U.S. Customs and Border Protection

COMMERCIAL CUSTOMS OPERATIONS ADVISORY COMMITTEE

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security (DHS).

ACTION: Committee Management; Notice of Federal Advisory Committee Meeting.

SUMMARY: The Commercial Customs Operations Advisory Committee (COAC) will hold its quarterly meeting on Wednesday, December 7, 2022, in College Park, Maryland. The meeting will be open for the public to attend in person or via webinar. Due to COVID–19 restrictions, the in-person capacity is limited to 100 persons for public attendees.

DATES: The COAC will meet on Wednesday, December 7, 2022, from 1 p.m. to 5 p.m. EST. Please note that the meeting may close early if the committee has completed its business. Registration to attend and comments must be submitted no later than December 2, 2022.

ADDRESSES: The meeting will be held at the National Archives and Records Administration College Park, 8601 Adelphi Road, College Park, MD 20740, on the basement level in Lecture Rooms C, D, and E. All in-person participants are required to show valid government-issued identification to enter the building. For virtual participants, the webinar link and conference number will be provided to all registrants by 5:00 p.m. EST on December 6, 2022. For information or to request special assistance for the meeting, contact Mrs. Latoria Martin, Office of Trade Relations, U.S. Customs and Border Protection, at (202) 344–1440, as soon as possible.

Comments may be submitted by one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Search for Docket Number USCBP–2022–0044. To submit a comment, click the "Comment" button located on the top-right hand side of the docket page.

• *Email: tradeevents@cbp.dhs.gov.* Include Docket Number USCBP–2022–0044 in the subject line of the message.

Comments must be submitted in writing no later than December 2, 2022, and must be identified by Docket No. USCBP–2022–0044. All submissions received must also include the words "Department of Homeland Security." All comments received will be posted without change to *https://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings* and *www.regulations.gov.* Therefore, please refrain from including any personal information you do not wish to be posted. You may wish to view the Privacy and Security Notice which is available via a link on the homepage of *www.regulations.gov.*

See **SUPPLEMENTARY INFORMATION** for file formats and other information about electronic filing.

FOR FURTHER INFORMATION CONTACT: Mrs. Latoria Martin, Office of Trade Relations, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.5A, Washington, DC 20229, (202) 344–1440; or Ms. Felicia M. Pullam, Designated Federal Officer, at (202) 344–1440 or via email at *tradeevents@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the authority of the Federal Advisory Committee Act, 5 U.S.C. Appendix. The Commercial Customs Operations Advisory Committee (COAC) provides advice to the Secretary of Homeland Security, the Secretary of the Treasury, and the Commissioner of U.S. Customs and Border Protection (CBP) on matters pertaining to the commercial operations of CBP and related functions within the Department of Homeland Security and the Department of the Treasury.

Pre-Registration: Meeting participants may attend either in person or via webinar. All participants must register using one of the methods indicated below:

For members of the public who plan to participate in person, please register online at *https://teregistration.cbp.gov/index.asp?w=296* by 5 p.m. EST on December 2, 2022. For members of the public who are pre-registered to attend the meeting in person and later need to cancel, please do so by 5 p.m. EST on December 2, 2022, utilizing the following link: *https://teregistration.cbp.gov/cancel.asp?w=296.*

For members of the public who plan to participate via webinar, please register online at *https://teregistration.cbp.gov/index.asp?w=295 by 5 p.m. EST on December 2, 2022. For members of the public who are pre-registered to attend the meeting via webinar and later need to cancel, please do so by 5 p.m. EST on December 2, 2022, utilizing the following link: https://teregistration.cbp.gov/cancel.asp?w=295.*

The COAC is committed to ensuring that all participants have equal access regardless of disability status. If you require a reason-

able accommodation due to a disability to fully participate, please contact Mrs. Latoria Martin at (202)–344–1440 as soon as possible.

Please feel free to share this information with other interested members of your organization or association.

To facilitate public participation, we are inviting public comment on the issues the committee will consider prior to the formulation of recommendations as listed in the Agenda section below.

There will be multiple public comment periods held during the meeting on December 7, 2022. Speakers are requested to limit their comments to two minutes or less to facilitate greater participation. Please note that the public comment period for speakers may end before the time indicated on the schedule that is posted on the CBP web page: *http://www.cbp.gov/trade/stakeholder-engagement/coac.*

Agenda

The COAC will hear from the current subcommittees on the topics listed below:

1. The Next Generation Facilitation Subcommittee will provide updates on its task forces and working groups, including an update on the progress of the 21st Century Customs Framework (21CCF) and E-Commerce Task Forces. The 21CCF Task Force will provide an update on the work addressed this past quarter, which includes discussions with Partner Government Agencies (PGAs) and some of the discussion drafts of trade-related legislative proposals stemming from the 21CCF Task Force and Focus Group. The Automated Commercial Environment (ACE) 2.0 Working Group will provide an update regarding adding new members to the working group to help focus on the identified gaps and potential solutions for ACE 2.0 Modernization. Finally, the One United States Government (1USG) Working Group will provide updates on some of the discussions held this past quarter pertaining to involvement of PGAs in a trusted trader program, with benefits to the trade stakeholders, as well as single window automation with the PGAs.

2. The Rapid Response Subcommittee will provide updates for the Broker Modernization Working Group, Domestic Manufacturing and Production (DMAP) Working Group, and the United States-Mexico-Canada Agreement (USMCA) Working Group. The Broker Modernization Working Group currently meets monthly with the expectation that recommendations will be developed and submitted for consideration at an upcoming COAC public meeting. The DMAP Working Group meets bi-weekly to obtain input from industry stakeholders on trade enforcement areas affecting domestic manufacturers and producers. The USMCA Working Group has reconvened and meets bi-

weekly. The focus of this working group is on Chapter 7 of the trade agreement, specifically the trilateral Committee on Trade Facilitation established pursuant to Article 7.24, which is composed of government representatives of each party to the USMCA.

3. The Secure Trade Lanes Subcommittee will provide updates on its four active working groups: the Cross-Border Recognition Working Group, the Export Modernization Working Group, the In-Bond Working Group, and the Trade Partnership and Engagement Working Group. Recommendations for the committee's consideration are anticipated from the Export Modernization Working Group regarding export-related benefits for Customs Trade Partnership Against Terrorism (CTPAT) partners. The In-Bond Working Group plans to present recommendations for the committee's consideration related to the trade community's proposed regulatory revisions/updates to 19 CFR part 18. The Trade Partnership and Engagement Working Group continues to provide an opportunity for input on CTPAT Trade Compliance program development and implementation from trade members with broad subject matter expertise. The Cross-Border Recognition Working Group continues to work on developing recommendations for the committee's consideration regarding potential changes to the current joint inspection program (Unified Cargo Processing) and has continued its discussions on CBP's CTPAT program and Mexico's Authorized Economic Operator program to ensure alignment and compliance with the mutual recognition arrangement signed in 2014.

4. The Intelligent Enforcement Subcommittee will provide updates on the work completed and topics discussed in its working groups. The Antidumping/Countervailing Duty (AD/CVD) Working Group will provide updates regarding its work and discussions on importer compliance with AD/CVD requirements. The Intellectual Property Rights Working Group (IPRWG) will provide recommendations for the committee's consideration relating to the automation of the CBP detention and seizure process and suggested enhancements to the CBP IPR web page. The Bond Working Group will report on the ongoing discussions and status updates for eBond requirements. The Forced Labor Working Group will submit recommendations for the committee's consideration regarding the Uyghur Forced Labor Prevention Act (UFLPA). Meeting materials will be available on November 28, 2022, at: *http://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings.*

Dated: November 14, 2022.

FELICIA M. PULLAM,
Executive Director,
Office of Trade Relations.

[Published in the Federal Register, November 18, 2022 (85 FR 69282)]

VESSEL ENTRANCE AND CLEARANCE AUTOMATION 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 the Vessel Entrance and Clearance Automation Test. This test will allow participants to submit certain vessel entry and clearance data and requests to CBP electronically through the Vessel Entrance and Clearance System (VECS), instead of submitting paper forms, as currently required by CBP regulations. Specifically, this test will allow participants to submit the data required on CBP Forms 26, 226, 1300, 1302, 1303, 1304, and 3171 electronically through VECS prior to arrival or departure from designated ports. This notice describes the test, sets forth the eligibility requirements for participation, and invites public comment on any aspect of the test.

DATES: The test will begin at the Port of Gulfport in Gulfport, Mississippi, no earlier than December 21, 2022 and will continue for 24 months from the date the test begins. During the 24 months, additional ports will be designated as test ports, and CBP will announce the additional ports participating in the test on its website. Comments concerning this notice and all aspects of the announced test may be submitted at any time during the test period.

ADDRESSES: Written comments concerning any aspect of the test should be submitted via email to Brian Sale, Branch Chief, Cargo and Conveyance Security, Manifest Conveyance and Security Division, Office of Field Operations, U.S. Customs and Border Protection, at *OFO-ManifestBranch@cbp.dhs.gov.* In the subject line of the email, please write "Comments on Vessel Entrance and Clearance Automation Test."

FOR FURTHER INFORMATION CONTACT: Brian Sale, Branch Chief, Cargo and Conveyance Security, Manifest Conveyance and Security Division, Office of Field Operations, U.S. Customs & Border Protection; *OFO-ManifestBranch@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Purpose of the Test

A. Purpose of the Test

U.S. Customs and Border Protection (CBP) regulations generally require that the master or vessel agent[1] of a commercial vessel submit certain arrival, entrance, and clearance data to CBP when traveling to and from U.S. ports of entry. *See* part 4 of title 19 of the Code of Federal Regulations (19 CFR part 4). The vessel agent must generally submit this data to CBP on paper forms. Some of the data collected through these forms is redundant or already available to CBP through other required data submission platforms, such as data required by the applicable U.S. Coast Guard (USCG) regulations. *See* 33 CFR 160.201–216.

Executive Order 13659, "Streamlining the Export/Import Process for America's Businesses," signed in February 2014, requires the U.S. Government to streamline the export/import process for America's businesses by increasing efforts to improve technologies, policies, and other controls governing the movement of goods across U.S. borders. In support of this Executive Order, as well as in response to requests from the trade industry, CBP is developing a web-based system that will allow for the partial automation and electronic filing of many of its paper-based commercial vessel arrival, entrance, and clearance data collections. The Vessel Entrance and Clearance Automation Test ("the Test") will allow CBP to test this system. The Test will also fulfill CBP's aims to improve service delivery and customer experience, by reducing paperwork burdens and promoting greater efficiency with respect to the submission of vessel entry and clearance forms.

Specifically, the Test will allow participants to electronically submit to CBP, through the Vessel Entrance and Clearance System (VECS), when seeking to enter into or depart from a designated port, the entrance and clearance data that is currently collected on CBP Form 1300: Vessel Entrance or Clearance Statement; CBP Form 1302: Inward Cargo Declaration; CBP Form 1303: Ship's Stores Declarations; CBP Form 1304: Crew's Effects Declaration; CBP Form 3171: Application-Permit-Special-License-Unlading-Lading-Overtime Services; CBP Form 26: Report of Diversion; and CBP Form 226: Record of Vessel Foreign Repair or Equipment Purchase. The Test will also allow participants to make certain entry and clearance requests and

[1] For the purposes of this document, "vessel agent" may include a vessel master or commanding officer, authorized agent, operator, owner, consignee, or a third party contracted by the owner or operator of the vessel to prepare and submit Entrance and Clearance documentation to CBP on behalf of the vessel owner or operator.

reports. Additionally, the Test will allow vessel agents to submit required supporting documentation, such as vessel certificates, to CBP electronically. CBP will then use the data and documentation submitted through VECS to process vessel entrances and clearances electronically at designated ports.

VECS is intended to modernize the maritime commercial entry and clearance process upon the arrival and departure of a commercial vessel at U.S. ports by eliminating the need for vessel agents to fill out and submit data elements that are requested on more than one of these forms or through other required data submission methods, and instead consolidate the maritime entry and clearance process into an electronic submission to a single platform. All other CBP forms required for the entrance and clearance of a vessel (*e.g.,* CBP Form 1302A: Cargo Declaration Outward with Commercial Forms; CBP Form I–418: Passenger List-Crew List;[2] and CBP Form 5129: Crew Member's Declaration) are not part of the Test and must continue to be submitted in accordance with the procedures outlined in the CBP regulations.

The current process for entering and clearing a commercial vessel generally involves the manual preparation and presentation of paper forms (originals and copies), even though in some cases, CBP regulations allow for electronic submissions. VECS will provide a web-based interface that can be accessed by both vessel agents and CBP on a mobile tablet or a standard desktop computer. It will pre-populate a number of data fields required on the aforementioned entry and clearance forms using information provided to CBP through other CBP databases. This method will enable the vessel agent to deploy a single transmission of data and effectively eliminate the need for duplicative data transmissions to CBP. Furthermore, this Test will decrease the time it takes for CBP Officers and the trade community to process an entrance and clearance of a commercial vessel.

B. Current Vessel Arrival, Entrance, and Clearance Processes and Requirements

The regulations outlining the requirements for vessel arrival, entrance, and clearance processes are in 19 CFR part 4. They are described below.

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[2] As of February 28, 2022, CBP's amended regulations require vessel operators and vessel agents to submit the data elements required on CBP Form I–418 electronically via the U.S. Coast Guard's electronic Notice of Arrival/Departure (eNOA/D) system. *See* 86 FR 73618.

1. Requests for Preliminary Entry, Permits, and Special Licenses

Before a commercial vessel carrying imported merchandise, baggage, and/or passengers and required to make formal entry arrives at a U.S. port of entry, the vessel agent may apply for a CBP permit or special license for unlading and lading. Alternatively, the vessel agent may make a preliminary entry before the vessel makes formal entry. *See* 19 CFR 4.8 and 4.30.

Vessel operators or agents seeking preliminary entry in advance of arrival must submit the electronic equivalent of a complete CBP Form 1302 through the CBP Automated Manifest System (AMS) under current established regulations, standards and practices and must also submit CBP Form 3171 (Application-Permit-Special License-Unlading-Lading-Overtime Services) to CBP electronically no less than 48 hours prior to the vessel's arrival. *See* 19 CFR 4.7(b)(2) and (b)(4); 19 CFR 4.8. Vessel agents typically submit CBP Form 3171 via paper, fax, or email. The submission of CBP Form 3171 also serves as notice of a vessel's intended date of arrival, and CBP uses the submitted CBP Form 3171 for vessel tracking and scheduling. If the intended date of arrival changes, the vessel agent must notify CBP of the new arrival time.

Except under certain circumstances,[3] vessels arriving directly or indirectly from any port or place outside the customs territory of the United States,[4] including the adjacent waters, or from a vessel which transits the Panama Canal, may not unlade passengers, cargo, baggage, or other articles until the port director issues a permit or special license for such unlading. 19 CFR 4.30(a). Similarly, until the port director has issued a permit or special license to the vessel operator on CBP Form 3171 or through a CBP-approved electronic data interchange system, cargo, baggage, or other articles may not be laden on a vessel destined to a port or place outside the customs territory of the United States, including the adjacent waters, if Customs supervision of such lading is required. 19 CFR 4.30(a).

Instead of applying for routine permits and special licenses to unlade/lade each time a vessel enters a U.S. port, vessel agents can request a term permit from CBP which allows them to immediately unlade/lade merchandise, baggage, and/or passengers prior to entry. With a term permit, vessel operators can immediately unlade/lade merchandise, baggage, and/or passengers for all arrivals and en-

[3] Excepted circumstances are enumerated in 19 CFR 4.30(f), (g), and (k), as well as 19 CFR 123.8. Additionally, the exception also applies in the case of vessels exempt from entry or clearance fees under 19 U.S.C. 288.

[4] "Customs territory of the United States" includes only the States, District of Columbia, and Puerto Rico. 19 CFR 101.1.

trances at a particular port of entry within a specific, though extendable, time period without the submission of CBP Form 3171 at each arrival. Vessel agents can apply for a term permit to immediately unlade/lade at a particular port of entry by submitting CBP Form 3171 with a continuous bond to the CBP port director via fax, email, or in person. If granted by CBP, the term permit remains in effect until revoked by the port director or automatically cancelled by termination of the supporting continuous bond.[5] Because vessel agents with term permits do not have to submit CBP Form 3171 for each arrival and entrance, they must report their intended date of arrival to CBP for vessel tracking and scheduling. *See generally* 19 CFR 4.30.

In recent years, CBP has limited advance unlading privileges to members of the Customs Trade Partnership Against Terrorism (CTPAT) program.[6] Members of CTPAT may request the privilege of using the Advanced Qualified Unlading Approval Program (AQUA Lane), which allows them, if approved, to commence cargo operations immediately upon arrival rather than having to wait for the vessel to be boarded and cleared by CBP Officers. To obtain this benefit, the CTPAT member's agent must request the privilege at least 24 hours prior to the arrival of the vessel by submitting CBP Form 3171 to CBP.

2. Report of Arrival

Pursuant to 19 CFR 4.2, when a vessel from a foreign port or place, any foreign vessel from a port or place within the United States, or any vessel of the United States carrying foreign merchandise for which entry has not been made, arrives at a U.S. port, the vessel agent must immediately report that arrival to the nearest CBP facility or other location designated by the port director. Generally, the report of arrival may be made by any means of communication to the port director or to a CBP Officer assigned to board the vessel.

3. Entry

For vessels required to make formal entry, the vessel agent must, within 48 hours of arrival, generally submit the original vessel manifest, along with one copy, to CBP at the customhouse. *See* 19 CFR 4.3 and 4.7. The manifest consists of the following CBP forms: CBP Form

[5] *See* 19 CFR 4.30.

[6] CTPAT is a voluntary public-private sector partnership program which recognizes that CBP can provide the highest level of cargo security only through close cooperation with the principal stakeholders of the international supply chain, including vessel operators and vessel agents. The Security and Accountability for Every Port Act of 2006 (SAFE Act) provided a statutory framework for the CTPAT program and imposed strict program oversight requirements. For more information, visit *https://www.cbp.gov/border-security/ports-entry/cargo-security/CTPAT.*

1300: Vessel Entrance or Clearance Statement (for Entrance); CBP Form 1302: Cargo Declaration; CBP Form 1303: Ship's Stores Declaration; CBP Form 1304: Crew's Effects Declaration; CBP Form I–418 (Passenger List-Crew List); and under some circumstances, CBP Form 5129, Crew Member's Declaration. *See* 19 CFR 4.7 and 4.9; 19 U.S.C. 1434.

For U.S. vessels documented for foreign or coastwise trade, as well as foreign vessels that intend to engage in foreign and coastwise trade under CBP regulations, the vessel agent must also include a foreign repairs declaration on CBP Form 226: Record of Vessel Foreign Repair or Equipment Purchase when it first arrives in the United States following a foreign voyage. *See* 19 CFR 4.14. If the agent declares that foreign repairs were done, the agent must also complete the vessel repair entry section of CBP Form 226. For foreign vessels, the vessel agent must show the vessel's document to the port director on or before the entry of the vessel. *See* 19 CFR 4.9. Along with the vessel manifest, a vessel agent making formal entry must also present any vessel certificates, such as the Certificate of Financial Responsibility (Passenger Transportation Indemnification), Load Line Certificate, and term permit to CBP. *See, e.g.,* 19 CFR 4.65–4.66c.

4. Manifests: Inward Foreign; Traveling; Abstract

Pursuant to 19 CFR 4.7, the master of every vessel arriving in the United States who is required to make formal entry must have a manifest on board the vessel. As discussed in the prior section, the manifest consists of CBP Forms 1300, 1302, 1303, 1304, I–418, and under some circumstances CBP Form 5129. 19 CFR 4.7(a). The original manifest, known as the "inward foreign manifest" and one copy must be presented to the CBP Officer who first demands it.[7] 19 CFR 4.7(b)(1).

If the vessel will proceed from the port of arrival to other U.S. ports with residue foreign cargo or passengers, the master of the vessel must provide an additional copy of the manifest for certification as a "traveling manifest." 19 CFR 4.7(b)(1) and 4.85. At each subsequent U.S. port the vessel travels to with inward foreign cargo or passengers still on board, the vessel agent must present the traveling manifest. The vessel agent must also present an "abstract manifest" for any cargo or passengers to be discharged at that port. 19 CFR 4.85(c).

[7] The vessel agent must submit a CBP-approved electronic equivalent of the vessel's Cargo Declaration (CBP Form 1302), 24 hours before the cargo is laden aboard the vessel at the foreign port. 19 CFR 4.7(a)(2). The electronic cargo declaration information must be transmitted through the CBP Automated Manifest System (AMS), or any electronic data interchange system approved by CBP to replace the AMS system for this purpose. *See* 19 CFR 4.7(b)(2).

5. Clearance: Foreign and Permit To Proceed Coastwise

To depart from a U.S. port or place, vessels must generally apply for clearance from CBP.[8] 19 CFR 4.60–4.61, 4.81. When the vessel's next intended destination is a foreign port or place, vessel agents must apply for foreign clearance by submitting CBP Form 1300 (Clearance Statement), executed by the vessel master or other proper officer, to CBP at the customhouse. 19 CFR 4.61(a). The vessel agent must also file CBP Form 1302A with the appropriate CBP Officer at the U.S. port from which clearance is being sought. 19 CFR 4.63(a). CBP will grant clearance either on the paper forms or by approved electronic means. 19 CFR 4.61(a).

When a foreign vessel's next intended destination is another U.S. port or place, the vessel agent must apply for a permit to proceed coastwise, by filing two copies of CBP Form 1300 with CBP. 19 CFR 4.81(e); *see also* 19 CFR 4.85. Unless the vessel is proceeding in ballast, the vessel agent must also file three copies of the Cargo Declaration with the port director for the port from which the vessel seeks to depart. 19 CFR 4.81(e).

Additionally, before any vessel may proceed from one domestic port to another with cargo or passengers on board, the vessel agent must present CBP Form 1300, in triplicate, to the director of the port from which the vessel seeks to depart. 19 CFR 4.85(b)(1).

6. Report of Diversion

When a vessel that has been cleared by a U.S. port to depart to a foreign port and, while enroute, is diverted to a U.S. port other than the one where it was cleared, the vessel agent must immediately notify the port that granted the last clearance of the vessel's diversion. 19 CFR 4.91(b). The vessel agent must also file a report of diversion on CBP Form 26 with the port that granted the last clearance. The same process applies to vessels that have received a permit to proceed coastwise. If such a vessel is diverted, the vessel agent must immediately give notice of the diversion to the port director who granted the permit to proceed. 19 CFR 4.91(a). Again, the vessel operator must also file a report of diversion on CBP Form 26 with that port.

[8] Some vessels are exempt from CBP's clearance requirements. *See* 19 CFR 4.60 and 4.61 for a list of vessels required to obtain clearance from CBP; *see also* 19 CFR 4.81(a) for additional exceptions to the general requirement that vessels request and receive permission to depart from a U.S. port.

II. Description of the Vessel Entrance and Clearance Automation Test

A. Vessel Entrance and Clearance Data Submissions Through VECS

The Test will assess the functionality of submitting certain vessel entrance and clearance data elements to CBP electronically through VECS, a web-based program that allows for the automation and electronic submission of many paper-based commercial vessel entrance and clearance CBP data collections. The Test will allow vessel agents to submit the data requested on certain forms to CBP through VECS, instead of completing and submitting multiple paper forms.

Specifically, the Test will allow participants entering, or departing from, designated ports to submit electronically the entrance and clearance data that CBP currently collects primarily by paper on CBP Forms 1300, 1302, 1303, 1304, 3171, 26, 226. Many of these forms require data elements that are requested on more than one of the forms or through other related data submission requirements. In addition, several of the forms must currently be submitted on multiple occasions (*e.g.,* a new CBP Form 1300 must be submitted every time a subject vessel enters or departs a U.S. port of entry) and/or must be provided in duplicate or triplicate.

VECS will prepopulate certain vessel arrival, entrance, and clearance information that Test participants have previously submitted to CBP through other maritime requirements, such as USCG's electronic Notice of Arrival/Departure (eNOA/D) submission. *See* 33 CFR 160.201–216. VECS will then prompt participants to enter additional data elements required by the forms manually. The Test will streamline information collection by asking for data elements only once, even when a particular element is needed to satisfy the requirements of multiple different CBP forms. The participant must verify that the information that has been pre-populated into VECS is accurate, correct any inaccurate or incomplete data fields, supply any additional information necessary, and confirm and submit the data to CBP.

1. Requests for Preliminary Entry, Permits, and Special Licenses

Test participants intending to arrive at one of the participating ports may make a request for preliminary entry, permits, special licenses, or AQUA Lane privileges through VECS, instead of faxing or emailing CBP Form 3171 to the port. The submission of these requests will be made on the "Arrival Report" page of the VECS website. This submission will serve as the vessel's advance notice of arrival to the intended port and must be submitted to CBP at least 48 hours prior to arrival.

In the VECS platform, the vessel agent will be able to request services for lading, unlading, and overtime. Additionally, participants may request the following special permits: (1) Request to unlade cargo at other than the original port of destination; (2) Request to discharge malfunctioning container; (3) Request to re-lade cargo that was prematurely landed by previous importing vessel through error or emergency; (4) Request to lade empty containers or stevedoring equipment; (5) Request to lade cargo for return to original vessel for cargo not landed at its destination and overcarried through error or emergency; (6) Request to retain cargo on board, due to emergent situation (*i.e.,* port closure), for later return to the United States; (7) Request to retain cargo on board, due to denied entry of cargo at foreign port, for later return to the United States; (8) Request to retain cargo inaccessibly stowed upon arrival at destination, and carried forward to another domestic port or ports, and returned to the port of destination; and (9) Request to retain or unlade cargo not landed at its destination and overcarried to another domestic port through error or emergency.

2. Report of Arrival

While participating in the Test, vessel agents will report a vessel's arrival to the nearest CBP facility or other location designated by the port director immediately via VECS. Thereafter, the vessel's arrival information will be available to CBP through the vessel agent's VECS submissions.

3. Entry

For vessels required to make a formal entry, participants in the Test must, within 48 hours of arrival at a designated port, submit to CBP, via VECS, the data elements required on CBP Form 1300, CBP Form 1302, CBP Form 1303, and CBP Form 1304. Test participants will first log into their Vessel Agency Portal Accounts in ACE, click the "Launch VECS" button, and then submit this information via the "Entrance" page of the VECS website. By submitting this data to CBP through VECS, participants in the Test will not need to bring the manifest to CBP at the customhouse.

For vessels subject to the requirements of 19 CFR 4.14 (addressing equipment purchases for, and repairs to, U.S. vessels), the vessel agent must also submit a declaration regarding foreign repairs through VECS, consistent with the declaration portion of CBP Form 226. If an agent declares in VECS that a U.S. vessel had undergone foreign repairs, VECS will send a notification to the Vessel Repair Unit and the vessel agent must then follow standard entry procedures.

For foreign vessels, a vessel agent may submit entry data to CBP via VECS, but the vessel agent must also bring the vessel's documents to the port director on or before the entry of the vessel at its port of first arrival for CBP validation.[9] The vessel agent may upload a valid vessel certificate into VECS using the Document Imaging System (DIS) and subsequently present the vessel's document to CBP. A CBP Officer will examine the document and verify that the copy uploaded to VECS is accurate. The verified electronic copy will be valid for entry at subsequent participating ports for one year or until the Test ends, whichever is sooner.

A vessel agent may also upload other supporting documentation into VECS through DIS for future electronic validation. If CBP needs to review any documentation in person, it may require vessel operators to travel to or from the customhouse to provide such documentation.

A CBP Officer at a designated port of arrival will use a vessel agent's VECS submission to review and process the vessel's arrival or entrance electronically. If there are no issues with the arrival or entrance data submissions, the CBP Officer will then certify the vessel's entry application electronically,[10] verify fees or taxes collected by CBP, and grant arrival or formal entry to the vessel, all through the VECS interface.

4. Manifests: Inward Foreign; Traveling; Abstract

As previously discussed, a manifest consists of CBP Forms 1300, 1302, 1303, 1304, I–418, and under some circumstances 5129. 19 CFR 4.7(a). Through VECS, numerous data elements requested on CBP Forms 1300, 1302, 1303, and 1304 will be auto-populated into the "Manifest" screen, using data submitted by the vessel operator to the USCG through the eNOA/D system. *See* 33 CFR 160.201–216. Through an information-sharing agreement between the two agencies, USCG sends to CBP this data soon after the vessel operator or vessel agent submits the same data to eNOA/D system. As part of this Test, participants must verify that the information that has been auto-populated into VECS is accurate, correct any inaccurate or in-

[9] These documents are: (1) Certificate Name; (2) Safety Construction Certificate; (3) Safety Equipment Certificate; (4) Radio Certificate; (5) Dangerous Goods Compliance; (6) Ship Security; (7) Safety Management Certificate; (8) Load Line Certificate; (9) Registry/Certificate of Nationality; (10) Tonnage Certificate; (11) Certificate of Financial Responsibility; (12) Continuous Synopsis Record; (13) Certificate of Financial Responsibility (Passenger Transportation Indemnification); (14) Certificate of Documentation; and (15) Bareboat Charter/Bridge Letter.

[10] Vessel operators will have the ability to print and save PDF copies of vessel manifest forms and will have access to the form data submitted through their VECS accounts. Vessel operators traveling coastwise to other U.S. ports of entry and who are required to make formal entry must have a traveling manifest for their future coastwise arrivals.

complete data fields, supply any additional information necessary, and confirm and submit the data to CBP.

While the Test will be evaluating CBP's capacity to automate CBP Forms 1300, 1302, 1303, 1304, 3171, 26 and 226 through VECS, the Test will not include the automated or electronic collection of information on CBP Forms I–418 or 5129. CBP currently requires vessel operators or vessel agents to submit the data required on CBP Form I–418 electronically through the eNOA/D system. *See* 19 CFR 4.7(a). CBP intends for the CBP Form I–418 data that is electronically submitted through the eNOA/D system and then sent to CBP to instead be transmitted directly to VECS at a future date. CBP Form 5129 is generally optional for manifest purposes. The information collected on CBP Form 5129 is largely duplicative of the information collected on CBP Form 1304.

5. Clearance: Foreign Clearance and Permit to Proceed Coastwise

As discussed above, when a vessel seeks to depart from a U.S. port or place, the vessel agent must request clearance from CBP. 19 CFR 4.60. Whether seeking clearance to a foreign port or a permit to proceed coastwise the vessel agent must submit the request for departure on a CBP Form 1300 (Clearance Statement).

Test participants may request clearance from designated ports by submitting the necessary information on the "Clearance" page of the VECS website. Most of the data elements requested will be auto-populated because of the vessel's earlier entry submission. However, some data elements will still need to be entered manually during the Test. Participants must verify that the information that has been auto-populated into VECS is accurate, correct any inaccurate or incomplete data fields, supply any additional information necessary, and confirm and submit the data to CBP.

The requirement to file three copies of the Cargo Declaration with the port director at the U.S. port where the vessel is seeking to depart from will be waived for vessels requesting a permit to proceed coastwise that are not proceeding in ballast. *See* 19 CFR 4.81(e). If a vessel requests foreign clearance, the vessel agent must affirm that CBP Form 1302A or its electronic equivalent has been filed with the appropriate CBP Officer at the port from which clearance is being sought. Through the Test, after a CBP Officer has reviewed and approved the vessel agent's request for clearance and associated forms, the CBP Officer must notify the vessel agent through VECS that the vessel has been cleared to depart.

While Test participants will not be required to submit a paper CBP Form 1300, it is important to highlight that foreign governments may not accept the electronic foreign clearance notification that CBP will

send to participants through VECS. Accordingly, Test participants seeking foreign clearance from one of the designated ports may also submit a paper CBP Form 1300. Alternatively, during the Test, CBP will also accept submissions of CBP Form 1300 via fax or as an email attachment from participants. For fax or email submissions, CBP will respond in the same manner.

6. Report of Diversion

Throughout the Test, if a vessel that has been cleared for departure from a participating port through VECS is diverted while enroute to a U.S. port other than that from which it was cleared, the vessel agent must, as soon as reasonably possible, log into VECS and submit information regarding the diversion on the "Report of Diversion" page. Upon arrival, CBP will notify the vessel agent through VECS, and the vessel will be authorized to proceed to the new destination.

7. Supplemental Documents

Through VECS, participants will have the ability to upload vessel documents into the CBP Document Imaging System (DIS). After a vessel agent uploads a document into the DIS, the vessel agent must present the original document to CBP. A CBP Officer will then confirm that the original document matches the one uploaded to DIS. Once a vessel document is uploaded into DIS and verified by CBP, CBP Officers at participating ports will be able to use the electronic copies of vessel documents at the time of entrance and clearance. Afterwards, CBP will no longer need the original documents to be presented again at a participating port during the course of the Test, until the Test is completed or the document is no longer valid or associated with the vessel (for example, in the case of an expired vessel document/registry or a vessel name change). Supplemental document submission through VECS/DIS is voluntary during the Test, but participants are strongly encouraged to participate in this aspect of the Test in order to take full advantage of the automation opportunities provided by VECS.

The following documents are eligible for submission to CBP through VECS/DIS during the Test: (1) Certificate Name; (2) Safety Construction Certificate; (3) Safety Equipment Certificate; (4) Radio Certificate; (5) Dangerous Goods Compliance; (6) Ship Security; (7) Safety Management Certificate; (8) Load Line Certificate; (9) Registry/Certificate of Nationality; (10) Tonnage Certificate; (11) Certificate of Financial Responsibility; (12) Continuous Synopsis Record; (13) Certificate of Financial Responsibility (Passenger Transportation Indemnification); (14) Certificate of Documentation; and (15) Bareboat Charter/Bridge Letter.

B. Eligibility for Participation

Any commercial vessel agent or other entity responsible for the filing of vessel entry and clearance forms at designated ports of entry may participate in the Test, as long as it meets the requirements outlined below. The ports designated for participation in this Test are listed in section II.G.

All participants must have a Vessel Agency Portal Account in ACE, along with the technical capability to electronically submit data to CBP, as well as receive responses from CBP. The Vessel Agency Portal Account in ACE will serve as access for Test participants to the VECS platform. For more information and for instructions on how to request an ACE Vessel Agency Portal Account, please visit *http://www.cbp.gov/trade/automated/getting-started/using-ace-secure-data-portal*. Additionally, Test participants will be required to provide a Type 3 Bond for each VECS filing with CBP. They also must have a valid U.S. address that is not a Post Office Box.

Test participants must agree to participate in any teleconferences or meetings established by CBP, when necessary. CBP may hold these teleconferences or meetings, as needed, for Test participants to ensure that any challenges or operational or technical issues regarding the Test are properly communicated and addressed. Lastly, each Test participant will be held accountable for the accuracy of the information submitted to CBP through VECS, as the participant would be for submitting the same information to CBP through the regular vessel entry and clearance process. *See* 19 CFR 4.3a.

C. Application Process and Acceptance

Commercial vessel agents and other entities interested in participating in the Test should first request and create an ACE Vessel Agency Account via *http://www.cbp.gov/trade/automated/getting-started/using-ace-secure-data-portal*. Once an ACE Vessel Agency Account is created, CBP will contact the vessel operator or vessel agent to provide training on VECS and instructions on how to properly submit the required data. Training for VECS is expected to take one to two hours. Once the training has been completed, a CBP Officer at the designated Test port will inform the Manifest and Conveyance Security Branch of the Office of Field Operations in CBP Headquarters to allow access to VECS for the Test participant. The vessel operator or vessel agent can then begin to submit all relevant data electronically. Vessel operators or vessel agents that complete the training will also receive training materials from CBP on VECS so that they, in turn, can train other employees of their respective vessel agency.

CBP will continue to provide technical and operational assistance to Test participants throughout the Test.

D. Waiver of Certain Regulatory Requirements

For purposes of the Test, the requirement to file paper CBP Forms 3171, 1300, 1302, 1303, 1304, 26, and 226 as provided for in 19 CFR part 4, will be waived for Test participants seeking entry into or clearance out of one of the designated ports when they submit the applicable data elements from these forms into VECS, as described above. All other CBP forms required for the entrance and clearance of a vessel (*e.g.,* CBP Form 1302A: Cargo Declaration Outward with Commercial Forms; CBP Form I–418: Passenger List-Crew List; and CBP Form 5129: Crew Member's Declaration) must continue to be submitted in accordance with the procedures outlined in the CBP regulations. 19 CFR 4.7, 4.7a, and 4.7b.

As discussed in section II.A.5, while participants in this Test will not be required to submit a paper CBP Form 1300 to CBP during the Test, CBP notes that foreign governments may not accept the electronic foreign clearance notification that CBP will send out to participants through VECS. Accordingly, participants seeking foreign clearance from one of the designated ports during this Test may also submit a paper CBP Form 1300. Alternatively, during the Test, CBP will also accept submissions of CBP Form 1300 by fax or as an email attachment from Test participants. For fax or email submissions, CBP will respond in the same manner.

Participation in the Test does not affect a participant's obligations to comply with any other applicable statutory and regulatory requirements. Participants will therefore still be subject to the relevant penalties for non-compliance. Additionally, submission of data under the Test does not exempt the participant from any CBP or other U.S. Government agency program requirements. Further, participation in the Test does not exempt participants from any statutory sanctions if a violation of U.S. laws is discovered within a shipment or container presented for entrance or clearance.

E. Costs to Test Participants

Test participants are responsible for all costs incurred as a result of their participation in the Test. The costs of participation will vary, depending on participants' current operations. Prospective Test participants will incur application time burdens, along with participation costs. These could include costs to: create and maintain a VECS profile; possess a type 3 bond; maintain a valid U.S. address; and adapt to and use the Test process. Such costs may be offset by a

significant reduction in the expenses associated with printing, processing, and presenting paper forms and supporting documents to CBP. Participants are encouraged to keep track of the costs incurred by their participation in the Test.

F. Benefits to Test Participants

While the benefits of the Test will vary by participant, several advantages of participating will include: the reduction in costs associated with the elimination of paper form printing, processing, and presentation; added time savings from eliminating the need to provide duplicative data on multiple forms; and greater transparency, flexibility, and communication with CBP during the vessel entrance and clearance process. The Test will also offer participants opportunities to help CBP establish, evaluate, and refine its electronic vessel entrance and clearance system and facilitate the future of implementing mandatory electronic vessel entrance and clearance information submission requirements. Participants are encouraged to keep track of the benefits experienced by their participation in the Test.

G. Designated Ports; Duration, Scope, and Evaluation of the Vessel Entrance and Clearance Forms Automation Test

1. Designated Ports

The Test will initially operate at the Port of Gulfport in Gulfport, Mississippi. CBP later intends to roll out the Test at the following designated ports: Mobile, AL; Los Angeles-Long Beach, CA; Port Hueneme, CA; Jacksonville, FL; Port Everglades, FL; Savannah, GA; Baton Rouge, LA; Gramercy, LA; Lake Charles, LA; and New Orleans, LA. CBP will notify participants of the Test expansion at the above-designated ports, as well as the designation of additional ports for Test expansion after publication of this document, via the Vessel Entrance and Clearance System page on CBP's website, available at *www.cbp.gov/trade/automated/vessel-entrance-and-clearance-system-vecs.*

2. Duration, Scope, and Evaluation of the Test

The Test will begin no earlier than December 21, 2022 and will continue for 24 months from the date the Test begins.

Throughout the Test, CBP will evaluate the results and determine if the Test should be expanded to additional ports beyond those designated above, be extended for an additional period of time, or be expanded to include additional maritime forms. CBP will take into consideration any comments or feedback that is received from Test

participants. Any expansion or extension of the Test will be announced in the **Federal Register**.

CBP will begin rulemaking to require the submission of most vessel entry and clearance data to CBP electronically through VECS for all mandated vessels seeking entry into or clearance from ports after sufficient Test analysis and evaluation is conducted.

H. Misconduct Under the Test

If a Test participant fails to abide by the rules, procedures, or terms and conditions of this and all other applicable **Federal Register** notices, fails to exercise appropriate level of care in the execution of Test participant obligations, or otherwise fails to comply with all applicable laws and regulations, the participant may be suspended from participation in this Test and may also be subject to civil or criminal penalties, liquidated damages, and other applicable enforcement action. Additionally, CBP may suspend a Test participant if it determines that an unacceptable compliance risk exists.

If CBP determines that a suspension is warranted, CBP will notify the participant of this decision, set forth the facts or conduct warranting suspension, and provide the date when the suspension is effective. In the case of willful misconduct or where public health interests or safety are concerned, the suspension may be effective immediately. This decision may be appealed in writing to the Executive Assistant Commissioner, Office of Field Operations, within 15 days of notification. The appeal should address the facts or conduct charges contained in the notice and state how the participant has or will achieve compliance. CBP will notify the participant within 30 days of receipt of an appeal whether the appeal is granted or denied. If a Test participant has already been suspended, CBP will notify the participant if and when his or her participation in the Test will be reinstated.

III. Authority

This Test is being conducted in accordance with 19 CFR 101.9(a) of the CBP regulations, which authorizes the Commissioner to impose requirements different from those specified in the CBP regulations for the purposes of conducting a test program or procedure designed to evaluate the effectiveness of new technology or operational procedures regarding the processing of passengers, vessels, or merchandise.

IV. Privacy

CBP will ensure that all Privacy Act requirements and applicable policies are adhered to during the implementation of this Test.

V. 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. An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget.

This Test does not impose any new information collection requirements; it simply changes the modality through which currently collected information is submitted to CBP. The Vessel Entrance and Clearance Statement (CBP Form 1300) (VECS) has been approved by the Office of Management and Budget (OMB) in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507) under OMB control number 1651–0019. In addition, the following collections of information have been submitted to OMB for review and approval in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507): 1651–0025 Report of Diversion (CBP Form 26), 1651–0027 Record of Vessel Foreign Repair or Equipment (CBP Form 226), 1651–0001 Cargo Manifest/Declaration, Stow Plan, Container Status Messages and Importer Security Filing (CBP Form 1302), 1651–0018 Ships Stores Declaration (CBP Form 1303), 1651–0020 Crew Effects Declaration (CBP Form 1304), 1651–0005 Application-Permit-Special License Unlading/Lading, Overtime Services (CBP Form 3171).

PETE FLORES,
Executive Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, November 21, 2022 (85 FR 70850)]

NOTE: This order is nonprecedential.

U.S. Court of Appeals for the Federal Circuit

HITACHI ENERGY USA INC., Plaintiff-Appellee v. UNITED STATES, Defendant-Appellee HYUNDAI HEAVY INDUSTRIES CO., LTD., HYUNDAI CORPORATION, USA, Defendants-Appellants

Appeal No. 2020–2114

Appeal from the United States Court of International Trade in No. 1:16-cv-00054-MAB, Judge Mark A. Barnett.

ON PETITION FOR PANEL REHEARING

Before NEWMAN, LOURIE, and DYK, *Circuit Judges*.
PER CURIAM.

ORDER

Appellee Hitachi Energy USA Inc. filed a combined petition for panel rehearing and rehearing en banc. Responses were invited by the court and filed by Appellee the United States and Appellants Hyundai Corporation, USA and Hyundai Heavy Industries Co., Ltd.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied. However, the previous precedential opinion issued May 24, 2022, is modified as follows:

On page 16, line 12, after "unqualified" insert "in the circumstances of this case."

FOR THE COURT

Dated: November 23, 2022

/s/ Peter R. Marksteiner
PETER R. MARKSTEINER
CLERK OF COURT

U.S. Court of International Trade

Slip Op. 22–125

DONGKUK S&C CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and WIND TOWER TRADE COALITION, Defendant-Intervenor.

Before: Leo M. Gordon, Judge
Court No. 20–03686

[Sustaining Commerce's surrogate data selection from the *Final Determination*, and Commerce's *Remand Results* as to steel plate cost smoothing.]

Dated: November 17, 2022

Robert G. Gosselink, *Jarrod M. Goldfeder*, and *MacKensie R. Sugama*, Trade Pacific PLLC, of Washington, D.C., for Plaintiff Dongkuk S&C Co., Ltd.

Joshua E. Kurland, Senior Trial Counsel, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, Washington, D.C., for Defendant United States. With Mr. Kurland on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Jesus N. Saenz*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, Washington, D.C.

Alan H. Price, *Robert E. DeFrancesco III*, and *Derick G. Holt*, Wiley Rein LLP, of Washington, D.C., for Defendant-Intervenor Wind Tower Trade Coalition.

OPINION

Gordon, Judge:

This action involves the U.S. Department of Commerce's ("Commerce") final affirmative determination in the antidumping ("AD") duty investigation of utility scale wind towers ("wind towers") from the Republic of Korea. *See Utility Scale Wind Towers from the Republic of Korea*, 85 Fed. Reg. 40,243 (Dep't of Commerce July 6, 2020) ("*Final Determination*"), and the accompanying Issues and Decision Memorandum, A-580–902, PD[1] 324 (Dep't of Commerce June 29, 2020), https://enforcement.trade.gov/frn/summary/korea-south/2020–14438–1.pdf (last visited this date) ("*Decision Memorandum*").

Before the court is Commerce's Final Results of Redetermination Pursuant to Court Remand, ECF No. 54–1 ("*Remand Results*"), filed pursuant to the court's remand order in *Dongkuk S&C Co. v. United*

[1] "PD" refers to a document in the public administrative record, which is found in ECF No. 15–3, unless otherwise noted. "CD" refers to a document in the confidential administrative record, which is found in ECF No. 15–2, unless otherwise noted.

States, 45 CIT ___, 548 F. Supp. 3d 1376 (2021) ("*Dongkuk I*"). *See* Pl. Dongkuk S&C Co. Ltd.'s ("DKSC") Comments in Opp'n Final Results of Remand Redetermination Pursuant to Ct. Remand, ECF No. 58[2] ("Pl.'s Cmts."); *see also* Def.'s Remand Resp. Comments, ECF No. 62 ("Def.'s Resp."); Def.-Intervenor Wind Tower Trade Coalition's Comments on Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 65. Additionally, the court will consider DKSC's challenge to Commerce's selection of surrogate financial data that was reserved in *Dongkuk I*. *See Dongkuk I*, 45 CIT at ___, 548 F. Supp. 3d at 1382. The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2018),[3] and 28 U.S.C. § 1581(c). For the reasons that follow, the court sustains the *Remand Results*, as well as Commerce's selection of surrogate data in its *Final Determination*.

I. Background

The court presumes familiarity with the procedural history of and the prior decision in this action; however, the court highlights the following background information as an aid to the reader. DKSC is a mandatory respondent in the underlying investigation. *See Final Determination*, 85 Fed. Reg. at 40,243. Wind towers are large structures designed to support the nacelle and rotor blades of a wind turbine and may vary in height, weight, and other physical characteristics. *See Dongkuk I*, 45 CIT at ___, 548 F. Supp. 3d at 1379. Wind towers typically consist of three to five cylindrical or conical sections, with each section consisting of multiple steel plates—the main material input—rolled and welded together to create a steel shell. *Id.* At the outset of its investigation, Commerce identified the 11 most significant characteristics differentiating the cost between completed wind towers. *Id.* at ___, 548 F. Supp. 3d at 1379 n.3 (listing characteristics). When combined, the physical characteristics identified by Commerce define unique products, *i.e.*, CONNUMs,[4] used for sales comparison purposes. *Id.* at ___, 548 F. Supp. 3d at 1379 (citing

[2] All citations to the *Remand Results*, the agency record, and the parties' briefs are to their confidential versions unless otherwise noted.

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

[4] A "CONNUM" is a contraction of the term "control number," and is Commerce jargon 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 deemed to be identical are part of the same CONNUM and are regarded as "identical" merchandise for the purposes of price comparison. The hierarchy of product characteristics defining a unique CONNUM varies from case to case depending on the nature of the subject merchandise.

Decision Memorandum at 21). Commerce then determined that a wind tower's height and weight were the two of the most important physical characteristics of a completed wind tower. *Decision Memorandum* at 21; *see also Dongkuk I*, 45 CIT at ___, 548 F. Supp. 3d at 1380.

Commerce rejected DKSC's reported specific steel plate costs for each individual wind tower during the period of investigation ("POI"), finding that those costs "were significantly different between [CONNUMs] sold in the Japanese comparison market and those sold in the U.S. market." *Decision Memorandum* at 19. To determine the cause of price differences in each of those markets, Commerce analyzed DKSC's reported costs "[u]sing physical characteristics as [its] guidepost" and "grouping CONNUMs by the related height and weight physical characteristics, and the steel plate cost differences between steel grades and dimensions (*i.e.*, thickness, width, or height) within the same time period." *Id.* at 22. As a result, Commerce concluded that the "overwhelming factor" causing the variation in those costs was the timing of the steel plate input purchase, not the physical characteristics of the subject merchandise. *Id.* at 22. Commerce then adjusted the steel plate costs to address distortions not attributable to the physical characteristics of the wind tower by weight averaging "the reported steel plate costs for all reported CONNUMs." *Id.* at 21.

In this action, DKSC challenged Commerce's decision to adjust DKSC's reported steel plate costs under 19 U.S.C. § 1677b(f)(1)(A), as well as the agency's selection of surrogate financial data to calculate DKSC's constructed value profit and selling expenses under 19 U.S.C. § 1677b(e)(2)(B)(iii). *See* Mem. in Supp. of Mot. for J. upon the Agency R. of Dongkuk S&C Co., Ltd. at 3–11, 17–26, ECF No. 22 ("Pl.'s Br."). After observing that there did not appear to be anything in the record "that supports a conclusion that Commerce did in fact group CONNUMs by any of the 11 physical characteristics or otherwise use those characteristics as a 'guidepost,'" the court remanded Commerce's steel plate cost adjustment for reconsideration or additional explanation. *Dongkuk I*, 45 CIT ___, 548 F. Supp. 3d at 1381. As noted above, the court also reserved decision on DKSC's challenge to Commerce's selection of surrogate financial data.

II. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" 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). More specifically, when reviewing agency determi-

nations, findings or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. V. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must also take into account whatever in the record fairly detracts from its weight."). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr. *Administrative Law and Practice* § 9.24[1] (3d ed. 2022). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2022).

III. Discussion

A. Steel Plate Cost Adjustment

In an antidumping duty investigation where Commerce is to determine whether sales of the foreign like product were made at less than the cost of production of the subject merchandise, Commerce normally calculates costs based on the company's records. These records are used "if such records are kept in accordance with the generally accepted accounting principles of the exporting country ... and reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). In applying this provision, Commerce determined that it will "adjust costs to address distortions when it encounters cost differences that are attributable to factors beyond differences in the products' physical characteristics." *See Remand Results* at 4 (citing *Thai Plastic Bags Indus. Co. v. United States*, 746 F.3d 1358 (Fed. Cir. 2014) and *NEXTEEL Co. v. United States*, 43 CIT ___, ___, 355 F. Supp. 3d 1336, 1361–62 (2019)). Here, Commerce identified all purchases of steel plate of varying dimensions that occurred within the POI that were used to produce

two different CONNUMs. *See id.* at 5. Commerce then performed a "like for like" comparison by examining the purchases made in the same month of different dimensions and grades of steel plate that were used to produce those two CONNUMs. *Id.* Commerce found virtually no cost difference on a per-unit weight basis for the different grades and dimensions of steel plate used. *Id.* Commerce explained that "if the cost of the steel plate varied significantly, it would have been due to grade and dimensional differences in the steel plate used to produce the different types of wind towers, which would have explained the significant steel plate cost differences between CONNUMs of differing weights and heights." *Id.* Commerce, however, found "that, after neutralizing the effect of timing, there was virtually no difference in the cost associated with the different dimensions and grades of steel plate purchases used to produce the CONNUMs analyzed." *Id.* at 5–6 (further noting that "the analysis showed that the purchase price for input steel plate in the selected month was very consistent, despite the fact that the steel plate was incorporated into finished wind towers with different physical characteristics (*i.e.*, weight and height), while DKSC's reported per-unit costs for the two selected CONNUMs reflected significant cost differences for the steel plate input"). Consequently, Commerce determined that the material cost differences reported in DKSC's database were not attributable to the physical characteristics defining the CONNUMs, but rather due to the timing of the steel plate purchases. *Id.*

Based on these findings, Commerce again found that DKSC's reported steel plate costs did not reasonably reflect the cost of producing the wind towers. Commerce therefore continued to adjust DKSC's reported costs under § 1677b(f)(1)(A) to "address distortions where cost differences occurred that were not attributable to the physical characteristics of the products." *See Remand Results* at 1, 10. Commerce explained that "its analysis of the dimensions (*i.e.*, thickness, width, and height/length) of the steel plate input is an appropriate and reasonable basis to use in the analysis to determine if adjustment is warranted because the steel plate input directly impacts the weight and height physical characteristics of the differing wind towers produced." *See id.* Commerce also observed that its prior analysis of the dimensions of the steel plate input is reasonable because the steel plate input directly impacts the physical characteristics of the finished wind towers. *See id.* at 9. Commerce therefore determined that DKSC's reported costs required a smoothing adjustment in order to accurately reflect the cost to produce the subject wind towers. *See id.* at 9–10.

DKSC contends that Commerce's *Remand Results* do not comply with the court's instructions in *Dongkuk I*, arguing that the court directed Commerce to "explain and/or demonstrate how DKSC's reported cost differences were *not* attributable to the physical characteristics of the finished wind towers." Pl.'s Cmts. at 2. DKSC maintains that Commerce wrongly focused on the steel plate input dimensions, rather than addressing the finished product dimensions as ordered by the court. *Id.* at 3. DKSC's argument ignores the fact that the standard for the court's review is whether Commerce's decision-making is reasonable given the circumstances provided by the record as a whole, not whether the agency "complied with the court's order." *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

In *Dongkuk I*, the court held that Commerce's *Final Determination* lacked analytical support, specifically noting that the record did not reflect how Commerce evaluated the CONNUMs in light of the 11 identified physical characteristics, or how it used such characteristics as a "guidepost" for its analysis. *See Dongkuk I*, 45 CIT at ___, 548 F. Supp. 3d at 1381 (observing that without such support in record, "Commerce's analysis may not constitute a reasonable application of 19 U.S.C. § 1677b(f)(1)(A)"). While the court concluded that "the record fails to demonstrate how Commerce's analysis could lead a reasonable mind to conclude that DKSC's reported costs did not reflect the cost to produce and sell the subject merchandise," *see Dongkuk I*, 45 CIT at ___, 548 F. Supp. 3d at 1382, Plaintiff's challenge to the *Remand Results* focuses solely on a narrow reading of the language in the court's remand order rather than the substance of the *Remand Results*. In remanding this matter, the court ordered that Commerce further explain its "adjustment for steel plate costs," and if appropriate, reconsider its cost analysis under 19 U.S.C. § 1677b(f)(1)(A). *Dongkuk I*, 45 CIT at ___, 548 F. Supp. 3d at 1382.

On remand, Commerce provided a more thorough explanation as to how and why its cost analysis and the record supported its determination to reject DKSC's reported steel plate costs in accordance with 19 U.S.C. § 1677b(f)(1)(A). *See Remand Results* at 3–10, 19–27. Specifically, Commerce noted that it considered variations in DKSC's reported costs and concluded that such discrepancies warranted adjustment as they not caused by differences in physical characteristics of the finished wind towers. *Id.* Given this, the court does not agree with DKSC that Commerce failed to comply with the court's remand order.

DKSC also contends that: (1) the *Remand Results* do not support Commerce's conclusion that steel plate is an appropriate basis to determine if an adjustment to DKSC's reported costs is warranted

because steel plate does not dictate a wind tower's physical characteristics, Pl.'s Cmts. at 3–7; (2) Commerce failed to consider whether the physical characteristics of the finished wind towers also impact costs, Pl.'s Cmts. at 7–10; and (3) evidence cited by Commerce confirms cost differences are related to the physical characteristics of the completed wind towers. Pl.'s Cmts. at 11–14.

The court is not persuaded by Plaintiff's arguments. Commerce's explanation of its cost analysis on remand supports a conclusion that Commerce grouped CONNUMs by the physical characteristics of height and weight and used them as guideposts. To that end, Commerce found that the steel plate used in producing the subject merchandise impacts those physical characteristics of the completed wind towers and that "the cost of the steel plate consumed is the *only* factor that ultimately determines the raw material cost of the wind tower." *Remand Results* at 19.

During the investigation, DKSC noted that "fluctuating raw material prices during the POI" led to differing reported plate costs for DKSC's reported CONNUMs sold in the comparison market (Japan) and CONNUMs sold in the U.S. market. Resp. of Dongkuk S&C Co., Ltd. to Dep't's Feb. 5, 2020 Supp. D Questionnaire S6–2, Feb. 12, 2020, PD 278, CD 190. In order to neutralize the impact the time of purchase may have had on steel plate costs, Commerce identified purchases of steel plate required to produce two different CONNUMs in a one-month period, *i.e.*, September 2018, and compared the reported costs. If, as DKSC suggests, the variation in steel plate costs was due to the height and weight physical characteristics, Commerce anticipated that its comparison of two CONNUMs, varying in height and weight, would result in different steel plate costs for each CONNUM. *Remand Results* at 5. Yet, as Commerce explains, its analysis showed no difference in steel plate costs between the two CONNUMs. *Id.* at 5–6.

Commerce also compared the steel plate cost of a particular CONNUM in May 2018 and September 2018. *Id.* at 26–27. The comparison "showed that the per-unit costs of steel plate purchased to build this wind tower increased from ... May 2018 to ... September 2018." *Id.* at 26. Commerce concluded that the timing of the steel plate purchase affected the price because "[n]either the physical characteristics of the wind tower, nor the type of steel plate purchased for its construction changed during this period." *Id.* at 26–27.

DKSC argues remand is again warranted because Commerce did not conduct "a comprehensive analysis" or focus on the CONNUM characteristics of the finished wind towers as Commerce's analysis compared "a subset of steel plate costs within a subset of two months

for only a limited number of CONNUMs . . . .” Pl.’s Cmts. at 13. DKSC further maintains that Commerce has failed to demonstrate significant steel plate cost differences across CONNUMs. *Id.* DKSC’s arguments, however, do little more than ask the court to reweigh the evidence. *See Downhole Pipe & Equipment, L.P. v. United States*, 776 F.3d 1369, 1376 (Fed. Cir. 2015) (“It is not for this court on appeal to reweigh the evidence or to reconsider questions of fact anew.” (internal citation omitted)). The *Remand Results* demonstrate that Commerce compared and made findings as to the differences in steel plate costs across CONNUMs, differing in height and weight physical characteristics using a “like for like” comparison, *Remand Results* at 4–7, considered evidence detracting from its findings, *id.* at 19, 21–25, and explained the rationale for its ultimate determination, consistent with its statutory obligation.

Contrary to Plaintiff’s argument, by comparing both the steel plate costs for CONNUMs with differing height and weight physical characteristics in an isolated time period, as well as comparing the steel plate costs for the same CONNUM across different time periods, Commerce used those physical characteristics as guideposts for its analysis under § 1677b(f)(1)(A). *See* 19 U.S.C. § 1677b(f)(1)(A); *see also, e.g.*, *Marmen Inc. v. United States*, 45 CIT ___, 545 F. Supp. 3d 1305 (2021) (upholding Commerce’s adjustment to steel plate input costs for wind towers where Commerce determined that cost variation was unrelated to physical characteristics of the wind towers); *NEXTEEL Co. v. United States*, 43 CIT ___, 355 F. Supp. 3d 1336 (2019) (upholding Commerce’s adjustment to reported cost of input where price of input declined substantially during period of review). Given this analysis, it was reasonable for Commerce to determine that DKSC’s reported costs were not reflective of the costs associated with the production and sale of the subject merchandise, and to adjust those costs accordingly.

In explaining its cost adjustment rationale, Commerce also relied on the determination in the AD investigation of wind towers from Canada. *See Remand Results* at 9 (citing *Utility Scale Wind Towers from Canada*: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances, 85 Fed. Reg. 40,239 (Dep’t of Commerce July 6, 2020) (“*Wind Towers from Canada*”), and accompanying Issues & Decision Memorandum at Cmt. 1 (smoothing costs for steel plate)). Commerce noted that its similar findings of cost differences “amongst CONNUMs which were unrelated to differences in the product’s physical characteristics” justified the same approach in this proceeding as in *Wind Towers from Canada*, *i.e.*, to apply cost smoothing to the steel plate input. *Id.*

DKSC argues that *Wind Towers from Canada* cannot be relied upon because it is a prior administrative determination that "does not establish a practice that Commerce must follow or that has any precedential authority here." *See* Pl.'s Cmts at 16. As Commerce explained, both administrative proceedings involve Commerce's application of a weighted average to variable reported steel plate costs used in the construction of wind towers. *Remand Results* at 9. Although each of Commerce's determinations involve a unique combination and interaction of many variables, DKSC fails to identify what facts, if any, distinguish *Wind Towers from Canada* from this proceeding. The court therefore does not agree that Commerce acted unreasonably in relying on *Wind Towers from Canada* in reaching its determination here. Given the record as a whole, the court sustains Commerce's determination to smooth DKSC's reported steel plate costs.

B. CV Profit and Selling Expenses

When calculating constructed value, Commerce typically relies on "the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product."[5] 19 U.S.C. § 1677b(e)(2)(A). When the actual data is not available, Commerce may use "any other reasonable method" to determine the profit and selling expenses incurred and realized. 19 U.S.C. § 1677b(e)(2)(B)(iii). In selecting surrogate financial data to calculate profit and selling expenses, Commerce relies on "(1) the similarity of the potential surrogate companies' business operations and products to the respondent's business operations and products; (2) the extent to which the financial data of the surrogate company reflects sales in the home market and does not reflect sales to the United States; ... (3) the contemporaneity of the date to the POI; ... [and (4)] the extent to which the customer base of the surrogate and the respondent were similar." *Decision Memorandum* at 26 (citing *Pure Magnesium from Israel*, 66 Fed. Reg. 49,349 (Dep't of Commerce Sept. 27, 2001) (notice of final determination of sales at less than fair value) and the accompanying Issues and Decision Memorandum Cmt. 8, A-821–813 (Dep't of Commerce Sept. 27, 2001)). Commerce generally relies on financial statements which have "completed and fully translated audited financial

[5] These expenses are colloquially referred to as profit and selling expenses. *See Decision Memorandum* at Cmt. 8.

statements and accompanying notes on the record." *Id.* Here, Commerce selected the 2018 consolidated financial statement from SeAH Steel Holdings Corporation's ("SSHC") as the basis for its constructed value calculations.

DKSC argues that Commerce's decision to calculate constructed value using SSHC's 2018 consolidated financial statement is unsupported by substantial evidence because SSHC's consolidated financial statement included financial data for products not comparable to wind towers and included six months of financial data outside the POI. Pl.'s Br. at 18. DKSC contends that Commerce should instead use the standalone financial statement of SeAH Steel Corporation because it reflects "financial results from September 1, 2018 to December 31, 2018, a period falling entirely within the POI," and reports "financial results from the exclusive production of comparable merchandise." *Id.* at 18–19.

While Plaintiff may have preferred that Commerce select SeAH Steel Corporation's financial statement, Plaintiff has failed to demonstrate that Commerce acted unreasonably by selecting SHCC's statement instead. Commerce explained that the record contained 11 possible surrogate sources for calculating DKSC's constructed value profit and selling expenses. *Decision Memorandum* at 25. In support of selecting SHCC's consolidated financial statement, Commerce explained that only SHCC's consolidated financial statement was complete and satisfied all four of the criteria relied on by Commerce. *Id.* at 26–27. While Commerce acknowledged that business activities unrelated to the comparable merchandise were included in the consolidated financial statement, it explained that SHCC's statement "is the only option on the record that includes 12 months of financial data, and reflects profits on the production and sale of comparable merchandise that is produced and sold in the Korean market." *Id.* at 27. Commerce considered Plaintiff's argument to use SeAH Steel Corporation's standalone financial statement, but ultimately rejected it because, although it reflects the production of comparable merchandise, it does "not reflect a full year of financial results." *Id.* Accordingly, the court sustains as reasonable Commerce's use of SHCC's consolidated financial statement to calculate DKSC's profit and selling expenses under 19 U.S.C. § 1677b(e)(2)(B)(iii).

IV. Conclusion

For the foregoing reasons, the court sustains Commerce's determination that DKSC's reported steel plate costs do not reasonably reflect the cost of producing the wind towers and its adjustment of those costs by using a weighted average, as well as Commerce's use of

SHCC's consolidated financial statement to construct DKSC's profit and selling expenses. Judgment will enter accordingly.

Dated: November 17, 2022
New York, New York

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

Slip Op. 22–126

GREENFIRST FOREST PRODUCTS, and GREENFIRST FOREST PRODUCTS (QC) INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 22–00097

[Remanding the U.S. Department of Commerce's denial of plaintiffs' request for a changed circumstances review.]

Dated: November 18, 2022

Yohai Baisburd, *Sarah E. Shulman*, and *Jonathan Zielinski*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for plaintiffs GreenFirst Forest Products Inc. and GreenFirst Forest Products (QC) Inc.

Bret R. Vallacher, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant United States. Also on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Claudia Burke*, Assistant Director. Of counsel was *Jesus N. Saenz*, Attorney, Office of the Chief Counsel for Trade, Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Kelly, Judge:

Plaintiffs GreenFirst Forest Products Inc. and GreenFirst Forest Products (QC) Inc. (collectively, "GreenFirst") challenge the U.S. Department of Commerce's ("Commerce") refusal to conduct a changed circumstances review ("CCR") of Commerce's countervailing duty ("CVD") order covering softwood lumber from Canada. For the following reasons, the court remands Commerce's decision for further explanation or reconsideration.

BACKGROUND

On November 8, 2017, Commerce issued its final determination that the Canadian government provided countervailable subsidies for certain softwood lumber products from Canada. *Certain Softwood Lumber Products from Canada*, 82 Fed. Reg. 51,814 (Dep't Commerce Nov. 8, 2017) (Final Affirmative [CVD] Determination, and Final Neg. Determination of Critical Circumstances), as amended by *Certain Softwood Lumber Products from Canada*, 83 Fed. Reg. 347 (Dep't Commerce Jan. 3, 2018) (Amended Final Affirmative [CVD] Determination and [CVD] Order) ("*Softwood Lumber from Canada*"). When Commerce initially imposed the resulting CVDs, Rayonier A.M. Canada G.P. ("RYAM") was a Canadian softwood lumber producer subject to the CVD order. Compl. ¶ 2, Mar. 25, 2022, ECF No. 2. However, Commerce did not select RYAM as a respondent, so Com-

merce assigned it the "all-others rate" of 14.19%. *See Softwood Lumber from Canada*, 83 Fed. Reg. at 348. Although RYAM requested to be reviewed in subsequent administrative reviews, it was not selected for review and Commerce assigned RYAM the "non-selected companies rate." Compl. ¶ 2; *Certain Softwood Lumber Products from Canada*, 86 Fed. Reg. 68,467 (Dep't Commerce Dec. 2, 2021) (Final Results of the [CVD] Admin. Review, 2019), as amended by *Certain Softwood Lumber Products from Canada*, 87 Fed. Reg. 1,114, 1,115, 1,117 (Dep't Commerce Jan. 10, 2022) (Notice of Amended Final Results of the [CVD] Admin. Review, 2019). As a non-selected company, RYAM's cash deposit rate is 6.32% based on the most recently completed administrative review. *Id.*[1]

GreenFirst claims it is the successor-in-interest to RYAM. Compl. ¶¶ 3–4. GreenFirst acquired RYAM's entire lumber and newsprint business, including RYAM's mills, inventory, employees, customers, and vendor relationships on August 28, 2021. *Id.* ¶¶ 2–3.[2] On October 4, 2021, GreenFirst requested that Commerce conduct a CCR to determine that it is RYAM's successor-in-interest. *Id.* ¶¶ 4, 13, Attach. A. If Commerce determines that GreenFirst is RYAM's successor-in-interest, GreenFirst would be subject to RYAM's cash deposit rate of 6.32% rather than the all-others rate of 14.19% from Commerce's initial investigation. *Id.* ¶ 4.

On November 16, 2021, Commerce denied GreenFirst's request to initiate a CCR. Compl. ¶¶ 5, 14, Attach. A. Commerce stated that as a matter of practice it does not conduct a CCR when there is evidence of a "significant change" that could have affected the nature and extent of subsidization. *Id.*, Attach. A (citing *Certain Pasta from Turkey*, 74 Fed. Reg. 47,225, 47,227–28 (Dep't Commerce Sept. 15, 2009) (Prelim. Results of [CVD CCR]), unchanged in *Certain Pasta from Turkey*, 74 Fed. Reg. 54,022 (Dep't Commerce Oct. 21, 2009) (Final Results of [CVD CCR])) ("*Pasta from Turkey*"). Commerce found that GreenFirst's acquisition of RYAM's lumber and newsprint businesses constituted a significant change, and therefore refused to initiate a CCR. *Id.* On January 18, 2022, GreenFirst requested that Commerce reconsider its refusal to initiate a CCR. Compl. ¶ 15. On February 24, 2022, Commerce denied GreenFirst's request for reconsideration, again finding that a significant change had taken place which precluded a CCR under its practice. Compl. ¶ 18, Attach. A. On March 25, 2022, GreenFirst challenged Commerce's refusal to initiate

[1] Companies which import merchandise subject to CVD orders must pay cash deposits for entries subject to ongoing administrative reviews at the rate assigned to them during the most recently completed administrative review. 19 C.F.R. § 351.212(a).

[2] GreenFirst claims it did not produce lumber prior to August 2021. Compl. ¶ 2.

a CCR as arbitrary and capricious. Compl. ¶¶ 24, 27. GreenFirst filed a motion for judgment on the agency record, which is before the court. Pl.'s Mot. J. Agency Rec., July 29, 2022, ECF No. 22 ("Pl.'s Mot."); Memo. Points of Law and Fact Support [Pl.'s Mot.], July 29, 2022, ECF No. 22 ("Pl.'s Br.").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 28 U.S.C. § 1581(i)(2), (4) (2018). The court reviews an action brought under 28 U.S.C. § 1581(i) under the same standards as provided under section 706 of the Administrative Procedure Act ("APA"), as amended. *See* 28 U.S.C. § 2640(e). Under the statute, the reviewing court shall:

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law

5 U.S.C. § 706(1), (2)(A).

Under the arbitrary and capricious standard, courts consider whether the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [the decision] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Alabama Aircraft Indus., Inc. v. United States*, 586 F.3d 1372, 1375 (Fed. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

DISCUSSION

GreenFirst contends Commerce arbitrarily and capriciously deviated from its practice of conducting CCRs for successor-in-interest companies by relying upon an inapposite exception to its practice. Pl.'s Br. at 4–9. It argues, and Defendant concurs, that Commerce's practice is to conduct successor-in-interest CCRs except where there is evidence of significant changes that could affect the subsidy rate calculated for the predecessor company. *Id.* at 5; Def.'s Resp. to [Pl.'s Mot], 6, Sept. 6, 2022, ECF No. 23 ("Def.'s Br."). However, GreenFirst argues that Commerce's exception to its practice only applies where: (1) the predecessor company was individually examined, and (2) the

successor company will be administratively reviewed. Pl.'s Br. at 6. GreenFirst argues neither prerequisite is present, and therefore Commerce's reliance on its significant changes practice is arbitrary. *Id.* at 9. Defendant argues Congress delegated to Commerce the authority to set criteria for CCRs, which Commerce has done by explaining that it will only conduct a CCR where there is no evidence of significant changes to the company, and that its practice is reasonable. Def.'s Br. at 6–7. For the reasons that follow, the court remands Commerce's denial of GreenFirst's request for a CCR for further explanation or reconsideration.

Pursuant to section 751(b) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(b)(1) (2018),[3] Commerce shall review an affirmative CVD determination whenever it receives information from an interested party which shows "changed circumstances sufficient to warrant a review of such determination." *Id.* The statute does not define "changed circumstances." Through practice, Commerce has established that successor-in-interest companies may be entitled to a CCR. *See, e.g.*, Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Not. of Initiation and Prelim. Results of [CVD CCR], 87 Fed. Reg. 10,772, 10,773 (Feb. 25, 2022) (finding a respondent was a successor-in-interest for CVD purposes); Certain Cold-Rolled Steel Flat Products and Certain Corrosion-Resistant Steel Products from the Republic of Korea: Prelim. Results of [CVD CCRs], 86 Fed. Reg. 287, 287, (Jan. 5, 2021) (finding a respondent was not a successor-in-interest for CVD purposes).

Commerce has further established that it will not conduct a successor-in-interest CCR when there is evidence of significant changes to a company. In *Pasta from Turkey*, Commerce explained the rationale for its significant changes practice:

> As a general rule, in a CVD CCR, the Department will make an affirmative CVD successorship finding (i.e., that the respondent company is the same subsidized entity for CVD cash deposit purposes as the predecessor company) where there is no evidence of significant changes in the respondent's operations, ownership, corporate or legal structure during the relevant period . . . that could have affected the nature and extent of the respondent's subsidy levels.

Pasta from Turkey, 74 Fed. Reg. at 47,227. As illustrated by *Pasta from Turkey*, Commerce has concluded that because it will not allow

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

a putative successor-in-interest company with significant changes to acquire the cash deposit rate of a predecessor company, it will not conduct a CCR where it has evidence of significant changes. *Id.* at 42,225, 42,227. Thus, Commerce uses its significant changes practice as a screening mechanism to weed out CCR requests where changes in the company may have impacted the rate of subsidization. *See, e.g.*, Commerce Ltr. re: POSCO Request for [CCR], bar code 4260700–01 (July 6, 2022) (declining to conduct CCR due to significant changes in respondent); Commerce Ltr. re: CHAP Request for [CCR], bar code 4140114–01 (July 6, 2021) (declining to conduct CCR under *Pasta from Turkey* practice).

This court held that Commerce's significant changes practice as articulated in *Pasta from Turkey* was reasonable in *Marsan Gida Sanayi Ve Ticaret A.S. v. United States*, 35 CIT 222, 225 (2011) ("*Marsan*"). The court explained that a CVD CCR determines whether a company is the same subsidized entity as a predecessor company; if the company is the same, then the CCR will allow it to obtain the same rate. *Id.* at 231. If the successor is different from its predecessor, it would likely have different levels of subsidization such that it would be inappropriate for it to obtain the predecessor's rate. *Id*. at 231–32. The respondent in *Pasta from Turkey* had been individually examined in the prior administrative review, and Marsan sought a CCR claiming to be its successor-in-interest. *Certain Pasta from Turkey: Final Results of [CVD] Admin. Rev.*, 71 FR 52,774 (Sept. 7, 2006) (final determination of CVD rate for respondent). Marsan challenged Commerce's denial of its CCR request and assignment of the all-others rate, arguing that a change in the company's ownership should not, as a significant change, automatically preclude a successorship finding in the CVD context. *Marsan*, 35 CIT at 226. The court held Commerce's practice was reasonable, stating "subsidization often seeks to stabilize a company's financial position or facilitate investment." *Id.* at 231. Thus, the court reasoned "changes in a company's name, ownership pr structure because of corporate reorganization, merger or acquisition by another company are relevant to subsidy benefits." *Id.*

In this case it is unclear from Commerce's explanation why its significant change practice applies. In denying the request for a CCR Commerce invokes its *Pasta from Turkey* practice explaining when a significant change is present Commerce finds it "inappropriate to affirm a cash deposit rate that had been calculated during a previous time period based upon a significantly different fact pattern." [CVD CCR] Decision not to Initiate, 2, Nov. 16, 2021, ECF 18–4. As ex-

plained in *Pasta from Turkey* and *Marsan*, the practice applies when a successor-in-interest stands to inherit a company's individually-calculated rate. In Commerce's letter rejecting GreenFirst's request for a CCR, Commerce notes that acquisition of RYAM's six lumber mills and one pulp mill constitutes a significant change. *Id.* Implicit in Commerce's explanation is that the rate is a function of RYAM's actual level of subsidization, which is unique to RYAM and not necessarily applicable to GreenFirst. As GreenFirst points out, however, Commerce calculated RYAM's rate by averaging the rates of non-selected companies, and not by individually examining RYAM. *See Softwood Lumber from Canada*, 83 Fed. Reg. at 348; Pl.'s Mot. at 7.

Defendant contends that Commerce's *Pasta from Turkey* practice applies regardless of whether a company has been individually examined. It explains it "does not examine *how* a 'significant change' impacted subsidization levels of the predecessor," but is only concerned with whether or not a change occurred. [CVD CCR] Request Recon. Decision not to Initiate, 2, Feb. 24, 2022, ECF 18–5 (emphasis in original). But Commerce does not explain why applying the practice in such circumstances is reasonable. Defendant argues that Commerce's rationale is distinct from its practice, Def.'s Br. at 10 ("Greenfirst provides no authority . . . for the proposition that Commerce must have calculated the former company's specific cash deposit rate via individual examination"); however, the reasonableness of Commerce's practice depends on its rationale. *See Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 966 (Ct. Int'l Trade 1986), aff'd, 810 F.2d 1137 (Fed. Cir. 1987) ("As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose . . . the court will not . . . question the agency's methodology"). Here, because RYAM was never individually examined, the court cannot discern why it would be reasonable for Commerce to apply its *Pasta from Turkey* practice to deny GreenFirst's request for a CCR.[4] On remand, Commerce must either reconsider or further explain the basis for its determination that its significant changes practice applies where the predecessor company was not individually examined.

[4] GreenFirst also contends Commerce's application of its significant changes practices is arbitrary unless Commerce individually calculates the successor company's rate during a later administrative review. Pl.'s Br. at 6, 8–9. This misinterprets Commerce's practice. The reason why Commerce refuses to grant successor-in-interest status is the potential for improper inheritance of an individually-calculated rate. *See Marsan*, 35 CIT at 231–32. Commerce has not indicated that whether a company is later examined forms any part of the rationale for its significant changes practice. Indeed, such an exception would swallow the rule because, as GreenFirst admits, the vast majority of companies will never be examined. Pl.'s Br. at 9. Rather, Commerce's practice is not to calculate a new subsidy rate during a CCR, owing to the abbreviated nature of the process. *Pasta from Turkey*, 74 Fed. Reg. at 47227.

CONCLUSION

In accordance with the foregoing, it is

ORDERED that Commerce's determination is remanded for further explanation or reconsideration consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within 90 days of this date; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing of its remand redetermination; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the remand redetermination; and it is further

ORDERED that the parties shall have 30 days to file their replies to the comments on the remand redetermination; and it is further

ORDERED that the parties shall file the joint appendix within 14 days of the date of filing of responses to the comments on the remand redetermination.

Dated: November 18, 2022
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE

Slip Op. 22–127

STAR PIPE PRODUCTS, Plaintiff, v. UNITED STATES, Defendant, and ASC ENGINEERED SOLUTIONS, LLC, Defendant-Intervenor.

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

[Ordering a remand to the issuing agency of a determination that failed to comply with the court's order.]

Dated: November 18, 2022

Francis J. Sailer, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, and New York, NY, for plaintiff. With him on the submission were *Ned H. Marshak* and *Kavita Mohan*.

Joshua E. Kurland, Trial Counsel, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the submissions were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the submissions 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, DC, for defendant-intervenor. With him on the submission was *J. Michael Taylor*.

OPINION AND ORDER

Stanceu, Judge:

Plaintiff Star Pipe Products ("Star Pipe") brought this action to contest a determination (the "Final Scope Ruling") issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") on its imported ductile iron flanges. In this litigation, Commerce until recently has taken the position that ductile iron flanges are within the scope of the anti-dumping order on non-malleable cast iron pipe fittings from the People's Republic of China (the "Order").

Before the court is the Department's most recent decision ("Third Remand Redetermination"), which Commerce submitted in response to the court's opinion and order in *Star Pipe Products v. United States*, 45 CIT __, 537 F. Supp. 3d 1362 (2021) ("*Star Pipe III*"). In an effort to respond to the court's opinion and order while changing its position only under protest, Commerce stated in the Third Remand Redetermination that the flanges are not subject to the Order.

Plaintiff has commented in favor of the Department's deciding in the Third Remand Redetermination that the ductile iron flanges are outside the scope of the Order. Nevertheless, plaintiff's comments disagree with the Department's decision to issue the Third Remand Redetermination under protest and with certain assertions Commerce made therein. Defendant-intervenor, ASC Engineered Solu-

tions, LLC ("ASC"), a U.S. producer of pipe fittings, has commented in opposition to the Third Remand Redetermination.

The court issues another remand order to Commerce. The Department's latest decision misconstrues the court's opinion in *Star Pipe III* in some respects and is not itself a new scope ruling in a form that could be sustained upon judicial review. Instead, Commerce informs the court that if the court were to sustain the Third Remand Redetermination, Commerce would issue a new scope ruling accordingly. Under this proposal, Commerce would issue its final ruling outside of the court's direct review. The court orders Commerce to submit for the court's consideration a revised remand redetermination that could go into effect if sustained.

I. BACKGROUND

Background on this case is presented in the court's prior opinions and is briefly summarized and supplemented herein. *Id*., 45 CIT at __, 537 F. Supp. 3d at 1365–67; *Star Pipe Prods. v. United States*, 44 CIT __, __, 463 F. Supp. 3d 1366, 1368–70 (2020) ("*Star Pipe II*"); *Star Pipe Prods. v. United States*, 43 CIT __, __, 365 F. Supp. 3d 1277, 1278–79 (2019) ("*Star Pipe I*").

Commerce issued the antidumping duty on non-malleable cast iron pipe fittings from China in April 2003 (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 (Int'l Trade Admin. Apr. 7, 2003) ("*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 Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China (A-570–875)* (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* (P.R. Doc. 13) ("*Final Scope Ruling*").

Star Pipe brought this action contesting the Final Scope Ruling on September 15, 2017. Summons, ECF No. 1; Compl., ECF No. 4. The court remanded the Final Scope Ruling to Commerce in *Star Pipe I*, ordering Commerce to reconsider the Final Scope Ruling, and remanded it again to Commerce in *Star Pipe II* and *Star Pipe III*.

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

Commerce filed the Third Remand Redetermination in response to *Star Pipe III* on December 22, 2021. Final Results of Redetermination Pursuant to Court Order, ECF No. 96–1 ("*Third Remand Redetermination*"). ASC filed its comment in opposition to the Third Remand Redetermination on January 21, 2022. Def.-Intervenor's Comments on the Final Results of Remand Redetermination, ECF No. 97. That same day, Star Pipe filed comments on the Third Remand Redetermination. Star Pipe Products' Comments on the Third Final Remand Redetermination (Jan. 21, 2022), ECF No. 98. Defendant filed a response on February 7, 2022. Def.'s Resp. to Comments on Remand Results, ECF No. 99.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants jurisdiction over civil actions brought under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a.[2] Among the decisions that may be contested according to 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." *Id*. § 1516a(a)(2)(B)(vi). In reviewing an agency determination, including one issued in response to court remand, 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). It is also the responsibility of the court to review the agency's decision for compliance with the court's previous order.

B. 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 America Water Works Association ('AWWA') Standard C115." *Scope Ruling Request* at 3. "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.* (footnote omitted). The Scope Ruling Request states that the flanges "are for the water and wastewater industries."

[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 2017 edition.

Id. at 10, 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.").

C. Scope Language of the Order

The scope language of 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 ¼ 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. 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. Star Pipe's flanges are made from ductile cast iron. Flanges are not expressly addressed in the scope language of the Order. Pipe fittings made from ductile cast iron are addressed only in the second paragraph of the scope language. *Star Pipe III*, 45 CIT at __, 537 F. Supp. 3d at 1367–68.

D. The Court's Decisions in *Star Pipe I*, *Star Pipe II*, and *Star Pipe III*

Commerce based its decision to include Star Pipe's flanges within the scope of the Order on its conclusion that these flanges were "pipe fittings" within the meaning of that term as used in the scope language. Because the scope language does not define that term, *Star Pipe I* considered it necessary to review the Department's conclusion that Star Pipe's flanges were described by that term in light of the sources identified in 19 C.F.R. § 351.225(k)(1). In *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1283, 1286, this Court ruled that the Final Scope Ruling rested on an analysis inconsistent with the Department's regulations, which required Commerce to take into account the descriptions of the merchandise contained in the petition (the "Petition"), *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), the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the U.S. International Trade Commission ("ITC"). *See* 19 C.F.R. § 351.225(k)(1) (providing that the Secretary of Commerce will 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 [International Trade] Commission."). The court concluded that Commerce "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." *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1286 (discussing 19 C.F.R. § 351.225(k)(1)). The court reasoned that Commerce erred in relying upon certain language in the ITC Report, *Non-Malleable Cast Iron Pipe Fittings From China*, Inv. No. 731-TA-990 (Final), USITC Pub. No. 3586 (Mar. 2003), and made no mention of other, detracting evidence. *Id.*, 43 CIT at __, 365 F. Supp. 3d at 1283–86; The court also identified 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 enabling subsequent connection to a flange on another pipe or apparatus or to a flanged fitting. *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1283.

Commerce issued the first redetermination upon remand ("First Remand Redetermination") in response to *Star Pipe I*, Final Results of Redetermination Pursuant to Court Order (June 27, 2019), ECF

Nos. 55–1 (public), 56–1 (conf.) ("*First Remand Redetermination*"), in which Commerce again concluded that Star Pipe's flanges are within the scope of the Order.

In *Star Pipe II*, the court held that while the First Remand Redetermination considered all sources required under its regulation, 19 C.F.R. § 351.225(k)(1), "Commerce committed errors in analyzing the evidence in one of those sources, the ITC Report." *Star Pipe II*, 44 CIT at __, 463 F. Supp. 3d at 1379. The court also concluded that Commerce, while permissibly finding support for its conclusion in a past ruling (the "UV Ruling"), erred in relying on two other past rulings. *Id.*, 44 CIT at __, 463 F. Supp. 3d at 1376–77.[3] The court ordered Commerce to reach a new decision and 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.*, 44 CIT 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*.

In the second redetermination upon remand ("Second Remand Redetermination"), Commerce, for a third time, determined that Star Pipe's flanges were subject merchandise under the scope of the Order. Final Results of Redetermination Pursuant to Court Order (Nov. 16, 2020), ECF No. 77–1 ("*Second Remand Redetermination*"). Commerce based its decision in the Second Remand Redetermination principally on four conclusions. *Star Pipe III* found that these conclusions were not supported by substantial evidence and issued a third order of remand to Commerce. 45 CIT at __, 537 F. Supp. 3d at 1371–80.

Commerce determined in the Second Remand Redetermination that "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." *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1370 (citing *Second Remand*

[3] *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* (P.R. Doc. 13, Attach. 1) (May 12, 2017); *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* (P.R. Doc. 13, Attach. 2) (Sept. 19, 2016); *Final Scope Ruling on the Black Cast Iron Flange, Green Ductile Flange, and the Twin Tee* (P.R. Doc. 13, Attach. 3) (Sept. 19, 2008).

Redetermination at 4–24). *Star Pipe III* explained that "Commerce, under protest, disclaimed in the Second Remand Redetermination any reliance on the . . . ITC Report," *id.*, 45 CIT at __, 537 F. Supp. 3d at 1371 (citing *Second Remand Redetermination* at 9), and that "[i]n contrast, the Petition contains some evidence, consisting of the product brochures of [the petitioners], supporting a finding that, as a general matter, flanges used in piping systems are described by the term 'pipe fitting' or 'fitting.'" *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1371. The court explained that it was "reasonable for Commerce to accord weight to this evidence" in the Petition "in interpreting the meaning of the term 'pipe fittings' in the scope language" and that "interpreting this term as used in the scope language as generally encompassing flanges is not *per se* unreasonable." *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1372 (footnote omitted). The court noted, however, that the scope language makes no mention of flanges and that the list of examples of pipe fittings in the scope language (i.e., elbows, ells, tees, crosses, and reducers as well as flanged fittings) expressly mentions fittings, but not flanges. *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1372. Additionally, the court explained that the "flanged fittings" included in the list of exemplars found in the scope language of the Order "differs from the other exemplars in referring to the method of attachment of a fitting to another good" and "encompasses products mentioned in the other exemplars." *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1372 (citation omitted). The court then instructed Commerce to examine the other relevant evidence, in addition to the evidence described above, on the record that was not referenced in the Second Remand Redetermination, including "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." *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1372.

Further, Commerce concluded in the Second Remand Redetermination that the exclusion in the scope language stating that "'[d]uctile 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'" did not apply to Star Pipe's flanges. *Id.* (quoting *Order*, 68 Fed. Reg. at 16,765). The court found that certain of the findings on which Commerce relied to make this determination were not supported by substantial evidence on the record. *Id.*

Third, Commerce concluded in the Second Remand Redetermination that "the ITC Report does not contain contrary evidence suffi-

cient to alter the Department's conclusion." *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1370. In *Star Pipe I*, the court identified language in the ITC Report demonstrating 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 the ITC would not have considered ductile iron flanges to be within that scope. *Star Pipe III*, 45 CIT at __, 537 F. Supp. 3d at 1374 (citing *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1285). Ultimately, in *Star Pipe III*, the court found the Department's conclusion in the Second Remand Redetermination to be "speculative and unsupported by the ITC Report." *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1375. The court explained that 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." *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1380.

Finally, Commerce determined that "the claimed conformance of Star Pipe's flanges with AWWA specification C115 does not place Star Pipe's flanges outside of the Order." *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1370 (citing *Second Remand Redetermination* at 4–24). The court found that "Commerce reached certain findings pertaining to AWWA C110 and C115 that are not supported by substantial evidence on the record of this proceeding." *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1376. Specifically, the court stated as follows:

> 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."

Id., 45 CIT at __, 537 F. Supp. 3d at 1380 (quoting *Scope Ruling Request* Ex. 3 at Sec. 4.3.3).

At its conclusion, *Star Pipe III* explained that "[t]he 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." *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1380. Instead, the court ruled that "Commerce must conduct a more comprehensive review of the relevant record evidence that remedies the shortcomings the court has identified." *Id.*

E. The Third Remand Redetermination

The Third Remand Redetermination is not a decision in a form the court could sustain. The concluding paragraph of the Third Remand Redetermination states as follows:

> Based on the above analysis, Commerce continues to find Star Pipe's ductile iron flanges to be outside the scope of the AD order on pipe fittings from China. Should the Court sustain these Final Results of Redetermination, we will issue a revised scope ruling accordingly.

Third Remand Redetermination at 19. The Department's proposed resolution seeks court approval for a decision that, unlike the agency determination contested in this litigation, is not a scope determination but instead is preliminary to such a decision. Because it is not the actual scope determination Commerce plans to issue, it could not be put into effect should it be sustained, and the agency decision that would follow if it were sustained would escape direct judicial review. The court concludes that the Third Remand Redetermination is unsatisfactory.

The court must rule on an agency decision, including one submitted in response to court order, by considering the decision according to the reasoning the agency puts forth. *See Michigan v. EPA*, 576 U.S. 743, 758 (2015) (It is a "foundational principle of administrative law" that judicial review of agency action is limited to "the grounds that the agency invoked when it took the action." (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943))). Not only would the resolution of this litigation that the Department has offered deny the court the opportunity to review the agency's actual decision on remand, it also would provide no opportunity for the parties to comment on that decision before the court reviews it. For these reasons, the Department's proposed resolution of this litigation does not allow the court to perform its essential judicial review function, and the court, therefore, rejects it. The court is directing Commerce to issue a third remand redetermination that, like the original agency determination contested in this litigation, is a scope ruling or determination for the court's review that would go into effect if, following judicial review, it is sustained.

The failure to provide for adequate judicial review is not the only flaw in the Third Remand Redetermination. Commerce devoted most of the substantive discussion of the Third Remand Redetermination to its disagreements with certain of the issues the court decided previously. Then, in conclusion, Commerce stated that:

> As described above, we find that Star Pipe's flanges are pipe fittings that have the same physical characteristics as pipe fittings subject to the scope of the *Order*. Further, we have accepted, under respectful protest, the Court's findings regarding end use criteria for pipe fittings in the Petition and waterworks end use criteria in the ITC Report, as well as the Court's expansion of the AWWA C110 standard to also include products made to the AWWA C115 standard. Based on the above analysis, we conclude that the 11 ductile iron flanges subject to Star Pipe's scope request are outside the scope of the *Order*.

Third Remand Redetermination at 9. The Third Remand Redetermination concludes that the court reached certain "findings," expanded the AWWA C110 standard, and ordered Commerce to exclude Star Pipe's flanges from the Order. As amply demonstrated by the court's Opinion and Order in *Star Pipe III* and the summary of that decision presented above, all three of these conclusions by Commerce are incorrect. Instead, pursuant to the standard of review, the court held that certain of the Department's findings were not supported by substantial evidence on the record and that Commerce failed to address certain record evidence detracting from its determinations. The court directed Commerce to reach its own ultimate determination based on "a more comprehensive review of the relevant record evidence." *Star Pipe III*, 45 CIT at __, 537 F. Supp. 3d at 1380.

III. CONCLUSION

The Third Remand Redetermination is unsatisfactory because it is not in a form in which the court could sustain it and because it is based on invalid reasoning that misconstrues the court's opinion and order in *Star Pipe III*. Commerce must issue a new determination that decides the issue of whether or not Star Pipe's flanges are within the scope of the Order based on findings that are supported by the evidence on the record considered as a whole, including evidence detracting from its findings. Consistent with this Opinion and Order, the new determination must be in a form that would go into effect if sustained upon judicial review and be based on reasoning that does not misconstrue a previous decision of the court.

Upon consideration of the Third Remand Redetermination and all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that the Third Remand Redetermination, Final Results of Redetermination Pursuant to Court Order (Dec. 22, 2021), ECF No. 96–1, is remanded to Commerce; it is further

ORDERED that Commerce, within 30 days from the date of issuance of this Opinion and Order, shall submit a fourth redetermination upon remand ("Fourth Remand Redetermination") that complies in all respects with this Opinion and Order; it is further

ORDERED that plaintiff and defendant-intervenor shall have 15 days from the filing of the Fourth Remand Redetermination in which to submit comments to the court; and it is further

ORDERED that should plaintiff or defendant-intervenor submit comments, defendant shall have 10 days from the date of filing of the last comment to submit a response.

Dated: November 18, 2022
New York, New York

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

Slip Op. 22–128

MCC HOLDINGS doing business as CRANE RESISTOFLEX, Plaintiff, v. UNITED STATES, Defendant, and ASC ENGINEERED SOLUTIONS, LLC Defendant-Intervenor.

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

[Ordering a remand to the issuing agency of a determination that failed to comply with the court's order.]

Dated: November 18, 2022

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

Joshua E. Kurland, Trial Counsel, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief was *Bryan M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the submissions was *William M. Purdy*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Daniel L. Schneiderman, King & Spalding LLP, of Washington DC, for defendant-intervenor. With him on the submission 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 the second redetermination upon remand ("Second Remand Redetermination"), which Commerce submitted in response to the court's opinion and order in *MCC Holdings dba Crane Resistoflex v. United States*, 45 CIT __, 537 F. Supp. 3d 1350 (2021) ("*Crane I*"). Final Results of Redetermination Pursuant to Court Order (Dec. 21, 2021), ECF No. 58–1 ("*Second Remand Redetermination*"). In an effort to respond to the court's order while changing its position only under protest, Commerce stated in the Second Remand Redetermination that Crane's flanges are not subject to the Order. Plaintiff has not commented in response to the Second Remand Redetermination. Defendant-intervenor, ASC Engineered Solutions, LLC, has commented in opposition.

The court issues another remand order to Commerce. The Department's latest decision misconstrues the court's opinion in *Crane I* in some respects and is not itself a new scope ruling in a form the court

could sustain. Instead, Commerce informs the court that if the court were to sustain the Second Remand Redetermination, Commerce would issue a new scope ruling accordingly. Under this proposal, Commerce would issue its final ruling outside of the court's direct review. The court orders Commerce to submit for the court's consideration a revised remand redetermination that could go into effect if sustained.

I. BACKGROUND

Background on this case is presented in the court's prior opinion and order and is summarized and supplemented herein. *Crane I*, 45 CIT at __, 537 F. Supp. 3d at 1353–55.

Commerce issued an antidumping duty order on non-malleable cast iron pipe fittings from China (the "Order") on April 7, 2003. *Notice of Antidumping Duty Order: Non-Malleable Cast Iron Pipe [Fittings] From the People's Republic of China*, 68 Fed. Reg. 16,765 (Int'l Trade Admin.) ("*Order*"). On August 29, 2018, Crane filed a request with Commerce for a scope ruling (the "Scope Ruling Request"), which advocated that Crane's flanges are outside the scope of the Order. *Non-Malleable Cast Iron Pipe Fittings from China: Ductile Iron Lap Joint Flanges, Scope Request* (P.R. Doc. 1) ("*Scope Ruling Request*").[1] On November 19, 2018, Commerce determined Crane's flanges to be within the scope of the Order (the "Final Scope Ruling"). *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* (P.R. Doc. 16) ("*Final Scope Ruling*").

Crane brought this action on December 19, 2018, to contest the Final Scope Ruling. Summons, ECF No. 1; Compl., ECF No. 2.

In response to Crane's motion for judgment on the agency record, Pl. MCC Holdings dba Crane Resistoflex's Rule 56.2 Mot. for J. on the Agency R. (Aug. 23, 2019), ECF No. 27, defendant on December 30, 2019, filed a motion, unopposed, for this case to 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, 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 its entirety. Order 2 (Jan. 7, 2020), ECF No. 33.

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

Commerce submitted the first redetermination upon remand ("First Remand Redetermination") on April 3, 2020, in which it again concluded that Crane's flanges were within the scope of the Order. Final Results of Redetermination Pursuant to Ct. Order, ECF No. 39–1 ("*First Remand Redetermination*"). The court remanded the First Remand Redetermination to Commerce in *Crane I*, ruling that Commerce had failed to consider certain material evidence on the record and reached some conclusions that were unsupported by substantial record evidence. 45 CIT at __, 537 F. Supp. 3d at 1353.

In response to the court's order in *Crane I*, Commerce filed the Second Remand Redetermination with the court on December 21, 2021. *See Second Remand Redetermination*. Defendant-intervenor filed its comments in opposition on January 20, 2022. Def.-Intervenor's Comments on the Final Results of Remand Redetermination, ECF No. 60. Defendant replied to the comments on February 4, 2022. Def.'s Resp. to Comments on Remand Results, ECF No. 61. Plaintiff did not comment in response to the Second Remand Redetermination.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants jurisdiction over civil actions brought under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a.[2] Among the decisions that may be contested according to 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." *Id*. § 1516a(a)(2)(B)(vi). In reviewing an agency determination, including one issued in response to court order, 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).

B. The Scope Language of the Order and Crane's Flanges

The Order defined the merchandise that is within the scope in the following terms (the "scope language"):

> [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 unthreaded, regardless of industry or pro-

[2] Citations to the United States Code and to the Code of Federal Regulations are to the 2018 editions.

> 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.

Crane's flanges include nine models of ductile iron lap joint flanges. *Final Scope Ruling* at 1. Each model is a single disc-shaped article made of ductile iron with an unthreaded center hole. *Scope Ruling Request* at 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 described an assembled lap joint as consisting of two 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, Ex. 1. The Scope Ruling Request added 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.

C. Defendant's Decision to Seek a Remand Following the Decision of this Court in *Star Pipe I*

In the Final Scope Ruling, Commerce ruled that five out of nine of Crane's flanges were within the scope of the Order. *Final Scope Ruling* at 1. Following Crane's contesting the Final Scope Ruling in this Court, defendant based its motion for a remand on this Court's decision in *Star Pipe I*, in which this Court concluded 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" and "failed to give fair and adequate consideration to record evidence contained in the final injury determination of the ITC [U.S. International Trade Commission] that detracts from its conclusion." *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1282. The regulation, as in effect for the proceedings at issue in this case, instructed that Commerce will 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 [International Trade] Commission." 19 C.F.R. § 351.225(k)(1).

D. The Department's First Remand Redetermination

Based on a premise that Crane's flanges are "pipe fittings" for purposes of the scope language, Commerce concluded that these products are specifically described by the first sentence of the second paragraph of the scope language Order. *Crane I*, 45 CIT at __, 537 F. Supp. 3d at 1357 (citing *First Remand Redetermination* at 3–5). Specifically, the First Remand Redetermination found that five of Crane's 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. Commerce also found in the First Remand Redetermination, and plaintiff did not dispute, that the flanges it ruled to be within the scope have unthreaded inside diameters and that the inside diameters of five of the models were within the size range described in the first paragraph of the scope language of the Order. *First Remand Redetermination* at 4–5; *Order*, 68 Fed. Reg. at 16,765 ("[F]inished and unfinished nonmalleable cast iron pipe fittings with an inside diameter ranging from 1/4 inch to 6 inches, whether threaded or unthreaded"). Addressing the sources described in its regulation, 19 C.F.R. § 351.225(k)(1), Commerce concluded that evidence attached as exhibits to the antidumping duty petition (the "Petition"), *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) (P.R. Docs.

18–21, Attach. I), showed that the petitioners had intended to include products such as these in proposing a scope for the antidumping investigation and that evidence in the International Trade Commission'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) ("*ITC Report*"), and three prior Commerce Department scope rulings supported a conclusion that these products constituted in-scope merchandise.

E. The Court's Decision in *Crane I*

Commerce based its decision in the First Remand Redetermination to include Crane's flanges within the scope of the Order on its conclusion that these flanges were "pipe fittings" within the meaning of that term as used in the scope language. Because the scope language does not define that term, *Crane I* considered it necessary to review the Department's conclusion that Crane's flanges were described by that term in light of the sources identified in 19 C.F.R. § 351.225(k)(1). *Crane I* held that Commerce, although identifying what it considered to be support for its decision, "failed to base its First Remand Redetermination on findings supported by substantial evidence, when that record is considered on the whole." *Crane I*, 45 CIT at __, 537 F. Supp. 3d at 1362.

In disagreeing with critical findings and conclusions Commerce had reached, *Crane I* pointed to evidence in the Petition detracting from the Department's conclusion. It ruled, further, that Commerce misinterpreted aspects of the ITC Report and ignored evidence therein supporting a conclusion that Crane's flanges are not subject to the Order. *Crane I* explained, regarding prior Commerce Department determinations, why two of the prior scope rulings upon which Commerce relied were directed to flanged fittings, not flanges, and that the third ruling Commerce cited erred by misinterpreting the first two rulings and the ITC Report.

As to the Petition, *Crane I* stated that while Commerce permissibly relied upon brochures included as exhibits to that document as evidence in support of the conclusion that the petitioners "'intended to cover flanges in the scope of the *Order*,'" 45 CIT at __, 537 F. Supp. 3d at 1357 (quoting *First Remand Redetermination* at 6), the brochures alone were not determinative on that issue.

Crane I explained that "[n]either the body of the Petition, nor the scope language of the Order that culminated from the investigation it launched, specifically addresses flanges." *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1357. This Court added, further, that Commerce failed to

address "certain language in the Petition" that "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." *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1357–58.

Second, this Court considered the conclusions Commerce drew from the ITC Report in the First Remand Redetermination to be unsupported by the text of that document. *Crane I* pointed to language in the ITC Report indicating that "the ITC declined to broaden the scope of the domestic like product to include flanged fittings made of ductile iron" and that "the ITC defined the scope of the domestic like product as corresponding to the scope of its injury and threat investigation." *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1359 (citing *ITC Report* at 7–8). In the First Remand Redetermination, Commerce disagreed with the ITC's finding that ductile iron flanged fittings were outside the scope of the Order, reasoning that such an interpretation contradicted the scope language. *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1359. Specifically, Commerce noted that the scope language contains an express exclusion for certain ductile cast iron fittings that conform to specified AWWA standards, signifying that ductile cast iron fittings not conforming to the exclusion are subject merchandise. *Id.* This Court opined in *Crane I* that the Department's disagreement with the ITC's interpretation "misses the point." *Id.* The opinion explained that "[t]he ITC was aware of the specific exclusion Commerce provided for certain AWWA-conforming goods, and the ITC expressed no disagreement with respect to it," and 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." *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1359 (citing *ITC Report* at I-8–9). In other words, the ITC intended to exclude ductile flanged fittings from the scope of its investigation regardless of whether these goods conformed to the specific exclusion. *Crane I* explained that "[t]he 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." *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1359.

The court also described as 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" and that "ductile iron flanges share a defining physical characteristic with ductile iron flanged fittings, i.e., a flange." *Id.* Accord-

ingly, *Crane I* took issue with the agency's conclusion that "'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.'" 45 CIT at __, 537 F. Supp. 3d at 1358 (quoting *First Remand Redetermination* at 8). This Court also cast doubt upon the Department's related finding that "'Crane has provided no evidence demonstrating that the ITC excluded flanges from its analysis in its investigation.'" *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1358 (quoting *First Remand Redetermination* at 9–10). *Crane I* characterized these conclusions as "misleading and erroneous" because Commerce failed to acknowledge that "the ITC did not identify flanges as within the scope of either its investigation or the scope of its domestic like product." *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1358. The court noted that Commerce considered Crane's products to be ductile fittings that are flanges but not ductile "flanged fittings," which the ITC excluded. *Id*. The court concluded that Commerce ignored this critical context and, therefore, overlooked that "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." *Id.* In short, the ITC Report provided evidence that the ITC never considered products such as those described by Crane in the Ruling Request to be within the scope of its investigation and, further, identified a highly similar product as expressly excluded from that investigation.

Crane I additionally took issue with the statement in the First Remand Redetermination 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* at 8 (quoting *ITC Report* at 4)." The court viewed that the Department's conclusion that "flanges are 'pipe fittings' within the meaning of the scope language of the Order" as "unwarranted" because "[t]he 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" and that "[t]here 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." *Crane I*, 45 CIT at __, 537 F. Supp. 3d at 1360 (citations omitted). The court also concluded that the Department's finding that "'the ITC Report also specifically references certain types of flanges as being included within its definition of a pipe fitting'" was "unsupported by the evidence it cited," which was addressing a flanged fitting, not a flange. *Id.* (quoting *First Remand Redetermination* at 9).

Third, the court in *Crane I* held that Commerce erred in relying on two past rulings that did not support "a determination that flanges are pipe fittings within the meaning of the Order." *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1360–61 (citing *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1285 n.8).[3] The court further found that the "UV Ruling," *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* (P.R. Doc. 16, Attach. IV) (May 12, 2017), a third prior scope ruling, "appears to be on point, but the support it provides is limited by an erroneous analysis." *Crane I*, 45 CIT at __, 537 F. Supp. 3d at 1361. The court explained that the UV Ruling mistakenly relied on the discussion in the ITC Report of "pipe fittings" in a similar manner as the First Remand Redetermination, which the court in *Crane I* had found to be misguided. *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1362. The court reasoned, further, that the UV Ruling further erred in misinterpreting the two prior rulings (the "Taco Ruling" and "Napac Ruling") as having addressed flanges when, in fact, they were concerned with flanged fittings. *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1362 (citations omitted).

Ultimately, in remanding the First Remand Redetermination to Commerce, the court held in *Crane I* that "Commerce must reconsider its decision in light of the deficiencies the court has identified." *Id,* 45 CIT at __, 537 F. Supp. 3d at 1362. The court further explained that it "does not hold that Crane's flanges are, or are not, within the scope of the Order" and "[t]hat is a determination for Commerce to make upon remand." *Id.*

F. The Second Remand Redetermination

The Second Remand Redetermination is not a decision in a form the court could sustain. The concluding paragraph of the Second Remand Redetermination states as follows:

> Based on the above analysis, Commerce continues to find Crane's ductile iron flanges to be outside the scope of the AD order on pipe fittings from China. Should the Court affirm these Final Results of Redetermination, Commerce will issue a revised scope ruling accordingly.

Second Remand Redetermination at 13. The Department's proposed resolution seeks court approval for a decision that, unlike the agency

[3] *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* (P.R. Doc. 16, Attach. V) (Sept. 19, 2016); *Final Scope Ruling on the Black Cast Iron Flange, Green Ductile Flange, and the Twin Tee* (P.R. Doc. 16, Attach. VI) (Sept. 19, 2008).

determination contested in this litigation, is not a scope determination but instead is preliminary to such a decision. Because it is not the actual scope determination Commerce plans to issue, it could not be put into effect should it be sustained, and the agency decision that would follow if it were sustained would escape direct judicial review. The court concludes that the Second Remand Redetermination is unsatisfactory.

The court must rule on an agency decision, including one submitted in response to court order, by considering the decision according to the reasoning the agency puts forth. *See Michigan v. EPA*, 576 U.S. 743, 758 (2015) (It is a "foundational principle of administrative law" that judicial review of agency action is limited to "the grounds that the agency invoked when it took the action." (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943))). Not only would the resolution of this litigation that the Department has offered deny the court the opportunity to review the agency's actual decision on remand, it also would provide no opportunity for the parties to comment on that decision before the court reviews it. For these reasons, the Department's proposed resolution of this litigation does not allow the court to perform its essential judicial review function, and the court, therefore, rejects it. The court is directing Commerce to issue a third remand redetermination that, like the original agency determination contested in this litigation, is a scope ruling or determination for the court's review that would go into effect if, following judicial review, it is sustained.

The failure to provide for adequate judicial review is not the only flaw in the Second Remand Redetermination. The document misconstrues *Crane I* to conclude that the court made "findings" and implies that Commerce is reaching the decision to exclude Crane's flanges from the Order out of a need to implement those "findings." *Second Remand Redetermination* at 5 (". . . because the Court has held that '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,' under respectful protest, were [*sic*] are implementing the Court's findings." (quoting *Crane I*, 45 CIT at __, 537 F. Supp. 3d at 1358)). This statement also misconstrues *Crane I*. The court did not state findings, and the language from *Crane I* on which Commerce relied merely described evidence that "supports a reasonable inference." *Crane I*, 45 CIT at __, 537 F. Supp. 3d at 1358. It is Commerce, not the court, that must make factual findings. Nor did *Crane I* direct the result. The opinion stated that "Commerce must reconsider its decision in light of the deficiencies the court has identified" and that "[t]he court does not hold that Crane's flanges are, or

are not, within the scope of the Order." *Id.*, 45 CIT at __, 537 F. Supp. 3d at 1362. "That is a determination for Commerce to make upon remand." *Id*.

III. CONCLUSION AND ORDER

The Second Remand Redetermination is not in a form in which the court could sustain it and misconstrues the court's opinion and order in *Crane I*. Commerce must issue a new determination that decides the issue of whether or not Crane's flanges are within the scope of the Order based on findings that are supported by the evidence on the record considered as a whole, including evidence detracting from its findings. Consistent with this Opinion and Order, the new determination must be in a form that would go into effect if sustained upon judicial review and be based on reasoning that does not misconstrue a previous decision of the court.

Upon consideration of the Second Remand Redetermination and all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that the Second Remand Redetermination, Final Results of Redetermination Pursuant to Court Order (Dec. 21, 2021), ECF No. 58–1, is remanded to Commerce; it is further

ORDERED that Commerce, within 30 days from the date of issuance of this Opinion and Order, shall submit a third redetermination upon remand ("Third Remand Redetermination") that complies with this Opinion and Order; it is further

ORDERED that plaintiff and defendant-intervenor shall have 15 days from the filing of the Third Remand Redetermination in which to submit comments to the court; and it is further

ORDERED that should plaintiff or defendant-intervenor submit comments, defendant shall have 10 days from the date of filing of the last comment to submit a response.

Dated: November 18, 2022
New York, New York

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

Slip Op. 22–129

HISTEEL CO., LTD., AND KUKJE STEEL CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and NUCOR TUBULAR PRODUCTS INC., and ATLAS TUBE AND SEARING INDUSTRIES, Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Court No. 20–00146

[Sustaining Commerce's remand results.]

Dated: November 23, 2022

Jeffrey M. Winton, Winton & Chapman PLLP, of Washington, D.C., for Plaintiffs HiSteel Co., Ltd. and Kukje Steel Co., Ltd.

Kara Marie Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Claudia Burke*, Assistant Director. Of counsel on the brief was *Vania Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Robert E. DeFrancesco, III, *Alan H. Price*, *Enbar Toledano* and *Jake R. Frischknecht*, Wiley Rein, LLP, of Washington, D.C., for Defendant-Intervenor, Nucor Tubular Products, Inc.

Roger B. Schagrin, *Elizabeth J. Drake*, *Christopher T. Cloutier*, *Luke A. Meisner*, *William A. Fennell*, and *Kelsey M. Rule*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor, Atlas Tube, a division of Zekelman Industries, and Searing Industries.

OPINION

Katzmann, Judge:

Before the court is the U.S. Department of Commerce ("Commerce")'s remand results filed pursuant to this court's order in *HiSteel Co. v. United States*, 45 CIT __, __, 547 F. Supp. 3d 1233 (2021) ("*HiSteel I*") in connection with Commerce's final determination in the 2017–2018 administrative review of the antidumping duty ("AD") order on heavy walled rectangular welded carbon steel pipes and tubes ("HWR") from Korea. *See* Final Results of Redetermination Pursuant to Ct. Remand, Dec. 15, 2021, ECF No. 68–1 ("*Remand Results*"); *see also Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 85 Fed. Reg. 41,538 (Dep't Commerce July 10, 2020), P.R. 402 ("*Final Results*").

The court presumes familiarity with the facts and legal frameworks underpinning this case as set out in its previous opinion, *see HiSteel I*, and now recounts only that which is relevant to the court's review of the *Remand Results*. For the following reasons, Commerce's *Remand Results* are sustained.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii). *See, e.g.*, *Foshan Shunde Yongjian Housewares & Hardwares Co., Ltd. v. United States*, 40 CIT __, __, 172 F. Supp. 3d 1353, 1356 (2016). "For administrative reviews of antidumping duty orders, the court sustains Commerce's 'determinations, findings, or conclusions' unless they are 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" *Id.* (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)).

DISCUSSION

In the underlying administrative review, Commerce determined that Korean producers of HWR were selling the subject merchandise into the United States at prices below fair value and imposed antidumping duties on mandatory respondents[1] HiSteel Co., Ltd. ("HiSteel") and Kukje Steel Co., Ltd. ("Kukje") (collectively, "Plaintiffs") of 26.20 and 35.11 percent, respectively. *See Final Results* at 41,539; *see also* 547 F. Supp. 3d at 1237. To determine these duties, Commerce calculated the difference between export price and normal value, with normal value here derived from home market sales of comparable goods.[2]

In deriving this normal value, because Commerce assessed that some home markets sales were made at prices below the cost of production, Commerce conducted a "sales-below-cost test" to disregard such sales from the normal value. *See* 19 U.S.C. § 1677b(b)(1). Moreover, because Commerce assessed that a "particular market

[1] In antidumping duty investigations or administrative reviews, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(c)(2), which provides:

> If it is not practicable to make individual weighted average dumping margin determinations [in investigations or administrative reviews] because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—
>
> (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

[2] Section 1677b of 19 U.S.C. outlines three possible ways to calculate normal value: (i) looking to sales of comparable goods in the home market, 19 U.S.C. § 1677b(a)(1)(B)(i); (ii) looking to sales of comparable goods in a third country, *id.* § 1677b(a)(1)(B)(ii); or (iii) calculating the product's "constructed value" by summing the costs of production and processing of the product as well as the costs incurred by the exporter to export and sell the product, *id.* § 1677b(a)(4), (e).

situation" ("PMS")[3] existed with respect to Korean hot-rolled steel coils ("HRC") — an input of HWR — that distorted the market and thereby prevented a proper comparison between normal value and export price, Commerce adjusted upward the cost of HRC prior to conducting the sales-below-cost-test. *HiSteel I*, 547 F. Supp. 3d at 1240–41.

Before the court in *HiSteel I*, Plaintiffs HiSteel and Kukje challenged Commerce's calculation of their respectively assigned antidumping duties, specifically alleging that Commerce does not have the authority to adjust for a PMS prior to conducting a sales-below-cost test when calculating normal value based on home market sales. This court agreed, explaining that although 19 U.S.C. § 1677b authorizes Commerce to undertake a PMS adjustment when calculating normal value based on constructed value, the statute does not similarly authorize Commerce to adjust for a PMS prior to conducting a sales-below-cost test when calculating normal value based on home market sales. 547 F. Supp. 3d at 1245. Accordingly, on September 23, 2021, the court held Commerce's assessed antidumping duties did not accord with law, necessitating remand.[4] *Id.* at 1247, 1253.

On December 10, 2021, in an analogous case, the Federal Circuit declared that it is "impermissible" for Commerce to "apply a PMS adjustment to the calculation of costs of production under the sales-below-cost test" for purposes of determining normal value based on home market sales. *Hyundai Steel Co. v. United States*, 19 F.4th 1346, 1354, 1356 (Fed. Cir. 2021); *see also id.* at 1348 ("We agree with the Trade Court that the . . . antidumping statute do[es] not authorize Commerce to use the existence of a PMS as a basis for adjusting a respondent's costs of production to determine whether a respondent has made home market sales below cost.").

Accordingly, in the case at bar, Commerce recalculated — without making an upward PMS adjustment to the cost of HRC — weighted-average dumping margins for HiSteel and Kukje of 9.90 and 1.91 percent, respectively on December 15, 2021. *Remand Results* at 1–2.

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[3] A "PMS" exists when "the costs of materials and fabrication or other processing of any kind" of a product "does not accurately reflect the cost of production in the ordinary course of trade." 19 U.S.C. §1677b(e)(3).

[4] In the alternative, the court held that even if Commerce was permitted by law to undertake a PMS adjustment prior to conducting a sales-below-cost test when calculating normal value based on home market sales, Commerce: (i) failed to provide substantial evidence that a PMS indeed existed in the HRC market during the period of review; and (ii) applied a calculated PMS adjustment that was not supported by substantial evidence. *See HiSteel* I, 547 F. Supp. 3d at 1247, 1252.

As *Hyundai Steel* is decisive,[5] "[n]o party challenges Commerce's remand results." Def.'s Resp. to Cmts. on Remand Results at 1, July 29, 2022, ECF No. 82 ("Def.'s Br."); Def.-Inter.'s Cmts. on Remand Results, July 14, 2021, ECF No. 79 ("Def.-Inter.'s Br."); Pls.' Cmts. on Remand Results, July 14, 2021, ECF No. 80 ("Pls.' Brief"). "[B]ecause *Hyundai Steel* is binding on this court and now final," the court agrees "it is appropriate . . . to affirm the Remand Redetermination." Def.-Inter.'s Br. at 1.

CONCLUSION

For the foregoing reasons, the *Remand Results* are sustained. Judgment will enter accordingly.

SO ORDERED.

Dated: November 23, 2022
New York, New York

/*s*/ *Gary S. Katzmann*
GARY S. KATZMANN, JUDGE

[5] This court previously granted a motion to stay the proceedings in *HiSteel I* pending the Federal Circuit's determination on a motion for rehearing and issuance of a final disposition in *Hyundai Steel*, 19 F.4th 1346. *See* Def.-Inter.'s Partial Consent Mot. to Stay, Jan. 4, 2022, ECF No. 70; *see also* Ct. Order Granting Mot. to Stay, Jan. 19, 2022, ECF No. 74 ("Ct. Order"). On March 16, 2022, the Federal Circuit denied the motion for rehearing and the period to appeal the Federal Circuit's decision expired on June 14, 2022, with no indication that any party filed a writ of certiorari with the Supreme Court. *See* Joint Status Report at 4, June 14, 2022, ECF No. 78. Consequently, parties' responses to Commerce's *Remand Results* were due to this court on July 14, 2022. *See* Ct. Order at 1.

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