U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR PART 12

CBP DEC. 24–06

RIN 1515–AE86

EXTENSION OF IMPORT RESTRICTIONS IMPOSED ON ARCHAEOLOGICAL AND ECCLESIASTICAL ETHNOLOGICAL MATERIAL FROM HONDURAS

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

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to extend import restrictions on certain archaeological and ecclesiastical ethnological material from Honduras. The Assistant Secretary for Educational and Cultural Affairs, United States Department of State, has made the requisite determinations for extending the import restrictions, which were originally imposed by CBP Decision (CBP Dec.) 04–08 and last extended by CBP Dec. 19–03. The United States and Honduras have also agreed to extend the restrictions for an additional five-year period. Accordingly, these import restrictions will remain in effect for an additional five years, and the CBP regulations are being amended to reflect this further extension through March 12, 2029.

DATES: Effective March 12, 2024.

FOR FURTHER INFORMATION CONTACT: For legal aspects, W. Richmond Beevers, Chief, Cargo Security, Carriers and Restricted Merchandise Branch, Regulations and Rulings, Office of Trade, (202) 325–0084, *ot-otrrculturalproperty@cbp.dhs.gov.* For operational aspects, Julie L. Stoeber, Chief, 1USG Branch, Trade Policy and Programs, Office of Trade, (202) 945–7064, *1USGBranch@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Convention on Cultural Property Implementation Act (Pub. L. 97–446, 19 U.S.C. 2601 *et seq.*) (CPIA), which implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)) (the Convention), allows for the conclusion of an agreement between the United States and another party to the Convention to impose import restrictions on eligible archaeological and ethnological materials. Under the CPIA and the applicable U.S. Customs and Border Protection (CBP) regulations, found in §§ 12.104 through 12.104i of title 19 of the Code of Federal Regulations (19 CFR 12.104 through 12.104i), the restrictions are effective for no more than five years beginning on the date on which an agreement enters into force with respect to the United States (19 U.S.C. 2602(b)). This period may be extended for additional periods, each extension not to exceed five years, if it is determined that the factors justifying the initial agreement still pertain and no cause for suspension of the agreement exists (19 U.S.C. 2602(e); 19 CFR 12.104g(a)).

On March 12, 2004, the United States entered into a bilateral agreement with the Republic of Honduras (Honduras) to impose import restrictions on certain archaeological material representing the Pre-Columbian cultures of Honduras and ranging in date from approximately 1200 B.C. to 1500 A.D. On March 16, 2004, CBP published a final rule (CBP Dec. 04–08) in the **Federal Register** (69 FR 12267), which amended 19 CFR 12.104g(a) to reflect the imposition of these restrictions, and included a list designating the types of archaeological materials covered by the restrictions.

The import restrictions were subsequently extended three times in accordance with 19 U.S.C. 2602(e) and 19 CFR 12.104g(a), and the designated list was amended once. On March 11, 2009, CBP published a final rule (CBP Dec. 09–05) in the **Federal Register** (74 FR 10482), which amended § 12.104g(a) to reflect the extension of these import restrictions for an additional five years. On March 12, 2014, CBP published a final rule (CBP Dec. 14–03) in the **Federal Register** (79 FR 13873), which amended § 12.104g(a) to reflect the extension of these import restrictions for an additional five years as well as amending the Designated List to add restrictions on ecclesiastical ethological material dating to the Colonial period of Honduras, c. A.D. 1502 to 1821.

Subsequently, on March 5, 2019, the United States and Honduras entered into a superseding memorandum of understanding (MOU),

that extended the import restrictions for an additional five years. On March 12, 2019, CBP published a final rule (CBP Dec. 19–03) in the **Federal Register** (84 FR 8807), which amended § 12.104g(a) to reflect the extension of these import restrictions for an additional five years. These import restrictions are due to expire on March 12, 2024.

On August 8, 2023, the United States Department of State proposed in the **Federal Register** (88 FR 53576) to extend the MOU. On January 24, 2024, after considering the views and recommendations of the Cultural Property Advisory Committee, the Assistant Secretary for Educational and Cultural Affairs, United States Department of State, made the necessary determinations to extend the import restrictions for an additional five years. Following an exchange of diplomatic notes, the United States Department of State and the Government of the Republic of Honduras have agreed to extend the restrictions for an additional five-year period, through March 12, 2029.

Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension of these import restrictions. The restrictions on the importation of archaeological and ecclesiastical ethnological material from Honduras will continue in effect through March 12, 2029. Importation of such material from Honduras continues to be restricted through that date unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

The Designated List and additional information may also be found at the following website address: *https://eca.state.gov/cultural-heritage-center/cultural-property/current-agreements-and-import-restrictions* by selecting the material for "Honduras."

Inapplicability of Notice and Delayed Effective Date

This amendment involves a foreign affairs function of the United States and is, therefore, being made without notice or public procedure under 5 U.S.C. 553(a)(1). For the same reason, a delayed effective date is not required under 5 U.S.C. 553(d)(3).

Executive Orders 12866 and 13563

Executive Orders 12866 (as amended by Executive Order 14094) and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. CBP has determined that this document is not a regulation or rule subject to the provisions of Executive Orders 12866 and 13563 because it pertains

to a foreign affairs function of the United States, as described above, and therefore is specifically exempted by section 3(d)(2) of Executive Order 12866 and, by extension, Executive Order 13563.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for a rule. Since a general notice of proposed rulemaking is not necessary for this rule, CBP is not required to prepare a regulatory flexibility analysis for this rule.

Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1) pertaining to the Secretary of the Treasury's authority (or that of the Secretary's delegate) to approve regulations related to customs revenue functions.

Troy A. Miller, the Senior Official Performing the Duties of the Commissioner, having reviewed and approved this document, has delegated the authority to electronically sign this document to the Director (or Acting Director, if applicable) of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects in 19 CFR Part 12

Cultural property, Customs duties and inspection, Imports, Prohibited merchandise, Reporting and recordkeeping requirements.

Amendment to the CBP Regulations

For the reasons set forth above, part 12 of title 19 of the Code of Federal Regulations (19 CFR part 12), is amended as set forth below:

PART 12—SPECIAL CLASSES OF MERCHANDISE

■ 1. The general authority citation for part 12 and the specific authority citation for § 12.104g continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

* * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;
* * * * *

■ 2. In § 12.104g, amend the table in paragraph (a) by revising the entry for Honduras to read as follows:

§ 12.104g Specific items or categories designated by agreements or emergency actions.

(a) * * *

State party	Cultural property	Decision No.
	* * * * *	
Honduras	Archaeological material of Pre-Columbian cultures ranging approximately from 1200 B.C. to 1500 A.D, and ecclesiastical ethnological materials dating from the Colonial Period, c. A.D. 1502 to 1821.	CBP Dec. 14–03 extended by CBP Dec. 24–06.
	* * * * *	

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

AVIVA R. ARON-DINE,
Acting Assistant Secretary of the Treasury for Tax Policy.

PROPOSED MODIFICATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE COUNTRY OF ORIGIN OF ABSORBER CRASHBOX

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

ACTION: Notice of proposed modification of one ruling letter and proposed revocation of treatment relating to the country of origin of an Absorber Crashbox.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to modify one ruling letter concerning the country of origin of an Absorber Crashbox. Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before April 26, 2024.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Shannon Stillwell, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. CBP is also allowing commenters to submit electronic comments to the following email address: *1625Comments@cbp.dhs.gov*. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Arrangements to inspect submitted comments should be made in advance by calling Ms. Shannon Stillwell at (202) 325–0739.

FOR FURTHER INFORMATION CONTACT: Reema R. Bogin, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at reema.bogin@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibil-

ity in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to the country of origin of an Absorber Crashbox. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N326445, dated June 30, 2022 ("Attachment A"), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N326445, CBP determined that the processing operations performed in Mexico did not result in a substantial transformation, and the country of origin of the Absorber Crashbox is China. CBP has reviewed NY N326445 and has determined the ruling letter to be in error. It is now CBP's position that the processing operations performed in Mexico result in a substantial transformation, and the country of origin of the Absorber Crashbox is Mexico.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY N326445 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H335139, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

Attachment A - NY N326445
Attachment B - Proposed 1625 Ruling - H335139

N326445

June 30, 2022
MAR-2:OT:RR:NC:N2:206
CATEGORY: Classification; Trade Preference; Country of Origin
TARIFF NO.: 8708.10.6050

LESLIE A. GLICK
1909 K STREET, NW
SUITE 500
WASHINGTON, DC 20006

RE: The classification, trade preference and the country of origin of an Absorber Crashbox.

DEAR MR. GLICK:

In your letter dated May 27, 2022, you requested a tariff classification ruling, the eligibility of duty-free treatment, and the country of origin of an Absorber Crashbox from Mexico under the United States-Mexico-Canada Agreement (USMCA), which you filed on behalf of your client Waldasschaff Automotive Mexico S de R.L. de C.V. (WAM). Pictures and other descriptive literature were submitted with your request.

The item under consideration is an Absorber Crashbox (Crashbox, crash box), which is designed to be used with passenger vehicles. The crash box is an important component designed exclusively to absorb energy in the event of a collision. It prevents the spread of kinetic energy, generating less damage to the vehicle structure. It is placed between the bumper and side rails before the chassis points.

You state in your letter that the Crashboxes are manufactured and assembled in Mexico with certain imported components from China. These imported parts are referred to as "profiles", Part Number V1570 and Part Number V1571. There are two model profiles, each consisting of two pieces. One pair is for the left hand Crashbox and one set for the right hand Crashbox. The Crashboxes are manufactured in Mexico using these profiles imported from China with Mexican labor. The imported profiles are considered a raw material and are subject to various processes in WAM's plant in Mexico including sawing, stamping, washing and heat treatment until the good is finished.

Classification:

The applicable subheading for the Absorber Crashbox will be 8708.10.6050, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Parts and accessories of the motor vehicles of headings 8701 to 8705: Bumpers and parts thereof: Parts of bumpers: Other." The general rate of duty will be 2.5% ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at *https://hts.usitc.gov/current*.

Trade Preference:

The United States-Mexico-Canada Agreement was signed by the Governments of the United States, Mexico, and Canada on November 30, 2018. The

USMCA was approved by the U.S. Congress with the enactment on January 29, 2020, of the USMCA Implementation Act, Pub. L. 116–113, 134 Stat. 11, 14 (19 U.S.C. § 4511(a)). General Note ("GN") 11 of the HTSUS implements the USMCA.

GN 11(a) provides that:

Goods originating in the territory of a country named herein, pursuant to the United States-Mexico-Canada Agreement (USMCA), are subject to duty as provided herein, including any treatment set forth in subchapter XXIII of chapter 98 and subchapter XXII of chapter 99 of the tariff schedule. For the purposes of this note, as provided in the tariff schedule—

Goods that originate in the territory of Mexico, Canada or the United States (hereinafter referred to as "USMCA country" or "USMCA countries" as further defined in subdivision (l)(xxiv) of this note) under the terms of subdivision (b) of this note and regulations issued by the Secretary of the Treasury (including Uniform Regulations provided for in the USMCA), and goods enumerated in subdivision (p) of this note, when such goods are imported into the customs territoryof [sic] the United States and are entered under a subheading for which a rate of duty appears in the "Special" subcolumn, followed by the symbol "S" in parentheses, are eligible for such duty rate, in accordance with section 202 of the United States-Mexico-Canada Agreement Implementation Act; and . . .

GN 11(b) sets forth the criteria for determining whether a good is an originating good for purposes of the USMCA. GN 11(b) states:

For the purposes of this note, a good imported into the customs territory of the United States from the territory of a USMCA country, as defined in subdivision (l) of this note, is eligible for the preferential tariff treatment provided for in the applicable subheading and quantitative limitations set forth in the tariff schedule as a "good originating in the territory of a USMCA country" only if the good is a good wholly obtained or produced entirely in the territory of one or more USMCA countries;

the good is a good produced entirely in the territory of one or more USMCA countries, exclusively from originating materials;

the good is a good produced entirely in the territory of one or more USMCA countries using nonoriginating materials, if the good satisfies all applicable requirements set forth in this note (including the provisions of subdivision (o));

Here, the merchandise will be produced in Mexico using nonoriginating materials. Therefore, the merchandise will not qualify as originating pursuant to GN 11(b)(i) or (ii). We must therefore consider whether the merchandise qualifies as originating pursuant to GN 11(b)(iii).

As noted above, the Absorber Crashbox is classified in subheading 8708.10.6050, HTSUS. The applicable product-specific rule of origin in GN 11(o)/87.08 is underscored and requires:

> 20. For a good of subheading 8708.10 for use in a passenger vehicle, light truck, or heavy truck:
>
> (A) A change to subheading 8708.10 from any other heading; or
>
> (B) A change to subheading 8708.10 from subheading 8708.99, whether or not there is also a change from any other heading, provided there is a regional value content of not less than 70 percent under the net cost method.

You asserted that both components of the Crashbox from China are classified in heading 7604, HTSUS, as aluminum profiles. Although this office agrees with you regarding Part Number V1570, after further review we determined that Part Number V1571 is advanced beyond a profile because of the holes and will be correctly classified in heading 7616, HTSUS, as other article of aluminum.

Subheading rule: The underscoring of the designations in subdivisions 20 through 21 pertain to goods provided for in heading 8708.10. If the good is for use in a passenger vehicle or light truck, Article 3.4 of the automotive appendix applies.

GN 11(k) provides special rules for automotive goods. GN 11(k)(i) provides that:

An automotive good and other motor vehicles and parts described herein shall be subject to applicable requirements set forth in this paragraph, including, with respect to a passenger vehicle or light truck that has been authorized to use the alternative staging regime described under subparagraph (viii), applicable requirements for the duration of the alternative staging period specified in the approval.

GN 11(k)(ii)(E)(2) includes in the definition of an "automotive good" any "part, component or material listed in table A.1, A.2, B, C, D, or E of the automotive appendix, subject to any provisions that may be included in regulations issued by the Secretary of the Treasury." GN 11(k)(ii)(D) defines "automotive appendix" as ". . . the Appendix to Annex 4-B of the USMCA (relating to the product-specific rules of origin for automotive goods, as reflected in subdivision (o) of this note)."

Examining Table B of the automotive appendix, entitled "Principal Parts for Passenger Vehicles and Light-Trucks," the subject merchandise is listed (8708.10 Bumpers and parts thereof) and is for use in a passenger vehicle. The Note to Table B in the automotive appendix provides that "[t]he Regional Value Content requirements set out in Article 3 of this Appendix apply to a good for use in a passenger vehicle or light truck."

Article 3.4 of the automotive appendix states that:

Notwithstanding Article 2 (Product-Specific Rules of Origin for Vehicles) and the Product-Specific Rules of Origin in Annex 4-B, each Party shall provide that the regional value content requirement for a part listed in Table B of this Appendix that is for use in a passenger vehicle or light truck is:

(a) 62.5 percent under the net cost method or 72.5 percent under the transaction value method, if the corresponding rule includes a transaction value method, beginning on January 1, 2020 or the date of entry into force of this Agreement, whichever is later;

(b) 65 percent under the net cost method or 75 percent under the transaction value method, if the corresponding rule includes a transaction value method, beginning on January 1, 2021 or one year after the date of entry into force of this Agreement, whichever is later;

(c) 67.5 percent under the net cost method or 77.5 percent under the transaction value method, if the corresponding rule includes a transaction value method, beginning on January 1, 2022 or two years after the date of entry into force of this Agreement, whichever is later; or

(d) 70 percent under the net cost method or 80 percent under the transaction value method, if the corresponding rule includes a transaction

value method, beginning on January 1, 2023 or three years after the date of entry into force of this Agreement.

In addition to the provisions of the automotive appendix and GN 11, as indicated in GN 11(a)(i), the trilaterally agreed USMCA Uniform Regulations in Appendix A of 19 C.F.R. Part 182 provide further guidance on the interpretation and application of the USMCA rules of origin. The Note to Table B in the Uniform Regulations clarifies that:

The Regional Value Content requirements set out in sections 13 or 15 or Schedule I (PSRO Annex) apply to a good for use as original equipment in the production of a passenger vehicle. For an aftermarket part, the applicable product-specific rule of origin set out in section 13 or Schedule I (PSRO Annex) is the alternative that includes the phrase "for any other good."

Accordingly, the Uniform Regulations draw a distinction between aftermarket parts and automotive parts that are used as original equipment in the production of a vehicle. See Section 12(1) ("aftermarket part means a good that is not for use as original equipment in the production of passenger vehicles, light trucks or heavy trucks as defined in these Regulations."). Here, the passenger vehicle Absorber Crashbox will be used either as original equipment or as aftermarket parts.

In accordance with the Note to Table B, when the merchandise is used as aftermarket parts, the applicable product-specific rule of origin is the rule in section 13 or Schedule I (PSRO Annex) of the Uniform Regulations that includes the phrase "for any other good." Schedule I provides that "[t]his schedule is deemed to be the contents of Sections A, B and C of Annex 4-B of the Agreement, as implemented in General Note 11 of the Harmonized Tariff Schedule of the United States..."

Here, Section 13 of the Uniform Regulations contains the following product-specific rules of origin for goods of 8708.10.60, HTSUS.

8708.10 For a good of subheading 8708.10 for use as original equipment in a passenger vehicle or light truck:

(1) A change to subheading 8708.10 from any other heading; or

(2) A change to subheading 8708.10 from subheading 8708.99, whether or not there is also a change from any other heading, provided there is a regional value content of not less than:

(a) 62.5 percent under the net cost method, beginning on July 1, 2020 until June 30, 2021;

(b) 65 percent under the net cost method, beginning on July 1, 2021 until June 30, 2022;

(c) 67.5 percent under the net cost method, beginning on July 1, 2022 until June 30, 2023;

(d) 70 percent under the net cost method, beginning on July 1, 2023, and thereafter.

For a good of subheading 8708.10 for use as original equipment in a heavy truck:

(3) A change to subheading 8708.10 from any other heading; or

(4) A change to subheading 8708.10 from subheading 8708.99, whether or not there is also a change from any other heading, provided there is a regional value content of not less than:

(a) 60 percent under the net cost method, beginning on July 1, 2020 until June 30, 2024;

(b) 64 percent under the net cost method, beginning on July 1, 2024 until June 30, 2027;

(c) 70 percent under the net cost method, beginning on July 1, 2027, and thereafter.

For any other good of subheading 8708.10 for use as original equipment in any other vehicle or as an aftermarket part:

(5) A change to subheading 8708.10 from any other heading; or

(6) A change to subheading 8708.10 from subheading 8708.99, whether or not there is also a change from any other heading, provided there is a regional value content of not less than 50 percent under the net cost method.

You have provided the information necessary to determine whether the above tariff shift rule has been met. Section 13 of the Uniform Regulations, rules (1) for use as original equipment in a passenger vehicle and (5) for use as an aftermarket part require "A change to subheading 8708.10 from any other heading." Based on the information provided, no non-originating materials are classified in the same subheading as the Absorber Crashbox (8708). Accordingly, provided that all other requirements are met, the passenger vehicles Absorber Crashbox will be eligible for preferential tariff treatment under the USMCA when used as original equipment or aftermarket parts.

Country of origin for marking purposes:

The "country of origin" is defined in 19 CFR 134.1(b) as "the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the 'country of origin' within the meaning of this part; however, for a good of a NAFTA or USMCA country, the marking rules set forth in part 102 of this chapter (hereinafter referred to as the part 102 Rules) will determine the country of origin."

19 CFR Part 102.11(a) provides that the country of origin of a good is the country in which:

The good is wholly obtained or produced;

The good is produced exclusively from domestic materials; or

(3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in Part 102.20 and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.

The Crashbox is neither "wholly obtained or produced" nor "produced exclusively from domestic materials." Therefore, paragraphs (a)(1) and (a)(2) cannot be used to determine the country of origin of the brake shoe, and paragraph (a)(3) must be applied next to determine the origin of the finished article. The tariff shift requirement in Part 102.20 for the Crashbox at issue states:

A change to subheading 8708.10 from any other subheading.

As we have established earlier, the "foreign" components are classified in headings 7604 and 7616, HTSUS. Therefore, the tariff shift is met and the country of origin of the Absorber Crashbox will be Mexico for marking purposes.

Country of origin for purposes of applying trade remedies under Section 301 of the Trade Act of 1974:

"The United States Trade Representative ("USTR") has determined that an additional ad valorem duty of 25% will be imposed on certain Chinese imports pursuant to its authority under Section 301(b) of the Trade Act of 1974 ("Section 301 measures"). When determining the country of origin for purposes of applying current trade remedies under Section 301, the substantial transformation analysis is applicable. The test for determining whether a substantial transformation will occur is whether an article emerges from a process with a new name, character, or use, different from that possessed by the article prior to processing. See Texas Instruments Inc. v. United States, 69 C.C.P.A. 151 (1982)."

However, if the manufacturing or combining process is merely a minor one that leaves the identity of the article intact, a substantial transformation has not occurred. Uniroyal, Inc. v. United States, 3 CIT 220, 542 F. Supp. 1026, 1029 (1982), aff'd, 702 F.2d 1022 (Fed. Cir. 1983) (Uniroyal). Substantial transformation determinations are based on the totality of the evidence. See Headquarters Ruling (HQ) W968434, date January 17, 2007, citing Ferrostaal Metals Corp. v. United States, 11 CIT 470, 478, 664 F. Supp. 535, 541 (1987). In Uniroyal case, the court held that an upper was not substantially transformed when attached to an outsole to form a shoe and that the upper was "the very essence of the completed shoe".

Further, in Energizer Battery, Inc. v. United States, 190 F. Supp. 3d 1308 (2016), the Court of International Trade ("CIT") interpreted the meaning of "substantial transformation" as used in the Trade Agreements Act of 1979 ("TAA") for purposes of government procurement. In Energizer, the court reviewed the "name, character and use" test in determining whether a substantial transformation had occurred in determining the origin of a flashlight, and reviewed various court decisions involving substantial transformation determinations. The court noted, citing Uniroyal, Inc. v. United States, 3 C.I.T. 220, 226, 542 F. Supp. 1026, 1031, aff'd, 702 F.2d 1022 (Fed. Cir. 1983), that when "the post-importation processing consists of assembly, courts have been reluctant to find a change in character, particularly when the imported articles do not undergo a physical change." Energizer at 1318. In addition, the court noted, "...when the end-use was pre-determined at the time of importation, courts have generally not found a change in use." Energizer at 1319, citing as an example, National Hand Tool Corp. v. United States, 16 C.I.T. 308, 310, aff'd 989 F.2d 1201 (Fed. Cir. 1993). Furthermore, courts have considered the nature of the assembly, i.e., whether it is a simple assembly or more complex, such that individual parts lose their separate identities and become integral parts of a new article.

According to the information supplied, none of the components from China undergo any substantial processing. The end-use of all components from China is pre-determined at the time of importation to Mexico. The assembly of the components into the Absorber Crashbox appears to be a minor one, and therefore, does not meet the substantial transformation requirements.

As a result, it is the opinion of this office that no substantial transformation occurs in Mexico. Therefore, the country of origin of the Absorber Crashbox will be China for purposes of applying trade remedies under Section 301, of the Trade Act of 1974, as amended.

Please note that 19 C.F.R. § 177.9(b)(1) provides that "[e]ach ruling letter is issued on the assumption that all of the information furnished in connection with the ruling request and incorporated in the ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect. The application of a ruling letter by a Customs and Border Protection field office to the transaction to which it is purported to relate is subject to the verification of the facts incorporated in the ruling letter, a comparison of the transaction described therein to the actual transaction, and the satisfaction of any conditions on which the ruling was based."

This ruling is being issued under the provisions of Part 177 of the Customs and Border Protection Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, please contact National Import Specialist Liana Alvarez at *liana.alvarez@cbp.dhs.gov*.

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

HQ H335139
OT:RR:CTF:VS H335139 RRB
CATEGORY: Origin

MATTHEW D. LAPIN
PORTER WRIGHT MORRIS & ARTHUR LLP
2020 K STREET, NW
SUITE 600
WASHINGTON, D.D. 20006

RE: Modification of NY N326445; Country of origin of an Absorber Crashbox

DEAR MR. LAPIN:

This is in response to your submission, dated July 29, 2022, requesting U.S. Customs and Border Protection ("CBP") to reconsider New York Ruling Letter ("NY") N326445, dated June 30, 2022, which was issued to your client Waldasschaff Automotive Mexico S de R.L. de C.V. ("WAM" or "importer"). NY N326445 addressed the classification, trade preference under the United States-Mexico-Canada Agreement ("USMCA"), and the country of origin of an Absorber Crashbox.

In NY N326445, CBP found that the country of origin of the Absorber Crashbox will be China for purposes of applying trade remedies under Section 301 of the Trade Act of 1974, as amended. After reviewing the ruling in its entirety, along with the information in your reconsideration request, we find it to be incorrect only with respect to the country of origin of the Absorber Crashbox for purposes of applying Section 301 trade remedies. For the reasons set forth below, we are modifying NY N326445.

FACTS:

In NY N326445, the Absorber Crashbox was described as follows:

> The item under consideration is an Absorber Crashbox (Crashbox, crash box), which is designed to be used with passenger vehicles. The crash box is an important component designed exclusively to absorb energy in the event of a collision. It prevents the spread of kinetic energy, generating less damage to the vehicle structure. It is placed between the bumper and side rails before the chassis points.
>
> You state in your letter that the Crashboxes are manufactured and assembled in Mexico with certain imported components from China. These imported parts are referred to as "profiles", Part Number V1570 and Part Number V1571. There are two model profiles, each consisting of two pieces. One pair is for the left hand Crashbox and one set for the right hand Crashbox. The Crashboxes are manufactured in Mexico using these profiles imported from China with Mexican labor. The imported profiles are considered a raw material and are subject to various processes in WAM's plant in Mexico including sawing, stamping, washing and heat treatment until the good is finished.

NY N326445 further states:

> [a]ccording to the information supplied, none of the components from China undergo any substantial processing. The end-use of all components from China is pre-determined at the time of importation to Mexico. The

assembly of the components into the Absorber Crashbox appears to be a minor one, and therefore, does not meet the substantial transformation requirements.

As a result, it is the opinion of this office that no substantial transformation occurs in Mexico. Therefore, the country of origin of the Absorber Crashbox will be China for purposes of applying trade remedies under Section 301, of the Trade Act of 1974, as amended.

In its reconsideration request, the importer explains that the heat treatment applied to the profiles is more than a minor operation. The importer states that the heat treatment process changes the properties of the metal in the profiles in order to permit the crashboxes to meet the requirements of the Federal Motor Vehicle Safety Standards ("FMVSS"). In particular, the heat treatment process subjects the sawed, cut, formed and hole-punched profiles to a specified high temperature for a set amount of time under controlled environmental conditions, using precision measuring and test equipment. This process changes the structural properties of the aluminum used to construct the raw profiles. Items that do not meet specific parameters regarding tensile strength, yield strength and elongation are removed from processing and are not incorporated into final assembly.

The importer asserts that the heat treatment and artificial aging process in Mexico transforms the aluminum components from the imported "T4" component into the "T6" component that can be incorporated into the final assembly of the crashboxes. Moreover, the transformation of the aluminum components into "T6" components renders them with substantially higher strength and hardness compared to the "T4" components form China. This processing leads to an improvement in the material's mechanical properties, including its strength, hardness, and ductility.

The importer explains that these changes to the physical properties of the aluminum are required to effectively absorb energy in a crashbox in the event of a collision and to ensure that the passenger vehicles upon which the crashboxes are installed meet requirements for occupant safety under the FMVSS.

In an email dated August 11, 2023, Counsel for WAM sent to our office photographs of the incoming materials that are sent to Mexico, along with photographs of what happens to these materials at various stages of production of the Absorber Crashboxes in Mexico.

ISSUE:

What is the country of origin of an Absorber Crashbox manufactured and assembled in Mexico, using certain imported components from China, for purposes of applying of Section 301 trade remedies?

LAW AND ANALYSIS:

The United States Trade Representative ("USTR") has determined that an additional ad valorem duty of 25% will be imposed on certain Chinese imports pursuant to USTR's authority under Section 301(b) of the Trade Act of 1974 ("Section 301 measures"). The Section 301 measures apply to products of China enumerated in Section XXII, Chapter 99, Subchapter III, U.S. Note 20(f), HTSUS. Among the subheadings listed in U.S. Note 20(f) of Subchapter III, Chapter 99, HTSUS, is subheading 8708.10.60, HTSUS, in which the finished Absorber Crashboxes are classified.

When determining the country of origin for purposes of applying trade remedies under Section 301, the substantial transformation analysis is applicable. The test for determining whether a substantial transformation will occur is whether an article emerges from a process with a new name, character, or use, different from that possessed by the article prior to processing. *See Texas Instruments Inc. v. United States*, 69 C.C.P.A. 151 (1982). In order to determine whether a substantial transformation has occurred, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. CBP has stated that a new and different article of commerce is an article that has undergone a change in commercial designation or identity, fundamental character, or commercial use. A determinative issue is the extent of the operations performed and whether the materials lose their identity and become an integral part of the new article. This determination is based on the totality of the evidence. *See National Hand Tool Corp. v. United States*, 16 C.I.T. 308 (1992), *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993).

In *Energizer Battery, Inc. v. United States*, 190 F. Supp. 3d 1308 (2016), the Court of International Trade ("CIT") interpreted the meaning of "substantial transformation" as used in the Trade Agreements Act of 1979 ("TAA") for purposes of government procurement. *Energizer* involved the determination of the country of origin of a flashlight, referred to as the Generation II flashlight, under the TAA. All of the components of the Generation II flashlight were of Chinese origin, except for a white LED and a hydrogen getter. The components were imported into the United States where they were assembled into the finished Generation II flashlight.

The court reviewed the "name, character and use" test in determining whether a substantial transformation had occurred and reviewed various court decisions involving substantial transformation determinations. The court noted, citing *Uniroyal, Inc. v. United States*, 3 C.I.T. 220, 226, 542 F. Supp. 1026, 1031, *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983), that when "the post-importation processing consists of assembly, courts have been reluctant to find a change in character, particularly when the imported articles do not undergo a physical change." *Energizer* at 1318. In addition, the court noted that "when the end-use was pre-determined at the time of importation, courts have generally not found a change in use." *Energizer* at 1319, citing as an example, *National Hand Tool Corp. v. United States*, 16 C.I.T. 308, 310, *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993). Furthermore, courts have considered the nature of the assembly, i.e., whether it is a simple assembly or more complex, such that individual parts lose their separate identities and become integral parts of a new article.

Customs has generally held that a heat treatment will result in a substantial transformation only if it alters the article's mechanical properties to a significant extent. *See* Headquarters Ruling Letters ("HQ") 083236 dated May 16, 1989. The decision in *Ferrostaal Metals Corp. v. United States*, 664 F.Supp. 535, 11 C.I.T. 470 (1987), is also pertinent. That case concerned whether certain operations performed on cold-rolled steel sheet, described as a continuous hot-dip galvanizing process, substantially transformed the sheet. The process involved two steps: annealing, undertaken to restore the steel's ductility lost in a previous cold rolling, and galvanizing, or dipping the steel in a pot of molten zinc. The court held that the continuous hot-dip galvanizing process resulted in a substantial transformation, in part, because the process changed the character of the steel sheet by significantly altering its mechanical properties and chemical composition.

In *National Hand Tool Corp.*, sockets and flex handles were either cold formed or hot forged into their final shape, speeder handles were reshaped by a power press after importation, and the grip of the flex handles were knurled in the United States. The imported parts were then heat treated, which strengthened the surface of the steel, and cleaned by sandblasting, tumbling, and/or chemical vibration before being electroplated. In certain instances, various components were assembled together, which the court stated required some skill and dexterity. The court determined that the imported components were not substantially transformed by the strengthening, cleaning, and assembly performed in the United States; therefore, they remained products of Taiwan. In making its determination, the court focused on the fact that the components had been cold-formed or hot-forged "into their final shape before importation," and that "the form of the components remained the same" after the assembly and heat-treatment processes performed in the United States. Although the court stated that a predetermined use would not preclude the finding of a substantial transformation, the determination must be based on the totality of the evidence. No substantial change in name, character or use was found to have occurred as a result of the processing performed in the United States.

Regarding certain assembly operations, CBP has generally held that those which are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. Factors which may be relevant in this evaluation may include the nature of the operation (including the number of components assembled), the number of different operations involved, and whether a significant period of time, skill, detail, and quality control are necessary for the assembly operation. If the manufacturing or combining process is a minor one which leaves the identity of the article intact, a substantial transformation has not occurred. *Uniroyal, Inc.* 3 C.I.T. at 224, 542 F. Supp. at 1029.

In NY N326445, CBP found that because sawing, stamping, washing and heat treatment are simple operations performed on the aluminum profiles in Mexico, no substantial transformation occurs. Accordingly, it determined that the country of origin of the Absorber Crashboxes is China. However, in the importer's reconsideration request, they explain the processing in further detail, particularly regarding the complexity of the heat treatment.

The aluminum profiles undergo various types of processing in Mexico as part of their manufacture into Absorber Crashboxes. One pair of aluminum profiles imported from China to Mexico is for the left hand crashbox and one pair is for the right hand crashbox. In order to manufacture these profiles into the final product, the profiles are sawed and then sent to a separate machining station where a U-shaped cutout is made in the individual profile. The profiles with cutouts are subject to two different hole-punching steps to allow for connecting to spacers and vehicle crossbeams. Then, they are washed followed by a specialized heat treatment and artificial aging process. In the final step of the manufacturing process, the profiles that have undergone processing are assembled with the spacers to form the Absorber Crashboxes.

In its reconsideration request, the importer explains that the heat treatment process changes the structural properties of the aluminum used to construct the profiles in order to permit the crashboxes to meet FMVSS requirements for passenger safety. According to the importer, this heat treatment and aging process results in a change to the grain structure of the aluminum components, based on the formation of precipitates within the

aluminum alloy to strengthen the material, which leads to an improvement in the material's mechanical properties, including its strength and hardness. Without these increases in strength and hardness following heat treatment of the aluminum, the crashboxes would not be suitable for their intended use in absorbing sufficient energy as part of a vehicle's crash management system.

To better assess whether the heat treatment and aging processes performed on the aluminum profiles in Mexico result in a significant change to the structural and chemical properties of the aluminum profiles used in the manufacture of the Absorber Crashboxes, this office requested the assistance of CBP's Laboratories and Scientific Services Division ("LSSD"). In its Lab Report, LSSD confirmed that "the heat treatment changes the properties of the material to ensure proper safety. . ."

Because CBP did not have complete information regarding the processes performed in Mexico to manufacture the aluminum profiles into Absorber Crashboxes, it erroneously concluded in NY N326445 that the country of origin of the crashboxes was China. Upon receiving more fulsome details of the processing operations, as well as photographs of the imported aluminum profiles before and after processing, we conclude that unlike in *National Hand Tool Corp.*, the imported aluminum profiles were not in their final shape before importation. Based on the provided photographs, the aluminum profiles underwent sufficient cutting and shaping such that the form of the components after processing was no longer the same.

Other evidence presented with the reconsideration request provides further detail into how the heat treatment and artificial aging process changes the character and use of the imported aluminum profiles. The importer avers that such processing transforms the aluminum profiles from the "T4" components received from China into the "T6" components that can be incorporated into the final assembly of the crashboxes. Specifically, we confirmed that the heat treatment applied to the aluminum profiles in Mexico changes the structural properties and character of the aluminum used to construct the raw profiles. In particular, the heat treatment notably alters the tensile strength, yield strength and elongation of the profiles used in the final assembly of the Absorber Crashboxes. The aluminum profiles that do not meet specific parameters regarding tensile strength, yield strength and elongation are removed from processing and not incorporated into final assembly, as they would not be suitable for their intended use in Absorber Crashboxes.

In determining whether a substantial transformation has occurred as a result of the various manufacturing processes performed in Mexico, we turn to the "name, character, and use test." *See National Hand Tool Corp.* Here, there is a change in name subsequent to processing because the imported articles are aluminum profiles whereas the finished product that integrates the processed aluminum profiles are Absorber Crashboxes. Additionally, even before the aluminum profiles are assembled into the Absorber Crashboxes, they undergo a name change from the "T4" to the "T6" as a result of the heat treatment applied to the aluminum. There is also a change in character as a result of the heat treatment and aging process applied to the profiles, which alters the grain structure of the aluminum components, based on the formation of precipitates within the aluminum alloy to strengthen the material. The heat treatment also alters the tensile strength, yield strength and elongation of the profiles. Without these increases in strength and hardness, the crashboxes would not be suitable for their intended use in absorbing sufficient energy as part of a vehicle's crash management system. Thus, the

purpose of the heat treatment is to change the properties of the aluminum so that the final product, the Absorber Crashboxes, meets the requirements for occupant safety under FMVSS by absorbing energy in the event of a collision. In sum, it is our determination that the sawing, stamping, washing, heat treatment and aging processes performed on the aluminum profiles in Mexico as part of their manufacture into Absorber Crashboxes result in a substantial transformation. Accordingly, the country of origin will be Mexico.

HOLDING:

The country of origin of the Absorber Crashboxes for purposes of applying trade remedies under Section 301 of the Trade Act of 1974 is Mexico.

EFFECT ON OTHER RULINGS:

NY N326445, dated June 30, 2022, is hereby **MODIFIED**.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

PROPOSED REVOCATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A RATCHET AND PAWL CARGO SECURING DEVICE

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

ACTION: Notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to the tariff classification of a ratchet and pawl cargo securing device.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning tariff classification of a ratchet and pawl under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before April 26, 2024.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Shannon L. Stillwell, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Arrangements to inspect submitted comments should be made in advance by calling Ms. Shannon L. Stillwell at (202) 325–0739.

FOR FURTHER INFORMATION CONTACT: Nataline Viray-Fung, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at nataline.viray-fung@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of a ratchet and pawl cargo securing device. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N262442, dated April 8, 2015 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N262442, CBP classified a ratchet and pawl cargo securing device in heading 8425, HTSUS, specifically in subheading 8425.39.01, HTSUS, which provides for "Pulley tackle and hoists other than skip hoists; winches and capstans; jacks: Winches; capstans: Other." CBP has reviewed NY N262442 and has determined the ruling letter to be in error. It is now CBP's position that ratchet and pawl is properly classified in heading 8479, HTSUS, specifically in subheading 8479.89.95, HTSUS, which provides for "Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and mechanical appliances: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N262442 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H336105, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

GREGORY CONNOR
for
YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N262442

April 8, 2015
CLA-2–84:OT:RR:NC:N1:104
CATEGORY: Classification
TARIFF NO.: 8425.39.0100

MR. CHRISTOPHER M. KANE
SIMON GLUCK & KANE LLP
250 WEST 34TH STREET – SUITE 4615
ONE PENN PLAZA
NEW YORK, N.Y. 10119

RE: The tariff classification of a ratchet and pawl cargo securing device from China

DEAR MR. KANE:

In your letter dated March 3, 2015 on behalf of Kinedyne Corporation, you requested a tariff classification ruling. Submitted sample will be returned to you as per your request.

The steel ratchet and pawl cargo securing device is designed to be used with a two inch woven polyester webbing to secure cargo and prevent it from shifting. Only the ratchet and pawl device is the subject of this ruling. The device basically consists of a frame containing toothed ratchet wheels mounted at the sides of a slotted drum, spring-loaded pawls, and a lever handle. The handle is worked back and forth in order to turn the drum and tighten the webbing. As the drum turns, the pawls engage with the teeth on the ratchet wheels to prevent the drum from rotating backwards, thus maintaining tension on the webbing. To release the tension, the pawls can be manually pulled back to disengage them from the ratchet wheels.

The applicable subheading for the ratchet and pawl cargo securing device will be 8425.39.0100, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Pulley tackle and hoists other than skip hoists; winches and capstans; jacks: Winches; capstans: Other". The rate of duty will be free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at http://www.usitc.gov/tata/hts/.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Patricia O'Donnell at patricia.k.odonnell@cbp.dhs.gov.

Sincerely,

GWENN KLEIN KIRSCHNER
Director
National Commodity Specialist Division

ATTACHMENT B

HQ H336105
OT:RR:CTF:EMAIN H336105 NVF
CATEGORY: Classification
TARIFF NO.: 8479.89.95

MR. CHRISTOPHER M. KANE
SIMON GLUCK & KANE LLP
250 WEST 34TH STREET – SUITE 4615
ONE PENN PLAZA
NEW YORK, N.Y. 10119

RE: Revocation of NY N262442; Classification of a ratchet and pawl cargo securing device

DEAR MR. KANE:

On April 8, 2015, we issued New York Ruling Letter ("NY") N262442 to your client, Kinedyne Corporation ("Kinedyne"). We have since reviewed NY N262442 and are revoking it in accordance with the reasoning below.

FACTS:

In NY N262442 the subject merchandise, a ratchet and pawl cargo securing device, is described as follows:

> The steel ratchet and pawl cargo securing device is designed to be used with a two inch woven polyester webbing to secure cargo and prevent it from shifting. Only the ratchet and pawl device is the subject of this ruling. The device basically consists of a frame containing toothed ratchet wheels mounted at the sides of a slotted drum, spring-loaded pawls, and a lever handle. The handle is worked back and forth in order to turn the drum and tighten the webbing. As the drum turns, the pawls engage with the teeth on the ratchet wheels to prevent the drum from rotating backwards, thus maintaining tension on the webbing. To release the tension, the pawls can be manually pulled back to disengage them from the ratchet wheels.

ISSUE:

Whether the ratchet and pawl is classified under heading 8425, HTSUS as a winch or under heading 8479, HTSUS as a mechanical appliance with individual functions not specified elsewhere.

LAW AND ANALYSIS:

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

GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the

basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions under consideration are as follows:

8425 Pulley tackle and hoists other than skip hoists; winches and capstans; jacks.
8479 Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof.

In Headquarter Ruling Letter (HQ) H273307 (May 5, 2023), we summarized our current position on the spectrum of cargo securing devices used with webbing or straps. Such devices range from simple steel D-rings tightened by hand to more complex winches that are housed separately and require additional cranking to tension the straps. The distinguishing factors between these goods are whether they provide the user with mechanical advantage and if so, how they provide mechanical advantage. Simple hardware, such as D rings or cams, provide no mechanical advantage in tightening the straps and merely hold tension in place and are thus not machinery of Chapter 84. "Winches," which are specifically provided for under heading 8425, HTSUS, feature a separate drum that is cranked by hand or electrically to impart tension on the straps and to provide mechanical advantage. *See also* HQ H031587 (Apr. 1, 2011) (Discussing winches of heading 8425, HTSUS). In addition to their cranking operation, winches can also be identified by a separate, stand-alone drum that is sometimes mounted on a surface for additional stability and power. *See* HQ H273307 (May 5, 2023) and HQ H031587 (Apr. 1, 2011). Finally, ratcheting straps provide mechanical advantage via a simple back and forth pumping motion. As this method of operation differs from that of winches, they are not covered by heading 8425, HTSUS, and are consequently classified under heading 8479, HTSUS. *See* HQ H273307

While the ratchet and pawl classified in NY N262442 does provide mechanical advantage, and is thus distinguishable from simple hardware like D rings or cams, it is not a winch. It does not have a separate stand-alone drum, nor does it have a handle or a crank like the winches covered by heading 8425, HTSUS. *See* HQ H031587. Rather, it has a lever or handle that the user pumps back and forth to tighten the webbing that has been threaded through its frame. Therefore, the subject ratchet and pawl is classified with the other ratchets under heading 8479, HTSUS as a machine having individual functions not specified elsewhere.

HOLDING:

By application of GRIs 1 and 6, the ratchet and pawl device is classified under subheading 8479.89.95, HTSUS which provides for: Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and mechanical appliances: Other: Other. The column one rate of duty is 2.5 percent ad valorem.

Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at https://www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY N242442, dated April 8, 2015, is REVOKED.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Slip Op. 24–26

THE AD HOC COALITION OF AMERICAN SAP PRODUCERS, Plaintiff, v. UNITED STATES, Defendant, and LG CHEM, Ltd., Intervenor-Defendant.

Senior Judge Aquilino
Court No. 23–00010
PUBLIC VERSION

[Plaintiff's motion for judgment on the agency record granted; remand to defendant for reassessment.]

Dated: March 1, 2024

Stephen J. Orava, *Jamieson L. Greer*, and *Daniel L. Schneiderman*, King & Spalding LLP, Washington, D.C., for the plaintiff.

Kyle S. Beckrich, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., for the defendant. With him on the brief *Brian M. Boynton*, Principal Deputy Assistant Attorney General, Civil Division, *Patricia M. McCarthy*, Director, and *L. Misha Prehiem*, Assistant Director. Of counsel on the brief *Rachel Bogdan*, Senior Attorney, Office of Chief Counsel for Enforcement and Compliance, U.S. Department of Commerce, Washington, D.C.

J. David Park, *Henry D. Almond*, *Kang Woo Lee*, *Gina M. Colarusso*, and *Archana Rao P. Vasa*, Arnold & Porter Kaye Scholer LLP, Washington, D.C., for the intervenor-defendant.

Opinion & Order

AQUILINO, Senior Judge:

From the government's supposedly sober double-take into the extent of dumped chemicals in diapers, the Ad Hoc Coalition of American SAP Producers ("Coalition"[1]) contests the model matching methodology used in *Certain Superabsorbent Polymers from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 87 Fed.Reg. 65035 (Dep't Commerce Oct. 27, 2022), as explained in its accompanying issues and decision memorandum (Dep't Commerce Oct. 20, 2022) ("IDM") (together, the "Contested Determination").

[1] Herein, the collective noun "Coalition" is treated as a plural for ease of clarification among party references.

Jurisdiction herein is pursuant to 28 U.S.C. §1581(c). The plaintiff has interposed a motion for judgment on the agency record pursuant to USCIT Rule 56.2.[2]

I

The Coalition petitioned the International Trade Administration ("ITA") of the U.S. Department of Commerce in November 2021 to investigate whether superabsorbent polymers ("SAP") from Korea are being or likely to be imported into the United States at less than fair value. *See* 19 U.S.C. §1673.

SAP retains large amounts of water and other aqueous liquids. It is made of sodium polyacrylic acid, commonly of granular powder, also pellets, powder fibers, flakes, liquids, or gel. Petition Volume I (Nov. 2, 2021) at 1 (C.R. 2, P.R. 2); *see Final Determination* at 65037. SAP can also incorporate additives for anti-caking, anti-odor, and other similar purposes. *Id*. It is primarily used in downstream hygiene products that require fluid absorption.

In its notice of initiation, ITA solicited comments and information from potential interested parties regarding SAP's general physical characteristics in order to define the proceeding's control numbers ("CONNUMs") that would identify identical or similar merchandise for comparison when calculating dumping margins. *Certain Superabsorbent Polymers From the Republic of Korea: Initiation of Less-Than-Fair-Value Investigation*, 86 Fed.Reg. 67915, 67916 (Dep't Commerce Nov. 30, 2021) (P.R. 34).

The Coalition and LG Chem, Ltd. ("LGC" or "LG Chem"[3]) provided separate characteristic hierarchies that they believed most important to distinguish SAP products. *See* Petitioner Model Match Comments (Dec. 13, 2021) (P.R. 42); LG Chem Model Match Comments (Dec. 13, 2021) (P.R. 43); *see also* Petitioner Rebuttal Comments on Model Match Product Characteristics (Dec. 23, 2021) (P.R. 49); LG Chem Rebuttal Comments on Model Match Product Characteristics (Dec. 23, 2021) (P.R. 54–55). All parties agreed that the model match criteria should include a characteristic for the ability of super-absorbent polymer products to hold liquid, recognized within the industry as "centrifugal retention capacity" or "CRC". *See id*. It is measured in grams of saline solution retained per gram of SAP ("g/g"). Interested parties argued for different CRC ranges.

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[2] *See* Pl's Mot. J. on Agency Rec. ("Pl's Br"), ECF No. 20; Def's Resp. to Pl's Mot. J. on Agency Rec. ("Def's Resp."), ECF. No. 25; Int-Def's Resp. to to Pl's Mot. J. on Agency Rec. ("LG Chem Resp."), ECF No. 26; Pl's Reply Br. ("Pl's Reply"), ECF No. 28.

[3] A Korean manufacturer of SAP products, LG Chem was selected as the sole mandatory respondent in ITA's investigation. *See* Respondent Selection Memorandum (Dec. 21, 2021) (C.R. 23, P.R. 47).

The Coalition proposed that the model match hierarchy should consist of CRC divided into "low," "intermediate," and "high" capacity ranges, and it requested reporting producers to identify the specific standard used to measure CRC based on a CRC range of 6 g/g between low-capacity and high-capacity grades, to wit: (1) less than 30 g/g; (2) greater than 30 g/g but less than 36 g/g; and (3) greater than 36 g/g. *See* Petitioner Model Match Comments at 2.

LG Chem agreed that CRC is "[t]he first and most important criterion for distinguishing SAP products" but asserted that "the traditional classification in the market [for SAP] is to group by divisions of 4 g/g." LG Chem Model Match Comments at 2. LG Chem thus recommended that ITA establish five ranges of 4 g/g increments: (1) minimum or no guaranteed CRC of less than 26 g/g; (2) minimum guaranteed CRC of 26 g/g or more and less than 30 g/g; (3) minimum guaranteed CRC of 30 g/g or more and less than 34 g/g; (4) minimum guaranteed CRC of 34 g/g or more and less than 38 g/g; (5) minimum guaranteed CRC equal to or more than 38 g/g. *See id*. at 3.

LG Chem also requested that ITA adopt two additional product characteristics for model match purposes of guaranteed performance levels: (1) absorbency under pressure ("AUP"), including absorbency under load ("AUL"), and (2) permeability ("PERM"). LG Chem claimed that AUP indicates how well SAP responds to stress, and that PERM indicates the ability to pass liquid between superabsorbent polymer particles. *Id*. at 6. LG Chem claimed that "these commercially meaningful characteristics have impacts on the effectiveness of downstream products and on customer preferences." LG Chem Resp. at 8, citing *id*.

AUP assesses SAP's ability to absorb liquid under a certain amount of pressure, *e.g*., 0.7 psi. LG Chem proposed model match codes for AUP and AUL depending on the type of test performed, with a cut-off threshold of 15 g/g for each test-based division: (1) no minimum guarantee; (2) minimum guaranteed AUP (0.3 psi) less than 15 g/g; (3) minimum guaranteed AUP (0.3 psi) equal to or more than 15 g/g; (4) minimum guaranteed AUP (0.7 psi) less than 15 g/g; (5) minimum guaranteed AUP (0.7 psi) equal to or more than 15 g/g; (6) minimum guaranteed AUL (0.9 psi) less than 15 g/g; (7) minimum guaranteed AUL (0.9 psi) equal to or more than 15 g/g. *Id*. at 5.

Permeability refers to the ability with which liquid passes between SAP particles, where "g/g" refers to the weight of water that each gram of SAP can retain. *Id*. LG Chem proposed divisions into model match codes depending on the test used by the producer to measure permeability: (1) no minimum guarantee; (2) minimum guaranteed

"Gel Bed Permeability" ("GBP"[4]) less than 40 (u.o.m. = Darcy (10^{-8} cm^2)); (3) minimum guaranteed GBP equal to or more than 40 (Darcy 10^{-8} cm^2); (4) minimum guaranteed Gel Permeability Under Pressure ("GPUP") or Saline Flow Conductivity ("SFC") less than 15 (10^{-7} cm^3 sec/g); (5) minimum guaranteed GPUP or SFC equal to or more than 15 (10^{-7} cm^3 sec/g); (6) minimum guaranteed Permeability Dependent Absorbency Under Pressure ("PDAUP") less than 10 (g/g); (7) minimum guaranteed PDAUP equal to or more than 10 (g/g). *See id*. at 6.

LG Chem also explained that AUP and permeability are "generally inversely related" to CRC; for example, as CRC increases, AUP and permeability decrease. *Id*. at 4.[5]

Another Korean producer and interested party, Sumitomo Seika Polymers Korea Co., Ltd., also submitted rebuttal comments regarding the model match hierarchy.[6] Sumitomo Rebuttal Comments on Model Match Product Characteristics (Dec. 23, 2021) (P.R. 53). Like the Coalition and LG Chem, Sumitomo Seika agreed that CRC is the most relevant characteristic of SAP, but it requested that ITA not adopt pre-established gram-to-gram ranges of CRC and instead require respondents to explain in narrative how they define low, medium, and high capacity when making sales of SAP in the normal course of business. Alternatively, Sumitomo Seika requested that, if ITA determined to use pre-established ranges to define the CRC characteristic, then it should adopt the ranges that Sumitomo Seika uses in its normal course of business: (1) < 30 g/g; (2) > 30 g/g but < 42 g/g; and (3) > 42 g/g. *Id*. at 2–3. Regardless, Sumitomo Seika "d[id] not believe the inclusion of AUP or permeability is necessary to differentiate between its different models of [SAP]." *Id*.

Sumitomo Seika proposed a broader divisional increment (12 g/g versus Coalition's 6 g/g); in doing so, it agreed with distinguishing CRC as low, intermediate, and high capacity. *See* Pl's Mot. for J. on the Agency Record, ECF No. 20, at 6. In their rebuttal comments, the

[4] "GBP is a measurement under which no pressure is placed on the SAP in the swelling stage. GPUP and SFC are measurements under which 0.3 psi pressure is placed on the SAP in the swelling stage. Finally, PDAUP is a measurement under which 0.7 psi pressure is placed on the SAP in the swelling stage." LG Chem Resp. at 8 n.2, referencing its Model Match Comments at 6 (P.R. 42).

[5] Not relevant here, LG Chem also proposed that ITA include a fourth physical characteristic distinguishing between SAP with raw materials ultimately sourced from crude oil and SAP with raw materials sourced from biodiesel and other bio materials. LG Chem Model Match Comments at 6–7 and Attachment 1.

[6] It was not selected as a mandatory respondent so it sought to participate in the review as a voluntary respondent. *See* 19 C.F.R. §351.204(d). Towards that objective, it submitted preliminary information on its organization, accounting practices, markets, and merchandise, *see* SSPK's Section A Response (Jan. 19, 2022) (C.R. 24–27; P.R. 67–70), but before providing a Sections B-D response of cost and sales data it withdrew its request to further participate. *See* Letter from SSPK to ITA, "Withdrawal of SSPK's Request for Voluntary Respondent Treatment" (Jan. 25, 2022) (P.R. 91).

Coalition also reiterated emphasis on the importance of classifying CRC in appropriate low, intermediate, and high categories, and that optimizing SAP for a certain CRC level generally will lead to tradeoffs in the levels of AUP and permeability. Petitioner Rebuttal Comments on Model Match Product Characteristics (Dec. 23, 2021) at 4–6 (P.R. 49).

The Coalition also emphasized that LG Chem's proposal to assign divisions within AUP and permeability characteristics by a respondent's chosen test methodology rather than physical characteristics would introduce distortions and allow a respondent to manipulate the dumping margin analysis, arguing that a given product could be categorized in multiple divisions within the AUP or PERM product characteristics depending on the selected testing method, which would result in more than one CONNUM being possible for such a product. *Id*. at 5–6.

After considering comments and rebuttal from interested parties, ITA announced its model match hierarchy in early 2022. The agency rejected LG Chem's proposal and chose to use only CRC as the key physical characteristic for SAP, divided into three measurement ranges for low (less than 30 g/g), intermediate (30 to 36 g/g), and high (more than 36 g/g) CRC. Memorandum, *Less-Than-Fair-Value Investigation of Certain Superabsorbent Polymers from the Republic of Korea: Product Characteristics Hierarchy* (ITA Jan. 21, 2022) (P.R. 89). ITA did not address any of the arguments raised by the Coalition or LG Chem in support of their respective positions in its memorandum.

Acknowledging that "[ITA] has historically been hesitant to revise the CONNUM once established," LG Chem requested that the agency reconsider its model match hierarchy, asserting that it was "simplistic" and that the views of Sumitomo Seiko should be disregarded. LG Chem Request for Reconsideration (Jan. 28, 2022) at 2 and 4 (C.R. 53, P.R 93). ITA did not modify its decision in response at that time.

LG Chem reported in its questionnaire response the CRC characteristic as defined by ITA. It also voluntarily provided alternative sales and cost data applying the model match criteria as outlined in its affirmative model match comments (*i.e*., measuring CRC in increments of 4 g/g and including AUP and permeability as key physical characteristics). Specifically, LG Chem reported alternative "CONNUM2s" using its proposed CRC characteristic ("CRC1") as well as its permeability ("PERM") and absorbency-under-pressure ("AUP") characteristics, based on testing protocols chosen by LG Chem. LG Chem's Sections B-D Questionnaire Response (Feb. 11, 2022) at B-10—B-12 (C.R. 60–61, 99, P.R. 97).

In the preliminary determination, ITA based its antidumping analysis on the standard sales and cost files using the January 21, 2022 model match hierarchy (*i.e.*, did not rely on LG Chem's alternative CONNUM2s) and calculated LG Chem's dumping margin as 28.74 percent. *Certain Superabsorbent Polymers From the Republic of Korea: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 87 Fed.Reg. 34647 (June 7, 2022) (P.R. 154).

ITA afterwards conducted verification of LG Chem's responsive cost and sales files. During verification, it did not explicitly verify LG Chem's alternative cost and sales files or any associated values in the CRC1, AUP, or PERM characteristics put forth by LG Chem. Sales Verification Report (Sept. 1, 2022) (C.R. 257, P.R. 173) and Cost Verification Report (Aug. 29, 2022) (C.R. 256, P.R. 171).

Following verification, LG Chem in its case brief requested that ITA re-evaluate and revise the product characteristics to include its proposed AUP, permeability, and CRC ranges of 4 g/g increments. *See* LG Chem Case Brief (Sept. 9, 2022) (P.R. 174).

The Coalition's rebuttal case brief requested that the agency continue to adopt CRC as the sole product characteristic. *See* Petitioner's Rebuttal Brief (Sept. 19, 2022) (P.R. 178).

Upon review of the briefing and reexamination of the record, ITA revised the model match hierarchy to include LG Chem's proposed AUP and permeability, amended CRC reporting to increments of 4 g/g, and recalculated LG Chem's margin using LG Chem's alternative sales and cost files based on LG Chem's volunteered CRC1, PERM, and AUP characteristics. Specifically, ITA found that "reporting CRC in 4 g/g increments, as well as including AUP and permeability, are commercially significant." IDM at 14 (P.R. 184). It claimed that replacing the CONNUMs used in the investigation with LG Chem's CONNUM2s "recognizes the significant physical and price differences in SAP produced with certain guaranteed levels of the physical characteristics." *Id*.

For the *Final Determination*, ITA ultimately asserted that price differences between products based on LG Chem's proposed characteristics were "meaningful from a commercial perspective." *Id*. at 9. It stated, on the one hand, that "cost differences were not instructive in determining that the differences were related to the additional physical differences." *Id*. On the other hand, ITA found that each of the proposed characteristics were commercially meaningful because "the price differences highlighted by LG Chem and observed by [it] appear to have a commercial basis." *Id*. at 10.

ITA found that, of the many characteristics that can be identified for SAP, those of AUP and PERM, as proposed by LG Chem along with its 4 g/g increments of CRC, are commercially significant with respect to price. IDM at 11–12 (P.R. 184). It asserted that differences associated with these three characteristics, as presented by LG Chem, "are reflected in the sales price to LG Chem's customers." *Id*. at 12.

Following ITA's replacement of the model match hierarchy, the dumping margin for LG Chem decreased from 28.74 percent to 17.64 percent. *Final Determination* at 65036 (P.R. 188). After an affirmative final injury determination by the International Trade Commission ("ITC"), ITA published an antidumping-duty order based upon the Contested Determination. *Certain Superabsorbent Polymers From the Republic of Korea: Antidumping Duty Order*, 87 Fed.Reg. 77794 (Dec. 20, 2022) (P.R. 196). This appeal ensued.

II

In an action such as this, the standard of judicial review is whether such a final determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. §1516a(b)(1)(B). The statute requires ITA to conduct a "fair comparison" between a product's "normal" value and either export price or constructed export price for its dumping margin analysis. 19 U.S.C. §1677b(a). "Normal" value is typically based on the adjusted home-market price of the foreign like product, which is defined in 19 U.S.C. § 1677(16)(A) in relevant part as "[t]he subject merchandise and other merchandise which is identical in physical characteristics."

To implement the statute's requirements, ITA is authorized to compare merchandise that is "identical in physical characteristics" by establishing a model match hierarchy[7] of the physical characteristics of the subject merchandise. *Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1209 (Fed.Cir. 1995). Physical characteristics must be "commercially significant"; minor differences are to be disregarded. *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1384 (Fed.Cir. 2001). Deciding upon the model match hierarchy is a "fact-intensive inquiry"[8], over which ITA has discretion. *SKF USA Inc. v. United States*, 263 F.3d 1369, 1381 (Fed.Cir. 2001). And, while the "commercial significance" of a difference in physical characteristics is

[7] This hierarchy of characteristics is used to create a control number, or CONNUM, in this instance for each unique SAP product. CONNUMs are comprised of digits, and each digit is a code for a physical characteristic of the product.

[8] *La Molisana S.p.A. v. United States*, 47 CIT ___, ___, 633 F.Supp.3d 1266, 1271 (2023) (citation omitted).

a determination made on a case-by-case basis, "at the very least it is a feature that is recognized in the broader industry of the subject merchandise." *Bohler Bleche GmbH & Co. KG v. United States*, 42 CIT ___, ___, 324 F.Supp.3d 1344, 1350 (2018)("*Bohler Bleche*") (citing *Pesquera Mares*, 266 F.3d at 1385).

III

The Coalition contends the *Final Determination* is unlawful because ITA: (A) erred by departing from its established practice of using the model match hierarchy that was decided early in the proceeding; (B) did not rely on substantial evidence in changing that hierarchy for the *Final Determination*; (C) relied on unverified alternative sales and cost information; and (D) did not address their argument regarding the potential for manipulation of the dumping margin.

A

The parties dispute whether ITA has an "established practice" of using the model match hierarchy chosen at the outset of an investigation for its final determination. The Coalition insists that ITA does, and it points to several agency statements from other proceedings indicating a practice of adhering to product matching criteria developed early in the investigation.[9] They also point to ITA's own statement in this proceeding that it has "historically been hesitant to revise the CONNUM once established." *See Final Determination* at 13.

The defendant and LG Chem point to *AB Rubber from France*[10] as an instance where ITA modified the model match framework at the final stage of an investigation.

The court considers that, to the extent the agency's model match hierarchy practice can be said to be "established", once announced,

[9] Pl's Reply at 1–2, referencing *Steel Propane Cylinders from Thailand: Final Determination of Sales at Less Than Fair Value*, 84 Fed.Reg. 29168 (Dep't Commerce June 21, 2019), and accompanying issues and decision memorandum ("I&D Memo") at Comment 1; *Carbon and Alloy Steel Wire Rod From the Republic of Korea: Final Affirmative Determination of Sales at Less Than Fair Value . . .*, 83 Fed.Reg. 13228 (Dep't Commerce March 28, 2018) ("*SWR from Korea*"), I&D Memo at Comment 3 ("Commerce has a long-standing practice of developing product characteristics and a model match methodology in the early stages of each proceeding, and in consultation with the interested parties"); *Notice of Final Determination of Sales at Less Than Fair Value . . .: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 Fed.Reg. 29310 (Dep't Commerce May 22, 2006), I&D Memo at Comment 1 ("[ITA] should not make any changes to the product characteristics or model match criteria at this time. We find that the appropriate time to consider comments with respect to the physical characteristics and model match criteria is at the beginning of the proceeding").

[10] *Acrylonitrile-Butadiene Rubber From France: Final Affirmative Determination of Sales at Less Than Fair Value . . .*, 87 Fed.Reg. 37833 (Dep't Commerce June 24, 2022).

the practice indicates reticence to revise the hierarchy after it is decided at the early stage of an investigation. Yet, it is settled that ITA has the authority to reconsider any decision on any aspect of an investigation made earlier in a proceeding prior to reaching a final determination. *See, e.g., Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360 (Fed.Cir. 2008) ("[t]he power to reconsider is inherent in the power to decide"); *Hyundai Steel Co. v. United States*, 42 CIT ___, ___, 319 F.Supp.3d 1327, 1343 (2018), quoting *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed.Cir. 1995) ("[p]reliminary determinations are 'preliminary' precisely because they are subject to change").

Implicitly acknowledging this state of the law, the Coalition contend that ITA has provided no "compelling" reason for altering its model match hierarchy in this investigation. Pl's Reply at 4. *See supra* n.9.

ITA has explained that it

> will find that "compelling reasons" exist if a party proves by "compelling and convincing evidence" that the existing model-match criteria "are not reflective of the merchandise in question," that there have been changes in the relevant industry, or that "there is some other compelling reason present which requires a change."

Fagersta Stainless AB v. United States, 32 CIT 889, 894, 577 F.Supp.2d, 1270, 1277 (2008), quoting *Notice of Final Results of the Twelfth Administrative Review of the Antidumping Duty Order on Certain Corrosion–Resistant Carbon Steel Flat Products from the Republic of Korea*, 72 Fed.Reg. 13086, and accompanying I&D Memo at Comment 1(b) (March 20, 2007).

In *AB Rubber from France*[11], concerning which the parties differ as to interpretation, ITA did not explicitly invoke the phrase "compelling reason" for altering its model-match hierarchy in the end, but it is apparent from the issues and decision memorandum of that proceeding that the agency found differences among product produced with and without certain stabilizers to be commercially significant, which it therefore considered a "compelling reason" to adopt a respondent's proposed alternative CONNUMs for the final determination.

In this proceeding, similarly, ITA did not explicitly claim a "compelling reason" in altering its model match hierarchy, but it is apparent that, when it examined the record as a whole, it concluded it had a compelling reason to do so. Whether the *Final Determination* adequately examines and articulates the substantial evidence and rea-

[11] *Supra*, n.10.

soning to support that conclusion (to adopt a new model match hierarchy at the tail-end of the proceeding) is considered below, but the court declines to hold as a matter of law that ITA was required to adhere to the model match hierarchy that it constructed during the early stage of the proceeding.

B

The IDM purports that LG Chem supported arguing the existence of commercially significant differences between SAP with certain guaranteed levels of AUP and permeability as well as SAP with CRC ranges reported in 4 g/g increments by providing separate analyses showing cost and price variations in comparison to ITA's existing CONNUMs; that those analyses showed that the price and cost differences could be substantial; that because they appeared significant on their face, ITA performed its own analysis of the prices reported in LG Chem's home market database and found that the price differences could be as much as 20 percent; that ITA's analysis of LG Chem's reported costs found their differences were not instructive in determining that they were related to the additional physical characteristics. IDM at 9.

Because price and cost differences alone are an insufficient basis for changing its model match methodology, ITA requires such differences to be "meaningful from a commercial perspective." *Id*. at 9–10. Noting the court's previous observation that relevant differences linked to product characteristics are those which "customers would view . . . as distinct in utility and value", *Bohler Bleche*, 42 CIT at ___, 324 F.Supp.3d at 1350, ITA "examined the evidence on the record and found that the price differences highlighted by LGC and observed by [it] appear to have a commercial basis which is 'recognized by the broader industry of subject merchandise.'" *Id*. at 10.

That evidence included the Coalition's own marketing materials, ITA stating:

> (1) CRC, AUP, and permeability are typical current SAP characteristics and an integral part of modern diapers; (2) SAP producers are able to break the normal restrictions of CRC and AUP independently; and (3) SAP products are marketed as distinct due to a small percentage difference in CRC. . . . [A] technical paper from BASF . . . lists CRC, AAP[12], and permeability as "Typical current SAP Characteristics;" an information sheet from BASF describes CRC, AAP, and permeability as "an integral part of modern diapers"; and a brochure from Evonik

[12] "AAP" is short for Absorbency Against Pressure and refers to the same physical characteristic as AUP. IDM at 5 n.26.

> Superabsorber LLC discusses its entire FAVOR® product range as featuring "different basic characteristics" which includes "absorption, retention, absorption under pressure, {and} permeability." Further, BASF's marketing materials emphasize that one product is meaningfully distinct from another product due to a ten percent improvement in CRC and results in a seven percent improvement of the downstream diaper product.

Id. (citations omitted).

The Coalition characterize this evidence as thin, sparse, and tenuous. Pl's Br. at 16, 18. They criticize that the marketing materials provided by LG Chem were obtained from the public domain and mostly undated; that the slide presentation from BASF Corporation (a member of the Coalition claiming a difference in CRC of 10 percent between two SAP products in its "HySorb" product line[13] — based upon which LG Chem apparently claimed that a ten percent difference is approximately equivalent to 4 g/g) was dated from 2015 and concerned a legacy product; that ITA relied on those marketing materials for the purpose of including only AUP and PERM in model matching; yet, the materials identify numerous physical characteristics of SAP, including CRC, absorption speed, odor control, haptics properties, SFC, raw materials purity, flow rate, bulk density, particle size distribution, absorption, pH, absorption under pressure, GBP, residual monomer, extractables, and color[14]; and they criticize ITA's lack of explanation for finding it appropriate to accept and rely on only two of these (in addition to narrower CRC increments) as providing "commercial significance;" and that ITA's reference to the CRC ranges they suggested in the ITC's injury investigation were submitted for the purpose of identifying product groups for the underselling analysis of domestic SAP, with CRC ranges of 6, 7, and 8 g/g (and which ranges were *broader*, not narrower, in any event). Pl's Br. at 11, referencing IDM at 11, n.83; *see also* Pl's Reply at 12–13.

The dispute, at this point, is over ITA's interpretation of what the foregoing evidence implies.

Defendant's central argument is that "the record contains information from both LG Chem and the Coalition showing that th[e AUP and permeability, in addition to CRC,] characteristics are commercially significant and not merely inversely related to one another." Def's Resp., ECF No. 25, at 7.

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[13] *I.e*., HySorb 9030 and HySorb 9900.

[14] Pl's Br. at 10–11, referencing LG Chem Model Match Rebuttal Comments (Dec. 23, 2021) at: Attachment 1, pp. 3, 13, and 18–21; Attachment 2, Section II "SAP Properties;" Attachment 3, p. 1 and Table 3; Attachment 4; and Attachment 5, pp. 9–10 and 13–14 (P.R. 54–55).

The Coalition contend that that is not this case, because CRC, AUP and permeability parameters necessarily involve trade-offs such that optimizing performance for one characteristic tends to decrease performance in the other characteristics, and since it is not possible to optimize all three parameters in a single product,"[t]his means that no SAP type is inherently superior or inferior to any other; it simply depends on the customer's preference for balancing the SAP parameters" — which implies that there is no inherent relation between costs, price, and the characteristics proposed by LG Chem. Pl's Br. at 18–19. This means, in other words, that the AUP and permeability product characteristics "have no commercial significance or 'utility' that is not already captured by the CRC product characteristic." Pl's Reply at 11.

The court observes that ITA's price analysis of LG Chem's home market database compared the original CONNUMs to LG Chem's alternate CONNUMs and "found that the price differences could be as much as 20 percent." IDM at 9; *see also* Def's Resp. at 13.

However, as the Coalition argue, this does not actually support the claim of "commercial significance" because changes to weighted-average prices are an unsurprising and expected result of changing the CONNUMs assigned to products: ITA observed that there are also cost differences between databases but in contrast to its treatment of price the agency dismissed such differences as commercially insignificant and unrelated to the new physical characteristics. *See, e.g.*, Pl's Br. at 12–13.

The Coalition submitted for ITA's consideration a table demonstrating that the new CONNUMs, when controlled for each new physical characteristic, show no correlation between price and the characteristic, *i.e.*, as the values in LG Chem's "alternative" data fields (CRC1, AUP, or PERM) increase, the average unit value (AUV) for price does not have a correlating increasing (or decreasing) trend. *See* Pl's Br. at Attachment 1. Further, they point out, there is no indication in LG Chem's sales documentation that certain minimum guaranteed performance levels for a given grade of SAP [[

]]. Pl's Reply at 9, referencing, *e.g.*, LG Chem Section A Response (Jan. 19, 2022) ("LGCA") at Exhibit A-18(A)'s Exhibit C, and Exhibit A-18(B)'s Exhibit (P.R. 77, C.R. 36–39).

ITA's practice is to rely on price and cost correlations as evidence of commercially significant differences among product characteristics and to reject product characteristics that do not show this. *See* Pl's

Reply at 9, referencing *SWR from Korea*[15] I&D Memo at Comment 3 ("[w]ith regard to pricing differences, POSCO has not demonstrated that pricing differences arose as a result of differences in the three product characteristics it proposes, or even the extent to which such pricing differences are correlated with variations in those three proposed characteristics"). But, ITA dismissed the Coalition's analysis on the ground that the methodology did not "accurately reflect" the foreign like product, which in the agency's view consists of all three product characteristics "collectively". IDM at 11 n.82. ITA reasoned that its response in *SWR from Korea* is not inconsistent with taking a "collective" view of product characteristics when it examines pricing or cost correlation, and it here avers that it was persuaded that AUP and permeability, in addition to CRC in 4 g/g increments, are commercially meaningful CONNUMs for the foreign like product, as its IDM also explained:

> LGC's marketing materials show that LGC also views CRC, AUP, and permeability as basic properties of SAP. For example, LGC provided a product brochure which contains information regarding raw materials, specifications, and applications of SAP. The brochure provides a graphic separating the three major categories of SAP properties and it clearly states that CRC, AUP, and permeability are basic properties. Further, and in line with its marketing materials, LCG sells SAP by grade, which is based on the physical characteristics of the products. LGC did not provide a key to its grade codes and, thus, we cannot determine to what extent LGC accounts for these characteristics in its grades. Therefore, we turned to LGC's home market sales database to analyze this question; our review showed that the grade codes and CONNUM2s proposed by LGC tracked perfectly (i.e., each grade code fell into only one CONNUM), suggesting that . . . LGC defines its SAP grades using both AUP and permeability (and that customers purchase SAP with expectations related to these characteristics). In this regard, . . . the question before us is not whether it is possible to optimize each of the three characteristics; rather, it is whether, in combination, those characteristics create distinct products which are regarded as meaningfully different from a commercial perspective.

IDM at 11.

The agency's analysis of the record appears flawed to the extent the Coalition show that it does not actually evince any material correla-

[15] *Supra*, n.9.

tion between LG Chem's reported alternative CONNUMs (*i.e.*, CRC1, PERM, and AUP) and either prices or costs. ITA appears to have largely premised the commercial significance of AUP, permeability, and 4 g/g CRC increments on a relatively small set of unverified and mostly undated marketing materials. *See id*. at 14–15. Those materials in isolation do not represent substantial evidence of the commercial significance of AUP, permeability, and 4 g/g CRC increments.

The defendant argues that AUP and permeability must be included in the model match because they are "basic properties of SAP", and it supports this claim by citing to lists of SAP physical characteristics in three slide decks discussing SAP, contending that the mention of AUP and permeability in them, with no discussion of price or cost, is enough to show commercial significance. *Id*. at 14. But mere references to AUP and permeability in those materials do not demonstrate the existence of commercially significant differences, which must be manifest on the record. As discussed earlier, they identify a large number of physical characteristics of SAP products, *e.g.*: CRC; absorption speed; odor control; haptics properties; saline flow conductivity; raw materials purity; flow rate; bulk density; particle size distribution; absorption; pH; absorption under pressure; GBP; residual monomer and extractables; color, and so forth. *See, e.g.*, LG Chem's Rebuttal Model Match Comments at Attachment 1, pp. 3, 13, 18–25; Attachment 2, Section II "SAP Properties;" Attachment 3, p. 1 and Table 3; Attachment 4; Attachment 5, pp. 9–10 and 13–14; and Attachment 6, p. 101 (P.R. 54–55). Apart from the primary physical characteristic of CRC, upon which the parties agree, there is nothing particularly evident in terms of commercial significance about any one of the other physical characteristics that would make it stand out from the rest.

Similarly, the defendant points to the discussion during the preliminary staff conference of the ITC's injury investigation, where a domestic industry official listed some examples of SAP properties, including CRC, speed, AUP, and permeability. *See* Def's Resp. at 14–15. Yet the ITC's final report lists the fuller, greater number of quality-related characteristics of SAP identified by purchasers than only AUP and permeability in addition to CRC, including: absorption speed; free swell; hydroxyl value; iodine value; permeability; particle size distribution; color; color stability; residual monomer; moisture content; foreign material; pH; and odor. Superabsorbent Polymers from South Korea, USITC Pub. 5388 (Dec. 2020) at II-20. Out of all such characteristics, many of which are discussed at length in the marketing materials, ITA summarily concluded that AUP and permeability drive commercially significant price differences. Def's Resp.

at 14. But it provided no data or analysis demonstrating that AUP and permeability have greater commercial significance than the other characteristics cited in the materials that served as the primary basis for the agency's decision.

Fundamentally, the defendant claims instead that, because AUP and permeability are "an integral part of modern diapers," they are commercially significant, *ipso facto*, in addition to CRC. *See id*. at 13–15. When viewed in the context of the many SAP characteristics identified throughout the investigation, however, mere reference to AUP and permeability in briefing and marketing materials is scant support on which to base a finding of commercial significance before ITA.

The Coalition argue that considering the CRC1, AUP and PERM CONNUM2s "collectively" means ITA looked at whether *the new CONNUMs* reflected a price correlation instead of examining *the new product characteristics* themselves. They contend that ITA provides no explanation why this should be the case, and, in so doing, fails in its obligation to consider evidence provided by them that fairly detracts from its conclusion. *See, e.g., CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1373 (Fed.Cir. 2016). The court concurs.

ITA defines product control numbers in order to capture those physical characteristics that have a meaningful impact on costs or prices. The fact that there are price differences among the CONNUM2s reported by LG Chem is irrelevant if it cannot be demonstrated that those differences relate to particular physical characteristics that have commercial significance. *See* 19 C.F.R. §351.411(b) (permitting the agency to consider only those differences among products associated with "physical differences") and ITA Policy Bulletin 92.2 (July 29, 1992) (prohibiting ITA from attributing price or cost differences related to "extraneous factors" to physical differences). By regarding LG Chem's CONNUM2s "collectively," and looking at price differences among CONNUM2s — rather than looking among specific product characteristics within those CONNUM2s — ITA has effectively "flipped the script" and assumed the conclusion. In this case, under ITA's "collectively"considered methodology, the source of any price differences among CONNUM2s remains unknown: price differences may result from random variations or non-random factors having nothing to do with the AUP, permeability, and CRC1 characteristics as reported by LG Chem. Thus the fact that CONNUM2s may show different prices says nothing about whether those differences are attributable to physical characteristics.

Absent finding that prices move specifically in relation to each of LG Chem's reported AUP, permeability, and CRC1 characteristics

(the Coalition demonstrably showing that they do not), ITA's decision to define CONNUMs based on those characteristics is unsupported by substantial evidence and not in accordance with law. The Coalition appear correct that viewing the CONNUM2s "collectively" masks the commercial significance of each of the product characteristic codes selected by ITA — the very question ITA is attempting to answer in considering whether to include AUP and permeability in addition to CRC. Here, the product codes differ according to testing methodologies for the product characteristics; they are not based on the underlying physical characteristics themselves. Several CONNUMs have product codes that reflect [[

]], making it impossible to even articulate a price-property relationship. *See* Final Determination Margin Calculation (Oct. 20, 2022) at Attachment 3 (P.R. 187, C.R. 260) (showing that [[ ]] of [[ ]] of LG Chem's CONNUM2s have product characteristic code [[
]]).

The defendant claims that AUP, permeability, and CRC in narrow ranges create CONNUMs that are "commercially distinct in both utility and value," citing *Bohler Bleche*, 42 CIT ___, 324 F. Supp. 3d 1344. Def's Resp. at 12, 14, and 18. However, the new product characteristics do not fit this description of commercial significance. First, as explained above, the new characteristics and increments show no correlation when analyzed with SAP value, *i.e.*, price. Second, the Coalition's evidence demonstrates that AUP and permeability have an inverse relationship with CRC. This means that these two product characteristics have no commercial significance or utility that is not already captured by the CRC product characteristic. LG Chem's product brochure itself highlights the existing "correlation between properties" among CRC, AUP, and permeability, explicitly describing the "inverse proportion" or "direct proportion" between them. LG Chem's Rebuttal Model Match Comments at Attachment 2, Section II "SAP Properties" (P.R. 54–55). Other LG Chem submissions confirm that "[t]here is a trade off between main absorption properties of SAP." LGCA at Exhibit A-25, pp. 22–23 (P.R. 77–78).

The defendant diminishes this underlying facet of SAP chemistry but highlights a marketing claim in undated BASF materials for a legacy SAP product of "break[ing] the normal restrictions of the CRC & AUP interdependency." Def's Resp. at 14. Apparently based solely on this, ITA "concluded that LG Chem [also] uses more advanced technologies to achieve SAP with the right balance of CRC, AUP, and permeability." *Id*. at 16. But LG Chem never makes this claim. In fact, it concedes in its brief that "'AUP' is a trait that is generally inversely

related to CRC." LG Chem's Br. at 23, 28. ITA appears to have made its assumption about LG Chem's products without any evidence, data, or supporting information. Its model match determination is therefore premised upon a conclusion with no basis.

With respect to the narrower 4 g/g CRC increments, ITA's determination relies on (1) a single graphic in an eight-year-old presentation discussing the relative CRC levels of legacy products no longer sold in the U.S. market and (2) the broad CRC ranges that the Coalition suggested the ITC use for its underselling analysis. *See* Def's Resp. at 15–16. Regarding the graphic, nothing in it links a narrower CRC level to the price (or cost) of SAP. Whether narrower CRC ranges caused commercially significant price or cost differences cannot reasonably be concluded from this graphic. ITA's reliance on it does not satisfy the substantial evidence standard.

Regarding the ITC's underselling analysis, the pricing products ITA used for *its* purpose must be tethered to *that* context, if the analysis is to have any relevance in the context of an ITA investigation. The pricing products before the ITC are used to compare U.S. sales of imported and domestic SAP; whereas ITA's investigation compares a foreign producer's foreign like product normal values and export sales. Regardless, the pricing products before the ITC, in CRC ranges of 6, 8, and 7 g/g, establish *broader* CRC increments, not narrower ones. Moreover, the only other foreign producer in the investigation before ITA agreed that broad increments for high, medium, and low CRC levels are appropriate, and it explicitly opposed the inclusion of AUP and permeability. *See* Sumitomo Seika Rebuttal Comments on Model Match (Dec. 23, 2021) at 2–3 (P.R. 53). Such evidence of record does not bolster the agency's rationale for changing its model match hierarchy to a narrower CRC increment at the eleventh hour.

LG Chem did not produce any evidence from its own records to support its proposed CRC increments. LG Chem's own materials differentiate SAP as "high capacity" and "low capacity." *See* LGCA at Exhibit A-25, p. 7 (P.R. 77). This record evidence does not support the specific claim that 4 g/g CRC increments are a "traditional" industry practice.

In addition to repeating much of defendant's arguments, LG Chem's brief criticizes the early "settled" model match used throughout the period of the investigation, because it "only established three CONNUMs"; LG Chem implies that no other antidumping proceedings relied on a small number of CONNUMs. LG Chem's Br. at 9, 10, and 21.

The number of CONNUMs, however, is not relevant to whether the agency's determination is based on substantial evidence or otherwise

in accordance with law. Different CONNUMs become necessary only when products have commercially significant differences, not for the sake of creating unnecessary complexity.

For that matter, there have been a number of proceedings with limited numbers of CONNUMs, particularly with respect to chemical products that have a basic molecular makeup like SAP. In *Glycine from China*, for example, there were no reportable product characteristics, and all glycine was effectively treated as being within a single CONNUM. Request for Information, *Glycine from China* (ITA May 18, 2017) at C-5, ACCESS Barcode Number 3573743–01. Similarly, in a *Urea Ammonium Nitrate Solutions* investigation, the CONNUM was based on one physical characteristic (nitrogen content) and also a second binary characteristic to distinguish product that also contained corrosion inhibitors. Memorandum, *Product Characteristics for the Less-Than-Fair-Value Investigations of Urea Ammonium Nitrate Solutions from the Russian Federation and the Republic of Trinidad and Tobago* (ITA Sept. 1, 2021), Attachment, ACCESS Barcode Number 4157013–01. Thus, it is not inconsistent with past ITA practice to have a limited number of product characteristics and CONNUMs.

To summarize, the agency apparently relied for the most part on a few pieces of anecdotal information as the sole factors weighing in favor of finding commercial significance among LG Chem's preferred product characteristics. That is hardly a "robust" evidentiary basis for replacing the model match hierarchy.

The court thus concurs with the Coalition that this evidence would neither convince nor compel a reasonable person to conclude that AUP and permeability are commercially significant or conclude that CRC levels are more appropriately narrowed to 4 g/g ranges from the initial model match hierarchy. The justifications offered by the defendant and LG Chem for altering the model match hierarchy at the tail-end of the investigation fail to demonstrate that ITA based that decision on substantial evidence.

C

The Coalition bolster their position in arguing that ITA's eleventh-hour change in the model match hierarchy meant that it failed to verify LG Chem's alternative sales and cost files based on LG Chem's CONNUM2 definitions and used such unverified information in the *Final Determination*, contrary to the statute. *See, e.g.*, Pl's Br. at 14.

The statute requires the agency to "verify all information relied upon in making . . . a final determination in an investigation." 19

U.S.C. §1677m(i). No party contests this basic requirement. *See, e.g.*, Def's Resp. at 24; Pl's Reply at 14. The defendant claims that ITA "verified the sales and cost data that LG Chem provided, including the AUP and permeability levels that LG Chem also provided in the alternative databases." Def's Resp. at 6.

LG Chem takes that claim a step further, insisting that ITA "specifically verified [its] product characteristics at both the sales and cost verifications, and did so on the basis of both the initial control number and the control number [it] proposed." LG Chem's Resp. at 35. The legal and factual premises of both of these assertions appear to be flawed.

Courts generally do, as the defendant notes, provide ITA "latitude" in its approach to executing the statute's requirement to verify all information. Def's Resp. at 25. The court has also, on more than one occasion, explained that "[v]erification is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness." *See, e.g.*, *Dalian Meisen Woodworking Co. v. United States*, 45 CIT ___, ___, 571 F.Supp.3d 1364, 1371 (2021); *Bomont Indus. v. United States*, 14 CIT 208, 209, 733 F. Supp. 1507, 1508 (1990).

For its cost verification, ITA sought to verify "the cost data file submitted on April 04, 2022." This was cost database lgccop02.sas7bdat, *not* lgccop02_alt.sas7bdat, the latter database being the one with the alternative model match data. *See* LG Chem's First Section D Supplemental Questionnaire Response (April 5, 2022) at 2 (P.R. 116).[16]

ITA reviewed the reported per unit costs for the selected CONNUMs, *i.e.*, based on the initial model match methodology. It reported that it "traced the physical characteristics of the grade [[ ]] (i.e., centrifuge retention capacity) to the COA (i.e., certificate of analysis) data from the global supplier quality assurance system . . . and confirmed that the product had been appropriately classified as CONNUM [[ ]]." *Id.* at 13. But ultimately, those CONNUMs were not used in the *Final Determination*. ITA did not trace CONNUM2s for AUP, permeability, or replacement CRC ranges to the certificate of analysis or otherwise verify their accuracy, even on a "spot check" basis, as part of the cost verification. The agency did not ask to review – and did not review – costs for any CONNUM2s created for the altered model match hierarchy. The fact that AUP and permeability coincidentally may appear on occasion on the same document sheet as

[16] ITA informed LG Chem it would review costs for original CONNUM [[ ]] and CONNUM [[ ]] "in detail." Cost Verification Report (Aug. 29, 2022) at 2 (C.R. 256, P.R. 171).

CRC does not appear to be relevant to the process ITA set out for verification. *See* LG Chem's Resp. at 37.

Similarly, for the sales verification, the agency planned to "[r]eview the product matching criteria listed in the Appendix to the questionnaire," *i.e.*, the original model match criteria. Sales Verification Report (Sept. 1, 2022) at 10 (C.R. 257, P.R. 173). LG Chem officials informed ITA officials that "the values of centrifuge retention capacity (CRC) are based on the guaranteed values of the certificate of analysis." ITA "compared that to the information reported in the [home market] sales database." *Id*. Again, ITA officials verified the CRC characteristics, but not with the new characteristics or CONNUM2s.

The court therefore doubts defendant's and LG Chem's claims that the agency conducted an adequate verification.

For example, the defendant never asserts that ITA actually verified those product characteristics or new CONNUMs, instead asserting that "it verified LG Chem's cost accounting data, the basis of the alternative databases that reflect its proposed product characteristics." Def's Resp. at 25. But that is not equivalent to the verification program that ITA apparently set out to accomplish, which was to audit the product characteristics and CONNUMs used in the margin program. The defendant states that ITA "reviewed the certificate of analysis for each selected sale," but it only did so with respect to CRC (in the original ranges). *Id*. at 26. ITA was clear about what it checked — CRC — and was silent about what it did not check — AUP, permeability, and CRC1 in narrow ranges.

The agency does not appear to have verified — even on a spot-check basis — the new product characteristics or new CONNUMs used to calculate LG Chem's margin. And ITA verified reported costs only for CONNUMs [[ ]] and [[ ]], which were not used for the final margin analysis. The first order of business for its cost verification was to verify the cost buildups and allocations of CONNUMs, but it did not do this for any particular CONNUM2.

Remand on the basis of issue B, above, may moot further discussion of this issue C; but, of course, on remand ITA has "latitude" to provide further explanation on the foregoing, at its discretion.

D

Concerning the Coalition's last issue, they argued to ITA that the CRC1, PERM, and AUP characteristics as defined by LG Chem were distortive and unusable because the same SAP product could be classified into multiple categories at LG Chem's discretion based on its chosen testing protocol, creating a significant risk of manipulation.

That is an obvious problem, the Coalition contend, that ITA ignored without addressing or attempting to ameliorate it.

In the investigation, the Coalition argued to the agency that the new model match hierarchy promoted by LG Chem permits it to categorize identical products in more than one CONNUM, allowing manipulation, and reducing the accuracy of the dumping margin. Specifically, they asserted that LG Chem's model match hierarchy allows it to choose among several codes to report a given product characteristic depending on how LG Chem decided to test for the relevant characteristic. This is the case, they contend, even though the type of testing does not affect or change the underlying physical characteristic. The Coalition thus argued that LG Chem could thus report a "unique" physical characteristic of a product in more than one way, based simply on the selected testing methodology, which in turn meant that products with identical physical characteristics could have different CONNUMs – or a single product could be classified in more than one CONNUM – based on the testing methodology for such characteristics. *See* Pl's Br. at 39–40. This approach allows for manipulation, they argued, and can reduce the accuracy of the dumping margin. Coalition Rebuttal Model Match Comments at 5–6 (P.R. 49); Coalition Response to LGC's Request for Reconsideration (Jan. 31, 2022) at 3 (P.R. 94); Coalition Rebuttal Brief at 6–7 (P.R. 178). The Coalition contend that this argument has been the core of their objection to LG Chem's preferred model-match hierarchy, and is directly relevant to whether the antidumping margin is accurate. Pl's Reply at 18.

The court concurs that ITA did not fully address this issue and therefore remands for such consideration.

IV

ITA did not engage with the Coalition's argument in its *Final Determination*. It did not discuss the possibility of LG Chem's changing the testing procedure for a given physical characteristic and its effect on accuracy. The Coalition's argument, however, is fundamental, and the potential validity of it would undermine the effectiveness of the antidumping-duty order.

Under the statute, ITA must "address[] relevant arguments, made by interested parties who are parties to the investigation or review." *See* 19 U.S.C. §1677f(i)(3)(A). It "must address any arguments made by the parties that are material to [ITA]'s determination." *Suzano S.A. v. United States*, 46 CIT ___, ___, 589 F.Supp.3d 1225, 1233 (2022); *Bonney Forge Corp. v. United States*, 46 CIT ___, ___, 560 F.Supp.3d 1303, 1312 (2022)("a failure to address an essential argu-

ment in making a final decision is sufficient grounds for remand"); *see also Hung Vuong Corp. v. United States*, 44 CIT ___, ___, 483 F.Supp.3d 1321, 1367 (2020).

The defendant claims that ITA did, in fact, address the Coalition's concerns about manipulation. It claims that the agency "discerned" in its *Final Determination* evidence with which it engaged and dismissed the Coalition's argument regarding manipulation and inaccuracy resulting from the model match framework introduced in the *Final Determination*. Def's Resp. at 23–24. Conceding that ITA did not mention "manipulation" or "distortion" in its *Final Determination*, the defendant argues this is immaterial to the court's analysis. *Id*. at 23.

Although the semantics of a determination are less important than its substance, the IDM does not support the defendant's ultimate assertion. Neither the substance nor the language of the *Final Determination* addressed the Coalition's argument. ITA's analysis in the *Final Determination* only focused on whether LG Chem's proposed model match reflected commercially significant differences; not on the possibility for manipulation, distortion, misuse, "gaming" the system, or a myriad of other terms that could describe this problem, as raised by the Coalition.

The defendant also points to ITA's analysis on the commercial significance of LG Chem's preferred characteristics in a separate discussion, but this appears to be a *post hoc* attempt to find an implicit basis for any analysis purportedly relevant to the potential for manipulation. *Id*. at 23–24. The defendant specifically claims that ITA made two points, regarding "customer preference" as part of its commercial significance analysis, that constitute consideration and reasoned analysis of the Coalition's manipulation argument, namely (1) that "the home market sales database suggests that LG Chem defines its SAP grades using both AUP and permeability 'and that customers purchase SAP with expectations related to these characteristics'"; and (2) "achieving different guaranteed levels of AUP and permeability, completed through relevant testing, is commercially significant to downstream customers." *Id*. According to the defendant, these points show that there was a "reasonably 'discernible path' to conclude that ITA considered and addressed potential concerns of distortion or manipulation." *Id*. at 24. But these points do not address the Coalition's core concern at all, which is the ability of respondents to manipulate the applicable CONNUM by using different tests for a given physical characteristic. The considerations highlighted by ITA address customers' expectations for AUP and permeability, and say nothing about LG Chem's ability to use a variety of testing options to measure such physical characteristics.

In any event, the court cannot accept *post hoc* rationalizations offered by government counsel. *See*, *e.g.*, *Coalition for Fair Trade in Garlic v. United States*, 44 CIT ___, ___, 437 F.Supp.3d 1347, 1356 (2020) ("[t]he court cannot sustain an agency determination based on findings the agency itself did not make")(citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962)). Furthermore, defendant's contention that "customer preferences" immunize LG Chem from manipulating the CONNUMs, *i.e.*, because LG Chem "conducts tests to satisfy customers' expectations and preferences, [such that] it would be difficult to manipulate testing", Def's Resp. at 23, cuts directly against the procedural posture of certain domestic interests: LG Chem's customers actively opposed trade relief in the investigation below and have a very strong interest in obtaining SAP that is not subject to a cash deposit rate that captures the full margin of dumping. *See*, *e.g.*, USITC Pub. 5388 at 3, B-4 (showing that customer Procter & Gamble appeared alongside LG Chem before the ITC "In Opposition" to the order and that Procter & Gamble and Kimberly-Clark Corporation appeared as "respondent entities"). In other words, LG Chem's customers' interests are aligned with its interests, which does not mitigate but potentially increases the risk of manipulation.

In what may seem a tad ironic here, the court, *sub silencio*, has considered LG Chem's arguments on this issue and finds that they do not merit rejecting the Coalition's plea for remand, as they argue in their reply brief. *Cf.* LG Chem Resp. at 40–43 *with* Pl's Reply at 22–23.

V

In view of the foregoing, plaintiff's motion for judgment on the agency record must be granted[17], and the matter is hereby remanded to the ITA for further proceedings consistent with this opinion. Results thereof to be filed on or before May 31, 2024 and a joint proposal for scheduling comments to be filed on or before June 14, 2024.

So ordered.

Dated: New York, New York
March 1, 2024

/s/ *Thomas J. Aquilino, Jr.*
SENIOR JUDGE

[17] The quality of the written submissions on all sides has obviated the need for oral argument, *see* ECF No. 33, and the order of January 9, 2024 therefor can be, and it hereby is, rescinded.

Slip Op. 24–30

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

[Sustaining a remand redetermination submitted in response to court order in litigation contesting a scope ruling]

Dated: March 11, 2024

Peter J. Koenig, Squire Patton Boggs (US) LLP, of Washington, D.C., 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, D.C., for defendant. With him on the submission were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel was *W. Mitchell Purdy*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

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

OPINION

Stanceu, Judge:

Plaintiff MCC Holdings dba Crane Resistoflex ("Crane"), an importer of certain ductile iron lap joint flanges ("Crane's flanges"), brought this action 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 on certain pipe fittings from the People's Republic of China (the "Order"). *Notice of Antidumping Duty Order: Non-Malleable Cast Iron Pipe [Fittings] From the People's Republic of China*, 68 Fed. Reg. 16,765 (Int'l Trade Admin. Apr. 7, 2003) (the "*Order*").

Before the court is a redetermination upon remand (the "Third Remand Redetermination"), which Commerce submitted in response to the court's opinion and order in *MCC Holdings dba Crane Resistoflex v. United States*, 46 CIT __, 607 F. Supp. 3d 1201 (2022) ("*Crane II*"). Final Results of Redetermination Pursuant to Court Order (Dec. 19, 2022), ECF No. 64 ("*Third Remand Redetermination*").

Commerce determined in the Third Remand Redetermination, under protest, that Crane's flanges are not subject to the Order. Plaintiff has commented in favor of the Third Remand Redetermination. Pl. MCC Holdings DBA Crane Resistoflex's Comments on Commerce Third Remand Redetermination (Jan. 3, 2023), ECF No. 66 ("Crane's

Comments"). Defendant-intervenor, ASC Engineered Solutions, LLC ("ASC"), has commented in opposition. Def.-Intervenor's Comments on the Final Results of Remand Redetermination 1 (Jan. 3, 2023), ECF No. 67 ("ASC's 2023 Comments") (incorporating by reference Def.-Intervenor's Comments on the Final Results of Redetermination (Jan. 20, 2022), ECF No. 60 ("ASC's 2022 Comments")). Defendant argues that the court should enter judgment for the Government, maintaining that the Third Remand Redetermination is supported by substantial evidence and otherwise in accordance with law.

The court sustains the Third Remand Redetermination.

I. BACKGROUND

Background on this case is presented in the court's prior opinions and is summarized and supplemented herein. *Crane II*, 46 CIT at __, 607 F. Supp. 3d 1202—03; *MCC Holdings dba Crane Resistoflex v. United States*, 45 CIT __, __, 537 F. Supp. 3d 1350, 1353—55 (2021) ("*Crane I*").

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] In the decision contested in this litigation, the "Final Scope Ruling," Commerce determined Crane's flanges to be within the scope. *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 commenced this action to contest the Final Scope Ruling on December 19, 2018. Summons, ECF No. 1; Compl., ECF No. 2.

Crane moved for judgment on the agency record under USCIT Rule 56.2. Pl. MCC Holdings dba Crane Resistoflex's Rule 56.2 Mot. for J. on the Agency R. (Aug. 23, 2019), ECF No. 27. In response to Crane's motion, defendant filed an unopposed motion 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, (Dec. 30, 2019), ECF No. 32. *Star Pipe I* arose from litigation in which a plaintiff contested a scope ruling on ductile iron flanges that in many respects were similar to Crane's flanges. The court concluded in *Star Pipe I* that the final scope ruling at issue in that case did not reflect consideration of all of the factors

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

(the "(k)(1) factors") Commerce was required to consider according to its regulation, 19 C.F.R. § 351.225(k)(1). The court granted defendant's motion in part and, considering the Department's requested remand too narrow, directed Commerce to reconsider the Final Scope Ruling in the entirety.[2] Order 2 (Jan. 7, 2020), ECF No. 33.

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*"). In *Crane I*, the court remanded the First Remand Redetermination to Commerce, ruling that Commerce had failed to consider certain material evidence on the record that detracted from its determination and reached some conclusions that were unsupported by substantial record evidence. *Crane I,* 45 CIT at __, 537 F. Supp. 3d at 1353.

Commerce filed a redetermination (the "Second Remand Redetermination") in response to *Crane I* on December 21, 2021, in which Commerce ruled, under protest, that Crane's flanges were outside the scope of the Order. Final Results of Redetermination Pursuant to Court Order, ECF No. 58–1. The court concluded in *Crane II* that the Second Remand Redetermination was preliminary to an actual scope determination and, therefore, not in a form in which it could go into effect if sustained upon judicial review. *Crane II*, 46 CIT at __, 607 F. Supp. 3d at 1209 (2022). Concluding that the Second Remand Redetermination "does not allow the court to perform its essential judicial review function," *Crane II* ordered Commerce to issue a determination that would go into effect if sustained upon judicial review. *Id*. *Crane II* held, further, that the Second Remand Redetermination "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.'" *Id. Crane II* clarified that the court did not make findings in *Crane I* nor did it direct the result. *Id*. The opinion and order in *Crane II* added that a decision on whether Crane's flanges are within the scope of the Order "is a determination for Commerce to make upon remand." *Id*., 46 CIT at __, 607 F. Supp. 3d at 1208.

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[2] The court recently sustained the Department's determination, submitted under protest following this court's decision in *Star Pipe Prods. v. United States*, 46 CIT __, 607 F. Supp. 3d 1192 (2022) ("*Star Pipe IV*"), that Star Pipe's flanges are outside the scope of the Order. *Star Pipe Prods. v. United States*, 48 CIT __, Slip Op. No. 24–28 (Mar. 6, 2024) ("*Star Pipe V*").

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, 19 U.S.C. § 1516a.[3] 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, 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

The Order contains language (the "scope language") defining the merchandise that is within the scope of the Order, as follows:

> [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 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

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

> petition.[4] These ductile fittings do not include grooved fittings or grooved couplings. Ductile cast iron fittings with mechanical joint ends (MJ), or push on ends (PO), or flanged ends 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.

C. The Scope Ruling Request and the Final Scope Ruling

The Scope Ruling Request described 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 2, Ex. 1. The Scope Ruling Request states that Crane's Flanges "are for a line of plastic lined piping at Crane Resistoflex in Marion, NC, USA for use in process piping primarily for the chemical process industry." *Id.* at 2.

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 3, Ex. 1. The Scope Ruling Request added that "[t]here is no pipe fitting attached to the subject Flanges." *Id.* at 3.

The Scope Ruling Request stated that Crane's Flanges are described by industry standard ASME B16.42, pointing out that this industry standard does not consider flanges to be "fittings." *Id.* at 4. It stated that "the standard B16.42 by its title covers 'Ductile Iron Pipe *Flanges* and Flanged *Fittings* Classes 150 and flange 300.'" *Id.* at 4.

The Final Scope Ruling concluded that five of the nine flanges described in the Scope Ruling Request—those with inner diameters of 1.938 inches to 4.615 inches, inclusive—are subject to the Order and that the remaining four flanges, having inner diameters greater than 6 inches, are not. *Final Scope Ruling* at 1. Commerce reasoned that Crane's flanges are described by the term "fittings" (or the synonymous term "pipe fittings") as used in the scope language in the Order and, because they are made of ductile iron, rather than non-malleable cast iron, are described by the first sentence of the second paragraph

[4] The word "petition" is incorrectly included in the scope language as it appears in 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). The apparent intent was a reference to the antidumping duty order instead.

of the scope language. *Final Scope Ruling* at 10—12. In pertinent part, the sentence is as follows: "Fittings that are made out of ductile iron that have the same physical characteristics as the gray or cast iron fittings subject to the scope above . . . are also included in the scope of this petition." *Order*, 68 Fed. Reg. at 16,765.

D. The Third Remand Redetermination

In the Third Remand Redetermination, as it did in the Second Remand Redetermination, Commerce determined under protest that Crane's flanges are outside the scope of the Order. In reaching this conclusion, Commerce reasoned that it "must take into account" the (k)(1) factors as set forth in 19 C.F.R. § 351.225(k)(1). *Third Remand Redetermination* at 8. The (k)(1) factors are "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the [U.S. International Trade] Commission ['ITC' or the 'Commission']." 19 C.F.R. § 351.225(k)(1). The Third Remand Redetermination states that "in consideration of *Crane I* and *Crane II* and further review of the evidence on the record, under respectful protest, we find that the sources identified in 19 CFR 351.225(k)(1) do not support a finding that the ductile iron flanges are within the scope of the *Order*." *Third Remand Redetermination* at 7 (footnote omitted).

In response to the court's objection in *Crane II*, Commerce stated in the Third Remand Redetermination that "should the Court affirm these final results of redetermination, a *Federal Register* notice will be published stating that, consistent with the Court's holdings, Crane's ductile iron flanges are outside the scope of the *Order*." *Third Remand Redetermination* at 17. Commerce added that "relevant instructions to [Customs and Border Protection] giving effect to the determination, as sustained by the Court, will also be issued at that time as appropriate." *Id.* at 18.

E. Comments on the Third Remand Redetermination

Crane supports the Third Remand Redetermination, stating that "Commerce correctly held that Crane flanges are not subject to the pertinent antidumping order, when rendering a decision in accordance with law and record facts, per this Court's decisions." Crane's Comments 1.

Arguing that it merely reformats the Department's previous decision rather than make any new findings, ASC opposes the Third Remand Redetermination and incorporates by reference its comments opposing the Second Remand Redetermination. ASC's 2023 Comments 1. Taking the position that both the Second and Third Remand Redeterminations are unsupported by substantial evidence

and otherwise not in accordance with law, ASC maintains that "Commerce, acting 'under protest,' erred by (1) finding that the Court directed a particular result, (2) improperly ignoring the plain meaning of the scope in favor of interpretations of certain '(k)(1)' materials, and (3) finding that it lacked discretion to interpret certain key language in the report of the International Trade Commission." *Id*. at 2.

Defendant responds to the comment submissions by stating that "the Court should sustain the Third Remand Results and enter final judgment for the Government because Commerce has complied with the Court's remand order and because the Third Remand Results are supported by substantial evidence and otherwise lawful." Def.'s Resp. to Comments on Remand Results 1 (Jan. 13, 2023), ECF No. 68.

The court agrees with the position of the Government and Crane that the Third Remand Redetermination is supported by substantial evidence on the record and otherwise accords with law. For the reasons stated below, the court disagrees with ASC's position to the contrary.

F. Commerce Was Required to Consider the Factors in 19 U.S.C. § 351.225(k)(1)

ASC argues that because the scope language of the Order unambiguously includes ductile iron flanges such as Crane's, Commerce should not have considered the (k)(1) factors. ASC's 2022 Comments 2—3 ("There being no ambiguity, that should have been the end of the matter; there was no justification to consider the '(k)(1)' materials." (footnote omitted)). This argument is unpersuasive because the scope language, although using the term "fittings" (and, synonymously, "pipe fittings"), does not define the term and on its face does not resolve the issue of whether flanges in general, or ductile iron flanges in particular, were within the intended meaning of that term.

Consideration of the (k)(1) factors not only was required by the plain language of the regulation, 19 C.F.R. § 351.225(k)(1), as applied to this proceeding but also was essential to the Department's determining, for purposes of the Third Remand Redetermination, whether ductile iron flanges were within the scope of the Department's and the ITC's investigations.[5] As discussed below, considerable record evidence pertaining to the (k)(1) factors supports the Department's decision in the Third Remand Redetermination that Crane's flanges are outside the scope of the Order.

[5] An amendment to 19 C.F.R. § 351.225(k), effective as to scope applications filed on or after November 4, 2021, does not apply to this proceeding. *See Regulations To Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws; Final Rule*, 86 Fed. Reg. 52,300, 52,327 (Sept. 20, 2021).

G. Substantial Evidence Supporting the Department's Determination that Crane's Flanges Are Not Within the Scope of the Order

The court, as does defendant, disagrees with ASC's comment that the Third Remand Redetermination is unsupported by substantial evidence on the record. In its previous opinions, the court identified certain evidence that detracted from the Department's earlier findings and that Commerce needed to consider, which it now has done. As the court discussed in *Crane I*, 45 CIT at __, 537 F. Supp. 3d at 1358—60, among the evidence earlier overlooked was certain evidence contained in the "ITC Report," which was the report of the affirmative determination of threat to the domestic industry issued by the ITC during the antidumping duty investigation. *See Non-Malleable Pipe Fittings from China*, Inv. No. 731-TA-990 (Final), USITC Pub. No. 3586 (Mar. 2003) (P.R. Docs. 18–21, Attach. IV) ("*ITC Report*"). The ITC Report contained evidence that the ITC considered ductile iron flanged fittings to be outside the scope of its investigation. *Crane I,* 45 CIT at __, 537 F. Supp. 3d at 1359. As *Crane I* further stated, "[n]oteworthy is evidence showing that ductile iron flanges share a defining physical characteristic with ductile iron flanged fittings, i.e., a flange" and "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." *Id*.

In its 2022 comments, ASC objected that the express exclusions in the scope language for certain ductile iron flanged fittings would be "superfluous" if all ductile iron flanged fittings were considered to be outside the scope of the Order. ASC's 2022 Comments 3—4. ASC also opined that the ITC Report is "ambiguous" on the issue of whether the ITC intended to exclude ductile iron flanged fittings from the scope of its investigation. As *Crane I* pointed out in responding to a similar analysis in the First Remand Redetermination, "[t]his conclusion misses the point" by "overlook[ing] the significance of the ITC's discussion of its domestic like product and the scope of the ITC's investigation" (which the ITC stated were the same). The ITC was aware of the specific exclusion Commerce provided for certain goods conforming to specifications of the American Water Works Association, "and the ITC expressed no disagreement with respect to it." *Crane I*, 45 CIT at __, 537 F. Supp. 3d at 1359 (citation omitted). "But apart from that, the ITC, based on its own investigation, still determined that *all* ductile flanged fittings were outside the scope of the domestic like product, and therefore also outside the scope of its own injury/threat investigation." *Id*. As *Crane I* explained:

> It is axiomatic that under the antidumping duty statute as it applies in this case, Commerce may impose antidumping duties on a good only following a determination by Commerce that the good is 'unfairly traded,' i.e., that it was the subject of an affirmative less-than-fair-value determination by Commerce and also was included within the goods investigated by the ITC and thereby found to have resulted in material injury or the threat of material injury to the domestic industry. *See* 19 U.S.C. § 1673. By requiring Commerce to consider 'the descriptions of the merchandise contained in . . . the determinations of . . . the Commission,' 19 C.F.R. § 351.225(k)(1), when ruling on a scope issue, the Department's regulations embody this principle.

Id., 45 CIT at __, 537 F. Supp. 3d at 1359—60. While ASC characterizes the ITC Report as "ambiguous" as to whether ductile iron flanged fittings were within the scope of the ITC's investigation, what is not ambiguous is that the ITC defined the domestic like product as corresponding to the scope of its investigation and did *not* broaden the scope of the domestic like product to include ductile iron flanged fittings. *Id*., 45 CIT at __, 537 F. Supp. 3d at 1359 (quoting *ITC Report* at 8). The intent of the ITC to exclude ductile iron flanged fittings from its investigation, and the absence in the ITC Report of a general discussion of "flanges" (or ductile iron flanges in particular, such as Crane's), lent support to the decision in the Third Remand Redetermination to exclude Crane's flanges from the scope of the Order.

The evidence in the ITC Report is not the only evidence that supports the Department's conclusion in the Third Remand Redetermination that Crane's flanges are not within the scope of the Order. The Petition ("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) ("*Petition*"), while containing certain brochures as exhibits that illustrate flanges, did not identify flanges in the body of the document as a class or kind of goods that was intended to be covered by the requested investigation. *Id*., 45 CIT at __, 537 F. Supp. 3d at 1357 ("Neither the body of the Petition, nor the scope language of the Order that culminated from the investigation it launched, specifically addresses flanges."). The Petition also stated that "[v]irtually all subject fittings are used in fire protection systems and in the steam heat conveyance systems used in old inner cities," *id*., 45 CIT at __, 537 F. Supp. 3d at 1358 (citing *Petition* 4); the Scope Ruling Request stated that Crane's flanges were for use in process piping primarily for the chemical process industry. *Scope Ruling Request* at 2.

The Scope Ruling Request stated, further, that Crane's Flanges are described by industry standard ASME B16.42, and that this industry standard does not consider flanges to be "fittings." *Id.* at 4. ("[T]he standard B16.42 by its title covers 'Ductile Iron Pipe *Flanges* and Flanged *Fittings* Classes 150 and flange 300'"). Throughout this proceeding, Commerce has considered ductile iron flanged fittings (which the ITC did not consider to be part of its investigation) and ductile iron flanges to be different classes of merchandise. Nevertheless, in the Final Scope Ruling and the First Remand Redetermination Commerce deemed Crane's flanges to be "fittings" based on logic that is open to question: how could a "flange" that, according to the Department's previous position, is also a "fitting" be something other than a "flanged fitting"? The Third Remand Redetermination avoids this apparent contradiction by determining, based on the evidence considered on the whole, that Crane's ductile iron flanges are not within the scope of the Order.

III. CONCLUSION

The Department's determination that Crane's flanges are not within the scope of the Order is supported by substantial evidence on the record considered as a whole and is otherwise in accordance with law. The court disagrees with ASC's comments to the contrary for the reasons discussed above. Judgment sustaining the Third Remand Redetermination will enter accordingly.

As provided in the Third Remand Redetermination, the Judgment will direct Commerce to publish a Federal Register notice of the Department's determination that Crane's ductile iron flanges are outside the scope of the Order and to issue, at that time, relevant instructions to Customs and Border Protection effectuating that determination. *Fourth Remand Redetermination* 17—18.

Dated: March 11, 2024
New York, New York

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

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