U.S. Court of International Trade

Slip Op. 18–175

PROSPERITY TIEH ENTERPRISE CO., LTD., and YIEH PHUI ENTERPRISE CO., LTD., Plaintiffs, 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, Chief Judge
Consol. Court No. 16–00138

[Sustaining a remand redetermination issued in response to court order in an action challenging an agency determination in an antidumping duty investigation]

Dated: December 20, 2018

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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

Stanceu, Chief Judge:

In this consolidated case, plaintiffs contested a final determination of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") concluding an antidumping duty investigation on certain corrosion-resistant steel products ("CORE") from Taiwan (the "subject merchandise").[1] The court

[1] Consolidated under *Prosperity Tieh Enterprise Co. v. United States* (Ct. No. 16–00138) is *Yieh Phui Enterprise Co. v. United States* (Ct. No. 16–00154). Order (Oct. 20, 2016), ECF No. 47.

previously ordered Commerce to reconsider the final determination with respect to three issues. *Prosperity Tieh Enterprise Co. v. United States*, 42 CIT __, 284 F. Supp. 3d 1364 (2018) ("*Prosperity I*").

Before the court is the Department's decision (the "Remand Redetermination") responding to the court's order in *Prosperity I*. *Final Results of Redetermination Pursuant to Ct. Remand* (May 23, 2018), ECF Nos. 86–1 (conf.), 87–1 (public) ("*Remand Redetermination*"). The court sustains the Remand Redetermination.

I. BACKGROUND

Background on this case is presented in the court's prior opinion and supplemented as necessary herein. *Prosperity I*, 42 CIT at __, 284 F. Supp. 3d at 1366–68.

In *Prosperity I*, plaintiffs Prosperity Tieh Enterprise Co., Ltd. ("Prosperity") and Yieh Phui Enterprise Co., Ltd. ("Yieh Phui")—each a Taiwanese producer and exporter of CORE— challenged aspects of the Department's amended final affirmative less-than-fair-value determination in *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) ("*Amended Final Determination*"). *Id.*, 42 CIT at __, 284 F. Supp. 3d at 1367 (2018). The decision amended the Department's final determination 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) (*"Final Determination"*). The period of investigation was April 1, 2014 through March 31, 2015. *Id.*

Commerce submitted the Remand Redetermination to the court on May 23, 2018. *Remand Redetermination*. Plaintiffs and defendant-intervenors filed comments on June 22, 2018. Pl. Yieh Phui's Comments on Final Results of Redetermination Pursuant to Court Remand (June 22, 2018), ECF Nos. 91 (conf.), 92 (public) ("Yieh Phui's Comments"); Comments of Defendant-Intervenors in Support of the Remand Redetermination (June 22, 2018), ECF No. 93 ("Def.-Intervenors' Comments"); Pl. Prosperity's Comments on the U.S. Dep't of Commerce's May 23, 2018 Final Redetermination Pursuant to Ct. Remand (June 22, 2018), ECF Nos. 94 (conf.), 95 (publ.) ("Prosperity's Comments"). Commerce replied to plaintiffs' comments on July 30, 2018. Def.'s Response to Pls.' Comments on Remand Results (July 30, 2018), ECF Nos. 99 (conf.), 100 (public) ("Def.'s Reply").

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2012), which grants the Court of International Trade jurisdiction of any civil action commenced under 19 U.S.C. § 1516a.[2] The court reviews the Remand Redetermination based on the agency record. *See* Customs Courts Act of 1980, § 301, 28 U.S.C. § 2640(b); 19 U.S.C. § 1516a(b)(1)(B)(i). The court "shall 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).

B. The Remand Redetermination

In *Prosperity I*, the court ordered Commerce to: (1) correct its erroneous decision not to make adjustments in the home market sales prices of Yieh Phui and Synn Industrial Co., Ltd. ("Synn") (which Commerce treated as a single entity in the investigation) for the foreign like product to account for certain rebates granted to the companies' home market customers; (2) reconsider its decision to treat as a single entity ("collapse") Prosperity and the Yieh Phui/Synn entity under 19 C.F.R. § 351.401(f); and (3) correct the Department's unlawful decision to use facts otherwise available and an adverse inference instead of information Prosperity reported on the yield strength of the products sold in its home market and the United States. *Prosperity I*, 42 CIT at __, 284 F. Supp. 3d at 1382.

In the Remand Redetermination, Commerce: (1) made, under protest, downward price adjustments to the home market sales prices of the Yieh Phui/Synn entity to account for the post-sale rebates granted to the companies' home market customers; (2) continued to treat Prosperity, Yieh Phui, and Synn as a single entity; and (3) used, under protest, Prosperity's reported yield strength data for its CORE production rather than facts otherwise available and an adverse inference. *See Remand Redetermination* 2. Applying these changes, Commerce revised the weighted average dumping margin for the Yieh Phui/Prosperity/Synn entity from 10.34% to 3.66%. *Id.* at 2–3. The court addresses each of these changes below.

C. Downward Price Adjustments to Yieh Phui's Home Market Sales

The court sustains the Department's decision in the Remand Redetermination to effectuate downward adjustments to the prices in Yieh

[2] All citations 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.

Phui/Synn's home market sales in recognition of the post-sale rebates at issue in this litigation, a decision required by the Department's regulations. Plaintiffs support this decision. Defendant-intervenors raise no specific objection but comment that they reserve the right to appeal this decision. Def. Intervenors' Comments 1 n.1.

As in effect at the time of the contested determination, the regulations required Commerce to "use a price that is net of any price adjustment, as defined in § 351.102(b), that is reasonably attributable to the subject merchandise or the foreign like product, whichever is applicable." 19 C.F.R. § 351.401(c). As defined in § 351.102(b), "[p]rice adjustment means *any* change in the price charged for subject merchandise or the foreign like product, such as discounts, rebates and post-sale price adjustments, that are [*sic*] reflected in the purchaser's net outlay." 19 C.F.R. § 351.102(b)(38) (emphasis added).

D. Use of Prosperity's Reported Yield Strength Data

As discussed in *Prosperity I*, Prosperity's responses to the Department's request for information on the yield strength of CORE products were based on a reasonable interpretation of the Department's instructions, and Commerce, therefore, was not permitted to use facts otherwise available with an adverse inference. *See Prosperity I*, 42 CIT at __, 284 Fed. Supp. 3d at 1378–81. The court reasoned that "[i]f 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" and that "[i]n this instance, the possibility that a respondent would not interpret the instructions according to the Department's subjective and undisclosed intent was a foreseeable consequence of the way Commerce drafted those instructions." *Id.*, 42 CIT at __, 284 F. Supp. 3d at 1381. The court concluded that "Commerce invoked its authority to use facts otherwise available and an adverse inference according to an invalid finding that misreporting on the part of Prosperity occurred." *Id.*, 42 CIT at __, 284 F. Supp. 3d at 1381–82. The court directed that Commerce, on remand, take "appropriate corrective action" to revise the dumping margin and "may not use facts otherwise available as a substitute for information that is now on the administrative record of the investigation." *Id.*, 42 CIT at __, 284 F. Supp. 3d at 1382. The court added that "[s]ubject to these requirements, the type of corrective action is a matter for Commerce to decide." *Id.* (footnote omitted).

In the Remand Redetermination, Commerce decided, under protest, to use "costs and yield strength as reported by Prosperity" to redetermine the antidumping duty margin. *Remand Redetermination* 13–14. This decision is in accordance with law and must be sustained.

Defendant-intervenors raise no substantive objection but comment that they reserve the right to appeal this decision. Def.-Intervenors' Comments 1 n.1.

E. The Department's Decision to Treat as a Single Entity ("Collapse") Prosperity and the Yieh Phui/Synn Entity

The remaining issue for the court to decide in this litigation is whether Commerce may collapse Prosperity into the combined Yieh Phui/Synn entity, i.e., to treat Prosperity and the combined Yieh Phui/Synn entity as a single respondent for purposes of the investigation. Commerce decided to collapse the three companies in the amended final less-than-fair-value determination and did so again in the Remand Redetermination. *Remand Redetermination* 12. Prosperity and Yieh Phui oppose this decision. Yieh Phui's Comments 1; Prosperity's Comments 1–2. Defendant-intervenor supports this decision. Def.-Intervenor's Comments 1–3. The court sustains this decision, concluding that it is consistent with the applicable regulation and rests on findings supported by substantial record evidence.

There is no dispute that Prosperity, Yieh Phui, and Synn are all "affiliated" within the meaning of 19 U.S.C. § 1677(33)(E). The collapsing of Yieh Phui with Synn is also undisputed; as noted in *Prosperity I*, the decision to collapse Yieh Phui with Synn is not challenged by any party to this litigation. *See Prosperity I*, 42 CIT at __, 284 F. Supp. 3d at 1373 n.7.

Under its regulations, Commerce "will treat two or more affiliated producers as a single entity" when two conditions are met. 19 C.F.R. § 351.401(f)(1). First, affiliated producers must "have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities." *Id.* There is no dispute that this condition is met, Commerce having found that each affiliated producer manufactures subject merchandise. *See Remand Redetermination* 8. Second, Commerce must "conclude[] that there is a significant potential for the manipulation of price or production." 19 C.F.R. § 351.401(f)(1). Prosperity and Yieh Phui contend that the Department's affirmative finding that there existed "a significant potential for the manipulation of price or production," *id.*, does not accord with the regulation and is unsupported by substantial record evidence. *See* Prosperity's Comments 2; Yieh Phui's Comments 2.

Central to this issue is the level of discretion provided to Commerce by its regulation, 19 C.F.R. § 351.401(f)(2), which provides that "[i]n identifying a significant potential for 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.

19 C.F.R. § 351.401(f)(2). The regulation speaks of "a significant potential" for manipulation of price or production, and thus actual manipulation of price or production need not be found. The reference to "the factors the Secretary *may* consider include . . . ," *id.* (emphasis added), connotes a measure of discretion. The regulation does not make the factors exclusive. Nor does it preclude Commerce from invoking the collapsing authority where, for example, not all three of the factors are met or where the case for collapsing is not strong under each one of them when considered separately.

In the Remand Redetermination, Commerce stated that it "finds that the potential for manipulation between Prosperity and Synn derives from a combination of common ownership, shared management, and intertwined operations." *Remand Redetermination* 9.

As to the first factor, the level of common ownership, Prosperity owned 20% of the shares of Synn during the POI. Noting that its ownership of the combined Yieh Phui/Synn entity as a whole was much smaller than 20%, Prosperity argues that "the Y[ieh] P[hui]/Synn single entity has no ownership in Prosperity, Prosperity has no ownership in Y[ieh] P[hui], and Prosperity's ownership of the Y[ieh] P[hui]/Synn single entity is negligible." Prosperity's Comments 10. The fact remains that during the POI both Prosperity and Yieh Phui owned significant shares in Synn, a fact Commerce permissibly considered as support for its collapsing decision. *Remand Redetermination* 9, 29. In support of its argument that Commerce must look to the level of ownership of Prosperity in the combined Yieh Phui/Synn entity, *see* Prosperity's Comments 10, Prosperity cites *AK Steel v. United States*, 22 CIT 1070, 1084, 34 F. Supp. 2d 756, 768 (Ct. Int'l Trade 1998), *aff'd in part, rev'd in part*, 226 F.3d 1361, 1376 (Fed. Cir. 2000). But the passage in the opinion on which Prosperity relies addressed affiliation under the statute, not collapsing under the Department's regulation. Prosperity also argues that its subsequent sale of the shares negates a possibility of future manipulation, *id.* at 11–12, but the sale occurred in December 2015, well after the close of the POI on March 31 of that year. The common ownership, therefore,

had significance through and beyond the POI itself. Yieh Phui argues that the record evidence does not show that the 20% stake allowed Prosperity "to exercise any control over Synn's sales or production activities." Yieh Phui's Comments 4–5. In order to proceed with collapsing, Commerce was not required by its regulation to conclude that the ownership level, considered alone, would be determinative.

On the second factor, the extent to which management or board members of one firm sit on the board of directors of an affiliated firm, Commerce noted that Prosperity's chairman was one of three members of Synn's board of directors. *See Remand Redetermination* 9, 16, 25. Prosperity argues that Prosperity's representative could always be outvoted on Synn's board. Prosperity's Comments 12–13. Yieh Phui argues, similarly, that the seat on Synn's board does not establish that Prosperity is able to control either Synn's board of directors or Synn's daily operations, particularly in light of the lack of shared management. Yieh Phui's Comments 5. Nevertheless, Prosperity's chairman was in a position to exercise significant influence through participation on both boards of directors, chairing one and constituting one-third of the voting membership of the other. Commerce reasonably concluded that this factor supported its decision to collapse.

On the third factor, intertwined operations, Commerce found that "Prosperity provided galvanizing services to Synn under a tolling agreement during the POI" while Synn was revamping its galvanizing line for steel coils. *Remand Redetermination* 9–10. Commerce found that the tolling agreement allowed for access by Synn to certain of Prosperity's books and records. *Id.* at 10. Commerce also found that "cold-rolling pursuant to a purchase and sale agreement between Prosperity and Synn is indicative of intertwined operations during the POI."[3] *Id.* at 10–11. Prosperity and Yieh Phui argue that based on various criteria, these were not "significant transactions" between Prosperity and Synn as required for the third factor in the regulation, and Yieh Phui argues that the "books and records" access was only

[3] In *Prosperity I*, the court ordered Commerce to reconsider its collapsing decision because certain findings were inconsistent with record evidence, as Commerce acknowledged in submissions to the court. *Prosperity Tieh Enterprise Co. v. United States*, 42 CIT __, 284 F. Supp. 3d 1364, 1375 (2018). Specifically, Commerce incorrectly stated in the Collapsing Memorandum that cold-rolling services Synn provided to Prosperity under a tolling agreement had occurred during the period of investigation ("POI") when in fact the services had predated the POI. *Id.* Furthermore, Commerce acknowledged that record data detailing Synn's sales to Prosperity and its purchases from Prosperity were for calendar year 2014, rather than for the entire POI (April 1, 2014 to March 31, 2015), as the Department's findings had represented. *Id.* In the Remand Redetermination, Commerce clarified that, while cold rolling services pursuant to a tolling agreement between Prosperity and Synn had ceased prior to the POI, Synn continued to provide cold rolling services to Prosperity pursuant to a purchase and sale agreement during the first month of the POI. *Final Results of Redetermination Pursuant to Ct. Remand* (May 23, 2018), ECF Nos. 86–1 (conf.), 87–1 (public) at 10–11.

that necessary for verification under the agreement. *See* Prosperity's Comments 13–17; Yieh Phui's Comments 6–11. Regardless, the record information on the galvanizing and cold-rolling services signifies at least that Prosperity and Synn had engaged in sales transactions, for goods and services, on production-related operations during the POI. Commerce was justified in inferring from the record evidence that the Prosperity and Synn could engage in other transactions in the future. The evidence of transactions during the POI must be viewed in conjunction with the evidence supporting the Department's findings under the first two factors. In doing so, the court concludes that the Department's collapsing decision rests on findings supported by substantial evidence on the record considered as a whole.

III. CONCLUSION

For the reasons discussed above, the court sustains the Remand Redetermination. Judgment will enter accordingly.

Dated: December 20, 2018
New York, New York

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

Slip Op. 19–19

BOHLER BLECHE GMBH & CO KG, et al., Plaintiffs, v. UNITED STATES, Defendant, and NUCOR CORP. and SSAB ENTERPRISES LLC, Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Court No. 17–00163

[Sustaining the Department of Commerce's Final Results of Redetermination Pursuant to Court Remand.]

Dated: February 12, 2019

David E. Bond and *Ron Kendler*, White and Case, LLP, of Washington, D.C., for plaintiffs.

Vito S. Solitro, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Chad A. Readler*, Acting Assistant Attorney General, *Tara K. Hogan*, Assistant Director, *Jeanne E. Davidson*, Director, and *Nikki Kalbing*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C., for defendant.

Roger B. Shagrin and *Paul W. Jameson*, Schagrin Associates, and *Alan H. Price* and *Christopher B. Weld*, Wiley Rein, LLP, of Washington, D.C., for defendant-intervenors.

OPINION AND ORDER

Goldberg, Senior Judge:

Before the court now are the Final Results of Redetermination Pursuant to Court Remand, ECF No. 55 (Oct. 9, 2018) ("Remand Results"), issued by the Department of Commerce ("the Department" or "Commerce") in its antidumping duty investigation of certain carbon and alloy steel cut-to-length plate from Austria. *See Certain Carbon and Alloy Steel Cut-to-Length Plate from Austria*, 82 Fed. Reg. 16,366 (Dep't Commerce Apr. 4, 2017) (final determ.) ("Final Determination"), and accompanying Issues & Decision Mem. ("I&D Mem."). Plaintiffs Bohler Bleche GmbH & Co. KG, Bohler International GmbH, voestalpine Grobblech GmbH, and voestalpine Steel & Service Center GmbH (collectively, "Plaintiffs") filed suit, challenging Commerce's methodology for selecting foreign like products. The court remanded the Final Determination to Commerce for further proceedings. *Bohler Bleche GMBH & Co. v. United States*, 42 CIT __, 324 F. Supp. 3d 1344 (2018) ("*Bohler I*"). Commerce's Remand Results now comply with the court's remand order and are supported by substantial evidence and in accordance with law; therefore, the Department's determination is sustained.

BACKGROUND

In its Final Determination, the Department designed a model-match methodology, pursuant to 19 U.S.C. § 1677b(a)(1)(A), for the purposes of identifying suitable "foreign like products" with which to compare the exported subject merchandise.[1] Final Determination and accompanying I&D Mem. As part of that process, Commerce created merchandise groups, each assigned a control number ("CONNUM"), meant to group together "identical merchandise" used to match home market sales with U.S. sales. The Department compared the weighted-average of export sales within each CONNUM to the weighted-average of home market sales in that same CONNUM. I&D Mem. cmt. 1. As part of this process, the Department created a hierarchy of product characteristics, the third of which was QUALITY, which would be used for the purposes of sorting merchandise based on various quality-related characteristics. *Id.*

Plaintiffs proposed their own methodology, called CONNUM2, "that replaced the QUALITY field (which reported the type of steel and the

[1] The court previously sustained the Department's determination that the model-match methodology need not further account for process. *Bohler I*, 42 CIT at __, 324 F. Supp. 3d at 1354. Thus, the sole issue on remand was that surrounding the QUALITY and GRADE fields.

chemical composition) with a GRADE field (which reported the gross estimation of the cost of alloy)." Remand Results at 4 (citing Pls.' Questionnaire Resp. B-13–14 (July 15, 2016), P.R. 163–174). Alternatively, Plaintiffs requested a number of changes to Commerce's methodology, including that the QUALITY field be placed first in the hierarchy, and that a QUALITY subcategory be added specifically for high alloy tool steel products. I&D Mem. cmt. 1. In response, Commerce moved the QUALITY field to first in the hierarchy. *Id.* Ultimately, Commerce's methodology produced a weighted average dumping margin of 53.72%, Final Determination, and Plaintiffs challenged those results.

On review, the court faulted Commerce's determination for "fail-[ing] to account for commercially significant physical differences based on alloy content." *Bohler I*, 42 CIT at __, 324 F. Supp. 3d at 1350. The court found that "Commerce's methodology [could not] be sustained because it allow[ed] subject merchandise to be cast as 'identical' to dubiously similar foreign like products," in contradiction of statute. *Id.*, 42 CIT at __, 324 F. Supp. 3d at 1352 (citing 19 U.S.C. § 1677b(a)). What's more, the court found that "[t]hroughout the investigation, the Department largely ignored Plaintiffs' central argument: that the Department's methodology allows comparisons of products with commercially distinct physical characteristics ...to determine whether" dumping occurred. *Id.* Therefore, the court disregarded Commerce's insistence that the challenges to the model-match methodology were untimely. *Id.* The court found Commerce's selected methodology unreasonable for insufficiently accounting for alloy contents and remanded to the Department so that Commerce could "amend its model-match methodology" so that a new model could be produced to differentiate between "similar" and "identical" products. *Id.*, 42 CIT at __, 324 F. Supp. 3d at 1354. Accordingly, Commerce was ordered to "design a model-match methodology in [its] investigation that accounts for all commercially significant physical differences" and "apply recalculated dumping margins consistent with its redetermination of its model-match methodology." *Id.*, 42 CIT at __, 324 F. Supp. 3d at 1355.

On remand, the Department has now "reconsidered its model-match methodology" and "intends to use [Plaintiffs'] proposed alternative model-match methodology (i.e., CONNUM2 which replaces the QUALITY field with a GRADE field) and to recalculate [Plaintiffs'] dumping margins and the all-others rate." Remand Results at 1–2. Commerce's revised methodology "replaced the QUALITY product characteristic field with a GRADE field to account for all commer-

cially significant differences, including alloy content." *Id.* at 7. The Department viewed Plaintiffs' CONNUM2 proposal from the underlying investigation as the only option that would "account for all commercially significant physical differences," namely alloy content. *Id.* at 9–10. This change resulted in a revised antidumping duty margin of 28.57%. *Id.* at 10.

In its comments on the Remand Results, Plaintiffs encourage the court to sustain Commerce's determination. They note that not only is the adoption of CONNUM2 reasonable, "the Department has the discretion to choose any [reasonable] methodology." Pls.' Comments in Support of the Final Results of Redetermination Pursuant to Court Remand 3, ECF No. 57 (Nov. 8, 2018). Commerce, on the other hand, issued the Remand Results under respectful protest, *see* Remand Results at 2 (citing *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003)), maintaining its view that the court incorrectly determined that Plaintiffs "timely raised [their] arguments concerning Commerce's model-match methodology in [their] July 15, 2016, questionnaire responses," *id.* at 6.

DISCUSSION

The court now sustains Commerce's determinations as both: 1) based on an option in conformance with the court's prior order and 2) supported by substantial evidence and in accordance with law. The Department's altered methodology accounts for physical differences based on alloy content and, per the court's prior order, results in a reasonable determination. Accordingly, Commerce's Remand Results are sustained.

The statute requires that Commerce compare "[f]oreign like product[s]," defined either as identical merchandise or similar merchandise, *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1375 (Fed. Cir. 2008), in such a manner as to allow for a "fair comparison," 19 U.S.C. § 1677b(a). While it is true that the Department's prior methodology ran counter to the directives of the statute, *see Bohler I*, 42 CIT at __, 324 F. Supp. 3d at 1352 ("Commerce's methodology cannot be sustained because it allows subject merchandise to be cast as 'identical' to dubiously similar foreign like products, when the statute plainly requires a different approach."), generally this court grants Commerce substantial discretion in its review of the Department's chosen model match methodology, *SKF USA, Inc.*, 537 F.3d at 1379. Commerce's altered methodology not only differentiates between identical and similar products, it also provides a reasonable basis for conducting a fair comparison. Whereas Commerce's prior methodology neither aligned with statutory directives nor resulted in fair compari-

sons, *see Bohler I*, 42 CIT at __, 324 F. Supp. 3d at 1352, the methodology chosen on remand is reasonable as it fairly compares commercially significant differences in physical characteristics.

Accordingly, the court finds the Department's determination—that is, adopting CONNUM2 and the resultant rate—to be reasonable as it is supported by substantial evidence and in accordance with law.

CONCLUSION

For the foregoing reasons, the court **SUSTAINS** Commerce's determination in full and enters judgment in the Department's favor.

Dated: February 12, 2019
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG
SENIOR JUDGE

Slip Op. 19–20

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

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

[Remanding to the issuing agency a decision interpreting the scope of an antidumping duty order on certain non-malleable cast iron pipe fittings from the People's Republic of China]

Dated: February 13, 2019

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*.

Sarah Choi, Trial Attorney, 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 *L. Misha Preheim*, Assistant Director. Of counsel was *Kristen E. McCannon*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

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

OPINION AND ORDER

Stanceu, Chief Judge:

Plaintiff Star Pipe Products ("Star Pipe") contests a 2017 "Final Scope Ruling" in which the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") interpreted the scope of an antidumping duty order (the "Order") on

non-malleable cast iron pipe fittings from the People's Republic of China ("China") to include certain ductile iron flanges imported by Star Pipe. Before the court is Star Pipe's motion for judgment on the agency record, in which Star Pipe argues that Commerce should have determined that its ductile iron flanges are excluded from the scope of the Order.

Star Pipe claims in the alternative that Commerce erred in not initiating a formal scope inquiry, under which Commerce would have been required to consider additional criteria as set forth in the Department's regulation. Plaintiff also claims in the alternative that should the Final Scope Ruling be sustained, Commerce must be held to have acted unlawfully in issuing liquidation instructions to U.S. Customs and Border Protection ("Customs") directing the assessment of antidumping duties on entries of its flanges that were made prior to issuance of the Final Scope Ruling.

Defendant United States and defendant-intervenor Anvil International, LLC, a United States manufacturer of the domestic like product, oppose plaintiff's motion.

The court remands the Final Scope Ruling to Commerce for reconsideration. The court holds in abeyance any ruling on plaintiff's alternative claims pending resolution of plaintiff's claim contesting the Final Scope Ruling on the merits.

I. BACKGROUND

Commerce issued the antidumping duty order on non-malleable cast iron pipe fittings from China in April 2003. *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) (the "*Order*"). Star Pipe filed with Commerce a request for a scope ruling (the "Scope Ruling Request") on June 21, 2017, in which it sought a ruling excluding its ductile iron flanges from the scope of the Order. *Star Pipe Products Scope Request: Ductile Iron Flanges* (June 21, 2017) (P.R. Docs. 1–3) ("*Scope Ruling Request*").[1]

Commerce issued the Final Scope Ruling on August 17, 2017, in which it ruled that the ductile iron flanges are within the scope of the Order. *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*").

Star Pipe commenced this action on September 15, 2017. Summons (Sept. 15, 2017), ECF No. 1; Compl. (Sept. 15, 2017), ECF No. 4. On

[1] All citations to documents from the administrative record are to public documents. These documents are cited as "P.R. Doc. __."

May 10, 2018, Star Pipe filed the instant motion for judgment on the agency record. Pl.'s Mot. for J. on the Agency R. under Rule 56.2 (May 10, 2018), ECF No. 29 ("Pl.'s Br."). Defendant responded on August 24, 2018, and defendant-intervenor responded on September 7, 2018. Def.'s Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R. (Aug. 24, 2018), ECF No. 37; Def.-Inter.'s Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R. (Sept. 7, 2018), ECF No. 38. Plaintiff replied on September 25, 2018. Pl.'s Reply (Sept. 25, 2018), ECF No. 41.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2012), which grants jurisdiction over civil actions brought under section 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a (2012).[2] Among the decisions that may be contested under section 516A is a determination of "whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping or countervailing duty order." 19 U.S.C. § 1516a(a)(2)(B)(vi). In reviewing a contested scope ruling, the court must set aside "any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(B)(i). Commerce may not disregard record evidence that detracts from its intended conclusion. *See, e.g.*, *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." (quoting *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997))).

B. The Final Scope Ruling Must Be Remanded to Commerce for Reconsideration

Determining whether merchandise is within the scope of an antidumping or countervailing duty order begins with the scope language. *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1302 (Fed. Cir. 2013); *see Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089 (Fed. Cir. 2002) ("*Duferco*"). The Court of Appeals for the Federal Circuit ("Court of Appeals") has instructed that "[s]cope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco*, 296 F.3d at 1089.

[2] All statutory citations herein are to the 2012 edition of the United States Code and all regulatory citations herein are to the 2017 edition of the Code of Federal Regulations.

Under its regulation governing scope determinations, 19 C.F.R. § 351.225(k), 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 [U.S. International Trade] Commission [('ITC')]." 19 C.F.R. § 351.225(k)(1).

If Commerce determines that the criteria of § 351.225(k)(1) are not dispositive, Commerce considers the other factors set forth in § 351.225(k)(2). Those factors are: "(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." *Id.* § 351.225(k)(2). The Final Scope Ruling determined that Star Pipe's flanges were subject to the Order based on § 351.225(k)(1) and, therefore, did not apply the criteria of § 351.225(k)(2). *Final Scope Ruling* 1, 13.

1. The Merchandise that Is the Subject of Star Pipe's Scope Ruling Request

The Scope Ruling Request stated that "[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 Association ('AWWA') Standard C115." *Scope Ruling Request* 3. It stated 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 added 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—as with excluded non-scope products—are sold to fabricators to fabricate the products into flanged pipes.").

The Scope Ruling Request included specifications and illustrations for each of eleven models of ductile iron flanges, which are similar in design but vary with respect to dimensions and specifications.[3] *Scope*

[3] The eleven models are in four groups, identified by name and product code as follows:
"HI Hub threaded 125 lb. flanges for ductile pipe (ductile iron)" (product codes FLD02SP, FLD03SP, and FLD04SP);
"Reducing 125 lb. flanges for ductile pipe (ductile iron)" (product codes FLD0403, FLD0604, and FLD0804),
"Threaded 125 lb. flanges for studs for ductile pipe (ductile iron)" (product codes FLDTFS02, FLDTFS03, FLDTFS04), and
"Threaded 250 lb. flanges for studs for ductile pipe (ductile iron)" (product codes FL250D03 and FL250D04)."
Scope Ruling Request 2; *see id.* at Ex. 2 ("Photographs of Sample Flanges").

Ruling Request Ex. 1 ("Star Pipe Products Catalog—Products Subject To Request"). Each is produced to be assembled to a ductile iron pipe. *Id.* Each is in the shape of a disc. *Id.* In the thicker center portion (the "hub") of each flange is a large hole with tapered thread to facilitate attachment of the flange to the end of a threaded pipe. *Id.* The outer, thinner portion of each flange is drilled with eight holes (either tapped or untapped), arranged in a circle, for insertion of fasteners. *Id.* A photograph in the Scope Ruling Request illustrates how two pipes to which flanges have been assembled can be joined at the ends using bolts and nuts through the eight holes, with a gasket fitted between the two flanges to seal the joint. *Id.* at Ex. 8 ("Photo of Threaded Fitting v. Threaded Flange").

2. The Scope Language in the Order

The scope language in the Order is 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.
>
> 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 [*sic*].[4] 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

[4] The reference to "this petition" is incorrect and probably should read "this order." Because it is Commerce, not the petitioner, that ultimately determines the scope, the scope of the investigation as proposed in the petition is not necessarily the scope Commerce determines when issuing an order.

> and produced to American Water Works Association (AWWA) specifications AWWA C110 or AWWA C153 are not included.

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

3. The Final Scope Ruling

The Final Scope Ruling states that "[f]or this scope proceeding, the Department examined the language of the *Order*, the description of the products contained in Star Pipe's scope ruling request, and prior scope determinations." *Final Scope Ruling* 10. Commerce added that "[w]e find that these factors, are, together, dispositive as to whether the product at issue is subject merchandise, in accordance with 19 CFR 351.225(k)(1)." *Id.*

Because the products at issue are made of ductile cast iron rather than non-malleable ("gray") cast iron, they are not described by the first paragraph of the scope language. Commerce concluded in the Final Scope Ruling that they were described by the first clause of the first sentence in the second paragraph, i.e., that the flanges are "[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; *see Final Scope Ruling* 12.

Commerce rejected Star Pipe's contention that the flanges were not "pipe fittings" within the scope of the Order. *Final Scope Ruling* 10. The Final Scope Ruling states that "[w]hile the scope of the *Order* does not provide a definition of the term 'pipe fittings,' . . . the ITC does define the term in its final injury determination," adding that "the ITC states 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.'" *Id.* (footnote omitted). Commerce concluded that Star Pipe's flanges satisfied this requirement and therefore were "pipe fittings" for purposes of the Order, based on its finding that they can be used to connect the bores of two or more pipes or to connect a pipe to another apparatus. *Id.* at 10–11.

Commerce also rejected Star Pipe's argument "that the ITC does not consider a flange to be a flanged fitting and that this demonstrates that flanges are different from fittings." *Id.* at 11. According to the Final Scope Ruling, "[w]hile the ITC's statement does demonstrate that flanges are different from flanged fittings, it does not demonstrate that flanges are not fittings." *Id.*

Commerce concluded, further, that the exclusion for ductile cast iron fittings in the last sentence of the scope language did not remove Star Pipe's flanges from the scope because these flanges had not been

demonstrated to meet either of the American Water Works Association ("AWWA") specifications mentioned in the exclusion (AWWA C110 or AWWA C153). *Id.* at 11–13. Responding to Star Pipe's argument that its flanges met AWWA C115, which Star Pipe argued is a companion specification to AWWA C110 and C153 (but applies to flanges as opposed to flanged fittings, to which AWWA C110 and C153 are directed), Commerce concluded that Star Pipe "did not provide any record evidence or demonstrate how AWWA C115 is the companion specification to the AWWA C110 or C153." *Id.* at 11.

4. The Final Scope Ruling Must Be Remanded for Reconsideration

The court concludes that Commerce failed to comply with its regulation when it reached a decision to place Star Pipe's flanges in the scope of the Order without considering the antidumping duty petition. In addition, Commerce failed to give fair and adequate consideration to record evidence contained in the final injury determination of the ITC that detracts from its conclusion. As a result of these failures, the Final Scope Ruling cannot be shown to be supported by substantial evidence contained on the record as a whole.

a. By Failing to Consider the Descriptions of the Merchandise Contained in the Petition, Commerce Did Not Comply with 19 C.F.R. § 351.225(k)(1)

The Department's regulation requires that the Secretary of Commerce "take into account . . . [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." 19 C.F.R. § 351.225(k)(1). The "analysis" portion of the written determination, *Final Scope Ruling* 10–13, makes no mention of analyzing the merchandise descriptions in the petition and, to the contrary, indicates that Commerce did not consider the petition at all. *See Final Scope Ruling* 10 ("For this scope proceeding, the Department examined the language of the *Order*, the description of the products contained in Star Pipe's scope ruling request, and prior scope determinations."). The court notes, further, that no portion of the petition has been placed on the administrative record of this case, indicating further that Commerce failed to consider it, despite the requirement in § 351.225(k)(1) that it do so.

The Scope Ruling Request included arguments grounded in the petition. *Scope Ruling Request* 9–10. Star Pipe argued that the petition, while mentioning flanged fittings, made no mention of flanges.

Id. at 9. The petition, according to the Scope Ruling Request, also stated that virtually all subject fittings are used in fire protection systems and steam heat conveyance systems whereas Star Pipe's flanges "are for the water and wastewater industries and are not generally used in fire protection systems or steam heat conveyance systems."[5] *Id.* at 9–10 (citing Petition for Imposition of Antidumping Duties: Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China, A-570–875 (Feb. 21, 2002) at 4).

In conclusion, Commerce did not comply with its regulation, 19 C.F.R. § 351.225(k)(1), when it failed to consider the merchandise descriptions in the petition in response to petition-related arguments Star Pipe made in the Scope Ruling Request. The court, therefore, must order Commerce to consider the merchandise descriptions in the petition and the arguments Star Pipe made regarding them. The court will order defendant to place on the record the petition or portions of the petition that Commerce reviews.

b. While Relying on the ITC Report for One Purpose, Commerce Failed to Address Record Evidence Detracting from its Conclusion that Star Pipe's Flanges Are Subject Merchandise

As mentioned previously, Commerce, in concluding in the Final Scope Ruling that Star Pipe's flanges are pipe fittings within the scope of the Order, relied upon certain language in the ITC's final injury determination concerning the uses of pipe fittings: "Specifically, the ITC states that 'pipe 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.'" *Final Scope Ruling* 10 (footnote omitted). This statement appears in the "Product Description" section of the Views of the Commission in the ITC Report, Non-Malleable Pipe Fittings From China, Inv. No. 731-TA-990 (Final), USITC Pub. No. 3586 (Mar. 2003) ("*ITC Report*") 4. Commerce concluded from this statement, which it interpreted to be a definition of the term "pipe fitting" as used in the scope language, that Star Pipe's flanges are "pipe fittings" for purposes of the Order. *Final Scope Ruling* 10. The ITC report and the Scope Ruling Request contain record evidence detracting from this conclusion.

The Final Scope Ruling did not quote or discuss the sentence in the ITC Report immediately preceding the one on which it relied. That preceding sentence, which followed a quotation of the scope language, was as follows: "Accordingly, the subject imports include non-

[5] The Final Scope Ruling does not discuss whether the scope exclusion for "cast iron soil pipe fittings" has implications for this case.

malleable cast iron pipe fittings as well as certain ductile cast iron pipe fittings, such as those that can be used in traditionally non-malleable *pipe fitting applications*." *ITC Report* 4 (emphasis added). This language at least suggests that the pipe fittings subject to the Order are those used in pipe fitting applications.[6] Here, there is evidence on the record that Star Pipe's ductile iron flanges are not suitable for, and are not approved for, use in pipe fitting applications. This evidence, which is contained in the Scope Ruling Request and its exhibits, indicates that Star Pipe's flanges, rather than being suitable for use by pipe fitters, are suitable for use, and are used, by pipe fabricators, who distribute pipes that have been modified by the addition of the flanges. *See Scope Ruling Request* 18.

The Scope Ruling Request identified only one use for Star Pipe's flanges: "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.* at 3 (emphasis added). The Scope Ruling Request stated that these flanges conform to AWWA Standard C115. *Id.* In Section 4.4 ("Fabrication"), AWWA C115 requires that "[t]hreaded flanges shall be *individually* fitted and *machine* tightened on the threaded pipe *at the point of fabrication*." *Id.* at Ex. 3 ("Excerpts from AWWA C115"), Sec. 4.4.1 (emphasis added). The AWWA standard cautions as follows: "NOTE: flanges are not interchangeable in the field." *Id.* According to the standard, the fabrication process involves more than simply threading the plain end of the pipe with a tapered thread and assembling to it the taper-threaded flange. The fabricator must use "thread compound" that "shall give adequate lubrication and sealing properties to provide pressure-tight joints." *Id.* After attaching the flange, the fabricator machines ("faces") the flange end after the final machine-tightening of the flange, ensuring that the flange is perpendicular to the pipe centerline and that bearing surfaces for bolting are parallel to the flange face within three degrees. *Id.* at Ex. 3, Sec. 4.4.3, Sec. 4.4.4. A further indication that flanges are not intended for assembly to pipes in the field is the requirement in the AWWA standard that a fabricator assembling flanges to both ends of a pipe standardize the assembly by aligning the bolt holes in the flanges. *See id.* at Ex. 3, Sec. 4.4.4.

In summary, there is record evidence that the threaded flanges imported by Star Pipe, in their condition as entered, are not suitable

[6] "Pipe fitting" is defined as "the work of a pipe fitter," MERRIAM WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/pipe fitting (last visited Feb. 8, 2019), and "pipe fitter" is defined as "a worker who installs and repairs piping," MERRIAM WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/pipe fitter (last visited Feb. 8, 2019).

for use in assembling piping systems.[7] Instead, according to the Scope Ruling Request and AWWA standard C115, to which they are described as conforming, they are suitable for use in the assembly of piping systems only after they have undergone post-importation assembly and fabrication. Nevertheless, Commerce, in the Final Scope Ruling, found that Star Pipe's flanges can connect the bores of two or more pipes, *Final Scope Ruling* 10, or connect a pipe to another apparatus, *id.* at 11 ("Having reviewed the record evidence, (*i.e.*, product documentation submitted by Star Pipe), the Department finds that Star Pipe's flanges conform to the ITC's definition of pipe fittings because the flanges can be used to connect a pipe to another apparatus."). Seen in light of the record evidence on the whole, the Department's finding appears to describe the use of the flange only after the flange has become a component in the downstream product resulting from post-importation processing, i.e., a pipe to which a fabricator has added one or more flanges. That product, however, is not the subject of the Scope Ruling Request and is not within the scope of the Order (which applies only to pipe fittings, not pipes or assemblies containing pipes). Substantial evidence is not available on the administrative record to support a finding that Star Pipe's flanges, in the form in which they are imported, are suitable for, or approved for, joining the bores of two pipes or joining a pipe to another apparatus.

Other information in the ITC Report also detracts from the Department's conclusion that Star Pipe's flanges are subject merchandise. The ITC Report stated that "[f]langed fittings are different from threaded fittings in that the flanged fittings are cast with an integral rim, or flange, at the end of the fitting." *ITC Report* I-9 (footnote omitted). The report adds that "[t]he flanged connection is made by inserting a gasket in between the flanged ends of two separate pieces and securing the ends with several bolts," *id.*, and that "[b]ecause of the ease of dismantling, flanged fittings are used in places where maintenance is often required," *id.* at I-9 n.53. Star Pipe's flanges do not conform to the description of "flanged fittings" in the ITC Report because they are not "cast with an integral rim, or flange, at the end of the fitting." *Id.* at I-9. Instead, they are flanges in the entirety, and they are designed, and used, to add a flange to a straight length of

[7] The scope language expressly includes unfinished non-malleable iron pipe fittings and might be read to include certain unfinished ductile iron fittings. The inclusion of certain "unfinished" articles in the scope does not support the placement of Star Pipe's flanges within the scope. Here, the record evidence is that the flange is imported in a finished form ready for attachment to a pipe by a pipe fabricator, with a threaded hub and other physical characteristics meeting AWWA C115. *See Scope Ruling Request* Ex. 3, Sec. 4.3.

pipe. *See Star Pipe's Resp. to Pet.'s Comments* (Aug. 1, 2017) (P.R. Doc. 9) Ex. 4 ("Photographs of Flanged Fitting v. Flange"). As noted previously, Commerce stated in the Final Scope Ruling that "[w]hile the ITC's statement does demonstrate that flanges are different from flanged fittings, it does not demonstrate that flanges are not fittings," relying again on the statement on the uses of fittings in the ITC Report.[8] *Final Scope Ruling* 11.

Other language in the ITC Report addresses the topic of flanged fittings made of ductile cast iron. Commerce does not mention in the Final Scope Ruling that the ITC considered *all* flanged ductile cast iron fittings to be excluded from the scope, regardless of specification. *ITC Report* I-1 n.1 ("The subject fittings include non-malleable and ductile elbows, ells, tees, crosses, and reducers as well as non-malleable flanged fittings."), I-8 ("[E]xcluded from the scope are flanged ductile cast iron fittings and ductile fittings produced to AWWA C110 or AWWA C153 specifications." (footnote omitted)).

In defining the domestic like product, the ITC, observing that no domestic producer filed a questionnaire response indicating that it produced ductile cast iron flanged fittings, expressly declined to broaden the domestic like product beyond the scope of the investigation to add this class of products. *Id.* at 7–8 ("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." (footnote omitted)). Because ductile flanged fittings are excluded from the scope of the domestic like product (which the ITC defined as identical to the scope of the investigation), it cannot be concluded that the ITC reached an affirmative injury or threat determination as to them. This aspect of the ITC's investigation strongly cautions against an interpretation of the scope language to include ductile flanged fittings, of any specifi-

[8] One of the prior scope rulings on which Commerce relied in placing Star Pipe's flanges within the scope of the Order is *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 Attachment 4. *Final Scope Ruling* 10. In that ruling, Commerce found that the black and green flanges at issue in that proceeding were "flanged fittings"; Commerce reached this finding "because they are fittings that are cast with an integral rim, or flange, at the end of the fitting." *Taco Ruling* 9; *cf. Final Scope Ruling* 11 (noting that the ITC's statement demonstrates that flanges are different from flanged fittings). Commerce also relied upon *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*"), *appended to Final Scope Ruling* as Attachment 2, for the proposition that Star Pipe's flanges have the same physical characteristics as the products at issue in that ruling. *Final Scope Ruling* 12. Some of the articles at issue in the Napac Ruling were described as gray iron flanged fittings, *Napac Ruling* 3, and the court is unable to conclude from the descriptions therein that the remaining articles were identical to Star Pipe's flanges.

cation. *See Atkore Steel Components, Inc. v. United States*, 42 CIT __, __, 313 F. Supp. 3d 1374, 1381–82 (2018) (reasoning that consideration of (k)(1) sources importantly reduces the risk that antidumping duties will be imposed absent an affirmative ITC injury or threat finding).

When viewed in the context of the ITC Report as a whole, the Department's conclusion that Star Pipe's flanges are subject merchandise raises a question for which the Final Scope Ruling does not provide a satisfactory answer. That question is 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. Commerce reached the conclusion that ductile iron flanges are within the scope 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 (and, therefore, within the domestic like product, which the ITC made equivalent to, and not broader than, the scope of the investigation). *See ITC Report* I-1 to I-9. The 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. The Final Scope Ruling does not analyze the issue of the physical and functional differences between ductile iron flanges and the examples of "subject fittings" listed in the scope language. *See Order*, 68 Fed. Reg. at 16,765 ("The subject fittings include elbows, ells, tees, crosses, and reducers as well as flanged fittings.").

Read in the entirety, the ITC Report contains evidence lending weight to a conclusion that Star Pipe's flanges are not subject merchandise. Under 19 C.F.R. § 351.225(k)(1), Commerce was not free to ignore this evidence.

III. CONCLUSION AND ORDER

In conclusion, the Department's regulation contemplates that Commerce will give thorough and fair consideration to "[t]he descriptions of the merchandise contained in the petition . . . and the determinations of the . . . Commission," 19 C.F.R. § 351.225(k)(1), in deciding whether certain merchandise is within the scope of an order. Commerce failed to do so here. It did not consider the petition, and its analysis of the ITC Report was so selective and cursory as to ignore a substantial amount of information relevant to the scope question

presented in this case. Commerce must correct these deficiencies in responding to this Opinion and Order.

Because the court is ordering reconsideration of the Final Scope Ruling, it does not reach, at this stage of the litigation, either of Star Pipe's two alternative claims. Commerce is not directed to consider the factors in 19 C.F.R. § 351.225(k)(2) pursuant to a formal scope inquiry, and it is premature to address plaintiff's alternative claim contesting liquidation instructions.

Therefore, upon consideration of plaintiff's motion for judgment on the agency record and all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that the stay ordered in this case, Order (Jan. 8, 2019), ECF No. 48, be, and hereby is, terminated; it is further

ORDERED that the court's previous order granting plaintiff's motion for oral argument, Order (Oct. 25, 2018), ECF No. 45, be, and hereby is, vacated; it is further

ORDERED that plaintiff's motion for oral argument (Oct. 12, 2018), ECF No. 43, be, and hereby is, denied; it is further

ORDERED that plaintiff's motion for judgment on the agency record (May 10, 2018), ECF No. 29, be, and hereby is, granted in part; it is further

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

ORDERED that defendant shall supplement the administrative record with documents, or portions thereof, considered by Commerce in reaching the decision in the Remand Redetermination; it is further

ORDERED that plaintiff and defendant-intervenor shall have 30 days from the filing of the 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: February 13, 2019
New York, New York

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