing alone, is not determinative of whether the scope language to be interpreted includes flanges in general, or the particular flanges at issue here. The scope language, like the text of the Petition, makes no mention of flanges. The list of exemplars (“elbows, ells, tees, crosses, and reducers as well as flanged fittings”), while not exhaustive, expressly mentions flanged fittings but not flanges. See *Order*, 68 Fed. Reg. at 16,765; *Petition 3*. Also, the “flanged fittings” reference differs from the other exemplars in referring to the method of attachment of a fitting to another good. It encompasses products mentioned in the other exemplars. See, e.g., *Petition Ex. 2* (illustrating two examples of flanged elbows that are threaded on one end and flanged on the other). In doing so, the language poses the question of why a good with a defining physical characteristic in common with a flanged fitting, i.e., a flange to allow attachment to other goods with flanges, was not also mentioned in the exemplars. This is not to conclude that the scope language, when read according to plain meaning, *must* be interpreted to exclude flanges; rather, it is to recognize that the scope language by itself does not resolve the issue, and Commerce, therefore, is required to examine the other relevant evidence on the record. As discussed later in this Opinion and Order, the record contains, for example, evidence that the type of flange at issue in this case, which is a threaded flange produced for attachment to a threaded pipe produced for the water works industry, is *not* considered to be a pipe fitting by the AWWA standards that apply to products produced for that industry. The Second Remand Redetermination does not indicate that Commerce considered this record evidence.

⁵ A pipe fitting has been defined as “a piece (such as a coupling or elbow) used to connect pipes or as accessory to a pipe.” Pipe Fitting, Merriam-Webster, <https://www.merriam-webster.com/dictionary/pipefitting> (last visited Aug. 24, 2021).

2. The Exclusion for Certain Ductile Iron Fittings Produced to AWWA Standards

The scope language of the Order contains this exclusion: “Ductile cast iron fittings with mechanical joint ends (MJ), or push on ends (PO), or flanged ends and produced to the American Water Works Association (AWWA) specifications AWWA C110 or AWWA C153 are not included.” *Order*, 68 Fed. Reg. at 16,765. In the Second Remand Redetermination, Commerce determined that this exclusion did not apply to any of Star Pipe’s flanges. *Second Remand Redetermination* 17–18. Commerce reached this determination based on a series of specific findings. Upon examining record evidence in the Petition, the Scope Ruling Request, and the ITC Report, the court concludes that certain of these findings are not supported by substantial evidence on the record.

The Petition proposed an investigation with a scope it described as follows:

The scope of this petition covers finished and unfinished non-malleable cast iron pipe fittings (including ductile fittings) with an inside diameter ranging from 1/4 inch to 6 inches whether threaded or unthreaded, regardless of industry or proprietary specification, used in, or intended for use in, non-malleable cast iron pipe fittings applications described in subsection 2 below.

Petition 3. “Subsection 2” stated, in pertinent part, that:

Virtually all subject fittings are used in fire protection systems and in the steam heat conveyance systems used in old inner cities. The fire protection/sprinkler market is by far the dominant use, accounting for approximately 90 percent of shipments. The steam heating market represents another 5 percent of shipments, with other uses constituting less than 5 percent of shipments.

Id. at 4. It is possible to interpret the term “applications described in subsection 2 below” as intended to encompass unnamed “other uses constituting less than 5 percent of shipments” as well as the named applications, i.e., fire protection sprinkler and steam heating systems, but this interpretation leads to a textual problem. If the Petition is interpreted in that way, then the words “used in, or intended for use in” as they appear in the first paragraph do not limit the proposed scope of the investigation being sought and therefore can have no meaning. This textual problem is avoided if the reference in the first paragraph to “applications described in subsection 2 below”

is limited to applications that actually are *described* there, as opposed to merely referenced there. At best, the Petition is ambiguous, the petitioners not having elaborated on the “other uses constituting less than 5 percent.” Commerce found, nevertheless, that “flanges used in water and wastewater systems may fall under the category of other uses, or nontraditional non-malleable pipe fitting applications.” *Second Remand Redetermination* 16. This finding is entirely speculative, being based on no record evidence.

The Department’s Initiation Notice, published in the Federal Register on March 20, 2002, described the scope of the antidumping duty investigation using language essentially identical to what would become the scope language in the Order. *See Initiation Notice*, 67 Fed. Reg 12,966. In proposing a scope for the investigation, the Petition did not propose an exclusion from the investigation for any product made to standards for the water works industry. The Second Remand Redetermination recognizes this point. *Second Remand Redetermination* 49 (“The petitioners did not seek to exclude products made to any AWWA standard in the instant pipe fittings investigation.” (footnote omitted)).

Paradoxically, Commerce nevertheless concluded in the Second Remand Redetermination that the “narrow” scope of the AWWA exclusion effectuated the intent of the petitioners, even though the Petition proposed no exclusion for products made to AWWA standards. *Id.* at 48–49. The record evidence does not support the Department’s conclusion. Commerce explained that “[a]bsent a concern that a proposed scope cannot be effectively administered, that there is a potential for evasion or circumvention without amendment, or that the scope language is inconsistent with the intent of the petitioner or industry support, Commerce generally will accept the scope as defined in the petition.” *Id.* (citing two of the Department’s decisions in an unrelated proceeding). Commerce did not invoke any of the three exceptions it noted, but still it reiterated its deference to the petitioners’ intent: “[T]he fact that the scope of the *Order* specifies only two excluded AWWA standards indicates that Commerce allowed a narrow exclusion, consistent with Commerce’s practice to defer to the intent of the petitioner in fulfilling its statutory mandate to provide, where appropriate, the relief requested by the petitioning industry.” *Id.* at 49 (citing two decisions in another unrelated proceeding). Commerce added that “[t]his practice ensures that the scope both includes the specific products for which the petitioner has requested relief and excludes those products that would otherwise fall within the general scope physical description, but for which the petitioner does not seek

relief.” *Id.* (citing two past decisions of Commerce in other proceedings).

The Petition, in stating that “[v]irtually all subject fittings are used in fire protection systems and in the steam heat conveyance systems used in old inner cities,” is at least a suggestion that goods produced to standards for the water works industry were intended to be outside the scope of the investigation. See *Petition* 4. It is possible that the Department’s intent was to distinguish goods produced for that industry from subject merchandise by requiring the excluded products to be produced to AWWA standards. But contrary to the rationale Commerce put forward, there is no suggestion in the Petition of an intent on the part of the two petitioners, Anvil and Ward, that some ductile iron products made to AWWA standards for the water works industry would be within the proposed scope of the investigation and others would not. Nor is there any indication in the *text* of the Petition that the two petitioners contemplated that flanges would be within the scope of the proposed investigation. And while the brochures are evidence that the petitioners generally considered flanges to be pipe fittings, there is no indication, in either the text of the Petition or the exhibits, that the petitioners specifically intended for ductile iron flanges, or in particular those such as Star Pipe’s—which Star Pipe described as threaded flanges produced for the water works industry—to be within the scope of their proposed investigation.

In summary, the Petition contains evidence that the two petitioners considered flanges, in general, to be within the scope of the term “pipe fittings,” but the evidence in the Petition is not dispositive of the specific issue presented by this litigation. As discussed above, Commerce permissibly considered that evidence from the petition as supporting its decision to include Star Pipe’s flanges within the scope of the Order. Commerce erred as to another finding it reached from the evidence in the Petition when it concluded that its interpretation of the “narrow” scope of the AWWA exclusion effectuated the intent of the petitioners. Commerce fails to point to any evidence in the Petition that supports this finding.

3. Relevant Evidence in the ITC Report

As mentioned previously, the scope of the investigation as Commerce defined it in the Initiation Notice, published on March 20, 2002, is essentially identical to the scope language of the Order, issued on April 7, 2003. The issuance of the ITC Report (which stated the final results of the ITC’s investigation) occurred in the interim. Therefore, it could not have resulted in any change by Commerce in

the scope language Commerce inserted into the Order at the conclusion of the investigations by Commerce and the ITC.

As the court concluded in *Star Pipe I*, the ITC Report contains certain evidence detracting from the Department's conclusion that Star Pipe's flanges are subject merchandise. 43 CIT at __, 365 F. Supp. 3d at 1285. The court identified language in the ITC Report indicating that the ITC considered all flanged fittings made of ductile cast iron to be excluded from the scope of the ITC's investigation, which suggested that ductile iron flanges also were considered by the ITC to be outside that scope. *Id.* at __, 365 F. Supp. 3d at 1285.

In the Second Remand Redetermination, Commerce concluded that "the ITC specifically investigated ductile iron pipe fittings and did not exclude ductile iron flanges from its material injury investigation." *Second Remand Redetermination* 44. While the conclusion that the ITC investigated ductile iron pipe fittings is supported by the ITC Report, the conclusion that the ITC did not exclude ductile iron flanges from its material injury investigation is speculative and misleading: there is no evidence in the ITC Report that the ITC considered flanges, which the ITC did not discuss, to be merchandise within the scope of its investigation. Moreover, Commerce fails to analyze the evidence that the ITC defined the domestic like product as corresponding to the scope of the investigation and, at the same time, declined to broaden the domestic like product to include any ductile flanged fittings:

Domestic producers did not report domestic production of ductile flanged fittings that would otherwise correspond to merchandise within the scope. Accordingly, there is no data on domestic ductile flanged fittings that could be included in any broadened like product analysis. Any issue regarding possible broadening of the domestic like product to include ductile flanged fittings is therefore moot.

ITC Report 7–8 (internal citation omitted). The ITC left no doubt that it defined the scope of the domestic like product as corresponding to the scope of its injury and threat investigation. *Id.* at 8 ("For the reasons stated above, we find the domestic product to be non-malleable and ductile cast iron pipe fittings corresponding to the scope."). Even though the ITC Report recognized that the scope as defined by Commerce contained a specific exclusion that covered ductile flanged fittings made to AWWA specifications C110 and C153, *see id.* at 4, the ITC's method of defining the scope of its own investigation is probative evidence on the issue of ductile iron flanges that Commerce was not free to ignore. This evidence strongly supports the

view that the ITC excluded ductile flanged fittings from the unfairly traded imports that it found to threaten to injure the domestic industry.⁶ Ductile iron flanges are shown by the record evidence to share a defining physical characteristic with ductile flanged fittings, i.e., the presence of a flange as a means of attachment to another article. That the ITC did not discuss flanges in discussing the subject merchandise is also apparent from this record.

The Second Remand Redetermination states, further, that “we find it reasonable to conclude that the ITC, which initiated its material injury investigation of non-malleable cast iron and ductile iron pipe fittings in response to the domestic industry’s request for relief, would be aware during the course of the investigation that the petitioners produced flanges and considered those products to be pipe fittings.” *Second Remand Redetermination* 44. This conclusion is speculative and unsupported by the ITC Report. While the Petition attached brochures that included flanges, the text of the Petition, like the ITC Report, did not discuss them.

Certain other evidence in the ITC Report is also relevant to the issues presented by this litigation. The staff report portion of the ITC Report states that “[t]he ductile fittings used in the waterworks applications are typically very large and are reportedly produced in the United States primarily by a handful of foundries, none of which produces non-malleable cast iron pipe fittings.” *ITC Report* I-7 (footnote omitted). The document also states:

As discussed earlier in this report, ductile fittings which are manufactured to the physical specifications for waterworks systems are distinguishable in physical characteristics from the domestic like product in that they are typically very large fittings which must meet different technical specifications. These fittings are used underground in the water distribution and transmission systems, above ground in water treatment plants, or for main water supply to buildings, and are meant for drinking water and waste water. These fittings are typically made to the American Water Works Association specifications and their end uses include water companies, municipal water systems, and water/waste water treatment plants.

⁶ Commerce may impose antidumping duties on a good only following a determination by Commerce that the good is “unfairly traded,” i.e., that it was the subject of an affirmative less-than-fair-value determination by Commerce and also was included within the goods investigated by the ITC and thereby found to have resulted in material injury or the threat of material injury to the domestic industry. See 19 U.S.C. § 1673. By including “the descriptions of the merchandise contained in . . . the determinations of . . . the Commission” among the sources of information Commerce is to consider in ruling on a scope issue, 19 C.F.R. § 351.225(k)(1), the Department’s regulations embody this principle.

Id. at I-9 (footnote omitted). This language from the staff report, which was before the Commission when it made its affirmative threat determination, suggests that the ITC may have considered ductile iron goods produced to AWWA standards for water supply and waste water applications to be excluded from the domestic like product. In the Second Remand Redetermination, Commerce focused on the ITC Report’s statement that “[f]ittings larger than six inches in inside diameter typically are made to specifications of the AWWA and often are used in waterworks applications,” *Second Remand Redetermination* 50 (quoting *ITC Report* 7), but the use of the word “typically” in the quoted sentence from the ITC Report and in the above-quoted language of the staff report section of the ITC Report, *ITC Report* I-9, introduces ambiguity as to whether the reference in the staff report section of the ITC Report possibly could be referring to all ductile iron fittings produced to AWWA standards for the water works industry. This evidence must be considered in light of the aforementioned record evidence indicating that the ITC—in the section setting forth the actual views of the Commission as opposed to the section from the staff report—considered *all* ductile iron flanged fittings to be outside the scope of the ITC’s investigation.

4. The Relationship Between AWWA C115 and AWWA C110

Commerce reached certain findings pertaining to AWWA C110 and C115 that are not supported by substantial evidence on the record of this proceeding. Commerce found that “the AWWA C115 specification that Star Pipe put on the record does not support Star Pipe’s assertion that AWWA C115 is equivalent to AWWA C110.” *Second Remand Redetermination* 21. Commerce followed with a finding that “[t]his specification information only indicates that *flanged pipe* (a flange assembled onto a pipe) produced to AWWA C115 may be used with products produced to AWWA C110.” *Id.* (citing *Scope Ruling Request-Exs.* 3 [excerpts from AWWA C115] & 4 [excerpts from AWWA C110]). The record evidence does not support either of these findings.

According to uncontradicted evidence Star Pipe placed on the record with its Scope Ruling Request, flanges conforming to AWWA C115 necessarily must be produced to “conform to the respective chemical and physical properties for gray-iron and ductile-iron fittings, according to ANSI/AWWA C110/A21.10 [AWWA C110].” *Scope Ruling Request* Ex. 3 at Sec. 4.3.3. Second, it is not true that AWWA C115 “only indicates that *flanged pipe* (a flange assembled onto a pipe) produced to AWWA C115 may be used with products produced to

AWWA C110.” See *Second Remand Redetermination* 21. According to the record evidence, AWWA C115 indicates much more than that, including, in particular, the aforementioned specification that flanges produced to C115 must comply with the chemical and physical properties that C110 specifies for fittings. It also demonstrates that C110 and C115 are closely interrelated and cross-reference each other. And both demonstrate that for purposes of these two standards, threaded flanges produced for attachment to threaded pipe produced for the industry served by these ANSI/AWWA standards comprise a class of products distinct from the products these standards identify as “pipe fittings.” The court addresses these issues in further detail below.

Exhibits to the Scope Ruling Request include pertinent information on the intended scope and historical development of AWWA Standards C110, C153 (the AWWA standards mentioned in the exclusion), and C115, which according to record evidence is formally known as “ANSI/AWWA C115/A21.15–75, Standard for Flanged Cast-Iron and Ductile-Iron Pipe With Threaded Flanges.” *Scope Ruling Request* Exs. 3, 4 at xi. The record evidence pertaining to ANSI/AWWA C115/A21.15–75 provides the following explanatory material on the need for the adoption of that industry standard:

I.B. *History*. Flanged fittings, sizes 3 in. through 48 in. (80 mm through 1,200 mm), are described in ANSI/AWWA C110/A21.10, Standard for Ductile-Iron and Gray-Iron Fittings. Flanged fittings, sizes 54 in. through 64 in. (1,400 mm through 1,600 mm), are covered in ANSI/AWWA C153/A21.53, Standard for Ductile-Iron Compact Fittings. The flanged pipe used with these fittings has been purchased for many years in accordance with users’, manufacturers’, and fabricators’ standards. An ANSI/AWWA standard was needed for flanged pipe. Consequently, Subcommittee 1 submitted a proposed standard for flanged pipe to Committee A21 in 1974. The first edition of the standard was adopted in 1975.

Id., Ex. 3 at ix. ANSI/AWWA C115/A21.15–75 applies to “flanged pipe,” not “fittings,” and, in Section 4.3.3 contains physical and chemical specifications for the threaded flanges that are produced for attachment to threaded pipes:

4.3.3 *Material properties*. Unless otherwise specified by the purchaser, solid flanges may be cast of either ductile iron or gray iron. Hollow-back flanges shall be ductile iron only. *Flanges shall conform to the respective chemical and physical properties for gray-iron and ductile-iron fittings, according to ANSI/AWWA C110/A21.10.*

Id., Ex. 3 at Sec. 4.3.3 (emphasis added). The text of Section 4.3.3 of ANSI/AWWA C115/A21.15–75 emphasized above is significant for this litigation in two respects. First, it is evidence that the developers of the ANSI/AWWA standards for the pipe fittings, flanged pipe, and flanges produced for the water works industry considered threaded flanges produced for attachment to threaded pipe to be a different class or kind of merchandise than the pipe “fittings” produced for that industry. That much is indicated by the fact that different AWWA standards were made to apply to each of these two classes or kinds, and it is further indicated by the sentence, “[f]langes shall conform to the respective . . . properties for . . . fittings.” *Id.* (emphasis added). This sentence would be nonsensical if flanges were “fittings” for purposes of the AWWA standards. Instead, the ANSI/AWWA standards group the threaded flanges with threaded pipe, not with fittings. Second, the promulgators of the ANSI/AWWA standards expressly required that flanges produced for attachment to threaded pipes would conform to the chemical and physical specifications their standards prescribed for fittings, with a specific reference to the specifications of ANSI/AWWA C110/A21.10. Star Pipe argues that “. . . AWWA C115 is a complementary standard to AWWA C110 and C153; the only difference is that C115 covers flanges while C110 and C153 are for flanged fittings.” Star Pipe’s Comments 22 (quoting *Scope Ruling Request 3*, Ex. 3 (AWWA C115)). Section 4.3.3 of ANSI/AWWA C115/A21.15–75 is evidence supporting Star Pipe’s contention.

The close interrelationship between ANSI/AWWA C115/A21.15–75 (flanged pipe) and ANSI/AWWA C110/A21.10 (fittings) is further demonstrated by a 1977 change to the latter to achieve conformity with the former:

Another change made in the 1977 edition [to ANSI/AWWA C110/A21.10] was in bolt lengths for flanged fittings to comply with ANSI/AWWA C115/A21.15–75, Standard for Flanged Cast-Iron and Ductile-Iron Pipe With Threaded Flanges. Appendix A was added to the standard to cover bolts, gaskets, and the installation of flanged fittings.

Scope Ruling Request Ex. 4 at xi. In summary, the materials attached to the *Scope Ruling Request* pertaining to ANSI/AWWA C110/A21.10 and ANSI/AWWA C115/A21.15–75 are evidence supporting findings that: (1) threaded flanges to be attached to threaded pipes for water works applications are considered by the ANSI/AWWA standards to be a different class or kind of goods than “fittings,” and (2) flanges and fittings for the industry served by the AWWA standards, and pro-

duced to the specifications in those standards, are required to be produced so as to have the same “chemical and physical properties,” *id.*, Ex. 3 at Sec. 4.3.3.

Thus, even if “flanges” in general may fall within some definitions of the term “pipe fittings,” that alone does not foreclose a finding that some or all of Star Pipe’s flanges are within a class or kind of goods that, based on the evidence in the Petition, the ITC Report, and the Scope Ruling Request (which includes record evidence on the ANSI/AWWA standards for the water works industry), qualify for the exclusion for certain ductile pipe fittings in the second paragraph of the scope language. In the Second Remand Redetermination, Commerce reasoned that Star Pipe’s articles cannot qualify for this exclusion because, although they are flanges and although they are fittings, they are not flanged fittings. *Second Remand Redetermination* 20–22. This reasoning overlooks the plain fact that Commerce itself drafted the exclusion in terms of AWWA standards. Having done so, Commerce must be presumed to have been familiar with those standards, including, in particular, the distinction the AWWA standards draw between threaded “flanges” used to manufacture flanged pipe, addressed by AWWA C115, and the “fittings” addressed by AWWA C110. As a result, Commerce did not address or explain the contradiction underlying its conclusion: Commerce placed Star Pipe’s flanges under the Order because it considered these goods to be pipe fittings (but not flanged pipe fittings) and because, according to Commerce, Star Pipe’s products are not produced to AWWA specifications C110 or C153—specifications according to which Star Pipe’s flanges are *not* pipe fittings. Commerce also failed to address the uncontradicted record evidence that flanges produced to ANSI/AWWA C115/A21.15–75 must conform to the chemical and physical properties required by ANSI/AWWA C110/A21.10.

Certain other record evidence in addition to the record evidence the court identified above also is relevant to the issue of whether some or all of Star Pipe’s flanges qualify for the AWWA exception in the second paragraph of the scope language. For example, according to the exhibits attached to the Scope Ruling Request, ANSI/AWWA C110/A21.10, Standard for Ductile Iron and Gray-Iron Fittings, i.e., AWWA C110, which applies only to pipe fittings, is limited to fittings with mechanical joint (“MJ”) ends or flanged ends. *Scope Ruling Request* Ex. 4 at xi (explaining that as a result of a 1977 revision that limited the scope, the standard (which until that revision applied to fittings 2 inches in nominal diameter) “included 3- to 48-in. (80- to 1,200-mm)

mechanical-joint and flanged fittings only” (emphasis added)), *see also id.*, Ex. 3 at ix.⁷ Thus, according to uncontradicted record evidence, *all* ductile iron fittings produced to AWWA C110 are, necessarily, described by the AWWA scope exclusion. As to AWWA C110, the scope language providing the exclusion for certain ductile iron fittings has language requiring MJ, push-on, or flanged ends that appears to be superfluous, and with respect to the AWWA standards the scope exclusion is broader than it might seem at first glance. This evidence, too, must be considered in light of record evidence that the ITC considered all ductile flanged fittings to be outside the scope of the domestic like product, which the ITC defined as corresponding to the scope of its investigation.

J. Record Evidence that Not All of Star Pipe’s Flanges Were Produced to AWWA Standard C115

ANSI/AWWA C115/A21.15–75, Standard for Flanged Cast-Iron and Ductile-Iron Pipe With Threaded Flanges, i.e., AWWA C115, which the evidence shows is closely interrelated with AWWA C110, parallels the 3-inch nominal minimum size specification for fittings by applying only to threaded pipes that are 3 inches or larger in nominal pipe size. *Scope Ruling Request* Ex. 3 at Sec. 4.3.1 (“Flanges shall conform to the dimensions shown in Table 2 [listing solid gray-iron or ductile-iron flanges for nominal pipe sizes of 3 inches through 64 inches] or [Table] 3 [listing hollow-back flanges, which must be of ductile-iron, for nominal pipe sizes of 3 inches through 36 inches]”).⁸

The Scope Ruling Request, in Exhibit 1, sought a scope ruling on 11 models of flanges. Two of the eleven models are produced for threaded pipes with outer diameters of 2.5 inches (2 inches in “nominal size”). *Id.*, Ex. 1. The other 9 are produced for threaded pipes of 3.96 inches or 4.8 inches in outer diameter. *See id.* Star Pipe stated in the Scope Ruling Request that “[t]he products that are the subject of this scope request . . . meet the American Water Works Association (‘AWWA’) Standard C115,” *id.* at 3, but as to the flanges produced for pipes of 2.5 inches in outer diameter, there is record evidence that appears to contradict this statement.

III. CONCLUSION AND ORDER

In summary, Commerce did not consider all relevant record evidence—and as the court mentioned, reached some findings that

⁷ The copyright date for AWWA C110 and AWWA C115, as present on the record, is 2012 and 2011, respectively.

⁸ Ductile flanged fittings of 54 inches through 64 inches are addressed in ANSI/AWWA C153/A21.53, Standard for Ductile Iron Compact Fittings. *See Star Pipe Products Scope Request: Ductile Iron Flanges* Ex. 3 at ix (June 21, 2017) (P.R. Docs. 1–3).

are unsupported by record evidence—in concluding that Star Pipe’s flanges are within the scope of the Order.

The court concludes that it must remand to Commerce the decision the agency reached in the Second Remand Redetermination. Certain material findings and conclusions Commerce reached in the Second Remand Redetermination, as identified in this Opinion and Order, are not supported by substantial evidence. Moreover, Commerce failed to address, or address in any meaningful way, certain evidence on the record that detracts from its ultimate conclusion. For example, Commerce did not confront the implications of the evidence in the ITC Report that the ITC considered all ductile flanged fittings to be outside the scope of its own investigation and its domestic like product. With respect to the AWWA exclusion in the second paragraph of the scope language, Commerce failed to address or resolve the problem for its analysis that is posed by: (1) record evidence demonstrating that threaded flanges produced to AWWA standards applicable to goods produced for the waterworks industry are not “pipe fittings” or “fittings” within the meaning of those standards, and (2) evidence that flanges produced to AWWA standard C115 “shall conform to the respective chemical and physical properties for gray-iron and ductile-iron fittings, according to ANSI/AWWA C110/A21.10.” *Scope Ruling Request* Ex. 3 at Sec. 4.3.3.

The court does not reach its own conclusion as to whether some or all of Star Pipe’s flanges must be determined to be within or outside the scope of the Order, as that is a matter for Commerce to determine upon remand. The court rules instead that Commerce must conduct a more comprehensive review of the relevant record evidence that remedies the shortcomings the court has identified. Therefore, upon consideration of the Second Remand Redetermination and all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that Commerce, within 90 days from the date of issuance of this Opinion and Order, shall submit a new redetermination upon remand (“Third Remand Redetermination”) that complies with this Opinion and Order; it is further

ORDERED that plaintiff and defendant-intervenor shall have 30 days from the filing of the Third Remand Redetermination in which to submit comments to the court; and it is further

ORDERED that defendant shall have 15 days from the date of filing of the last comment on which to submit a response.

Dated: August 26, 2021

New York, New York

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU

JUDGE

Slip Op. 21–111

POKARNA ENGINEERED STONE LIMITED, Plaintiff, v. UNITED STATES,
Defendant, and CAMBRIA COMPANY LLC, Defendant-Intervenor.

Before: Leo M. Gordon, Judge
Consol. Court No. 20–00127

[Granting partial judgment pursuant to USCIT Rule 54(b).]

Dated: August 26, 2021

Lizbeth R. Levinson, Ronald M. Wisla, and Brittney R. Powell, Fox Rothschild LLP, of Washington, D.C., for Plaintiff Pokarna Engineered Stone Limited.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. On the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel were *Vania Wang* and *W. Mitch Purdy*, Attorneys, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance, of Washington, D.C.

Luke A. Meisner and *Roger B. Schagrin*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Cambria Company LLC.

OPINION

Gordon, Judge:

Recently the court issued an opinion denying a challenge to the final determination made by the U.S. Department of Commerce (“Commerce”) in the antidumping investigation of certain quartz surface products from India. *See Pokarna Engineered Stone Ltd. v. United States*, 45 CIT ___, Slip Op. 21–107 (Aug. 25, 2021) (“*Pokarna*”); *see also Certain Quartz Surface Products from India*, 85 Fed. Reg. 25,391 (Dep’t of Commerce May 1, 2020) (final affirm. determ.) (“*Final Determination*”), and the accompanying Issues & Decision Memorandum, A-533–889 (Dep’t of Commerce Apr. 27, 2020), <https://enforcement.trade.gov/frn/summary/india/2020–09407–1.pdf> (last visited this date) (“*Decision Memorandum*”). The court’s opinion focused on the challenge to Commerce’s decision to include paid sample sales in its calculation of respondents’ U.S. price that was raised and briefed by Pokarna Engineered Stone Limited (“PESL”). *See* Pl.’s Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R., ECF No. 36; *see also* Pl.’s Revised R. 56.2 Mot. for J. on the Agency R., ECF No. 41–1 (“Pl.’s Br.”); Def.’s Resp. in Opp’n to Pl.’s R. 56.2 Mots. for J. on the Agency R., ECF No. 45; Def-Intervenor’s Resp. in Opp’n to R. 56.2 Mots. for J. on the Agency R., ECF No. 47; Pl.’s Reply Brief, ECF No. 53; Scheduling Order, ECF No. 33 (bifurcating briefing in this consolidated action between issues raised by PESL and M S International, Inc.). Given the court’s decision, the question

is whether the court should enter a partial judgment pursuant to USCIT Rule 54(b), sustaining Commerce's determination to include PESL's paid sample sales in its calculations of U.S. price. For the reasons set forth below, the court will enter a Rule 54(b) partial judgment.

Rule 54(b) provides in part that:

[w]hen an action presents more than one claim for relief—whether as a claim, counterclaim, cross-claim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.

USCIT R. 54(b). Rule 54(b) requires finality—"an ultimate disposition of an individual claim entered in the course of a multiple claims action." *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956). Additionally, in evaluating whether there is no just reason for delay, the court examines whether the concern for avoiding piecemeal litigation is outweighed by considerations favoring immediate entry of judgment. *See Timken v. Regan*, 5 CIT 4, 6 (1983).

Here, PESL's brief solely challenged Commerce's decision not to exclude PESL's paid U.S. sample sales in the *Final Determination*. *See generally* Pl.'s Br. What remains for adjudication is a challenge by M S International, Inc. ("MSI"), arguing that Commerce lacked the requisite industry support to proceed with the underlying investigation. *See* Pl. MSI's Mot. for J. on the Agency R., ECF No. 39. As PESL did not raise or join the industry support challenge, the court's decision provides "an ultimate disposition" as to PESL's challenge to the *Final Determination*. *See Sears, Roebuck & Co.*, 351 U.S. at 436; *see also Pokarna*, Slip Op. 21-107.

The entry of a Rule 54(b) partial judgment would serve the interests of the parties and the administration of justice by bringing this issue, and PESL's role in this litigation, to a conclusion. Partial judgment would also give PESL the opportunity to immediately appeal if it so chooses. Moreover, there is no threat of piecemeal judicial review as the resolution of the remaining issue presented by MSI does not implicate the final disposition of the challenge raised by PESL to Commerce's inclusion of paid U.S. sample sales in the *Final Determination*. Therefore, the court has no just reason for delay.

Based on the foregoing, the court will enter partial judgment pursuant to USCIT Rule 54(b).

Dated: August 26, 2021
New York, New York

/s/ *Leo M. Gordon*
JUDGE LEO M. GORDON

Slip Op. 21–112

HYUNDAI STEEL COMPANY, Plaintiff, v. UNITED STATES, Defendant, and
NUCOR CORPORATION AND UNITED STATES STEEL CORPORATION,
Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 20–03799

[Granting Defendant’s motion for voluntary remand and remanding the U.S. Department of Commerce’s final results in the 2017 administrative review of the countervailing duty order on certain hot-rolled steel flat products from the Republic of Korea.]

Dated: August 27, 2021

Brady W. Mills, Donald B. Cameron, Julie C. Mendoza, R. Will Planert, and Mary S. Hodgins, Morris, Manning & Martin, LLP, of Washington, D.C., for Plaintiff Hyundai Steel Company.

Kelly A. Krystyniak, Trial Attorney, and *Tara K. Hogan*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Hendricks Valenzuela*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Alan H. Price, Christopher B. Weld, and Theodore P. Brackemyre, Wiley Rein, LLP, of Washington, D.C., for Defendant-Intervenor Nucor Corporation.

Thomas M. Beline, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor United States Steel Corporation.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff Hyundai Steel Company (“Plaintiff” or “Hyundai Steel”) challenges the final results in the 2017 administrative review of the countervailing duty order on certain hot-rolled steel flat products from the Republic of Korea (“Korea”). *Certain Hot-Rolled Steel Flat Products From the Republic of Korea (“Final Results”)*, 85 Fed. Reg. 64,122 (Dep’t Commerce Oct. 9, 2020) (final results of countervailing duty admin. review; 2017); *see also* Issues and Decision Mem. for the Final Results of the Admin. Review of the Countervailing Duty Order on Certain Hot-Rolled Steel Flat Products from the Republic of Korea;

2017, ECF No. 26–4 (Sept. 28, 2020) (“Final IDM”).¹ Before the court are the Rule 56.2 motion for judgment on the agency record filed by Plaintiff and the motion for voluntary remand filed by Defendant United States (“Defendant”). Mot. Pl. Hyundai Steel Company J. Agency R., ECF Nos. 31, 32; Def.’s Resp. Pl.’s Mot. J. Agency R. and Def.’s Mot. Voluntary Remand, ECF No. 33 (“Defendant’s Motion” or “Def. Mot.”); *see also* Pl. Hyundai Steel Company’s Br. Supp. Its Mot. J. Agency R., ECF Nos. 31–2, 32–2 (“Plaintiff’s Brief” or “Pl. Br.”).

For the following reasons, the court remands the *Final Results*.

BACKGROUND²

Commerce initiated this first administrative review of the countervailing duty order on certain hot-rolled steel flat products from Korea for the period covering January 1, 2017 through December 31, 2017. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 83 Fed. Reg. 63,615, 63,617 (Dep’t Commerce Dec. 11, 2018). Commerce selected Hyundai Steel as the sole mandatory respondent for individual examination. *See Final Results*, 85 Fed. Reg. at 64,123.

Hyundai Steel reported to Commerce that it participated in a program involving port usage rights at the Port of Incheon pursuant to which it was scheduled to receive berthing income from shipping operators and “other” income from itself and third-party users. Final IDM at 7, 29; *see also* Pl. Br. at 3. Defendant-Intervenor Nucor Corporation (“Nucor”) submitted a new subsidy allegation related to this program and Commerce initiated an investigation of the program. Final IDM at 29; *see also* Pl. Br. at 4. Commerce issued a new subsidy questionnaire related to the program to Hyundai Steel, and Hyundai Steel responded timely. Pl. Br. at 4–5. Commerce issued a supplemental questionnaire to Hyundai Steel, and Hyundai Steel responded timely. *Id.* at 5–7.

Preliminarily Commerce calculated a *de minimis* subsidy rate of 0.45% for Hyundai Steel by dividing the amount of Hyundai Steel’s reported 2017 berthing income under the program by Hyundai Steel’s total free on board sales value. *See Final IDM* at 29; *Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, 84 Fed. Reg. 67,927 (Dep’t Commerce Dec. 12, 2019) (prelim. results of countervailing duty admin. review; 2017).

In the *Final Results*, Commerce determined that in addition to Hyundai Steel’s reported berthing income, Hyundai Steel received a

¹ The court stayed further briefing and filing of the joint appendix pending this decision. Order, ECF No. 34. The administrative record was not filed.

² The court’s account of the background relevant to Defendant’s Motion is drawn from the Final IDM and Plaintiff’s Brief because further briefing and the filing of the administrative record were stayed.

benefit related to the “other” income, i.e., certain fees, that it was entitled to receive. Final IDM at 29, 30. Because necessary information was not available on the record with respect to the fees, Commerce measured the benefit based on facts available and applied the resulting rate to Hyundai Steel’s reported volume of cargo. *Id.* at 30. Commerce calculated a final subsidy rate of 0.51% for Hyundai Steel. *Final Results*, 85 Fed. Reg. at 64,123.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the court authority to review actions contesting the final results of an administrative review of a countervailing duty order. The court will uphold Commerce’s determinations unless they are unsupported by substantial record evidence, or are otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Plaintiff argues that Commerce’s application of facts available was not in accordance with the law because Commerce did not identify deficiencies in Plaintiff’s submissions as required by 19 U.S.C. §§ 1677m(d) and 1677e(a) before applying facts available in determining that the financial contribution provided to Plaintiff under the North Incheon Harbor program conferred a benefit. Pl. Br. at 13–14. Defendant asks the court to remand the *Final Results* for Commerce to reconsider its application of facts available, and, if appropriate, the rate assigned to Plaintiff. Def. Mot. at 1, 7. Plaintiff consents to Defendant’s Motion and Defendant-Intervenor United States Steel Corporation takes no position. *Id.* at 1. Nucor opposes Defendant’s Motion, asserting that Defendant did not demonstrate that Commerce’s request for a remand was based on a substantial and legitimate concern and that the *Final Results* are supported by substantial evidence and otherwise in accordance with the law. Def.-Interv.’s Opp’n Def.’s Mot. Voluntary Remand at 2–4, ECF No. 35.

The U.S. Court of Appeals for the Federal Circuit has recognized that the decision to remand is in the court’s discretion when an agency seeks a remand without confessing error in order to reconsider its previous position. *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) (citations omitted). If the court grants a remand, Commerce will review the procedures that were applied in this administrative review relative to the requirements of 19 U.S.C. §§ 1677m(d) and 1677e(a) and will reconsider application of facts available (the subject of Plaintiff’s first two arguments), which may affect Commerce’s determination that the port usage rights constitute a

countervailable benefit (the subject of Plaintiff's third argument). *See* Def. Mot. at 7–8; *see also* Pl. Br. at 2. It is “prefer[able] to allow agencies to cure their own mistakes rather than wasting the court’s and the parties’ resources,” especially when the agency seeks to “cure the very legal defects asserted by plaintiffs.” *See* Def. Mot. at 6 (quoting *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993)), 8 (quoting *Citizens Against the Pellissippi Parkway v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004)). Because a remand will allow Commerce to cure its own mistakes and reconsider the substantive issues raised by Plaintiff, as well as preserve court resources, the court grants Defendant’s Motion.

CONCLUSION

The court remands the *Final Results* for reconsideration.

Accordingly, it is hereby

ORDERED that Defendant’s Motion for Voluntary Remand, ECF No. 33, is granted; and it is further

ORDERED that the deadlines in Scheduling Order, ECF No. 29, that were stayed pursuant to Order, ECF No. 34, are vacated; and it is further

ORDERED that the *Final Results* are remanded for Commerce to reconsider application of facts available and the rate assigned to Plaintiff; and it is further

ORDERED that this case will proceed according to the following schedule:

- (1) Commerce shall file the remand results on or before October 20, 2021;
- (2) Commerce shall file the administrative record on or before November 3, 2021;
- (3) Comments in opposition to the remand results shall be filed on or before December 8, 2021;
- (4) Comments in support of the remand results shall be filed on or before January 12, 2022; and
- (5) The joint appendix shall be filed on or before January 26, 2022.

Dated: August 27, 2021
New York, New York

/s/ Jennifer-Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 21–113

PROSPERITY TIEH ENTERPRISE CO., LTD., Plaintiff, and YIEH PHUI ENTERPRISE CO., LTD, Plaintiff, v. UNITED STATES, Defendant, and AK STEEL CORP., NUCOR CORP., STEEL DYNAMICS, INC., CALIFORNIA STEEL INDUSTRIES, INC., ARCELORMITTAL USA LLC, AND UNITED STATES STEEL CORP., Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 16–00138

[Ordering an agency redetermination in an antidumping duty investigation, in compliance with a mandate of the United States Court of Appeals for the Federal Circuit.]

Dated: September 1, 2021

Donald B. Cameron, Julie C. Mendoza, R. Will Planert, Brady W. Mills, Eugene Degnan, and Mary S. Hodgins, Morris, Manning & Martin LLP, of Washington, D.C., for plaintiff Prosperity Tieh Enterprise Co., Ltd.

Kelly A. Slater, Jay Y. Nee, and Edmund W. Sim, Appleton Luff Pte. Ltd., of Washington, D.C., for plaintiff Yieh Phui Enterprise Co., Ltd.

Elizabeth A. Speck, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel was *Michael T. Gagain*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Stephen A. Jones and Daniel L. Schneiderman, King & Spalding, LLP, of Washington, D.C., for defendant-intervenor AK Steel Corp.

Alan H. Price and Timothy C. Brightbill, Wiley Rein LLP, of Washington, D.C., for defendant-intervenor Nucor Corp.

Roger B. Schagrin, Schagrin Associates, of Washington, D.C., for defendant-intervenors Steel Dynamics, Inc. and California Steel Industries, Inc.

John M. Herrmann, II, Kelley Drye & Warren, LLP, of Washington, D.C., for defendant-intervenor ArcelorMittal USA LLC.

Thomas M. Beline and Sarah E. Shulman, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for defendant-intervenor United States Steel Corp.

OPINION AND ORDER

Stanceu, Judge:

Before the court is the mandate issued by the United States Court of Appeals for the Federal Circuit (“Court of Appeals”) in *Prosperity Tieh Enter. Co. v. United States*, 965 F.3d 1320 (Fed. Cir. 2020) (“*Prosperity III*”). CAFC Mandate in Appeal # 19–1400 (Sept. 8, 2020), ECF No. 132 (“CAFC Mandate”). *Prosperity III* vacated the judgment entered by the court in *Prosperity Tieh Enter. Co. v. United States*, 42 CIT __, 358 F. Supp. 3d 1363 (2018) (“*Prosperity II*”), and remanded “for further proceedings consistent with this opinion,” 965 F.3d at 1328. The court issues this Opinion and Order to explain how it will comply with that mandate and to order the further proceedings con-

sistent with the opinion of the Court of Appeals that are required to resolve the remaining issues in this litigation.

I. BACKGROUND

Background of this litigation is described in the prior opinions of this Court and the opinion of the Court of Appeals and is summarized briefly herein. See *Prosperity Tieh Enter. Co. v. United States*, 42 CIT __, __, 284 F. Supp. 3d 1364, 1366–68 (2018) (“*Prosperity I*”); *Prosperity II*, 42 CIT at __, 358 F. Supp. 3d at 1365–66; *Prosperity III*, 965 F.3d at 1322–26.

A. Contested Decisions in the Final and Amended Final Less-than-Fair-Value Determinations

In this litigation, plaintiffs Prosperity Tieh Enterprise Co., Ltd. (“Prosperity”) and Yieh Phui Enterprise Co., Ltd. (“Yieh Phui”), each a Taiwanese producer and exporter of certain corrosion-resistant steel products (“CORE”), contested aspects of a final affirmative less-than-fair-value determination of the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”). The contested decision was published as *Certain Corrosion-Resistant Steel Products From India, Italy, the People’s Republic of China, the Republic of Korea and Taiwan: Amended Final Affirmative Antidumping Determination for India and Taiwan, and Antidumping Duty Orders*, 81 Fed. Reg. 48,390 (Int’l Trade Admin. July 25, 2016) (P.R. Doc. 390) (“*Am. Final Determination*”).¹ The Amended Final Determination modified the Department’s decision in *Certain Corrosion-Resistant Steel Products From Taiwan: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 81 Fed. Reg. 35,313 (Int’l Trade Admin. June 2, 2016) (P.R. Doc. 389) (“*Final Determination*”); see also *Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from Taiwan* (May 26, 2016) (P.R. Doc. 372) (“*Final Decision Mem.*”). The period of investigation was April 1, 2014 through March 31, 2015. *Final Determination*, 81 Fed. Reg. at 35,313.

Early in its investigation, Commerce identified Yieh Phui and Prosperity as the “mandatory” respondents, i.e., the exporter/producers selected by Commerce for individual investigation and the determination of individual estimated weighted-average dumping margins.

¹ All citations to the administrative records are to public versions. References cited as “P.R. Doc. __” are to documents that were on the record of the proceeding at issue in *Prosperity Tieh Enter. Co. v. United States*, 42 CIT __, 284 F. Supp. 3d 1364 (2018), while references cited as “Remand P.R. Doc. __” are to documents placed on the agency record during Commerce’s redetermination proceedings.

Selection of Respondents for the Antidumping Duty Investigation on Certain Corrosion-Resistant Steel Products from Taiwan 4 (July 20, 2015) (P.R. Doc. 62). In its preliminary less-than-fair-value determination, Commerce treated as a single entity (“collapsed”) Yieh Phui and an affiliate, Synn Industrial Co., Ltd. (“Synn”). *Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from Taiwan* 4 (Dec. 21, 2015) (P.R. Docs. 262–263). Commerce preliminarily determined zero margins for Prosperity and for the combined Yieh Phui/Synn entity and, accordingly, preliminarily reached a negative less-than-fair-value determination, i.e., a preliminary determination that CORE from Taiwan was not being, and is not likely to be, sold in the United States at less than fair value. *Corrosion-Resistant Steel Products from Taiwan: Negative Preliminary Determination of Sales at Less than Fair Value*, 81 Fed. Reg. 72 (Int’l Trade Admin. Jan. 4, 2016).

In the Final Determination, Commerce determined that CORE from Taiwan was being, or was likely to be, sold in the United States at less than fair value. *Final Determination*, 81 Fed. Reg. at 35,313. In reaching that determination, Commerce stated that “[w]e continue to find that YP [Yieh Phui] and Synn are affiliated pursuant to section 771(33)(E) of the Act [19 U.S.C. § 1677(33)(E)] and should be collapsed together and treated as a single company, pursuant to the criteria laid out in 19 CFR 351.401(f).” *Id.* at 35,314 (footnote omitted). “Additionally, for these final results, we have determined that PT [Prosperity] is also affiliated with Synn, pursuant to section 771(33)(E) of the Act and the three companies should be collapsed together and treated as a single company (collectively, ‘PT/YP/Synn’), pursuant to the criteria laid out in 19 CFR 351.401(f).” *Id.* (footnotes omitted).

For the Final Determination, Commerce determined that Prosperity misreported the yield strength of certain of its sales of CORE and, invoking its authority under 19 U.S.C. § 1677e, applied “facts otherwise available” and an “adverse inference” to the costs of the sales it found to be misreported. *Final Decision Mem.* 11–19; *Final Determination*, 81 Fed. Reg. at 35,314.

In the Final Determination, Commerce assigned to the combined Prosperity/Yieh Phui/Synn entity, which now was the only individually-investigated respondent, a weighted-average dumping margin of 3.77%. *Final Determination*, 81 Fed. Reg. at 35,313. Commerce assigned this 3.77% rate to the exporter/producers it did not individually examine (the “all-others” rate). *Id.*

After addressing a ministerial error allegation, Commerce issued an amended final less-than-fair-value determination that increased the margin for the Prosperity/Yieh Phui/Synn combined entity, and the all-others rate, to 10.34%. *Am. Final Determination*, 81 Fed. Reg. at 48,393.

B. This Court's Decisions in *Prosperity I*

Before this Court, Prosperity and Yieh Phui challenged: (1) a decision by Commerce to refuse to make downward adjustments in the home market sales prices of Yieh Phui and Synn that would account for certain rebates granted to the home market customers of these companies; (2) the Department's decision to collapse Prosperity with the Yieh Phui/Synn entity; and (3) the Department's use of facts otherwise available with an adverse inference in response to Prosperity's reporting of yield strength.

In *Prosperity I*, the court ruled that Commerce erred in refusing to make the downward adjustments to the home market sales prices of Yieh Phui and Synn and ordered Commerce to correct this error. 42 CIT at __, 284 F. Supp. 3d at 1373.

Concluding that the Department's decision to collapse Prosperity with the Yieh Phui/Synn entity was based on erroneous findings of fact, and in particular relied upon events occurring outside the period of the Department's investigation, the court ordered Commerce to reconsider this collapsing decision and reach a new determination based on findings supported by substantial evidence on the record of the investigation. *Id.* at __, 284 F. Supp. 3d at 1375.

Finally, the court concluded that in its instructions to report minimum specified yield strength for CORE, Commerce "did not define in its questionnaire the meaning of the term 'Minimum specified yield strength' as used in its table of yield strength categories ('codes')." *Id.* at __, 284 F. Supp. 3d at 1379. The court reasoned that the instructions, read as a whole, did not preclude a respondent from using a manufacturer's specification for yield strength and did not state a requirement that only a specification in an industry standard would suffice. *Id.* at __, 284 F. Supp. 3d at 1380 ("Having not requested yield strength information only in the form of yield strength as specified by a standards organization, Commerce was not supported by substantial evidence on the record when it found, per 19 U.S.C. § 1677e(a)(2)(B), that Prosperity failed to provide requested yield strength information."). *Prosperity I* further concluded that Commerce had erred in finding that Prosperity had failed to cooperate by not acting to the best of its ability to comply with a request for information and, on that basis, using an adverse inference under 19

U.S.C. § 1677e(b). *Id.* at ___, 284 F. Supp. 3d at 1381 (“If Commerce is to take an action adverse to a party for an alleged failure to comply with an information request, it must fulfill its own responsibility to communicate its intent in that request.”). The court reasoned that “[i]n this instance, the possibility that a respondent would not interpret the [Department’s] instructions according to the Department’s subjective and undisclosed intent was a foreseeable consequence of the way Commerce drafted those instructions.” *Id.* at ___, 284 F. Supp. 3d at 1381.

C. The Department’s Remand Decision in Response to *Prosperity I* and Subsequent Proceedings

In its decision in response to the court’s opinion and order in *Prosperity I* (the “Remand Redetermination”), Commerce again determined that it should collapse Prosperity with the Yieh Phui/Synn entity. *Final Results of Redetermination Pursuant to Ct. Remand* (May 23, 2018), ECF Nos. 86–1 (conf.), 87–1 (public) (“*Remand Redetermination*”). Under protest, Commerce made downward adjustments to the home market sales prices of Yieh Phui and Synn to account for the post-sale rebates granted to the companies’ home market customers. Also under protest, Commerce used Prosperity’s reported yield strength data for its CORE production rather than facts otherwise available and an adverse inference. *Remand Redetermination 2*. Based on these changes to the Amended Final Determination, Commerce revised the weighted average dumping margin for the Prosperity/Yieh Phui/Synn entity from 10.34% to 3.66%. *See Prosperity II*, 42 CIT at ___, 358 F. Supp. 3d at 1366. In *Prosperity II*, the court sustained the Remand Redetermination.

In *Prosperity III*, the Court of Appeals vacated, in part, the judgment entered by this Court in *Prosperity II*. On September 8, 2020, the Court of Appeals issued the mandate to accompany *Prosperity III*. CAFC Mandate.

II. DISCUSSION

The court exercises jurisdiction over this case pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants the court jurisdiction of any civil action commenced under Section 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a.² The court must “hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).

² All references to the United States Code herein are to the 2012 edition and all citations to the Code of Federal Regulations herein are to the 2016 edition.

The Court of Appeals addressed two issues in *Prosperity III*: (1) whether Commerce engaged in the correct analysis when it found “significant potential for manipulation of price or production” between Prosperity and Synn that would support its “collapsing” decision; and (2) whether substantial evidence supported the Department’s determination that Prosperity did not comply with its information requests and misreported its yield strength information. 965 F.3d at 1326, 1328. The Court of Appeals held that Commerce did not engage in a permissible analysis in reaching its decision on collapsing of producers. *Id.* at 1328. The appellate court held, further, that Commerce did not err in invoking its authority to use facts otherwise available with an adverse inference in response to Prosperity’s reporting of yield strength. *Id.* Because no party appealed this Court’s holding in *Prosperity I* and *Prosperity II* that Commerce was required by its regulations to recognize the downward adjustments to home market prices for rebates, that aspect of the judgment entered in *Prosperity II* was not vacated by the Court of Appeals and, therefore, is now final and binding as to further proceedings in this litigation.

A. The Department’s Collapsing Analysis

In response to *Prosperity I*, the Remand Redetermination found as to Prosperity and Synn that there existed, for purposes of its regulation, 19 C.F.R. § 351.401(f), “a significant potential for manipulation [of price or production] between these two companies based on Prosperity’s and Synn’s level of common ownership, overlapping management, and intertwining of operations.” *Remand Redetermination* 11. Regarding Prosperity and the Yieh Phui/Synn entity, Commerce reasoned that “no party disputes our determination to collapse Yieh Phui and Synn in the *Final Determination*.” *Id.* at 12. Commerce summarized its conclusion by stating that “[g]iven our determination to collapse Prosperity with Synn, and our determination to collapse Yieh Phui with Synn, we find that Prosperity, Yieh Phui, and Synn should be collapsed as a single entity for this Final Redetermination due to the significant potential for manipulation of price or production between the collapsed entities.” *Id.*

The Court of Appeals described the issue before it as one of “first impression.” *Prosperity III*, 965 F.3d at 1326. The court interprets the *Prosperity III* opinion to address the collapsing issue with both an express holding and more general guidance as to how Commerce must conduct the necessary collapsing analysis in the further proceedings to follow. The court addresses these separately below.

The express holding of *Prosperity III* on the collapsing issue is that Commerce, in applying its collapsing regulation to a situation involving three or more affiliated producers, must apply the criteria in its regulation to the evidence of relationships between all three or more of those producers, even when a previous decision to collapse two of those producers was not contested by any party to the litigation that gave rise to the remand proceeding.³ 965 F.3d at 1326. While the Department “need not find all of the factors in [§ 351.401(f)(2)] present,” Commerce “must consider the totality of the circumstances.” *Id.* at 1323 (quoting *U.S. Steel Corp. v. United States*, 40 CIT __, __, 179 F. Supp. 3d 1114, 1139 (2016); *Zhaoqing New Zhongya Aluminum Co. v. United States*, 39 CIT __, __, 70 F. Supp. 3d 1298, 1304 (2015)). In the particular situation presented by this case, the Court of Appeals instructed that:

Commerce must consider the “totality of the circumstances” relevant to whether there is “significant potential for manipulation of price or production” by evaluating either: (i) the relationship between each individual entity being considered for collapse (here, Prosperity to Synn, Prosperity to Yieh, and Yieh to Synn) or (ii) the relationship between an individual entity and an already collapsed entity with which it is being considered for further collapsing (here, Prosperity to Yieh/Synn).

Id. at 1328. While it might be argued that Commerce, in the Remand Redetermination, evaluated the relationship identified in the second of the two choices because of the previous, uncontested decision to treat Yieh Phui and Synn as a single entity, the Court of Appeals clearly rejected that notion, concluding that “Commerce conducted neither of these inquiries.” *Id.* The Court of Appeals viewed as impermissible the Department’s deeming an analysis of the relationship between Prosperity and Synn to *be* an analysis of the relationship between Prosperity and the Yieh/Synn entity, regardless of the earlier, uncontested collapsing. In other words, under option (i), Commerce was required to evaluate the specific ties between Prosperity, Yieh, and Synn, and under option (ii), if considering Yieh and Synn to

³ The Department’s regulation, 19 C.F.R. § 351.401(f)(2), provides as follows:

- (2) Significant potential for manipulation. In identifying a significant potential for the manipulation of price or production, the factors the Secretary may consider include:
- (i) The level of common ownership;
 - (ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and
 - (iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

be the same entity, Commerce still was required to examine the ties between Prosperity and *both* parts of the Yieh/Synn entity.

The more general guidance by the Court of Appeals pertained to the purpose underlying what it described as a “totality of the circumstances” inquiry. This inquiry must consider whether the companies considered for collapsing (in this case, all three companies) “could potentially manipulate pricing and production to the entity with the lowest antidumping duty rate.” *Id.* at 1327. The Court of Appeals considered this an inquiry as to whether there is significant potential for manipulation of price or production “to circumvent antidumping duties.” *Id.* at 1326; *see also id.* at 1323 (“The purpose of collapsing multiple entities into a single entity is to prevent affiliated entities from circumventing antidumping duties by ‘channel[ing] production of subject merchandise through the affiliate with the lowest potential dumping margin.” (*citing Slater Steels Corp. v. United States*, 27 CIT 1255, 279 F. Supp. 2d 1370, 1376 (2003))). Noting language in the preamble to the promulgation of the Department’s regulation, the Court of Appeals emphasized that collapsing requires a “*significant*” potential for manipulation of price or production. *Id.* at 1323–24 (*citing Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,345 (Int’l Trade Admin. May 19, 1997)). The opinion of the Court of Appeals indicates a general disapproval of the Department’s resort to collapsing in instances in which the record evidence of such a potential does not meet this more demanding standard.

In accordance with the opinion of the Court of Appeals in *Prosperity III*, Commerce must make a new decision as to whether or not collapsing should occur, supported by valid findings of fact and adequate explanation, in the second redetermination upon remand (“Second Remand Redetermination”) that it must submit to the court in response to this Opinion and Order. In applying option (i) or (ii), it is possible that Commerce, based on the totality of the circumstances and the anti-circumvention purpose of collapsing, now will decide that collapsing should not involve all three companies, or that it should not occur at all. Such a decision will require an additional inquiry.

The court is aware that the collapsing of Yieh Phui with Synn was not contested in this litigation, but the court also is aware that the final selection of a mandatory respondent did not occur until the issuance of the Final Determination. In that determination, Commerce found only one mandatory respondent, which was the Prosperity/Yieh Phui/Synn combined entity. Any change in the collapsing decision reached in the Final Determination necessarily would alter the final decision on mandatory respondent selection. If it

is necessary to do so, Commerce must resolve this issue in the Second Remand Redetermination and it must calculate new weighted-average dumping margins, as appropriate.

B. Reporting of Yield Strength for Prosperity's Merchandise

In *Prosperity III*, the Court of Appeals, reversing a decision of this Court in *Prosperity I*, held that Commerce permissibly found in its original determination that Prosperity failed to comply with the Department's requests for information and misreported yield strength of its CORE sales.

In the initial stages of investigation, Commerce issued a questionnaire and accompanying memorandum to Prosperity inquiring on yield strength information. *Initial Antidumping Duty Questionnaire for Prosperity Tieh Enterprise Co., Ltd.* (Aug. 7, 2015) (P.R. Doc. 97); *Memorandum Regarding Correction to Yield Strength Field of Initial Questionnaire* (Aug. 14, 2015) (P.R. Doc. 102). Commerce determined that Prosperity misreported yield strength of some of its merchandise by using a proprietary standard rather than an industry standard, justifying use of "facts otherwise available" under 19 U.S.C. § 1677e(a)(2). *Final Decision Mem.* 18. Further, Commerce found that Prosperity did not cooperate to the best of its ability in responding to the questionnaire and on that basis used an adverse inference under 19 U.S.C. § 1677e(b). *Id.* at 19. As discussed previously, this Court held in *Prosperity I* that Prosperity's responses to the requests for information were based on a reasonable interpretation of the Department's instructions and, therefore, that the Department's use of facts otherwise available with an adverse inference was improper. 284 F. Supp. 3d. at 1378–81.

Disagreeing with this Court's holding on the issue of yield strength reporting, the Court of Appeals concluded that the several examples in the questionnaire and memorandum "support[] Commerce's finding that Commerce's questionnaire sought yield strength information based on the ASTM industry standard Substantial evidence also supports Commerce's finding that 'minimum specified yield strength' has a common meaning in the industry, which incorporates ASTM specifications." *Prosperity III*, 965 F.3d at 1328. Further, "[s]ubstantial evidence also supports Commerce's finding that Prosperity failed to provide yield strength information based on the ASTM industry standard." *Id.* The Court of Appeals concluded that the evidence is cited is "adequate to show that Prosperity misreported the yield strength of its sales and did not comply with Commerce's requests for information." *Id.*

The court notes that Prosperity contested the Department's decisions to use facts otherwise available and an adverse inference—decisions that have been sustained upon appeal—but did not contest the substituted information Commerce used in its adverse inference decision. See Mot. of Pl. Prosperity Tieh Enterprise Co., Ltd. for J. Upon the Agency R. 25–43 (Dec. 15, 2016), ECF No. 55. Therefore, in accordance with the holding in *Prosperity III*, Commerce, in redetermining a margin for Prosperity, must reinstate its original determinations on these two issues.

III. CONCLUSION AND ORDER

As discussed above, Commerce must reach a new determination on the collapsing issue presented in this litigation and redetermine margins as required by that decision. Therefore, upon consideration of all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that Commerce shall submit, in accordance with the instructions herein, a second determination upon remand (“Second Remand Redetermination”) that is consistent with the opinion of the Court of Appeals in *Prosperity III*; it is further

ORDERED that in the Second Remand Redetermination Commerce, in determining a margin for Prosperity, shall employ the use of facts otherwise available with an adverse inference as to the reporting of yield strength by Prosperity that it used in its final and amended determinations of sales at less than fair value; it is further

ORDERED that in the Second Remand Redetermination Commerce shall reach a new determination on whether collapsing is appropriate and, if so, how it should be performed; it is further

ORDERED that Commerce, upon deciding the collapsing issue that remains unresolved in this litigation, must make a decision on mandatory respondents and calculate new weighted-average dumping margins, as appropriate; it is further

ORDERED that Commerce shall submit its Second Remand Redetermination within 90 days of the date of this Opinion and Order; it is further

ORDERED that comments of plaintiffs and defendant-intervenors on the Second Remand Redetermination must be filed with the court no later than 30 days of the filing of the Second Remand Redetermination; and it is further

ORDERED that defendant may respond to the aforementioned comments within 15 days from the date on which the last comment is filed.

Dated: September 1, 2021
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, JUDGE

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