U.S. Court of International Trade

Slip Op. 16–82

SEAH STEEL VINA CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and MAVERICK TUBE CORPORATION, UNITED STATES STEEL CORPORATION, BOOMERANG TUBE LLC, ENERGEX TUBE (A DIVISION OF JMC STEEL GROUP), TEJAS TUBULAR PRODUCTS, TMK IPSCO, VALLOUREC STAR, L.P., and WELDED TUBE USA INC., Defendant-Intervenors.

Richard W. Goldberg, Senior Judge
Consolidated Court No. 14–00224
PUBLIC VERSION

[The court remands in part and sustains in part the final antidumping duty determination on oil country tubular goods from the Socialist Republic of Vietnam.]

Dated: August 31, 2016

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Emma E. Bond, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Whitney Rolig*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

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Alan H. Price, Adam M. Teslik, Laura El-Sabaawi, *Robert E. DeFrancesco, III*, Wiley Rein, LLP, of Washington DC, for defendant-intervenor Maverick Tube Corporation.

Roger B. Schagrin, John W. Bohn, Paul W. Jameson, Schagrin Associates, of Washington DC, for defendant-intervenors Boomerang Tube LLC, Energex Tube (a Division of JMC Steel Group), Tejas Tubular Products, TMK IPSCO, Vallourec Star, L.P., and Welded Tube USA Inc.

OPINION AND ORDER

Goldberg, Senior Judge:

This case resolves challenges to the final antidumping duty determination of the U.S. Department of Commerce ("Commerce") for oil country tubular goods ("OCTG") from the Socialist Republic of Vietnam ("Vietnam"). *See Certain Oil Country Tubular Goods from the Socialist Republic of Vietnam*, 79 Fed. Reg. 41,973 (Dep't Commerce

July 18, 2014) (final determ.) (“*Final Determination*”), as amended by *Certain Oil Country Tubular Goods from India, the Republic of Korea, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam*, 79 Fed. Reg. 53,691 (Dep’t Commerce Sept. 10, 2014) (amended final determ.).

Both Plaintiff, SeAH Steel VINA Corporation (“SSV”), and Defendant-Intervenor, United States Steel Corporation (“U.S. Steel”), moved for judgment on the agency record under USCIT Rule 56.2. SSV challenges five aspects of the *Final Determination*. Pl.’s Mot. for J. on Agency R. 4–11, ECF No. 54 (“SSV Br.”). U.S. Steel challenges four aspects of the *Final Determination*. Def.-Intervenor’s Mot. for J. on Agency R. 6–8, ECF No. 56 (“U.S. Steel Br.”). For the reasons set forth below, the court remands the *Final Determination* to Commerce for reconsideration on all but one of the challenges.

GENERAL BACKGROUND

When foreign merchandise sold for less than fair value in the United States injures or threatens a domestic industry, the United States collects antidumping duties on the merchandise. *See* 19 U.S.C. § 1673 (2012). To calculate antidumping duties, Commerce contrasts the “export price (or the constructed price)” of the merchandise with the “normal value” (“NV”) of the merchandise. *Id.*§§ 1673, 1677b(a). In general, the export price reflects the price of the merchandise in the United States, and the normal value is the price of the merchandise in the exporting country. *Id.*§§ 1677a–1677b.

The method of calculating NV hinges on whether the merchandise comes from an exporter in a market economy (“ME”) or an exporter in a nonmarket economy (“NME”). *Id.* § 1677b(a)(1), (c)(1). If the merchandise originates in a ME, Commerce typically uses the price of the merchandise in the exporting country. *Id.*§ 1677b(a)(1)(B)(i). But here the source of OCTG is Vietnam, which is a NME. Surrogate Country Selection Mem., PD 186 (Apr. 10, 2014), ECF No. 60.

When merchandise originates in a NME, Commerce bases the NV of the goods on “the value of the factors of production utilized in producing the merchandise” plus an “amount for general expenses and profit plus the cost of containers, coverings, and other expenses.” 19 U.S.C. § 1677b(c)(1)(B). However, in NME countries, the law presumes that government action distorts the cost of the factors of production (“inputs”) actually used to produce the merchandise. *Blue Field (Sichuan) Food Indus. Co. v. United States*, 37 CIT __, __, 949 F. Supp. 2d. 1311, 1316–17 (2013). Because Commerce cannot use the distorted input prices of a NME, Commerce calculates and ascribes a “surrogate value” representing a market price to each of the inputs. 19 U.S.C. § 1677b(c)(1)(B). Commerce must base its calculation of each surrogate value on “the best available information regarding the

values of such factors in a [ME] country.” *Id.* Additionally, Commerce must use “the prices or costs of [inputs]” in a ME country that is “at a level of economic development comparable to that of the [NME]” and that is a “significant producer[] of comparable merchandise.” *Id.* § 1677b(c)(4).

Here, Commerce uses surrogate values from India to calculate the NV. Surrogate Country Selection Mem., PD 186 (Apr. 10, 2014), ECF No. 60. After determining the surrogate values, Commerce calculates an amount corresponding to other production expenses and profits. *Id.*§ 1677b(c)(1)(B). Specifically, “[b]ecause firms have ‘general expenses and profits’ not traceable to a specific product, in order to capture these expenses and profits, Commerce must factor [into the NV calculation] (1) factory overhead (‘overhead’), (2) selling, general and administrative expenses (‘SG&A’), and (3) profit.” *Mittal Steel Galati S.A. v. United States*, 31 CIT 1121, 1137–38, 502 F. Supp. 2d 1295, 1310 (2007). To calculate and incorporate these factors, “Commerce relies upon financial statements from one or more [surrogate] companies based in the primary surrogate country.” *Id.* Commerce then combines the total expenses, profits, and surrogate input values to create NV. 19 U.S.C. § 1677b(c)(1)(B).

With regard to export price, the relevant background is simpler. To resolve this case, the court need mention only one rule: When calculating export price, or the price of the merchandise in the United States, Commerce must deduct “the amount . . . attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States.” 19 U.S.C. § 1677a(c)(2)(A).

After calculating both the export price and the NV, Commerce determines the “dumping margin,” which is the “amount by which the [NV] exceeds the export price.” *Id.* § 1677(35)(A). This is the foundation of the antidumping duties owed on the foreign merchandise. *Id.* § 1673.

In making the above determinations, Commerce relies on the information in the administrative record, including information submitted by the parties. To gather information from the parties, Commerce issues questionnaires and reviews the resultant submissions of data from the parties. 19 C.F.R. § 351.221(b)(2). Commerce may subsequently issue supplemental questionnaires requesting additional information. *Id.* § 351.301. If a party is unforthcoming with information, Commerce sometimes applies adverse facts available (“AFA”), which entails making inferences unfavorable to the uncooperative party. *Id.* § 1677e(a). After reviewing the administrative record, Commerce issues the preliminary results of its calculation on

the dumping margin. 19 C.F.R. § 351.221(b)(4). Interested parties may then submit case briefs and rebuttal case briefs to challenge the findings in the preliminary results. *Id.* Commerce completes the process by reviewing the challenges and issuing its final determination. *Id.* § 351.221(b)(5).

U.S. Steel and SSV each argue that Commerce improperly calculated antidumping duties on OCTG. U.S. Steel challenges four aspects of Commerce's calculation. First, U.S. Steel argues that Commerce erred in refusing to apply partial AFA to SSV. Second, U.S. Steel contests Commerce's valuation of SSV's hot-rolled coil input. Third, U.S. Steel argues that Commerce improperly excluded the cost of the domestic inland insurance that SSV allegedly used to transport OCTG. And fourth, U.S. Steel opposes Commerce's selection of financial statements for use in calculating the financial statement ratios. U.S. Steel Br. 6–8. The court remands on the second, third, and fourth issues.

SSV challenges five aspects of Commerce's calculation. First, SSV argues that Commerce erred when deducting from the export price the brokerage and handling costs on SSV's exports of OCTG. Second, SSV contests the decision to adjust the normal value by adding a surrogate value for brokerage and handling services on SSV's imports of inputs. Third, SSV argues that Commerce incorrectly allocated the surrogate values for brokerage and handling services on SSV's imports of inputs and exports of OCTG. Fourth, SSV opposes the selection of financial statements used to calculate the financial-statement ratios. And fifth, SSV challenges Commerce's decision to adjust the normal value to account for yield loss on OCTG. SSV Br. 4–11. The court remands for Commerce to reconsider all five issues.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction to hear this appeal under 28 U.S.C. § 1581(c). The court will sustain the antidumping duty determination unless the court concludes that the determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with the law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence amounts to "more than a mere scintilla" of evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (citation omitted). It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation omitted). "Even if it is possible to draw two inconsistent conclusions from evidence in the record, such a possibility does not prevent Commerce's determination from being supported by substantial evidence." *American Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001).

DISCUSSION

The court remands on all issues except the challenge to Commerce's refusal to apply partial adverse facts available to SSV.

I. Substantial Evidence Supported Commerce's Refusal to Apply Partial Adverse Facts Available to SSV, but the Court Remands for Further Explanation of Commerce's Valuation of Hot-Rolled Coils.

U.S. Steel argues that Commerce erred in refusing to apply partial AFA to SSV. U.S. Steel Br. 6–7. In particular, U.S. Steel contends that Commerce should apply partial AFA because SSV improperly responded to Commerce's requests for information regarding SSV's use of hot-rolled coil ("HRC"). *Id.*

U.S. Steel also argues that Commerce incorrectly valued the HRC that SSV consumed in the production of OCTG. U.S. Steel Br. 21. Commerce valued the entirety of SSV's HRC input without separately valuing the three variations of HRC that SSV used. I&D Mem. 34. Thus, U.S. Steel maintains that "Commerce's decision not to value the three types of [HRC] separately ignored its established practice, disregarded the significant physical and cost differences between the three types of [HRC], and contravened the statute's mandate." U.S. Steel Br. 21.

The court finds that Commerce did not err when refusing to apply partial AFA to SSV. However, the court remands for a detailed explanation or, if necessary, a revision of Commerce's failure to value separately the three variations of HRC.

A. Background

As explained above, when companies from a NME export merchandise, Commerce typically "determine[s] the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise." 19 U.S.C. § 1677b(c)(1)(B). This "valuation of the factors of production shall be based on the best available information regarding the values of such factors in a [ME] country." *Id.* In accordance with this statute, Commerce requested information regarding SSV's factors of production. Commerce Questionnaire to SSV, PD 56–59 (Aug. 23, 2013), ECF No. 92.

On August, 23, 2013, Commerce asked SSV in its Section D Questionnaire to disclose "each type and grade of material used in the production process." *Id.* at D-8. Within the deadline, SSV disclosed that it consumed "API J55" HRC. SSV Resp. to Sections C&D Questionnaire app. D4-C ("C&D Resp."), PD 87–91 (Oct. 30, 2013), ECF No. 60. SSV also disclosed that [[ ]] of the HRC came from ME suppliers and [[ ]] came from NME suppliers. C&D Resp. app.

D-6, CD 21–28 (Oct. 30, 2013), ECF No. 60. In December of 2013, Commerce asked SSV to "[p]rovide a sample invoice for the purchase of each input." Commerce's Suppl. Section D Questionnaire 14, PD 96 (Dec. 12, 2013), ECF No. 60. On January 13, 2014, SSV timely submitted an invoice regarding a purchase of HRC from [[ ]]. SSV Resp. to Suppl. Section D Questionnaire ("Suppl. D Resp.") app. SD-10, CD 36–39 (Jan. 13, 2014), ECF No. 60. This information indicated that SSV purchased and received [[ ]] *id.*, which contains a chromium content of [[ ]], Verification Report 23, CD 154 (May 7, 2014), ECF No. 73–3.

In its supplemental questionnaire dated January 28, 2014, Commerce asked SSV if "any of [SSV's] U.S. sales involved pipes which, when shipped to the United States, were upgradeable merchandise (e.g., upgradeable J55 that actually meets all the requirements of the API 5CT specification"). Suppl. D Resp. 10. Within the established deadline, SSV responded that, in addition to "normal J-55 steel coil," which has a carbon content of 0.13 percent, it used "upgradeable J-55 coil," which has a carbon content of 0.25 percent. *Id.*; *see also* Pl.'s Resp. to Def.-Intervenor's Mot. for J. on Agency R. 10 n.13, ECF No. 66.

B. Substantial Evidence Supported Commerce's Decision to Not Apply Partial Adverse Facts Available to SSV.

U.S. Steel argues that Commerce acted without the support of substantial evidence in failing to apply partial AFA to SSV. U.S. Steel Br. 13. U.S. Steel asserts that when disclosing its factors of production, SSV "failed to provide accurate information regarding its upgradable [J55 HRC] within the deadlines established by Commerce and withheld information regarding" its use of high-chromium J55 HRC. *Id.* at 12. Simply put, U.S. Steel maintains that SSV should have disclosed in its first response to Commerce all of the above variations of J55 HRC. *Id.* at 6–7. This alleged misconduct, U.S. Steel argues, required application of partial AFA. *Id.*at 13.

In making its antidumping determinations, Commerce may sometimes "use the facts otherwise available in reaching the applicable determination." 19 U.S.C. § 1677e(a). Commerce can use "facts otherwise available" when a respondent "withholds [requested] information," "fails to provide such information by the [applicable] deadlines," fails to provide the information "in the form and manner requested," "significantly impedes a proceeding," or provides "information [that] cannot be verified." *Id.* § 1677e(a)(2). But Commerce can sometimes do more. It "*may* use an inference that is adverse to the interests of [a]

party in selecting from among the facts otherwise available." *Id.* § 1677e(b)(1) (emphasis added). However, Commerce may use this adverse inference only if it "finds that [the] interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." *Id.* An interested party fails to act to "the best of its ability" when it does not "put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). "[T]he standard does not require perfection and recognizes that mistakes sometimes occur." *Id*. Nonetheless, "inattentiveness, carelessness, [and] inadequate record keeping" constitute a failure to act to the best of one's ability. *Id.* The application of this standard is within Commerce's domain: "It is well-established that Commerce enjoys broad discretion when considering whether to apply adverse facts available in antidumping proceedings." *Tianjin Magnesium Int'l Co. v. United States*, 36 CIT __, __, 844 F. Supp. 2d 1342, 1346 (2012).

Here, the record demonstrates that substantial evidence supported Commerce's conclusion that the application of partial AFA was unwarranted. Commerce found that, with regard to the J55 HRC, SSV withheld no requested information, provided all information within the established deadlines and in the manner requested, and did not significantly impede the investigation. I&D Mem. 32–34. As stated above, in its Section D questionnaire on August 23, 2013, Commerce requested that SSV "[d]escribe each type and grade of material used in the production process." Commerce Questionnaire to SSV at D-8, PD 56–59 (Aug. 23, 2013), ECF No. 92. Within the established deadline, SSV identified solely J55 HRC. C&D Resp. app. D-4C, PD 87–91 (Oct. 30, 2013), ECF No. 60. The Section D questionnaire, which deals with the factors of production used to make OCTG, provided no definition for "type and grade." But in the Section C questionnaire, which deals with U.S. sales of OCTG, Commerce allowed SSV to provide answers according to the American Petroleum Institute's ("API") OCTG standards. Commerce Questionnaire to SSV at C-9. The API specifications do not distinguish between upgradeable J55 HRC, nonupgradeable J55 HRC, and J55 HRC with an elevated Chromium composition. *Id.* Consequently, J55 HRC encompasses upgradeable and nonupgradeable HRC, as well as HRC with an elevated Chromium content. *Id.* In other words, under the API specifications, the variations in SSV's J55 HRC inputs do not amount to different "types."

Without additional guidance from Commerce in its Section D questionnaire, it was reasonable for SSV to answer the Section D questionnaire by disclosing its HRC input using the API specifications, which treat the above J55 HRC variations as one "type and grade." As

a result, SSV provided an honest and reasonably accurate answer when it disclosed solely J55 HRC in its first Section D response without also disclosing upgradeable J55 HRC and high-chromium J55 HRC. Commerce, therefore, reasonably concluded that SSV properly provided the requested information within the deadlines (and, by extension, did not withhold the information). *See* 19 U.S.C. § 1677e(a)(2). And because SSV complied with the demands of the investigation, it did not impede the investigation. *Id*. For that reason, Commerce refused to apply partial AFA, and substantial evidence supports the refusal.[1]

C. Commerce Did Not Act Arbitrarily in Refusing to Apply Partial Adverse Facts Available to SSV.

U.S. Steel also argues that Commerce's refusal to apply partial AFA to SSV contravened the law because Commerce inexplicably and unjustifiably disregarded its alleged practice of applying AFA to respondents behaving comparable to SSV. U.S. Steel Br. 18.

"[I]t is well-established that 'an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.'" *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (alteration in original) (citation omitted). Commerce acts arbitrarily and violates the law when it "consistently followed a contrary practice in similar circumstances and provided no reasonable explanation for the change in practice." *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003). "'An action . . . becomes an 'agency practice' when a uniform and established procedure exists that would lead a party, in the absence of notification of a change, reasonably to expect adherence to the [particular action] or procedure." *Huvis Corp. v. United States*, 31 CIT 1803, 1811, 525 F. Supp. 2d 1370, 1378 (2007) (alteration in original) (citation omitted). That said, given Commerce's "broad discretion" to apply partial AFA, *Tianjin*, 36 CIT at __, 844 F. Supp. 2d at 1346, it is especially difficult for a party to demonstrate that it "reasonably . . . expect[ed]

[1] As explained above, Commerce cannot apply partial AFA without (1) finding a problem with a respondent's response *and* (2) finding that the respondent failed to cooperate to the best of its ability. 19 U.S.C. § 1677e. And "[t]his court has made clear that [Commerce's discretion to apply AFA] does not saddle Commerce with the burden of showing that an importer cooperated to the best of its ability every time it determines that adverse facts available should not be applied." *Tianjin*, 36 CIT at __, 844 F. Supp. 2d at 1346; *see also AK Steel Corp. v. United States*, 28 CIT 1408, 1417, 346 F.Supp.2d 1348, 1355 (2004) (explaining that it "runs counter to the discretion afforded to Commerce" to require Commerce to "prove that an importer cooperated to the best of its ability every time that the agency decides *not* to apply adverse facts available"). Commerce found no issue with SSV's responses (the first of the two requirements). Consequently, even though it could have done so, Commerce chose not to address the second of the two requirements. But to prove partial AFA warranted in this case, U.S. Steel would also have to show that SSV failed to act to the best of its ability—perhaps a tall order on these facts.

adherence" to an allegedly "uniform and established procedure" of always applying partial AFA, *Huvis Corp.*, 31 CIT at 1811, 525 F. Supp. 2d at 1378.

U.S. Steel cites a list of cases in its attempt to demonstrate an established practice in which Commerce previously applied AFA whenever a respondent behaved like SSV here. Yet these cases are inapplicable because, unlike here, the respondents in the cited cases did not comply with Commerce's requests. *See* I&D Mem. 32–34. For example, in both *Yantai Xinke Steel Structure Co. v. United States*, Slip Op. 12–95, 2012 WL 2930182, at *6–14 (CIT July 18, 2012), and *Jiangsu Changbao Steel Tube Co. v. United States*, 36 CIT __, __, 884 F. Supp. 2d 1295, 1300–01 (2012), the court sustained the application of AFA to respondents who, unlike SSV, inaccurately disclosed their factors of production. Accordingly, any established practice emanating from the cited cases is irrelevant to Commerce's refusal to apply partial AFA to SSV.[2] By extension, Commerce did not act arbitrarily in violation of the law.[3]

D. The Court Remands for Further Explanation or Reconsideration of Commerce's Valuation of J55 Hot-Rolled Coil.

U.S. Steel argues that Commerce erred when it did not separately calculate the values of the three types of J55 HRC that SSV consumed. U.S. Steel Br. 21. The court finds that Commerce insufficiently explained its valuation decision, leaving the court without enough information to review the decision. As a result, the court

[2] Also, in all but one of the cases that U.S. Steel cites, this court affirmed Commerce's decision to apply AFA, rather than overturning a decision not to apply AFA. U.S. Steel Br. 20. In the only outlier, the importer submitted fabricated documents to Commerce, which self-evidently signals that the importer failed to comply with Commerce's requests and failed to "cooperate to the best of its ability." *Tianjin*, 36 CIT at __, 844 F. Supp. 2d at 1347. Unlike the respondent in *Tianjin,* SSV's behavior evidenced no flagrant failure to fully cooperate with Commerce. Thus, the sole cited instance of this court overturning a refusal to apply AFA is even more inapplicable than the other cases. Moreover, this court has previously refused to overrule Commerce's failure to apply AFA even when the respondent, also unlike SSV, struggled to comply with Commerce's requests and disclosed information past deadlines. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 33 CIT 533, 548–50, 616 F. Supp. 2d 1354, 1368–69 (2009). Accordingly, there is no practice that required Commerce to apply partial AFA to SSV, a respondent that fully complied.

[3] U.S. Steel also argues that failure to apply AFA to SSV violates the purpose of the AFA provision. U.S. Steel Br. 18, 20. The purpose of the AFA provision "is 'to provide respondents with an incentive to cooperate' with Commerce's investigation." *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012) (citation omitted). "Without the ability to enforce full compliance with its questions, Commerce runs the risk of gamesmanship and lack of finality in its investigations." *Id.* U.S. Steel's argument is unpersuasive because, as stated above, SSV complied with Commerce's requests. Accordingly, application of partial AFA is unnecessary because SSV's conduct incentivizes neither gamesmanship nor a lack of cooperation.

remands for further explanation or, if Commerce chooses, recalculation of Commerce's valuation of HRC.[4]

"In determining the valuation of the factors of production, the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible." *Shakeproof Assembly Components, Div. of Illinois Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001). Commerce has "wide discretion in the valuation of factors of production." *Id.* Nonetheless, "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (stating that "the agency must examine the relevant data and articulate a satisfactory explanation" without any attempt by the reviewing court to "make up for [any] deficiencies"). This court, therefore, cannot provide a rationale for Commerce's refusal to value separately each variation of J55 HRC.

Here, Commerce obtained information showing that SSV purchased three variations of J55 HRC. First, record evidence confirms that SSV purchased regular J55 HRC with a carbon content of 0.13 percent from ME sources. Suppl. D Resp. 10, PD 142–143 (Feb. 5, 2014), ECF No. 60. Second, record evidence shows that SSV purchased upgradeable J55 with a carbon content of 0.25 percent from ME sources. *Id.* Third, record evidence confirms that SSV purchased J55 HRC containing a heightened chromium content of [[ ]] percent from [[ ]]. Verification Report 23, CD 154 (May 7, 2014), ECF No. 73–3. Regular J55 HRC from ME sources contains only [[ ]]. SSV Verification Exs. at Ex. 14, CD 71–150 (Apr. 14, 2014), ECF No. 92. When calculating the value of OCTG inputs, Commerce used SSV's "average [ME] purchase price of [J55 HRC] during the" period of investigation rather than calculating a separate value for each of the above variations of J55. I&D Mem. 34. U.S. Steel insists that Commerce erred in failing to separately value the three variations.

In particular, U.S. Steel argues that Commerce violated the statutory requirement that Commerce determine dumping margins using "the best available information." 19 U.S.C. § 1677b(c)(1). U.S. Steel argues that Commerce's established practice "is to base surrogate values on prices for materials that most closely reflect the specific grades and chemical compositions of the inputs consumed in the

[4] *See Diamond Sawblades Mfrs. Coal. v. United States*, 612 F.3d 1348, 1357 (Fed. Cir. 2010) (providing the court with discretion to remand for further explanation when the record before the court "'need[s] further explanation in order for the court to understand and properly evaluate the agency's action'" (citation omitted)).

production of the subject merchandise." U.S. Steel Br. 22, 26.[5] U.S. Steel highlights record evidence demonstrating the potential differences among the three variations of J55 HRC. U.S. Steel Br. 23–27. Specifically, U.S. Steel contends that the three variations of J55 coil have varying compositions and prices, making it necessary to separately value each HRC variation to achieve the most accurate dumping margins. *Id.* at 28.[6]

Commerce provides little explanation for its refusal to value separately each variation of J55 HRC. It first concludes that "[t]he differences between the three types of J55 are not so substantial as to make them different products requiring separate valuations." I&D Mem. 34. On that basis, Commerce states, it "valued SSV's coil using its average [ME] purchase price of [HRC] during the [period of investigation], as [it] did in the *Preliminary Determination*." *Id.* In the *Preliminary Determination*, Commerce followed a then-established practice that the agency previously announced in the *Federal Register*. Prelim. Decision Mem. 12 & n.44, PD 245 (Feb. 14, 2014), ECF No. 73–2. Under that practice, Commerce granted

> a rebuttable presumption that [ME] input prices are the best available information for valuing an entire input when the total volume of the input purchased from all [ME] sources during the period of investigation or review exceeds 33 percent of the total volume of the input purchased from all sources.

Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Requests for Comments, 71 Fed. Reg. 61,716, 61,717–18 (Dep't Commerce Oct. 19, 2006)). Thus, "[w]hen a[] NME producer purchase[d] inputs from

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[5] U.S. Steel cites the following proceedings: (1) *Pure Magnesium from the People's Republic of China*, 76 Fed. Reg. 76,945 (Dep't Commerce Dec. 9, 2011) (final results) and accompanying I&D Mem. at cmt. 7; (2) *Certain Ball Bearings and Parts Thereof from the People's Republic of China*, 68 Fed. Reg. 10,685 (Dep't Commerce Mar. 6, 2003) (final determ.) and accompanying I&D Mem. at cmt. 44; and (3) *Certain Cut-To-Length Carbon Steel Plate from the People's Republic of China*, 62 Fed. Reg. 61,964 (Dep't Commerce Nov. 20, 1997) (final determ.) and accompanying I&D Mem. at cmt. 16.

[6] Unlike ordinary J55, the higher carbon content of upgradeable J55 allows for conversion from J55-grade OCTG to L80-grade OCTG. Suppl. D Resp. 10. L80-grade hot-rolled coil has a yield strength ranging from 552 Mega-Pascals ("MPa") to 655 MPa, while J55-grade hot-rolled coil has a yield strength from 379 MPa to 552 MPa. SSV Section A Resp. at app. A-8, PD 73–77 (Sept. 24, 2013), ECF No. 60. L80 has a minimum tensile strength of 655 MPa, while J55 has a minimum tensile strength of 517 MPa. *Id.* L80 has a Rockwell Hardness of 23 and a Brinell Hardness of 241; J55 has no specified hardness. *Id.* Likewise, U.S. Steel also asserts that, compared to regular J55, high-chromium J55 HRC renders the steel more immune to corrosion. U.S. Steel Br. 25. What is more, U.S. Steel argues that, with a [[ ]], the HRC that SSV purchased qualifies as alloy steel rather than carbon steel under Harmonized Tariff Schedule codes. *Id.* at 25, 27. U.S. Steel also argues that there are appreciable price differences between the regular J55, the upgradable J55, and the high-chromium J55. *Id.* at 24–25.

[ME] suppliers and pa[id] in a [ME] currency, [Commerce] normally use[d] the average actual price paid by the NME producer for these inputs to value the [entire] input in question." *Id.* at 61,716.

If this practice applies to Commerce's valuation of HRC, Commerce properly valued the HRC input because, as the practice dictates, it used the average price of ME purchases of J55 HRC. But Commerce must satisfy two conditions before applying this practice. First, the practice applies, by its own terms, only if the ME J55 HRC that SSV purchased with ME currency amounted to 33 percent or more of the total quantity of J55 HRC that SSV purchased during the period of investigation. *Id.* at 61,717–18. Second, and again by its own terms, the practice applies only if the three variations of J55 HRC constitute the same input. *Id.* Here, Commerce satisfies the first condition because SSV purchased [[ ]] of its J55 HRC in ME currency from ME suppliers. C&D Resp. app. D-6, CD 25 (Oct. 30, 2013), ECF No. 73–3. As a result, if the three variations of J55 HRC constitute the same input, Commerce satisfied both conditions for applying its established practice when it valued the entire J55 HRC input of SSV using exclusively the ME purchases of J55 HRC.

But Commerce insufficiently explained its decision to classify the three variations of J55 HRC as the same input. Rather than clarify its decision to conflate three reputedly differing J55 HRCs, Commerce merely stated that "[t]he differences between the three types of J55 are not so substantial so as to make them different products requiring separate valuations." I&D Mem. 34. This statement provides no explanation; it simply offers a conclusion.

And so it is unclear whether Commerce justifiably used the above established practice to value all of the J55 HRC based solely on the ME purchases of J55 HRC. Although Commerce may be correct, it has not satisfied its obligation to say why it is correct. This court, therefore, cannot "properly review [Commerce's] conclusions based on its explanations and its citations to the data." *Diamond Sawblades Mfrs. Coal. v. United States*, 612 F.3d 1348, 1358 (Fed. Cir. 2010). Accordingly, the court remands for further detailed explanation regarding Commerce's decision to value all J55 HRC based on the purchase of a single variation of J55 HRC. Commerce must explain why it treated the three variations as a single input. Alternatively, Commerce has the discretion to recalculate the value of the HRC.

II. The Court Remands for Further Explanation of Commerce's Refusal to Value and Deduct SSV's Alleged Domestic Inland Insurance from the Export Price.

U.S. Steel contends that, contrary to Commerce's finding, SSV "paid for and received insurance associated with transporting the subject merchandise by inland freight from its plant to the port in Vietnam."

U.S. Steel Br. 28. As a result, U.S. Steel maintains that Commerce "should have valued the cost of such insurance and deducted it as a movement expense from" the export price, "[c]onsistent with its decisions in prior cases." *Id.* The court concludes that Commerce failed to adequately explain its conclusion that SSV's contract with the freight forwarder included no insurance provision.

A. Background

Under 19 U.S.C. § 1677a(c)(2)(A), Commerce must reduce the export price by "the amount, if any, . . . attributable to any additional costs, charges, or expenses . . . which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." U.S. Steel believes that SSV purchased insurance from [[ ]] and that Commerce should have valued and deducted the cost of this insurance from the export price pursuant to 19 U.S.C. § 1677a(c)(2)(A), consistent with the agency's past practice. U.S. Steel Br. 28.

The contract between SSV and [[ ]] required [[ ]] to transport OCTG from SSV's plant to the port in Vietnam. SSV Suppl. Section A and C Resp. ("Suppl. A&C Resp.") app. SC-5, CD 31–35 (Jan. 9, 2014), ECF No. 60. The contract states that [[ ]] *Id*. The contract also includes the following provision:

> [[ ]]

Id. Additionally, the contract states that the price includes [[ ]] *Id.*The contract apparently does not limit [[ ]] liability to accidents or damage for which [[ ]] is responsible. U.S. Steel Br. 30. According to U.S. Steel, this establishes that [[ ]] charged SSV for both shipment and insurance of the OCTG. *Id.* at 28–29. SSV, however, denied paying for insurance. SSV Resp. to Section C Questionnaire 28 ("C Resp."), CD 22 (Oct. 30, 2013), ECF No. 73–3.

Commerce agreed with SSV and classified the language as a "risk of loss" provision, not an insurance contract. I&D Mem. 41. On that basis, Commerce determined the surrogate value of SSV's inland freight costs without calculating a separate surrogate value for inland freight insurance. *Id.*

B. Discussion

To prove that Commerce erred, U.S. Steel first focuses on the language of the contract between SSV and [[ ]]. U.S. Steel Br. 28–29. According to U.S. Steel, the language unequivocally establishes an insurance contract between the two entities, as well as agreements for a number of other services. *Id.* Next, U.S. Steel explains that Commerce has an established practice of separately valuing domestic inland insurance when the insurance is purchased "in conjunction with the provision of another service." *Id.* at 29. Thus, if the agreement between SSV and [[ ]] to transport the OCTG also created an insurance contract, Commerce must either follow its alleged practice of valuing the insurance or explain the reasons for its departure. *Id.* at 33. U.S. Steel concludes that Commerce's explanation has no record support. *Id.* at 28–33.

Commerce provides scant insight into its decision. It believes that the contract language merely transfers the "risk of loss" from SSV to [[ ]]. I&D Mem. 41. As evidence, Commerce states that "it is not uncommon for trucking companies to bear the risk of loss on the shipments they handle." *Id.* Commerce then states that it "do[es] not find that the bearing of such risk constitutes an 'insurance contract' that would require a separate surrogate value." *Id.* Yet Commerce provides no explanation for why it believes that trucking companies commonly carry the risk of loss. Nor does it give any reasons for its refusal to classify the language of the freight agreement as an insurance contract requiring a separate surrogate value. This is not enough.

This court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citing *Chenery*, 332 U.S. at 196). Here, Commerce supplied no reasoned basis. For that reason, the court cannot "properly review [Commerce's] conclusions based on its explanations and its citations to the data." *Diamond Sawblades*, 612 F.3d at 1358. As a result, the court remands for further explanation of Commerce's determinations that (1) trucking companies commonly bear the risk of loss and that (2) the agreement between SSV and [[ ]] contained no insurance contract. Alternatively, Commerce has the discretion to reclassify the contract provision.

III. The Court Remands for Commerce to Reconsider its Selection of Financial Statements.

In the *Final Determination*, Commerce used the financial statements of a single company, Welspun Corporation Limited ("Welspun"), to calculate financial ratios. I&D Mem. 19–20. In their motions for judgment on the agency record, U.S. Steel and SSV both argued that Commerce should use additional companies. SSV Br. 33–46; U.S. Steel Br. 33–37. After all briefing and oral argument

before this court, SSV filed a motion for leave to submit supplemental information. SSV Mot. for Leave, ECF No. 104. The supplemental information conflicts with Commerce's explanation for choosing Welspun over other proposed companies. In response, the Government requested a voluntary remand, Def.'s Resp. to SSV Mot. for Leave, ECF No. 105, and this court granted SSV leave to submit supplemental information, ECF No. 106.[7] The court now grants the request for a voluntary remand.

A. Background

"When Commerce is constructing the normal value for a respondent in a [NME] country, Commerce must also take into account those costs that are not covered by the factors of production (the physical inputs and the wages of the workers directly involved in the manufacturing process.)" *Mittal Steel Galati S.A. v. United States*, 31 CIT 1121, 1137, 503 F. Supp. 2d 1295, 1310 (2007); *see also* 19 U.S.C. § 1677b(c)(1). In other words, "[b]ecause firms have 'general expenses and profits' not traceable to a specific product, in order to capture these expenses and profits, Commerce must factor [into the normal value calculation] (1) factory overhead ('overhead'), (2) selling, general and administrative expenses ('SG&A'), and (3) profit." *Mittal Steel*, 31 CIT at 1137–38, 503 F. Supp. 2d at 1310 (citation omitted). To calculate and incorporate these costs, "Commerce relies upon financial statements from one or more [surrogate] companies based in the primary surrogate country." *Id.*

In its *Preliminary Determination*, Commerce used the financial statements of three companies to calculate the financial ratios: APL Apollo Tubes Ltd., Bhushan Steel Ltd., and Welspun. Surrogate Values Mem. for Prelim. Determ. 7, PD 151 (Feb. 13, 2014), ECF No. 73–1. In the *Final Determination*, Commerce used only the financial statements of Welspun. I&D Mem. 19–20.

In their respective motions for judgement on the agency record, both U.S. Steel and SSV argued that Commerce erred in using exclusively the financial statements of Welspun. U.S. Steel insisted that Commerce should have used the financial statements of four additional companies. U.S. Steel Br. 33–37. Commerce explained that it rejected two of the suggested companies because the companies received countervailable subsidies. I&D Mem. 18–19. It rejected the other two because they were integrated at levels different from SSV. *Id.* In like manner, SSV argued that Commerce erred in rejecting the financial statements of six proposed nonintegrated Indian companies. SSV Br. 33–46. Commerce rejected these companies, and chose to rely

[7] Defendant-Intervenors filed no response to SSV's motion.

on only Welspun, because Welspun produced identical merchandise (OCTG) and the rejected companies produced merely comparable merchandise. I&D Mem. 17–18.

After the parties submitted briefs and participated in oral argument, SSV submitted a motion to file supplemental information showing that Commerce's explanation may be false. SSV Mot. for Leave, ECF No. 104. The supplemental information is the remand redetermination of the investigation of OCTG from the Republic of Korea. *Id.* at 2–3 (citing Remand Redetermination at 19, 56, *Husteel Co. v. United States*, Slip Op. 16–76, 2016 WL 4091162 (Feb. 22, 2016) (No. 14–00215), ECF No. 240–1. In that remand redetermination, Commerce refused to accept the financial statements of Welspun because Commerce found that "Welspun is not an OCTG producer." *Id.* at 56. Yet, as explained above, Commerce chose Welspun here precisely because it found that Welspun produced OCTG. I&D Mem. 19. The two findings are irreconcilable. Admitting no error, the Government requests a remand to fix potential problems.

B. Discussion

Without admitting any error, the Government "may request a remand . . . in order to reconsider its previous opinion." *SKF USA*, 254 F.3d at 1029. The Government may "simply state that it ha[s] doubts about the correctness of its decision." *Id.* When the Government requests a remand, admits no error, and provides little explanation for its request, "the reviewing court has discretion over whether to remand." *Id.* And "if the agency's concern is substantial and legitimate, a remand is usually appropriate." *Id.* That said, if the Government's request for a remand "is frivolous or in bad faith," the court may deny the remand. *Id.*; *see also Albemarle Corp. v. United States*, 37 CIT __, __, 931 F. Supp. 2d. 1280, 1290 (2013) (explaining that a voluntary remand provides enhanced efficiency by ensuring that only one Commerce decision comes before the court).

The court finds no evidence of bad faith or frivolousness in the Government's request for a remand. To the contrary, there are substantial and legitimate grounds for a remand. Commerce predicated its selection of the financial statements of Welspun on the express finding that Welspun, unlike other proposed companies, produces OCTG. I&D Mem. 19. But Commerce appears to be confused, because it has also found that, in fact, Welspun produces no OCTG. Remand Redetermination at 56, *Husteel*, 2016 WL 4091162 (No. 14–00215). Given these inconsistent findings—and the importance of these findings for selecting the appropriate financial statements—the Government properly requested "a voluntary remand so that [Commerce] may reconsider its selection of financial statements for calculating the surrogate financial ratios." Def.'s Resp. to SSV Mot. for Leave 1, ECF No. 105. The court grants the remand request.

IV. The Court Remands for a Reconsideration of SSV's Yield Loss.

SSV challenges Commerce's calculation of yield loss, U.S. Steel argues that Commerce properly calculated yield loss, and the Government requests a remand to reconsider yield loss. The court grants the Government's request for a remand.

A. Background

In its *Final Determination*, Commerce adjusted the normal value of OCTG to account for yield loss. I&D Mem. 38. Documents obtained during verification formed the basis for the yield loss calculation. Sales Verification Report 11–12, CD 169 (May 30, 2014), ECF No. 58. These documents showed that before the period of investigation, SSV's U.S. affiliate rejected as defective [[ ]] percent of SSV's shipment of upgradeable OCTG (OCTG made with J55 coil containing elevated carbon levels). Final Analysis Mem. 1–2, CD 182 (July 10, 2014), ECF No. 73–3. From this information, Commerce increased SSV's usage rate of inputs by [[ ]] percent. *Id.*

B. Discussion

SSV challenges the yield loss calculation on four grounds. First, SSV argues that a [[ ]] percent yield loss was inaccurate because Commerce calculated this loss using exclusively transactions of upgradeable OCTG exported before the period of investigation rather than all transactions of OCTG. SSV Br. 47–48. Second, SSV contends that the defects in the OCTG "must have occurred during transit, and not during manufacture." *Id.* at 49. Accordingly, SSV insists that any yield loss was inappropriate because transportation insurance proceeds would have covered SSV's losses on the rejected OCTG if such losses existed. *Id.* Third, SSV asserts that the [[ ]] percent yield loss was improper because Commerce did not offset this loss with the value of the rejected OCTG sold as scrap. *Id.* at 50. Fourth, SSV argues that adjusting "normal value for losses experienced during transit from Vietnam to the United States was also contrary to the statute." *Id.* at 50–51 (emphasis omitted).

For its part, the Government requests a voluntary remand to reconsider its calculation of yield loss. Def.'s Resp. to Pl.'s and Def.-Intervenor's Mots. for J. on Agency R. 46, ECF No. 65 ("Gov't Resp.").[8] Again, the Government may request a remand for reconsideration

[8] The Government nonetheless opposes three of SSV's four arguments challenging the yield loss calculation. The Government states that SSV included nothing in its case brief or rebuttal case brief to Commerce regarding SSV's current arguments that (1) insurance covered all losses from the rejected OCTG and that (2) Commerce erred in failing to offset the yield loss by the scrap value of the rejected OCTG. Gov't Br. 47. Consequently, the

without admitting error. *SKF USA*, 254 F.3d at 1029. Rather than listing specific grounds for the remand, the Government may "simply state that it ha[s] doubts about the correctness of its decision." *Id*.

Here, the Government fails to explain the reason for its remand request. But there is no evidence that the request "is frivolous or in bad faith." *Id.* And there are "substantial and legitimate" grounds for granting the remand. *Id.* Commerce's explanation does not provide a satisfactory rebuttal to SSV's arguments. For example, in response to SSV's argument that yield loss should be offset with scrap sales, Commerce stated—with no citation to authority—that "yield loss can occur regardless of whether any of it is sold as scrap." I&D Mem. 38. Likewise, Commerce asserted without citation that midtransit yield loss still counts because "[y]ield loss can occur when the semi-finished product is shipped to or further processed by a further processor." *Id.* Commerce's sparse and unsubstantiated explanation would not likely weather this court's review under the substantial-evidence standard. Therefore, the court grants the Government's request for a voluntary remand to reconsider its yield loss calculation. *See generally SeAH Steel Corp. v. United States*, 34 CIT 605, 637, 704 F. Supp. 2d 1353, 1379 (2010) (finding that although, as here, "Defendant-Intervenor urges the Court to affirm Commerce's decision . . ., the Court cannot overlook the fact that Commerce itself has called into question an aspect of the *Final Results*"); *Albemarle Corp.*, 37 CIT at __, 931 F. Supp. 2d. at 1290 (explaining that a voluntary remand enhances efficiency by ensuring that only one Commerce decision comes before the court).[9] On remand, Commerce must provide a detailed explanation of its conclusions, with citations to record evidence and legal authority.

V. The Court Remands for Commerce to Reconsider the Inclusion of "Document Preparation" Costs in the Calculation of SSV's Brokerage and Handling Costs for Exports of OCTG.

SSV argues that Commerce acted in violation of the law and without the support of substantial evidence when it included "document preparation" costs in the calculation of SSV's brokerage and handling ("B&H") costs on exports of OCTG. SSV contends that it never used document preparation services and, therefore, Commerce had no reason to value and include these services within B&H. SSV Br. 11–16.[10]

Government argues that "SSV therefore failed to exhaust its administrative remedies." *Id.* Further, the Government explains that "SSV is incorrect in claiming that Commerce may not make any yield loss adjustment to normal value for merchandise" damaged after the packing stage. *Id.* at 46.

[9] A remand is appropriate despite U.S. Steel's opposition

[10] SSV also complains about Commerce's decision to use the World Bank's Doing Business India: 2014 report to calculate surrogate values for B&H services. SSV Br. 12. According to SSV, the report "was not intended as a measure of the actual brokerage and handling

Both U.S. Steel and the Government argue that, under Commerce's established practice, SSV is ineligible for an adjustment to its B&H surrogate value. The court remands for further explanation or, alternatively, recalculation.

A. Background

In shipping goods from Vietnam to the United States, SSV incurred B&H expenses. C Resp. 28, CD 22 (Oct. 30, 2013), ECF No. 73–3. To determine a surrogate value for the B&H services, Commerce used the World Bank's report "Doing Business India: 2014" ("Doing Business report"). I&D Mem. 6–7. This report provides a total cost for B&H services, and also breaks down this total cost into four subcategories: "[c]ustoms clearance and technical control" costs, "[p]orts and terminal handling" costs, "[i]nland transportation and handling" costs, and "[d]ocuments preparation" costs. Surrogate Value Sources Ex. IV, PD 164 (Fed. 21, 2014), ECF No. 73–2. The report lists the following nine documents under the category of "document preparation": (1) bill of lading, (2) certificate of origin, (3) commercial invoice, (4) foreign exchange control form, (5) inspection report, (6) packing list, (7) shipping bill (customs export declaration), (8) technical standard certificate, and (9) terminal handling receipts. *Id.* However, the report does not provide individual costs for these documents. *Id.*

Commerce included three of the Doing Business report's subcategorized costs in the calculation of SSV's B&H costs: "document preparation," "customs clearance and technical control," and "ports and terminal handling." *See* Surrogate Values Mem. Ex. 9, PD 152 (Feb. 20, 2014), ECF No. 73–2. SSV contends that it did not incur any "document preparation" costs. SSV Br. 11. On that basis, SSV concludes that Commerce should adjust the B&H surrogate value by excluding the "document preparation" costs. *Id.* at 16.

In the *Final Determination*, Commerce stated the established practice governing its decision to adjust B&H surrogate values:

> [Commerce] will sometimes make an adjustment to surrogate value data to reflect an individual exporter's experience, including to B&H surrogate value data, but normally only when the item's amount is clearly identified in the 'Doing Business' report and the factors of production for self-preparation are accounted for.

services for exports of steel products like OCTG"; rather, "it was part of a comparative analysis prepared by the World Bank's staff to benchmark the costs of a wide range of business activities in various countries around the world." SSV Br. 12. But SSV never argues that Commerce's use of the report lacked the support of substantial evidence or that it was not in accordance with the law. SSV's grievance is not a full-fledged challenge to Commerce's decision and this court does not address its merit.

I&D Mem. 7 (footnote omitted). No party disputes the relevance or validity of this practice. Consequently, to qualify for an adjustment to its B&H values, SSV must satisfy two conditions. First, the Doing Business report must clearly identify the cost for the documents that SSV claims that it prepared without a broker. Commerce concluded that the Doing Business report did not provide the requisite costs. *Id.* Second, Commerce must have otherwise accounted for the factors of production for any self-preparation of documents. Commerce never addressed the second condition. The court finds that substantial evidence does not currently support Commerce's finding that SSV failed to satisfy the first condition, and it is unclear whether SSV satisfies the second condition. Thus, the court remands.

B. Discussion

To prove satisfaction of the first condition above, SSV enumerates all nine documents within the category of "document preparation" and shows the source of each document. (Again, the nine documents are (1) certificate of origin; (2) foreign exchange control form; (3) terminal handling receipts; (4) bill of lading; (5) commercial invoice; (6) inspection report; (7) packing list; (8) shipping bill (customs export declaration); and (9) technical standard certificate. SSV Case Br. Attach. 2, PD 197 (June 6, 2014), ECF No. 58.) According to a chart that counsel for SSV prepared in response to verification requests, SSV's broker prepared none of these documents. SSV Verification Ex. 5, CD 84 (Apr. 14, 2014), ECF No. 58. The chart claims that nobody prepared documents (1) through (3) because these documents were unnecessary for shipment of OCTG. *Id.*The ocean shipping company covered document (4). *Id.* And SSV itself prepared documents (5) through (9). *Id.* Although the Doing Business report lists no individual costs for any of the foregoing documents, the report lists a total cost for document preparation services, and the nine foregoing documents comprise this total cost. Surrogate Value Sources Ex. IV, PD 164 (Fed. 21, 2014), ECF No. 73–2. Put differently, the total cost of the documents that SSV claims its broker did not prepare (whether because the documents were prepared by SSV, a third party, or no one at all) is listed in the report. Accordingly, SSV argues that, because its broker prepared none of the nine documents, the "item's amount"—the amount for the services that SSV did not receive from a broker, which here includes all the documents—is "clearly identified in the Doing Business report." SSV Br. 14 (quoting I&D Mem. 7). As a result, SSV maintains that it satisfied the first of two conditions of Commerce's practice.

In the *Final Determination*, Commerce disagreed. It concluded that "the cost for each item" that "SSV has identified" was "not indicated

in the 'Doing Business' report." I&D Mem. 7. But Commerce referenced no record evidence, and consequently never accounted for the evidence that SSV provided. *Id.* On its face, SSV's evidence appears to indicate that the broker prepared none of the nine documents, in which case the Doing Business report indicated "the cost for each item" that "SSV has identified." The report indicated a cost for the items because the report listed the total aggregated cost for document preparation services, and this total aggregated cost incorporated exclusively the documents that SSV either did not prepare or prepared without a broker. Surrogate Value Sources Ex. IV. In other words, SSV's evidence suggests that SSV satisfied the first condition—yet Commerce ignored this evidence, and cited no alternative evidence, in reaching the opposite conclusion. "Commerce's total failure to consider or discuss record evidence which, on its face, provides significant support for an alternative conclusion renders [Commerce's] determination unsupported by substantial evidence." *Allegheny Ludlum Corp. v. United States*, 24 CIT 452, 479, 112 F. Supp. 2d 1141, 1165 (2000).[11]

U.S. Steel attempts to explain Commerce's finding that the Doing Business report did not satisfy the first condition because it did not indicate the document preparation costs. U.S. Steel maintains that SSV's broker "did, in fact, prepare documents that were necessary to export OCTG to the United States [[ ]]." Def.-Intervenor's Resp. to Pl.'s Mot. for J. on Agency R. 12, ECF. No. 64 ("U.S. Steel Resp."). As evidence, U.S. Steel cites a contract between SSV and its freight forwarding company, [[ ]], in which [[

]] Suppl. A&C Resp. app. SC-5, CD 31–35 (Jan 9, 2014), ECF No. 60. The contract specifies that the fees for [[ ]] *Id.* U.S. Steel concludes that this contract proves that SSV's broker prepared documents. And because the Doing Business report lists only a total cost for all nine documents, and not a separate cost for each particular document, the Doing Business report does not clearly identify the amount for the documents that SSV prepared without a broker. From this, U.S. Steel concludes that substantial evidence

[11] U.S. Steel cites a list of cases in which this court "previously rejected respondents' claims that the calculation of their B&H expenses should be adjusted based on the fact that they self-prepare one or more of the documents listed in the World Bank's Doing Business reports." Def.-Intervenor's Resp. to Pl.'s Mot. for J. on Agency R. 15, ECF. No. 64 (alteration omitted) (citing *DuPont Teijin Films China Ltd. v. United States*, 38 CIT __, __, 7 F. Supp. 3d 1338, 1350 (2014); *Since Hardware (Guangzhou) Co. v. United States*, 37 CIT __, __, 911 F. Supp. 2d 1362, 1378 (2013); *Dongguan Sunrise Furniture Co. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1216, 1247 (2012). But these cases are inapplicable. In the cases U.S. Steel cites, unlike here, the respondents did not allege that the broker prepared none of the documents listed under "document preparation." Therefore, the Doing Business report did not provide the total aggregate cost for document preparation, as it does here.

supported Commerce's conclusion that SSV failed to satisfy the first condition necessary for adjusting B&H surrogate values. U.S. Steel Resp. 10–17.

But even if U.S. Steel offers a plausible explanation for Commerce's finding, Commerce did not. The court cannot rely on U.S. Steel's "post hoc rationalizations" for Commerce's decision. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). Commerce itself must explain the basis for declining to adjust the B&H surrogate value to reflect the absence or presence of "document preparation" costs. If Commerce continues to conclude that the Doing Business report failed to list the cost of the items for which SSV incurred no broker-preparation costs, Commerce must reconcile this conclusion with the evidence that SSV produced. *Allegheny*, 24 CIT at 479, 112 F. Supp. 2d at 1165. In addition, Commerce has the discretion to consider whether SSV satisfied the second condition necessary for a B&H adjustment.[12] However Commerce proceeds, the agency must recalculate SSV's B&H value if its analysis warrants that result.

VI. The Court Remands for Commerce to Reconsider its Decision to Add B&H Costs to SSV's ME Purchase Price for HRC Imports.

SSV argues that Commerce improperly added the costs of B&H services on imports of the HRC input. SSV offers three reasons that adding B&H costs to these imports allegedly lacked the support of substantial record evidence and contravened the law. First, SSV argues that there is no evidence that SSV incurred B&H costs on imports of HRC. SSV Br. 16–17. Second, SSV states that, "even if a Vietnamese customs broker had assisted SSV in connection with customs clearance on imports of [HRC], there is no reason to believe that SSV [obtained the other services] described in the Doing Business report." SSV Br. 18. Third, even if SSV incurred known B&H

[12] As explained above, to prove that Commerce's practice requires adjusting the B&H surrogate value, two conditions must exist: (1) the Doing Business report must clearly identify the allegedly unincurred document preparation costs and (2) Commerce must separately account for the factors of production for these documents. I&D Mem. 7 (footnote omitted). Commerce never discussed the second condition. The court, therefore, cannot consider it in weighing the substantiality of Commerce's reasoning. *Burlington*, 371 U.S. at 168–69. SSV argued that Commerce accounted for the self-preparation of the documents because it "captured [the cost of these documents] in the surrogate values for overhead and SG&A expenses." SSV Br. 15. SSV offered no evidence that Welspun—the surrogate company whose financial statements Commerce used to calculate financial ratios—prepared its own documents. Therefore, it seems unlikely that SSV satisfied the second condition necessary for an adjustment. Regardless, Commerce requested and this court granted a remand to reconsider Commerce's selection of financial statements. As a result, the court does not know which company Commerce will use for financial statements. And so it is currently impossible to ascertain whether Commerce accounted for the cost of self-preparation of B&H documents in its overhead and SG&A calculations. It is therefore impossible to know at this stage whether the second condition counsels for or against a B&H surrogate value adjustment.

services, Commerce's practice prohibits adding the cost of B&H services to the cost of input imports. SSV Br. 21–22.

A. Background

19 U.S.C. § 1677b(c)(1) mandates that, when calculating the normal value, Commerce must determine the value of the factors of production used to produce subject merchandise. To do so, Commerce determined the cost for imports of HRC, an input in SSV's OCTG. To fully account for the cost of acquiring HRC, Commerce added to the purchase price of HRC the B&H costs that SSV incurred for importing the HRC. Commerce again relied on the Doing Business report to calculate the value of the B&H services. I&D Mem. 40. As with B&H costs pertaining to exports, the Doing Business report provides a total B&H cost as well as subcategorized costs for "[d]ocuments preparation," "[c]ustoms clearance and technical control, "[p]orts and terminal handling," and "[i]nland transportation and handling." Surrogate Value Sources Ex. IV, PD 164 (Fed. 21, 2014), ECF No. 73–2. Commerce used the costs of three of the four subcategories to calculate SSV's B&H cost on imports of HRC: (1) "documents preparation," (2) "customs clearance and technical control," and (3) "ports and terminal handling." Final Analysis Mem. Attach. 2, PD 217 (July 16, 2014), ECF No. 58.

B. The Court Sustains Commerce's Finding that SSV Incurred B&H Costs.

First, SSV argues that "there is no evidence on the record that SSV used the services of a customs broker in connection with imports of [HRC]." SSV Br. 16 (emphasis omitted). From this, SSV concludes that Commerce erred in adding B&H costs to imports of HRC. SSV Br. 17. The court finds that SSV failed to exhaust its administrative remedies on this issue.

Before the *Preliminary Determination*, U.S. Steel argued that Commerce should add B&H fees to SSV's imports of HRC. U.S. Steel Pre-prelim. Cmts. 12–14, CD 53 (Feb. 3, 2014), ECF No. 73–3. SSV failed to argue that it incurred no B&H expenses. Instead, it argued that the financial ratios for overhead capture B&H expenses. SSV Pre-prelim Cmts. 9, PD 144 (Feb. 7, 2014), ECF No. 73–1. The *Preliminary Determination* included no B&H costs for imports of HRC. Prelim. Decision Mem., PD 245 (Oct. 23, 2014), ECF No. 73–2. Later, U.S. Steel again insisted that Commerce add B&H costs for HRC imports because it is "clear that [SSV] incurred brokerage and handling and port fees associated with its [ME] purchases of [HRC]." U.S. Steel Case Br. 34, PD 203 (June 9, 2014), ECF No. 73–2. U.S. Steel explained that SSV "does not dispute as a factual matter that it incurs brokerage and handling and port fees on its imports of [HRC]."

Id. at 35. In response, SSV again failed to argue that it incurred no B&H costs from a customs broker. Rather, SSV argued (1) that U.S. Steel provided no "evidence to support their claim that the import charges were not already included in the overhead figures calculated by [Commerce]" and (2) that "the import brokerage-and-handling charges proposed by [U.S. Steel] [were] plainly excessive." SSV Rebuttal Br. 35, PD 207 (June 13, 2014), ECF No. 73–2. In its *Final Determination*, Commerce stated that "SSV does not dispute" that it had B&H costs. I&D Mem. 40. Now, SSV disputes that it had B&H costs.

This court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). The court has "generally taken a strict view of the need for parties to exhaust their remedies by raising all arguments in a timely fashion so that they may be appropriately addressed by the agency." *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 553, 564, 558 F. Supp. 2d 1319, 1329 (2008) (citation omitted). The doctrine of exhaustion "allows the administrative agency to perform the functions within its area of special competence (to develop the factual record and to apply its expertise), and—at the same time—it promotes judicial efficiency and conserves judicial resources." *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT 627, 644, 342 F. Supp. 2d 1191, 1206 (2004); *see also Richey v. United States*, 322 F.3d 1317, 1326 (Fed. Cir. 2003). "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). In this case, SSV never argued before Commerce that SSV did not incur B&H costs. As a result, SSV failed to exhaust this argument.

SSV cites *Qingdao Taifa Group Co. v. United States*, 33 CIT 1090, 1093, 637 F. Supp. 2d 1231, 1236 (2009) for the proposition that

> [a] party . . . may seek judicial review of an issue that it did not raise in a case brief if Commerce did not address the issue until its final decision, because in such a circumstance the party would not have had a full and fair opportunity to raise the issue at the administrative level.

SSV Reply Br. 9 n.15. But the rationale driving *Qingdao* is inapplicable in this case. Although Commerce did not decide that SSV incurred B&H costs until the *Final Determination*, U.S. Steel lobbied for such a conclusion both before and after the *Preliminary Determination*. U.S. Steel Case Br. 34–35. Though SSV had no obligation to respond to these arguments, it chose to respond. In response, SSV could have argued, as it did here, that there is no evidence that it used

B&H services on its imports of HRC. It did not. Instead, SSV responded that Commerce need not add B&H expenses because the financial ratio for overhead captures this expense—an argument that presupposes the existence of B&H expenses. SSV Rebuttal Br. 35. In addition, SSV argued that the B&H costs that U.S. Steel requested were "plainly excessive"—another argument that seems to presuppose the existence of B&H expenses. *Id.* In other words, SSV failed to advance an argument about the existence of B&H costs—and implicitly admitted the existence of these costs—at a time when SSV was intentionally discussing the appropriate handling of B&H costs.[13] And U.S. Steel even relied on SSV's implicit acknowledgment of B&H costs in fashioning its argument about how to account for them: U.S. Steel noted that SSV did not "dispute as a factual matter that it" incurred B&H expenses. U.S. Steel Case Br. 34–35. Because SSV responded to U.S. Steel's argument, SSV could have argued that it incurred no B&H costs. Put differently, SSV had a "full and fair opportunity to raise the issue at the administrative level." The rule in *Qingdao* is inapplicable here, where SSV's arguments and representations—and not SSV's mere silence—led others to reasonably conclude that SSV incurred B&H costs from a broker on imports of HRC.

In addition, requiring exhaustion here furthers the values behind the doctrine by (1) avoiding judicial inefficiency and (2) allowing Commerce to more thoroughly develop a relevant factual record and apply its expertise. *Ta Chen*, 28 CIT at 644, 342 F. Supp. 2d at 1206. For the foregoing reasons, SSV failed to exhaust its administrative remedies on this issue. Moreover, no exhaustion exceptions apply here because (1) this is not a pure question of law, (2) there was no lack of access to the confidential record, (3) there is no intervening legal decision, and (4) it would not have been futile to raise this issue at the administrative level. *See Gerber Food (Yunnan) Co. v. United States*, 33 CIT 186, 193, 601 F. Supp. 2d 1370, 1377 (2009) (listing exhaustion exceptions). Accordingly, the court does not now allow SSV to argue for the first time that it incurred no B&H costs. *See* 28 U.S.C. § 2637(d).[14]

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[13] In fact, SSV may have explicitly recognized the use of B&H services from brokers on imports of HRC when it stated: "[T]he 'Doing Business' report figures proposed by [U.S. Steel] do not provide a reasonable basis for ascertaining the value of the *brokerage-and-handling services [that SSV] obtained from its customs broker on [HRC] imports during the investigation period*." SSV Rebuttal Br. 41 (emphasis added).

[14] Notwithstanding this conclusion, even if this court considered SSV's challenge, substantial record evidence would likely support Commerce's conclusion that SSV incurred B&H expenses from a broker on imports of HRC. SSV's purchasing agent stated at verification that "[w]hen he receives all the documents he starts the customs clearance." SSV Verification Report 25, PD 191 (May 7, 2014), ECF No. 58. Additionally, the agreement between SSV and its freight forwarder for imports of raw materials, [[ ]] confirms that SSV

C. The Court Remands for Commerce to Explain How its Conclusion that Financial Statements do not Account for B&H Costs Changes Following the Potential Reselection of Financial Statements.

SSV contends that, "even if a Vietnamese customs broker had assisted SSV in connection with customs clearance on imports of [HRC], there is no reason to believe that SSV" obtained services for "document preparation" and "ports and terminal handling." SSV Br. 18. Thus, SSV maintains that Commerce improperly included the Doing Business report costs for these two services. *Id.* at 18–19.

SSV first asserts that "[t]here was no evidence that SSV employed a customs broker to prepare any of the . . . documents that were included in the Doing Business [r]eport's" "document preparation" category. *Id.* at 19. On the import side, the "document preparation" category includes eleven documents. Surrogate Value Sources Ex. IV, PD 164 (Fed. 21, 2014), ECF No. 73–2. In footnotes in its Rebuttal Brief before Commerce, SSV cited record evidence to show that SSV personnel and the suppliers of HRC prepared nine of the eleven documents. SSV Rebuttal Br. 38–40 n.60–66, PD 207 (June 13, 2014), ECF No. 58.[15] The record citations appear to demonstrate that SSV used no broker for nine of the eleven documents in the "document preparation" category. *Id.*[16] SSV next asserts that "there was no evidence that a customs broker provided port or terminal handling services." SSV Br. 20. SSV explains that it incurred such services "only for shipments made in containers," and asserts it did not ship

obtained B&H services. SSV Resp. to Suppl. Sec. C&D Questionnaire app. SSD-5, CD 54–56 (Feb. 5, 2014), ECF No. 72. The contract stated that [[
]] *Id.* [[

]] *Id.* The contract simply required
[[

]] *Id.* The contract also stated that the price includes the following fees and services: [[ ]] *Id.* This record evidence substantiates Commerce's finding that SSV contracted to receive B&H services from a broker on imports of HRC. It also evidences receipt of the three categories of B&H costs that Commerce included in its calculation: "document preparation," "ports and terminal handling," and "customs clearance and technical control."

[15] SSV regularly and inconveniently excludes relevant record citations (and citations to proceedings) from its brief before this court. This requires the court to peruse the footnotes of SSV's briefing at the administrative level so that the court can locate the citations relevant to SSV's arguments before this court. In the future, SSV may instead choose to directly cite record evidence and proceedings, not SSV's own prior statements discussing record evidence and proceedings.

[16] The Doing Business report lists only a single cost for all documents. Surrogate Value Sources Ex. IV. It does not provide costs for any individual documents. Thus, the Doing Business report identifies no costs for the specific documents that SSV and the suppliers prepared.

OCTG in containers. *Id.* In support of this last point, SSV cites no record evidence. *Id.*

For its part, Commerce explained that it added "B&H and import fees to the [ME] purchase price of [HRC] because the record indicates that SSV incurred cost[s] for B&H and SSV does not dispute this cost." I&D Mem. 40. Commerce then concluded that "SSV has presented no evidence that the B&H costs are included in the overhead reported on any of the financial statements on the record." *Id.*

From this, it appears that Commerce used the same established practice that it used in Issue V above. *See* Gov't Resp. 40. As applied here, the practice dictates that Commerce must adjust the (import-side) B&H value if two conditions exist.[17] First, the Doing Business report must clearly identify the cost for the services that SSV claims that it and its suppliers provided. Second, Commerce must have otherwise accounted for the cost of the services provided. *See* I&D Mem. 7 (footnote omitted). Commerce never addressed the first condition in its explanation, but it addressed the second condition by explaining that no evidence exists concerning whether the financial ratios otherwise accounted for the B&H costs of imports. I&D Mem. 40. If true, both conditions are not satisfied and Commerce properly refused to adjust the B&H calculation. Nevertheless, the Government requested and this court granted a remand to Commerce to reconsider its selection of financial statements. For that reason, Commerce's explanation here may no longer apply because, if the financial statements change on remand, the new financial statements may account for SSV's B&H costs on its imports of HRC. On that basis, the court remands for Commerce to explain how its findings change, or do not change, based on its selection of financial statements. The court also orders Commerce to provide a more thorough explanation of its reasoning.

D. The Court Remands for Commerce to Consider if an Applicable Agency Practice Precludes Commerce from Adding Costs for B&H Services to SSV's ME Purchase Price for HRC.

Third, SSV argues that "the inclusion of import brokerage costs in the calculation of the cost of imported [HRC] is [inconsistent] with Commerce's practice." SSV Br. 21. SSV cites two proceedings where Commerce declined to calculate and apply surrogate values for the B&H services used to import inputs. SSV Br. 21 n.24 (citing *Fresh Garlic from the People's Republic of China*, 79 Fed. Reg. 36,721 (Dep't Commerce June 30, 2014) (final admin. review) and accompanying

[17] The court, however, is not certain that Commerce used this established practice. Consequently, Commerce must explain its reasoning more fully on remand.

I&D Mem. ("*Fresh Garlic*") at cmt 7; *Prestressed Concrete Steel Rail Tie Wire from the People's Republic of China*, 79 Fed. Reg. 25,572 (Dep't Commerce May 5, 2014) (final determ.) and accompanying I&D Mem. ("*Prestressed Concrete*") at cmt. 3). SSV argues that these two proceedings establish that, in adding costs for B&H services to the ME purchase price of HRC, Commerce departed from its established practice without explanation. SSV Br. 21–22. If SSV is correct, Commerce acted arbitrarily and in violation of the law.

But Commerce provided no response to this argument because SSV never raised it at the administrative level. As chronicled above, U.S. Steel argued both before and after the *Preliminary Determination* that Commerce should add the cost of B&H services to the ME purchase price of imports of HRC. U.S. Steel Pre-prelim. Cmts. 12–14, CD 53 (Feb. 3, 2014), ECF No. 73–3; U.S. Steel Case Br. 34–35, PD 203 (June 9, 2014), ECF No. 73–2. Though not required to respond, SSV responded, and it argued (1) that the overhead financial ratios captured the cost of B&H services on imports of inputs and (2) that U.S. Steel inflated the value of these B&H services. SSV Rebuttal Br. 35, PD 207 (June 13, 2014), ECF No. 73–2. SSV failed to mention its current argument.

However, an exception to exhaustion doctrine prevents the court from barring SSV's current argument. Commerce issued *Prestressed Concrete* on May 5, 2014. Shortly thereafter, on June 13, 2014, SSV submitted its rebuttal brief. *Id.* On June 30, 2014, Commerce issued *Fresh Garlic*. Therefore, at the time SSV submitted its rebuttal brief, SSV may have lacked the information necessary to argue that an applicable established practice exists. On that basis, the court excuses SSV from its failure to exhaust this argument. *See Gerber Food*, 33 CIT at 193, 601 F. Supp. 2d at 1381 (explaining that the court has discretion to deem the exhaustion doctrine inapplicable when there is an intervening legal decision or it would have been futile to raise the argument at the administrative level). Further, although U.S. Steel and the Government offer potentially legitimate explanations as to why no practice precludes the adding of B&H costs here, the court "may not accept . . . counsel's post hoc rationalizations for agency action." *Burlington Truck Lines*, 371 U.S. at 168.[18] Instead, "a

[18] U.S. Steel states that "[i]n NME cases where respondents have incurred B&H expenses on their imports of market economy inputs, Commerce has [previously] increased the market economy prices by such fees." U.S. Steel Resp. 17. Additionally, U.S. Steel explains that this court previously held that "two prior determinations . . . are not enough to constitute an agency practice that is binding on Commerce." *Id.* at 21 (quoting *Shandong Huarong Mach. Co., Ltd. v. United States*, 30 CIT 1269, 1293, 435 F. Supp. 2d 1261, 1282 n.23 (2006)). Thus, U.S. Steel argues that the two proceedings SSV cites are insufficient proof of an established practice. *Id.* Further, U.S. Steel insists that, even if the two proceedings create an established practice, the practice is inapplicable here. *Id.* at 22. It is evidently inapplicable because the practice relates to situations where Commerce adds a surrogate B&H value to a surrogate value for imports of inputs. In contrast, here Commerce added a surrogate B&H value to the market economy purchase price of an imported input. *Id.*

reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *Chenery*, 332 U.S. at 196. Because there is, understandably, no explanation from Commerce, the appropriate result is a remand to allow Commerce to apply its expertise.

On remand, Commerce must determine and explain whether a relevant established practice exists. An established practice exists "when a uniform and established procedure exists that would lead a party, in the absence of notification of change, reasonably to expect adherence to the [particular action] or procedure." *Huvis*, 31 CIT at 1811, 525 F. Supp. 2d at 1378 (alteration in original) (citation omitted). If an established practice is applicable to Commerce's decision to add B&H costs to the ME purchase price of HRC, Commerce must either (1) explain the reasons for departing from the practice or (2) revise its decision.

VII. The Court Remands for Further Explanation of Commerce's Allocation of B&H Costs.

SSV argues that "Commerce's allocation of the 'Doing Business report' costs was illogical, contrary to this court's precedent, and unsupported by the evidence on the record." SSV Br. 23. The court remands for further explanation.

A. Background

As discussed, Commerce used the Doing Business report to calculate surrogate values for B&H services on both exports of OCTG and imports of HRC. I&D Mem. 6–7, 40. The figures from the report assumed a sample shipment of goods weighing ten metric tons ("MT"). SSV Case Br. Attach. 2–3, PD 197 (June 6, 2014), ECF No. 58. For its *Final Determination*, Commerce calculated B&H surrogate values in dollars per metric ton "by dividing the total costs shown in the Doing Business report (for documents preparation, customs clearance and technical control, and ports and terminal handling) by 10—[because] the hypothetical container that was the focus of the Doing Business [r]eport's estimates contained 10 tons of the hypothetical goods." SSV Br. 23. In other words, Commerce first divided by ten the total B&H costs (for documents preparation, customs clearance and technical control, and ports and terminal handling) given in the Doing Business report on imports and exports. Doing this gave Commerce the B&H costs per metric ton of goods imported and exported. Commerce then multiplied the per metric ton B&H costs on imports by the total metric tons of HRC that SSV imported. Final Analysis Mem. Attach. 2, PD 217 (July 16, 2014), ECF No. 58. Commerce used the same approach to calculate the surrogate value for B&H costs on exports of OCTG. Surrogate Values Mem. Ex. 9, PD 152

(Feb. 20, 2014), ECF No. 73–2. In doing so, Commerce "assumed that the [B&H costs] would increase proportionately with the weight of the products contained in each shipment." SSV Br. 23. This assumption, SSV argues, was "flawed and contrary to law." *Id.* at 24.

B. Discussion

SSV argues that Commerce erred in assuming "that the [B&H costs] would increase proportionately with the weight of the products contained in each shipment." *Id.* at 23. For example, "if the costs for exporting a 10-ton shipment would be $77, Commerce assumed that the costs for exporting a 100-ton shipment would be $770, the costs for exporting a 1,000 ton shipment would be $7,700, and so on." *Id.* Commerce failed to provide a detailed explanation supported by substantial evidence for its conclusion that the B&H costs would increase proportionately with the weight of the exported and imported goods.

In its *Final Determination*, Commerce detailed its decision to "use the weight of 10 MT for a standard container." I&D Mem. 8 (citation omitted). It explained that calculating unit value using a 10 MT weight per container is necessary to avoid a "distorted result," because "mixing different sources of data in the B&H calculation would add inconsistency to the ratio calculation." *Id.* (citation omitted). "Using 10 MT in the per-unit calculation maintains the relationship between cost and quantity from the survey (which is important because the numerator and the denominator of the calculation are dependent upon one another), makes use of data from the same source, and is consistent with [Commerce's] practice." *Id.* at 9 (citation omitted).

Although helpful to resolving challenges to the standard container weight it uses when calculating unit value, this explanation appears to shed no light on why Commerce assumed that B&H costs for SSV increased proportionately with the weight of the product.[19] Commerce points to no evidence or law justifying its conclusion that

[19] SSV argues that Commerce should alter its allocation in light of the holding in *CS Wind Vietnam Co. v. United States*, 38 CIT __, 971 F. Supp. 2d 1271 (2014). SSV Br. 24–27. There, the court held that Commerce failed to adequately explain its finding that B&H document preparation costs increased proportionately with the weight of the shipped goods. *CS Wind*, 38 CIT at __, 971 F. Supp. 2d at 1294–95. The court reasoned that Commerce's methodology assumed, without the support of substantial evidence, "that a shipment weighing less will incur lower document processing costs while a shipment weighing more will incur higher processing costs." *Id.* at 1295; *see also Dupont Teijin Films China v. United States*, 38 CIT __, __, 7 F. Supp. 3d 1338, 1350–52 (2014) (remanding for Commerce to explain or change its conclusion that customs clearance fees and document preparation costs for containerized shipments increase proportionately with weight). *But see Dongguan Sunrise Furniture*, 36 CIT at __, 865 F. Supp. 2d at 1247 (finding that Commerce properly concluded that B&H values increase proportionately because respondent presented no evidence that values do not increase proportionately). Here, rather than explaining why Commerce assumed that B&H costs increased proportionately with the increased weight of a shipment, Commerce explained that *CS Wind* was on remand and, therefore, "no final court decision" bound Commerce. I&D Mem.9. This response is unconvincing. *CS Wind* poses a question Commerce should have answered regardless of whether *CS Wind* bound Commerce's actions. In

document preparation costs, customs clearance and technical control costs, and ports and terminal handlings costs should increase here based on the weight of the total shipment of goods. This court can "judge the propriety of [Commerce's action] solely by the grounds invoked by" Commerce. *Chenery,* 332 U.S. at 196. Here, Commerce did not provide enough explanation or evidence for its finding that the B&H costs should increase proportionately with the weight of the product. Accordingly, the court remands for further explanation or for a recalculation.[20]

CONCLUSION AND ORDER

After carefully reviewing the briefs and administrative record, the court remands all issues except the challenge to Commerce's refusal to apply partial adverse facts available to SSV.

Accordingly, it is hereby:

ORDERED that the final determination of the United States Department of Commerce, published as *Certain Oil Country Tubular Goods from the Socialist Republic of Vietnam*, 79 Fed. Reg. 41,973 (Dep't Commerce July 18, 2014) (final determ.) and accompanying

other words, even if *CS Wind* did not bind Commerce, Commerce must still show that its allocation decision complied with the law and had the support of substantial evidence. The court finds no evidence that Commerce attempted to make this showing.

[20] As an alternative, SSV argues that Commerce erred in using 10 MT as the standard weight for a container instead of the maximum capacity of the container, which is 21.727 MT. SSV Br. 31–33. As detailed above, Commerce clearly articulated the reasons that it chose a 10 MT weight. Further, Commerce supported this reasoning with ample legal authority. I&D Mem. 8–9 nn.27–28 (citing *Certain Steel Threaded Rod from the People's Republic of China*, 78 Fed. Reg. 66,330 (Dep't Commerce Nov. 5, 2013) (final admin. review) and accompanying I&D Mem. at cmt. 7; *Hardwood and Decorative Plywood from the People's Republic of China*, 78 Fed. Reg. 58,273 (Dep't Commerce Sept. 23, 2013) (final determ.) and accompanying I&D Mem. at cmt. 10; *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 78 Fed. Reg. 56,211 (Dep't Commerce Sept. 12, 2013) (final admin. review) and accompanying I&D Mem. at cmt. 5; *Certain Steel Nails from the People's Republic of China*, 78 Fed. Reg. 16,651 (Dep't Commerce Mar. 18, 2013) (final admin. review) and accompanying I&D Mem. at cmt. 3).

Nonetheless, SSV references two proceedings to argue that Commerce violated an established practice when it chose the 10 MT weight over the 21.727 MT weight. SSV Br. 31–33. In one of these, Commerce rejected the proposed 10 MT weight in favor of the respondent's actual average load weight per container because it found "that the assumed weight of 10 MT [was] not referenced in" the 2013 version of the Doing Business report. *Welded Stainless Pressure Pipe from the Socialist Republic of Vietnam*, 79 Fed. Reg. 31,092 (Dep't Commerce May 30, 2014) (final determ.) ("*Welded Pressure Pipe*") and accompanying I&D Mem. at cmt. 5. No parties discuss the other proceeding that SSV referenced.

SSV's reference to merely two prior proceedings fails to establish a practice with which Commerce had to comply. And Commerce provided adequate evidence that its decision violated no established practice. That said, even if *Welded Pressure Pipe* demonstrated a binding practice, it is a practice inapplicable to the facts here. *Welded Pressure Pipe* rejected the 10 MT weight because no evidence existed that the Doing Business report relied on this weight. *Id.* In contrast, here evidence exists that the report relied on the 10 MT weight. SSV Case Br. Attach. 3, PD 197 (June 6, 2014), ECF No. 58. *Welded Pressure Pipe* is therefore irrelevant to resolving the issue here. Commerce need not address this argument on remand.

Issues & Decision Mem., as amended by *Certain Oil Country Tubular Goods from India, the Republic of Korea, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam*, 79 Fed. Reg. 53,691 (Dep't Commerce Sept. 10, 2014) (amended final determ.) is hereby REMANDED to Commerce for redetermination; it is further

ORDERED that both Plaintiff's and Defendant-Intervenor's Motions for Judgment on the Agency Record Under USCIT Rule 56.2 are GRANTED in part as provided in this Opinion and Order; it is further

ORDERED that Commerce shall issue a redetermination ("Remand Redetermination") in accordance with this Opinion and Order that is in all respects supported by substantial evidence and in accordance with law; it is further

ORDERED that Commerce provide a detailed explanation of, or reconsider, its decision to treat all J55 HRC as a single input and value all J55 HRC based on the purchase of a single variation of J55 HRC; it is further

ORDERED that Commerce either (1) explain why it concluded that trucking companies commonly bear the risk of loss and why SSV had no insurance contract or (2) reclassify the contract as an insurance contract; it is further

ORDERED that Commerce reconsider its selection of financial statements; it is further

ORDERED that Commerce reconsider its yield loss calculation and provide a thorough response to SSV's challenges to the calculation of yield loss; it is further

ORDERED that Commerce analyze the conflicting evidence concerning use of B&H costs on exports of OCTG and explain its decision to adjust or not adjust the B&H costs; it is further

ORDERED that Commerce (1) explain how its decision on financial statements affects, or does not affect, the decision to add B&H costs to imports of HRC, and (2) consider whether an agency practice bars Commerce from adding B&H costs to SSV's imports of HRC; it is further

ORDERED that Commerce thoroughly explain its finding that B&H costs increase proportionately with the weight of a shipment; it is further

ORDERED that Commerce shall have ninety (90) days from the date of this Opinion and Order in which to file its Remand Redetermination, which shall comply with all directives in this Opinion and Order; that the Plaintiff and Defendant-Intervenors shall have thirty (30) days from the filing of the Remand Redetermination in which to file comments thereon; and that the Defendant shall have thirty (30)

days from the filing of Plaintiff's and Defendant-Intervenors' comments to file comments.

Dated: August 31, 2016
New York, New York

/s/ Richard W. Goldberg
Richard W. Goldberg
Senior Judge

Slip Op. 16–86

Capella Sales & Services Ltd., Plaintiff, v. United States, Defendant.

Donald C. Pogue, Senior Judge
Court No. 15–00318

[Action dismissed for failure to state a claim upon which relief can be granted.]

Dated: September 14, 2016

Irene H. Chen, Chen Law Group, LLC, of Rockville, MD, and *Mark B. Lehnardt*, Lehnardt & Lehnardt, LLC, of Liberty, MO, for the Plaintiff.

Aimee Lee, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for the Defendant. Also on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel were *Jessica M. Link*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC, and *Edward N. Maurer*, Deputy Assistant Chief Counsel, International Trade Litigation, Customs & Border Protection, of New York, NY.

Alan H. Price, Robert E. DeFrancesco, III, and *Derick G. Holt*, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor.

OPINION

Pogue, Senior Judge:

In this action, Capella Sales & Services Ltd. ("Plaintiff" or "Capella")[1] again[2] challenges the assessment of countervailing duties ("CVD"), at the rate of 374.15 percent ad valorem, on four of its entries of aluminum extrusions from the PRC. The U.S. Department of Commerce ("Defendant" or "Commerce") assessed these duties by applying the all-others rate calculated in *Aluminum Extrusions from the [PRC]*, 76 Fed. Reg. 18,521 (Dep't Commerce Apr. 4, 2011) (final affirmative countervailing duty determination) ("*Final CVD Determination*"), rather than the (lower) "lawful [cash] deposit rate" calcu-

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[1] Capella is "an importer of aluminum extrusions" from the People's Republic of China ("PRC"). Compl., ECF No. 3, at ¶ 50.

[2] In *Capella Sales & Servs., Ltd. v. United States*, __ CIT __,Slip Op. 16–72 (July 20, 2016) ("*Capella I*"), the court, pursuant to USCIT Rule 12(b)(6), dismissed Capella's first challenge for failure to state a claim upon which relief can be granted.

lated subsequently on remand and redetermination of the same Final CVD Determination pursuant to litigation to which Capella was not a party. Compl., ECF No. 3, at ¶¶ 56, 58.

The result in this second action is directed by the Court's opinion in *Capella I*: Because Capella's complaint challenges Commerce's administration and enforcement of a CVD rate, the court has jurisdiction under 28 U.S.C. § 1581(i) (2012). However, because Plaintiff did not participate in, and have liquidation of its entries enjoined pursuant to, the litigation that resulted in the "lawful rate" calculated on remand and redetermination, it cannot claim entitlement to that rate for entries made prior to the effective date of the revised rate. *See* 19 U.S.C. §§ 1516a(c)(1), 1516a(e) (2012); Compl., ECF No. 3, at ¶ 7; *cf.* *Capella I*, __ CIT at __, Slip Op. 16–72 at 3. Plaintiff has, therefore, failed to state a claim upon which relief can be granted. USCIT Rule 12(b)(6).

BACKGROUND

The background of this case is, in almost all respects, identical to the background provided in the Court's opinion in *Capella I*, __ CIT at __, Slip. Op. 16–72 at 3–11. For ease of reference, we note here only that Commerce's underlying CVD determination on aluminum extrusion from the PRC calculated an all-others rate of 374.15 percent ad valorem. *Final CVD Determination*, 76 Fed. Reg. at 18,523. Pursuant to the associated *CVD Order*, Commerce instructed U.S. Customs and Border Protection ("Customs") to collect cash deposits for non-individually investigated companies at that all-others rate. *Aluminum Extrusions from the [PRC]*, 76 Fed. Reg. 30,653, 30,655 (Dep't Commerce May 26, 2011) (countervailing duty order) ("*CVD Order*"). Some respondents appealed this determination to this Court in *MacLean-Fogg v. United States*, Consol. Ct. No. 1100209,[3] as a result of which, after multiple judicial opinions,[4] including an appeal to the Court of Appeals for the Federal Circuit ("CAFC"),[5] and agency redeterminations,[6] the all-others rate was reduced to 7.37 percent (the

[3] *See* Summons, Consol. Ct. No. 11–209 ECF No. 1; Compl., Consol. Ct. No. 11–209, ECF No. 6; *see also* Order, Consol. Ct. No. 11209 ECF No. 26 (consolidation order). This Court had jurisdiction under 28 U.S.C. § 1581(c). *See MacLean-Fogg Co. v. United States*, __ CIT __, 836 F. Supp. 2d 1367, 1369–70 (2012)

[4] *MacLean-Fogg Co. v. United States*, __ CIT __, 836 F. Supp. 2d 1367, *on reconsideration in part*, __ CIT __, 853 F. Supp. 2d 1253 (2012); *MacLean-Fogg Co. v. United States*, __ CIT __, 853 F. Supp. 2d 1336 (2012); *MacLean-Fogg Co. v. United States*, __CIT __, 885 F. Supp. 2d 1337 (2012) ("*MacLean-Fogg IV*"); *MacLean-Fogg Co. v. United States*, __ CIT __, 32 F. Supp. 3d 1358(2014); *MacLean-Fogg Co. v. United States*, __ CIT __, 100 F. Supp. 3d 1349 (2015); *MacLean-Fogg Co. v. United States*, __ CIT__, 106 F. Supp. 3d 1356 (2015) ("*MacLean-Fogg VIII*").

[5] *MacLean-Fogg Co. v. United States*, 753 F.3d 1237 (Fed. Cir. 2014) ("*MacLean-Fogg V*").

[6] [First] Results of Redetermination Pursuant to Ct. Remand, Consol. Ct. No. 11–209, ECF Nos. 62–1 (pub. ver.) & 63 (conf. ver.); [Second] Results of Redetermination Pursuant to Ct. Remand, Consol. Ct. No. 11–209, ECF No. 80–1; [Third] Results of Redetermination

post-*MacLean-Fogg* rate). [Fourth] Results of Redetermination Pursuant to Ct. Remand, Consol. Ct. 11–209, ECF Nos. 124–1 (conf. ver.) & 125–1 (pub. ver.).

While the above was ongoing, Capella made four entries of aluminum extrusions from the PRC – two on November 28, 2011, one on March 20, and one on June 16, 2012. Capella mistakenly entered its merchandise as Type 01 (i.e., not subject to AD or CVD duties) rather than Type 03 (i.e., subject to AD or CVD duties). Compl., ECF No. 3, at ¶ 7; CBP Forms 7501 *reproduced in* Compl., ECF No. 3–1 at attach. 5; Protest, 4601–14–101149 (July 14, 2014), *reproduced in* Compl. ECF No. 3–1 at attach. 15.

Capella did not participate in the investigation underlying the *CVD Order* or the *MacLean-Fogg* litigation. Compl., ECF No. 3, at ¶ 7 ("Capella was unaware of the *CVD Order*."). Nor did Capella participate in the first administrative review of the *CVD Order*. *Id*. at ¶ 10 ("[Capella] was not aware of" the review and therefore "did not know to request a review"). Capella also did not participate in the second administrative review of the *CVD Order*. *Id*. at ¶ 22. Based on this lack of participation, Commerce instructed Customs to liquidate Capella's entries at their cash deposit rate. CBP Message No. 2209305 (July 27, 2012), *reproduced in* Compl., ECF No. 3–1 at attach. 6; CBP Message No. 3197305 (July 16, 2013), *reproduced in* Compl., ECF No. 3–1 at attach. 10.[7]

Capella filed its first action with this Court following the CAFC's decision in *MacLean-Fogg V*, 753 F.3d 1237. Summons, Ct. No. 14–304, ECF No. 1; Compl., Ct. No. 14–304, ECF No. 2. In that case, as here, Capella challenged Commerce's decision to assess the investigation rate, rather than a rate resulting from the *MacLean-Fogg* litigation, on its entries. *See Capella I*, __ CIT at __, Slip Op. 16–72 at 16, 18–19.

While *Capella I* was pending, Commerce made its fourth and final redetermination in *MacLean-Fogg*, establishing an all-others rate of 7.37 percent ad valorem. [Fourth] Results of Redetermination Pursuant to Ct. Remand, Consol. Ct. 11–209, ECF Nos. 124–1 (conf. ver.) & 125–1 (pub. ver.). This Court affirmed. *Mac-Lean Fogg VIII*, 106 F. Supp. 3d 1356. Between this affirmance and publication of Commerce's amended final CVD determination in the Federal Register, Capella sent a letter to Commerce arguing that "Commerce should adjust the effective date of the new all-others cash deposit rate of 7.37

Pursuant to Ct. Remand, Consol. Ct. No. 11–209, ECF No. 108–1; [Fourth] Results of Redetermination Pursuant to Ct. Remand, Consol. Ct. No. 11–209, ECF Nos. 124–1 (conf. ver.) & 125–1 (pub. ver.).

[7] Capella's four entries, being covered by the *CVD Order* but not subject to any administrative review or injunction in the pending the *MacLean-Fogg* litigation, were subject to automatic liquidation. *See* Compl., ECF No. 3, ¶¶ 13, 23. Three of Capella's four entries have already been liquidated; the fourth, Capella's June 16, 2012, entry had liquidation enjoined pending litigation in *Capella Sales & Services Ltd. v. United States*, Ct. No. 14–304. *Capella I*, __ CIT at __, Slip Op. 16–72 at 10 n. 14.

percent to apply retroactively to all entries since [*Aluminum Extrusions from the [PRC]*, 75 Fed. Reg. 54,302 (Dep't Commerce Sept. 7, 2010) (preliminary affirmative CVD determination)]." Letter from Capella to Commerce (Oct. 29, 2015) at 2, *reproduced in* Compl., ECF No. 3–1 at attach. 17; *see* Compl., ECF No. 3, at ¶ 35.[8]

Commerce did not adjust the effective date of the new all-others rate. Rather, Commerce published notice of the new all-others cash deposit rate with an effective date of November 2, 2015, *Am. Final CVD Determination*, 80 Fed. Reg. at 69,640–41,[9] and issued corresponding instructions to Customs.[10] Commerce also issued instructions to Customs to refund cash deposits made in excess of the new rate for entries made before the new cash deposit instructions (November 13, 2015) but after the effective date (November 2, 2015).[11]

Capella then filed its second action – the instant action – again challenging the CVD rate assessed on its four entries. Summons, ECF No. 1; Compl., ECF No. 3. Capella challenges Commerce's *Am. Final CVD Determination*, 80 Fed. Reg. 69,640, the corresponding *Cash Deposit Instructions*, ECF No. 3–1 at attach. 17, and *Refund Instructions*, ECF No. 3–1 at attach. 19, as "arbitrary, capricious, and [an] abuse of discretion, or otherwise not in accordance with law" for failing to apply, retroactively to Capella's entries, "the lawful [cash] deposit rate," that is the post-*MacLean-Fogg* rate of 7.37 percent ad valorem. Compl., ECF No. 3, at ¶¶ 56, 58; *see Am. Final CVD Determination*, 80 Fed. Reg. at 69,641.

The Defendant's motion to dismiss is now before the court. Def.'s Mot. to Dismiss, ECF No. 27.[12]

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[8] Capella's letter constitutes what Capella claims to be a procedural difference between Capella's challenge here, to the *Aluminum Extrusions from the [PRC]*, 80 Fed. Reg. 69,640 (Dep't Commerce Nov. 10, 2015) (amended final affirmative CVD determination pursuant to court decision) ("*Am. Final CVD Determination*") and Capella's challenge in *Capella I*, to *Aluminum Extrusions from the [PRC]*, 77 Fed. Reg. 74,466 (Dep't Commerce Dec. 14, 2012) (notice of court decision not in harmony with final affirmative CVD determination and notice of amended final affirmative CVD determination). *Compare* Compl., ECF No. 3, at ¶¶ 35, 38, 51 *with* Am. Compl., Ct. No. 14–304, ECF No. 32–1. As explained below, *see* note 17, it is a difference of no moment.

[9] This is the final "Timken Notice" for *MacLean-Fogg*, Consol. Ct. No. 11–209. *Am. Final CVD Determination* at 69,640 (citing *Diamond Sawblades Mfrs. Coal. v. United States*, 626 F.3d 1374 (Fed. Cir. 2010) (clarifying *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990)).

[10] *See* CBP Message No. 5317319 (Nov. 13, 2015) ("*Cash Deposit Instructions*"), *reproduced in* Compl., ECF No. 3–1 at attach. 18 ("As a result of [*MacLean-Fogg VIII*, __ CIT __, 106 F. Supp. 3d 1356], for shipments of aluminum extrusions from the [PRC] entered, or withdrawn from warehouse, for consumption on or after 11/02/2015, [Customs] shall require, for [all others rate] entries, a cash deposit equal to [7.37 percent ad valorem].").

[11] CBP Message No. 5328301 (Nov. 24, 2015) ("*Refund Instructions*"), *reproduced in* Compl., ECF No. 3–1 at attach. 19.

[12] Defendant-Intervenor, the Aluminum Extrusion Fair Trade Committee ("AEFTC"), "concurs with and adopts by reference the arguments set forth in [Def.'s Mot. to Dismiss, ECF No. 27]." Def.-Intervenor [AEFTC]'s Resp. to Def.'s Mot. to Dismiss, ECF No. 28, at 1.

DISCUSSION

I. Defendant's Motion to Dismiss Pursuant to USCIT Rule 12(b)(1) For Lack of Subject Matter Jurisdiction[13]

As in *Capella I*, Capella claims jurisdiction here under 28 U.S.C. §§ 1581(i)(2), (4), Compl., ECF No. 3, at ¶ 38, framing its action as a challenge to Commerce's decision to not retroactively apply the "lawful [cash] deposit rate" calculated pursuant to the *MacLean-Fogg* litigation to Capella's entries, *id.* at ¶ 56.[14] Defendant again moves to dismiss, under USCIT Rule 12(b)(1), asserting that Capella's action seeks to challenge the 374.15 percent rate itself and therefore requires jurisdiction under § 1581(c). Def.'s Mot. to Dismiss, ECF No. 27 at 19–22.

Defendant, however, fails to recognize the nature of Capella's claim. Here, Capella challenges Commerce's "decision in the [*Am. Final CVD Determination*, 80 Fed. Reg. 69,640, *Cash Deposit Instructions*, ECF No. 3–1 at attach. 18, and *Refund Instructions*, ECF No. 3–1 at attach. 19] to apply the lawful [cash] deposit rate" only prospectively, for entries made on or after November 2, 2015, given the "extreme disparity between" the 374.15 percent investigation rate and the post-*MacLean-Fogg* rate. Compl., ECF No. 3, at ¶ 56.[15] As explained more fully in *Capella I*, __ CIT at __, Slip Op. 16–72 at 11–17, Plaintiff challenges the administration and enforcement of that CVD rate, not the CVD rate itself – specifically, Capella seeks a change in who is retroactively entitled to the benefit of the post MacLean-Fogg rate. *See* Compl., ECF No. 3, at ¶¶ 39, 56..[16]

As Plaintiff's action is therefore a challenge to the "administration and enforcement" of "[CVD] duties," *see* 28 U.S.C. §§ 1581(i)(2), (4), and "jurisdiction under another subsection of § 1581" is not available,

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[13] *See* USCIT R. 12(b)(1) ("[A] party may assert the . . .defense[] of. . . lack of subject matter jurisdiction [by motion].").

[14] *See* 28 U.S.C. §§ 1581(i)(2), (4) (giving this Court "exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for" the "administration and enforcement" of "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue").

[15] *See also id*. at ¶ 58 (where Plaintiff reiterates its challenge to Commerce's decision in the *Am. Final CVD Determination*, 80 Fed. Reg. 69,640, to make the effective date of the post-*MacLean-Fogg* rate November 2, 2015).

[16] The court's analysis of jurisdiction considers the "[s]ubstance, not form" of the complaint, to determine the "true nature of the action." *Williams v. Sec'y of Navy*, 787 F.2d 552,557 (Fed. Cir. 1986) (internal quotation marks and citation omitted); *see Hutchison Quality Furniture, Inc. v. United States*, Appeal No. 2015–1900, 2016 WL 3668030 at *4 (Fed. Cir. July 6, 2016) ("Determining the true nature of an action under §1581 requires us to discern the particular agency action that is the source of the alleged harm so that we may identify which subsection of § 1581 provides the appropriate vehicle for judicial review." (citation omitted)).

Norcal/Crosetti Foods, Inc. v. United States, 963 F.2d 356, 359 (Fed. Cir. 1992),[17] this Court has jurisdiction over Plaintiff's action pursuant to 28 U.S.C. § 1581(i). *Cf. Capella Sales & Services, Ltd. v. United States*, CIT Ct No. 14–304, Slip Op. 16-, (July, 2016); *Snap-on, Inc. v. United States*, __ CIT __, 949 F. Supp. 2d 1346, 1352 (2013). Whether Plaintiff is actually entitled to that "lawful rate" absent participation in the 19 U.S.C. § 1516a(a)(2)(B)(i) challenge that led to its adoption is another question,[18] as discussed below.

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[17] Plaintiff makes an ineffective attempt to claim jurisdiction under 28 U.S.C § 1581(c). Compl., ECF No. 3, at ¶¶ 1, 38 (asserting jurisdiction under § 1581(c)); Pl.'s Opp'n To Def.'s Mot to Dismiss, ECF No. 33 ("Pl.'s Resp."), at 21 n. 8.

Capella argues that because it "filed comments with Commerce regarding the effective date of the [*Am. Final CVD Determination*, 80 Fed. Reg. 69,640]," and "Commerce did not reject" those comments, Capella should be considered "a party to the proceeding" with standing to challenge the *Am. Final CVD Determination*, 80 Fed. Reg. 69,640, under § 1581(c). Pl.'s Resp., ECF No. 33, at 21 n. 8; *see* Compl., ECF No. 3, at ¶ 58.

"[A]ny interested party who was a party to the proceeding" before Commerce may challenge a final CVD determination before this Court. 28 U.S.C. § 2631(c); *see* 28 U.S.C. § 1581(c), 19 U.S.C. § 1516a(a)(2)(B)(i). While Plaintiff is an interested party, as an importer of aluminum extrusions, *see* 19 U.S.C. §1677(9)(A); Compl., ECF No. 3, at ¶ 50, it was not a party to the proceeding. To be a "party to the proceeding" here, Plaintiff must have "actively participate[d], through written submissions of factual information or written argument, in a segment of [the CVD investigation]." 19 C.F.R. § 351.102(b)(36); *see also JCM, Ltd. v. United States*, 210 F.3d 1357, 1360 (Fed. Cir. 2000). Plaintiff did not participate in any segment of the CVD investigation, but rather sent a letter to Commerce after the final determination, when proceedings on the question had already concluded. *Diamond Sawblades Mfrs. Coal. v. United States*, __ CIT __, 2016 WL 2858896, at *2 (May 11, 2016) ("[T]he Court of Appeals for the Federal Circuit has clarified that a remand determination becomes effective on the date that the agency files its determination with the court, not when the court sustains the remand determination.") (citing *Diamond Sawblades Mfrs. Coal. v. United States*, 626 F.3d 1374, 1378 n. 1 (Fed. Cir. 2010)); Compl., ECF No. 3, at ¶ 35 (explaining that Capella sent its "comments" to Commerce after the court had affirmed Commerce's final determination, *MacLean-Fogg VIII*, __CIT __, 106 F. Supp. 3d 1356 (affirming [Fourth] Results of Redetermination Pursuant to Ct. Remand, Consol. Ct. No. 11–209, ECF Nos. 124–1 (conf. ver.) & 125–1 (pub. ver.)), but before Commerce filed notice of that affirmance in the Federal Register). Accordingly, Plaintiff was not a party to the proceeding, cannot bring a claim pursuant to 19 U.S.C. §1516a(a)(2)(B)(i), and cannot assert jurisdiction for its claim under 28 U.S.C. § 1581(c).

[18] *Bell v. Hood*, 327 U.S. 678, 682 (1946) ("Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction." (citation omitted)); *Special Commodity Grp. on Non-Rubber Footwear from Brazil, Am. Ass'n of Exps. & Imps. v. Baldridge*, 6 CIT 264, 267,575 F. Supp. 1288, 1292 (1983) ("Whether or not a complaint states a claim upon which relief may be granted should not be confused with the threshold question of the jurisdiction of the court over the subject matter.").

II. Defendant's Motion to Dismiss Pursuant to USCIT Rule 12(b)(6) For Failure to State a Claim[19]

As noted above, Plaintiff claims that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"[20] for Commerce to not retroactively apply the post-*MacLean-Fogg* all-others rate (the "lawful [cash] deposit rate") to Capella's entries, regardless of its failure to participate in that litigation. Plaintiff argues that its claim is the result of the "extreme disparity" between the applied all-others rate (374.15 percent ad valorem) and the post-*MacLean-Fogg* all-others rate (7.37 percent ad valorem). Compl., ECF No. 3, at ¶¶ 39, 56.

But, just as in *Capella I*, Plaintiff has failed to present a "legally cognizable right of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation marks and citation omitted); *see Capella I*, __ CIT at __, Slip Op. 16–72 at 17–25. Specifically, contrary to Plaintiff's arguments,[21] 19 U.S.C. §§ 1516a(c)(1), 1516a(e) expressly and unambiguously instruct Commerce to assess the investigation rate, not the post-*MacLean-Fogg* rate, on Plaintiff's entries.[22]

When Commerce issues a CVD order, the statute requires "the posting of a cash deposit, bond, or other security . . . for each entry of the subject merchandise in an amount based on the [applicable] estimated [rate]," here, the all-others rate, as calculated in the precipitating investigation. 19 U.S.C. § 1671d(c)(1)(B)(ii); *see also id.* at § 1671e(a)(3). This estimated rate is called the cash deposit rate.[23] The cash deposit rate is not necessarily the rate at which an entry is

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[19] *See* USCIT R. 12(b)(6) ("[A] party may assert the . . .defense[] [of] . . . failure to state a claim upon which relief can be granted [by motion].").

[20] Where the court has jurisdiction pursuant to 28 U.S.C. §1581(i), it will uphold the agency's determination unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see* 28 U.S.C. §2640(e) (Actions brought under § 1581(i) are reviewed "as provided in [§] 706 of title 5.").

[21] Plaintiff argues that use of the term "entries" in 19 U.S.C.§§ 1516a(c)(1), (e) is ambiguous. Pl.'s Resp., ECF No. 33, at 28–32. For discussion of this argument *see* note 26 below.

[22] *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1307–08 (Fed. Cir. 2004) ("Thus, under [19 U.S.C. § 1516a's] parallel liquidation and injunction provisions, subject merchandise that is entered prior to publication of the final decision of the Court of International Trade or [the CAFC] is liquidated as entered unless liquidation is enjoined. In contrast, merchandise entered after the final decision of the Court of International Trade or [the CAFC] must be liquidated in accordance with that final decision." (citing 19 U.S.C. §§1516a(c), 1516a(e))).

[23] *See Decca Hosp. Furnishings, LLC v. United States*, 30 CIT 357,358, 427 F. Supp. 2d 1249, 1251 (2006) ("As mentioned, the cash deposit rate is merely an estimate of the eventual liability importers subject to an antidumping duty order will bear. Because the rate established by the final determination is based on past conduct, i.e., conduct occurring before the final determination, interested parties to an antidumping duty proceeding may ask Commerce to annually review the antidumping duty order in light of an importer's current practices." (citations omitted)).

or will be liquidated.[24] Rather, it may be appealed to this Court. 19 U.S.C. § 1516a(a)(2)(A)(i)(II). If such an appeal results in a revised rate, then those entries for which liquidation is enjoined pursuant to that appeal will be liquidated at the revised rate. *Id.* at § 1516a(e)(2). This is what the plaintiffs in *MacLean-Fogg*, Consol. Ct. No. 11–209 accomplished for their covered entries.[25]

"Unless [] liquidation is enjoined by the court [in a pending appeal], entries of merchandise of the character covered by [Commerce's appealed] determination" that were entered "on or before the date of publication in the Federal Register by [Commerce] of a decision of the [USCIT or CAFC] not in harmony with that determination" are "liquidated in accordance with [Commerce's original] determination." 19 U.S.C. § 1516a(c)(1). Those entries for which "liquidation . . . was enjoined" or that were made "after the date of publication in the Federal Register" of the notice, are "liquidated in accordance with the final court decision in the action." *Id.* at § 1516a(e); *see Snap-on*, __ CIT at __, 949 F. Supp. 2d at 1354.[26]

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[24] *See Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1047 (Fed. Cir. 2012) ("[T]he cash deposits collected upon entry are considered estimates of the duties that the importer will ultimately have to pay as opposed to payments of the actual duties.").

[25] *See MacLean-Fogg VIII*, 106 F. Supp. 3d at 1357 (ordering that "any entries covered by Section 516A(e)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(e)(1) (2012), are to be liquidated in accordance with this judgment").

[26] Plaintiff argues that the "term 'entries' in 19 U.S.C. §1516a(c)(1) is ambiguous," Pl.'s Resp., ECF No. 33, at 28, because the statute "is silent" as to whether § 1516a(c)(1) "extends to *all* remaining entries that entered on or before the date of the Timken Notice, or just to a subset of [] these entries," *id.* at 30, and § 1516a(e) "neither requires nor prevents the new rate of the final court decision from being applied retroactively to earlier entries," *id.* at 29 (emphasis original). Plaintiff believes that "[t]he omission of the word 'all'" from 19 U.S.C. § 1516a(c)(1) "removes the terms 'entries' from under the oft-cited rule that 'all means all.'" *Id.* (citing *Knott v. McDonald's Corp.*, 147 F.3d 1065, 1067 (9th Cir. 1998)).

Try as Plaintiff might, "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (citation omitted). Plaintiff's "'all means all' rule" is not a rule at all, but a by-product of the plain meaning rule. *Knott*, 147 F.3d at 1067 (finding that use of the word "all" in a contract was unambiguous on the contract's face and therefore binding on the parties thereto). And the plain meaning here leaves Plaintiff's arguments meritless.

Read as a whole, in context, 19 U.S.C. § 1516a is not silent or ambiguous, but rather plain and direct. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340–41 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." (citations omitted)). Section 1516a(c)(1) provides that "entries" of subject merchandise made "on or before the date of publication in the Federal Register by [Commerce] of a [Timken Notice]" "shall be liquidated in accordance with [Commerce's] determination," "[u]nless such liquidation is enjoined by the court [in a pending appeal]." The language is clear and imperative. Commerce "shall" liquidate entries matching the statutory description – subject to the order, made prior to the Timken notice, and un-enjoined in a pending litigation – in accordance with Commerce's determination. This statutory directive is without ambiguity and Commerce is without discretion. Section 1516a(e) lists which "entries" are to be "liquidat[ed] in accordance with [the] final [court] decision" in an appeal: those made "after the date of" the Timken Notice and "the liquidation of which was enjoined" pursuant to the appeal. 19 U.S.C. § 1516a(e). The list is closed; Congress left no

In the alternative, or in addition, an interested party may challenge the cash deposit rate by requesting Commerce conduct an administrative review of its entries that were subject to that cash deposit rate – to calculate the actual rate. 19 U.S.C. § 1675(a)(1). A review must be requested. *Id.*[27] If it is not, entries are liquidated at the cash deposit rate. 19 U.S.C. § 1675(a)(2)(C); *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 976–77 (Fed. Cir. 1994).

Plaintiff, by its own admission in its complaint, did not participate in the litigation challenging the *Final CVD Determination* rate, *MacLean-Fogg*, Consol. Ct. No. 11–209; liquidation of its entries was never enjoined pursuant to that litigation. *See* Compl., ECF No. 3, at ¶ 7.[28] Further, and again by Plaintiff's own admission in its complaint, Plaintiff did not participate in either administrative review relevant to its entries. Compl., ECF No. 3, at ¶¶ 10, 22.[29] Plaintiff has thereby "plead [it]self out of court by alleging facts that show there is no viable claim." *Pugh v. Tribune Co.*, 521 F.3d 686, 699 (7th Cir. 2008) (citation omitted). Specifically, by the plain statutory language "entries of merchandise of the character covered by" the *Final CVD Determination*, entered "on or before the date of publication in the Federal Register" of the *Am. Final CVD Determination*, for which "liquidation [has not been] enjoined" in the appeal of the *Final CVD Determination, MacLean-Fogg*, Consol Ct. No. 11–209, must be "liquidated in accordance with the [*Final CVD Determination*]," 19 U.S.C. §§ 1516a(c)(1), 1516a(e),[30] absent a request for administrative review, 19 U.S.C. §§ 1675(a)(1), 1675(a)(2)(C). All of Plaintiff's entries

discretion to Commerce to expand it. *Expressio unius est exclusio alterius*. Plaintiff's argument thus fails.

[27] *See Asociacion Colombiana de Exportadores de Flores v. United States*, 916 F.2d 1571, 1576 (Fed. Cir. 1990).

[28] Plaintiff asserts that it did not know about the *Final CVD Determination, CVD Order*, and subsequent first review because its customs broker did not advise it of such. Compl, ECF No. 3, at ¶¶ 7, 10. However, publication in the Federal Register of the *Final CVD Determination, CVD Order* and opportunity for administrative review, *see CVD Order*, 76 Fed. Reg. 30,653; *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 77 Fed. Reg. 25,679, 25,680 (Dep't Commerce May 1, 2012) (providing notice of opportunity to request first administrative review); *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 78 Fed. Reg. 25,423, 25,424 (Dep't Commerce May 1, 2013) (providing notice of opportunity to request second administrative review), is "sufficient to give notice of the contents of the document to a person subject to or affected by it," 44 U.S.C. § 1507, such as Capella, *see Deseado Int'l, Ltd. v. United States*, 600 F.3d 1377, 1380 (Fed. Cir. 2010); *Stearn v. Dep't of Navy*, 280 F.3d 1376, 1384–85 (Fed. Cir. 2002); *Royal United Corp. v. United States*, 34 CIT 756, 767–68, 714 F. Supp. 2d 1307, 1318 (2010).

[29] *Hemi Grp., LLC v. N.Y.C.*, 559 U.S. 1, 5 (2010) (holding that all the factual allegations in the complaint are taken as true).

[30] *See Asociacion Colombiana*, 916 F.2d at 1577 ("We do not question the authority of [Commerce], pursuant to its regulation, to liquidate entries for an annual review period at the rate set in the original antidumping duty order when there has been no challenge to the validity of that order and no request for an annual review."); *Snap-on*, 949 F. Supp. 2d at 1354.

at issue here were made prior to the *Am. Final CVD Determination*, 80 Fed. Reg. 69,640, *see* CBP Forms 7501, *reproduced in* Compl., ECF No. 3–1 at attach. 5; Protest, 4601–14–101149 (July 14, 2014), *reproduced in* Compl., ECF No. 31 at attach. 15, and their liquidation was not enjoined pursuant to the *MacLean-Fogg* litigation, *see* Compl., ECF No. 3, at ¶ 7. Plaintiff did not seek administrative review of its entries. *Id.* at ¶¶ 10, 22.[31] Accordingly, the only lawful rate for Plaintiff's entries, the rate required by statute, is the rate as calculated in the *Final CVD Determination*, 374.15 percent ad valorem. *See* 19 U.S.C. §§ 1516a(c)(1), 1516a(e), 1675(a)(1), 1675(a)(2)(C).

"Congress has directly spoken to the precise question at issue," *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), and Commerce, having complied with that directive for Plaintiff's entries, has made a determination in accordance with law, that is neither arbitrary and capricious[32] nor an abuse of discretion.[33] Plaintiff has "not based its claim for relief on a plausible legal theory." *Hutchison*, 2016 WL 3668030 at *5 n. 4. Its complaint must be dismissed for failure to state a claim upon which relief can be granted. USCIT Rule 12(b)(6).[34]

CONCLUSION

Because Plaintiff did not participate in the *MacLean-Fogg* litigation, and did not have liquidation of entries enjoined pursuant thereto, it cannot, claim entitlement to the rate as calculated therein on remand and redetermination. 19 U.S.C. §§ 1516a(c)(1), 1516a(e)(2); Compl., ECF No. 3, at ¶ 7. As such, Plaintiff has failed to

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[31] Plaintiff's letter to Commerce, Letter from Capella to Commerce (Oct. 29, 2015), *reproduced in* Compl., ECF No. 3–1 at attach. 17, has no effect on this conclusion. It does not change the fact that Plaintiff did not participate in the underlying proceedings, *see supra* note 8, nor have liquidation of its entries enjoined pursuant *MacLean-Fogg*, Consol. Ct. No. 11–209.

[32] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

[33] *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005) ("An abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents an unreasonable judgment in weighing relevant factors." (citation omitted)).

[34] Plaintiff's various other arguments regarding the reasonableness of Commerce's determination, *see* Pl.'s Resp., ECF No. 33, at 32–41, are, as such, irrelevant here. Where Congress has "directly spoken to the precise question at issue," where "the intent of Congress is clear," then "that is the end of the matter." *Chevron*, 467 U.S. at 842. "[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43.

state a claim upon which relief can be granted; Defendant's motion to dismiss under USCIT Rule 12(b)(6) is therefore granted.[35] Judgment will be entered accordingly.

Dated: September 14, 2016
New York, NY

/s/Donald C. Pogue
DONALD C. POGUE, SENIOR JUDGE

Slip Op. 16–87

GUANGZHOU JANGHO CURTAIN WALL SYSTEM ENGINEERING CO., LTD., et al. Plaintiffs, v. UNITED STATES, Defendant.

Donald C. Pogue,
Senior Judge
Court No. 15–00023

GUANGZHOU JANGHO CURTAIN WALL SYSTEM ENGINEERING CO., LTD., et al. Plaintiff, v. UNITED STATES, Defendant.

Donald C. Pogue,
Senior Judge
Court No. 15–00024

[Redetermination affirmed in part and remanded in part.]

Dated: September 19, 2016

Kristen Smith, Arthur K. Purcell, and *Michelle L. Mejia*, Sandler, Travis, & Rosenberg, P.A., of Washington, DC, for Plaintiff.

Aimee Lee, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for the Defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel were *Scott D. McBride*, Senior Attorney, and *Jessica M. Link*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Alan E. Price, Robert E. DeFrancesco, and *Derick G. Holt*, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor.

OPINION AND ORDER

Pogue, Senior Judge:

In these two actions, Guangzhou Jangho Curtain Wall System Engineering Co. Ltd. and Jangho Curtain Wall Hong Kong Ltd. (collectively "Jangho" or "Plaintiff") challenge the results of two related administrative reviews conducted by Defendant, the U.S. Department of Commerce ("Commerce") – the second administrative review

[35] *Cf. Capella I*, __ CIT __, Slip Op. 16–72.

of the antidumping duty ("AD") order on aluminum extrusions from the People's Republic of China ("PRC") and the second administrative review of the countervailing duty ("CVD") order on aluminum extrusions from the PRC.[1]

Currently before the court are Plaintiff's USCIT Rule 56.2 motions for judgment on the agency record. Pls.' 56.2 Mot. for J. on the Agency R., Ct. No. 15–23, ECF No. 31; Pls.' Mot. for J. on the Agency R., Ct. No. 15–24, ECF No. 32.[2] Plaintiff claims that Commerce's decision to include Plaintiff's curtain wall and window wall imports within the scope of the review was neither in accordance with law nor supported by a reasonable reading of the record evidence. Pl.'s Br., Ct. No. 15–23, ECF No. 31–1, at 6–7; *see* Pl.'s Br., Ct. No. 15–24, ECF No. 32–1, at 1–2. Plaintiff further argues that Commerce's decision to assess antidumping and countervailing duties on Jangho's entries prior to the initiation of a formal scope inquiry was not in accordance with law. Pl.'s Br., Ct. No. 15–23, ECF No. 31–1, at 18–23; Pl.'s Br., Ct. No. 15–24, ECF No. 32–1, at 6–14. Defendant opposes Plaintiff's motions. Def.'s Resp. to [Pls.' Br.], Ct. No. 15–23, ECF No. 34 ("Def.'s Resp."); Def.'s Resp. to [Pls.' Br.] ("Def.'s Resp."), Ct. No. 15–24, ECF No. 34. Defendant-Intervenor, the Aluminum Extrusions Fair Trade Committee ("AEFTC") concurs with and adopts by reference Defendant's arguments. [AEFTC]'s Resp. to [Pls.' Br.], Ct. No. 15–23, ECF No. 36; [AEFTC]'s Resp. to [Pls.' Br.], Ct. No. 1524, ECF No. 36. The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012) and 28 U.S.C. § 1581(c) (2012).[3]

The court affirms in part and remands to Commerce in part for further consideration, holding that Commerce's determination to include Plaintiff's curtain wall products within the scope of the review was procedurally deficient, as it was not in accordance with the methodology set forth in Commerce's regulations, and substantively insufficient as it was not supported by a reasonable reading of the record evidence.

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[1] *Aluminum Extrusions From the [PRC]*, 79 Fed. Reg. 78,784 (Dep't Commerce Dec. 31, 2014) (final results of antidumping duty administrative review; 2012–2013) ("*Final AD Determination*"), and accompanying Issues & Decisions Mem., A-570–967 (Dep't Commerce Dec. 31, 2014) ("*AD I&D Mem.*"); *Aluminum Extrusions from the [PRC]*, 79 Fed. Reg. 78,788 (Dep't Commerce Dec. 31, 2014) (final results of countervailing duty administrative review; 2012) ("*Final CVD Determination*") and accompanying Issues & Decision Mem., C-570–968 (Dep't commerce Dec. 22, 2014) ("*CVD I&D Mem.*").

[2] *See also* Mem. in Supp. of [Pl.'s] Mot. for J. on the Agency R., Ct. No. 15–23, ECF No. 31–1 ("Pl.'s Br."); Pl.'s Mem. of P. & A. in Supp. of Pl.'s 56.2 Mot. for J. on the Agency R., Ct. No. 1524, ECF No. 32–1 ("Pl.'s Br.").

[3] All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2012 edition.

BACKGROUND

I. The Antidumping and Countervailing Duty Orders on Aluminum Extrusions

The issues presented here stem from the language of Commerce's AD&CVD Orders on aluminum extrusions from the PRC. *See Aluminum Extrusions from the [PRC]*, 76 Fed. Reg. 30,650 (Dep't Commerce May 26, 2011) (antidumping duty order) ("AD Order"); *Aluminum Extrusions from the [PRC]*, 76 Fed. Reg. 30,653 (Dep't Commerce May 26, 2011) (countervailing duty order) ("CVD Order"). The Orders impose duties on aluminum extrusions, which are "shapes and forms" made from certain aluminum alloys, "produced by an extrusion process." AD Order, 76 Fed. Reg. at 30,650; CVD Order, 76 Fed. Reg. at 30,653. Aluminum extrusions that are "described at the time of importation as parts for final finished products" are also "include[d] in the scope" if they "otherwise meet [this] definition of aluminum extrusions." AD Order, 76 Fed. Reg. at 30,650–51; CVD Order, 76 Fed. Reg. at 30,654.[4] Similarly, "aluminum extrusion components that are attached (e.g., by welding or fasteners) to form subassemblies, i.e., partially assembled merchandise," are also within the scope of the order. AD Order, 76 Fed. Reg. at 30,651; CVD Order, 76 Fed. Reg. at 30,654. In contrast, the Orders exclude finished merchandise "containing aluminum extrusions as parts" and "finished goods" that are "entered unassembled in a 'finished goods kit.'" AD Order, 76 Fed. Reg. at 30,651; CVD Order, 76 Fed. Reg. at 30,654. Subassemblies may be excluded as well, provided that they enter the United States as part of or as "finished goods" or "finished goods kits." AD Order, 76 Fed. Reg. at 30,651; CVD Order, 76 Fed. Reg. at 30,654.[5]

II. Prior Scope Rulings on Curtain Wall Products

The scope of the AD&CVD Orders has been questioned in three previous scope rulings on curtain wall products; two are relevant here.[6]

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[4] *Cf. Aluminum Extrusions Fair Trade Comm. v. United States*, __CIT __, 2016 WL 1268191, at *4 (Mar. 31, 2016) ("[T]he Orders apply to 'extrusions,' a term that is defined expansively by the Orders to include goods that have been processed in various ways following an extrusion process. The term 'extrusions,' however, is not defined in the general scope language so broadly as to include all goods consisting of assemblies of which extrusions are parts."

[5] *See* [Valeo] Final Results of Redetermination Pursuant to Ct. Remand, Ct. No. 12–00381, ECF No. 20–1, at 8 (citing *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't Commerce Sept. 24, 2012) (preliminary side mount valve controls scope ruling) at 7 (adopted unchanged in *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Oct. 26, 2012)(final side mount valve controls scope ruling)).

[6] The third is a scope ruling on curtain wall units with non-PRC aluminum extrusions. *See Aluminum Extrusions from the [PRC]*, A570–967 & C-570–968 (Dep't of Commerce March 14, 2013) (final scope ruling on Tesla curtain walls with non-PRC extrusions).

In the first, requested by the Curtain Wall Coalition ("CWC"),[7] Commerce determined that "curtain wall parts," defined as parts that "fall short of the final finished curtain wall that envelopes an entire building structure," including, but not limited to individual curtain wall units (i.e., "modules that are designed to be interlocked with [each other], like pieces of a puzzle"), were within the scope of the Orders. *CWC Scope Ruling* at 3, 10. Jangho, as well as Shenyang Yuanda Aluminum Industry Engineering Co., Ltd. and Yuanda USA Corporation (collectively "Yuanda")[8] participated as interested parties, submitting comments in opposition. *CWC Scope Ruling* at 2. Yuanda and Jango subsequently challenged this finding before the Court of International Trade ("CIT"); the CIT affirmed. *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, __ CIT __, 961 F. Supp. 2d 1291 (2014) ("*Yuanda I*"). The plaintiffs appealed this decision to the Court of Appeals for the Federal Circuit ("CAFC"); the CAFC affirmed, *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351 (Fed. Cir. 2015) ("*Yuanda II*").

In the second scope ruling, requested by Yuanda while *Yuanda I* was still pending before the CIT, Commerce determined, contrary to Yuanda and Jangho's arguments,[9] that complete curtain wall units sold "pursuant to [a] contract[] to supply [a] complete curtain wall [system]" were within the scope of the AD&CVD Orders. *Yuanda Scope Ruling* at 1 (footnote and internal quotation marks omitted). Yuanda and Jangho appealed this ruling to the CIT; this Court remanded twice, the first at the request of Commerce and the second upon a finding that Commerce's determination was not in accordance with law, unsupported by substantial evidence, and arbitrary and capricious. *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, __ CIT __, 146 F. Supp. 3d 1331 (2016) ("*Yuanda III*"). The second redetermination on remand in the *Yuanda Scope Ruling* is now pending before this Court. [2d] results of Redetermination Pursuant to Ct. Remand, Consol. Ct. No. 14–106, ECF Nos. 109–1 (conf. ver.) & 110–1 (pub. ver.).

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[7] The CWC is a group of three domestic companies – Walters &Wolf, Architectural Glass & Aluminum Company, and Bagatelos Architectural Glass Systems, Inc. – each "a U.S. manufacturer, producer or wholesaler of a domestic like product," i.e., "aluminum extrusions for the production of curtain wall units and parts of curtain wall systems in the United States." *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Nov. 30, 2012) (final scope ruling on curtain wall units and other parts of a curtain wall system) ("*CWC Scope Ruling*") at 2.

[8] Yuanda USA Corp. is an importer and Shenyang Yuanda Aluminum Industry Engineering Co., Ltd. is a foreign producer and exporter of curtain wall units. *Id*. at 1–2; *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce March 27, 2014) (final scope ruling on curtain wall units that a reproduced and imported pursuant to a contract to supply curtain wall) ("*Yuanda Scope Ruling*") at 1–2.

[9] Jangho submitted comments in support of Yuanda's application. *Yuanda Scope Ruling* at 2.

III. The Second Administrative Reviews

On May 1, 2013, Commerce published notice of the opportunity to request administrative review of the AD Order for the period of May 1, 2012 through April 30, 2013, and the CVD Order for the period of January 1, 2012 through December 31, 2012. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 78 Fed. Reg. 25,423 (Dep't Commerce May 1, 2013). At this time, with *Yuanda I* pending before the CIT and the *Yuanda Scope Ruling* pending before Commerce, the status of various curtain wall products was uncertain. Amidst this uncertainty, Jangho requested, in accordance with 19 C.F.R. § 351.213, an administrative review of its entries.[10]

A. The Antidumping Review

Jangho participated in the AD Review, filing a separate rate application.[11] Commerce selected Jangho as a mandatory respondent and issued questionnaires.[12] Jangho filed its Section A Questionnaire Response, but noted that "for reasons explained in detail to [Commerce] in the pending [*Yuanda Scope Ruling*], Jangho's imported finished curtain wall units, the product manufactured by Jangho and exported to the United States, fall outside the scope of the aluminum extrusions orders." [Jangho's] Sect. A Questionnaire Resp., A-570–967 (Nov. 18, 2013) ("Jangho's Sect. A Questionnaire Resp.") at A-2, *reproduced in* Def.'s App., Ct. No. 15–23, ECF No. 35, at Tab 4. Jangho emphasized that it was answering Commerce's questionnaires "[t]o show its good faith as a mandatory respondent . . . pending . . . the as of yet undecided scope inquiry." *Id*. Jangho also filed its Section C and Section D Questionnaire Responses. *See* [Jangho's] Sect. C Questionnaire Resp., A-570–967 (Dec. 9, 2013), *reproduced in* Def.'s App., Ct. No. 15–23, ECF No. 35–2, at Tabs 23–26; [Jangho's] Sect. D Questionnaire Resp., A-570–967 (Dec. 12, 2013), *reproduced in* Def.'s App., Ct. No. 15–23, ECF No. 35–3, at Tabs 27–29.

Following comments by Petitioner and Defendant-Intervenor, the AEFTC, Commerce issued a supplemental questionnaire to Jangho. *AD Prelim. I&D Mem.* at 3. Rather than respond to the supplemental questionnaire, with *Yuanda II* pending before the CAFC and the

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[10] Letter from [Jangho] to [Commerce] Pertaining to Jangho Request for Admin. R., A-570–967 (May 31, 2013), *reproduced in* App. of Docs. Supp. Def.'s Resp. to [Pl.'s Br.] ("Def.'s App."), Ct. No. 15–23, ECF No. 35, at Tab 1; Letter from [Jangho] to [Commerce] Pertaining to Jangho Request for Admin. R., C-570–968 (May 31, 2013), *reproduced in* App. of Docs. Supp. Def.'s Resp.to [Pl.'s Br.] ("Def.'s App."), Ct. No. 15–24, ECF No. 35, at Tab 1.

[11] [Jangho] Separate Rate Application, A-570–967 (Aug. 27, 2013) *reproduced in* Def.'s App., Ct. No. 15–23, ECF No. 35, at Tab 3.

[12] *Aluminum Extrusions From the [PRC]*, 79 Fed. Reg. 36,003,36,003 (Dep't Commerce June 25, 2014) (preliminary results of antidumping duty administrative review and rescission, in part; 2012/2013) ("*Prelim. AD Determination*") and accompanying Issues & Decisions Mem., A-570–967 (Dep't Commerce June 18, 2014) ("*AD Prelim. I&D Mem.*") at 3.

Yuanda Scope Ruling recently issued, Jangho withdrew from "active participation as a mandatory respondent" while reserving "the right to participate in [the] review and file comments . . . where it feels appropriate." Letter From Jangho to Commerce, A-570–967 (Apr. 7, 2014), *reproduced in* Def.'s App., Ct. No. 15–23, ECF No. 35–4, at Tab 33 at 1–2.

Commerce, in its *Preliminary AD Determination*, found that Jangho was not eligible for a separate rate because it had not responded to the supplemental questionnaire; instead, Commerce declared Jangho a part of the PRC-wide entity and therefore subject to the PRC-wide rate. *AD Prelim. I&D Mem*. at 15. Commerce did not address Jangho's arguments that its merchandise should be excluded from the scope of the Orders and that the Yuanda scope inquiry was applicable to its entries. In response to Commerce's *Prelim. AD Determination*, Jangho filed comments, arguing again that Jangho's curtain wall (and window wall) imports should be excluded from the scope of the Orders, or, in the alternative, if Commerce found Jangho's curtain wall products subject to the AD Order, that Commerce could not assess duties retroactive to the initiation of the Yuanda Scope inquiry (i.e., prior to May 10, 2013, thus excluding the entire period of review). [Jangho] Case Br. [before Commerce], *reproduced in* Def.'s App., Ct. No. 15–23, ECF No. 35–5, at Tab 36 at 1–2.

In its *Final AD Determination*, Commerce finally discussed Jangho's scope argument, finding the company's curtain wall imports subject to the AD Order while acknowledging that the determination was incomplete "because Jangho ha[d] not fulfilled the procedural and evidentiary requirements specified in 19 C.F.R. [§] 351.225(c)" – that is, Jangho had not formally requested and been subjected to a scope inquiry independent of the review. *AD I&D Mem.*, Cmt 6 at 30; *see Final AD Determination*, 79 Fed. Reg. 78,784. As such, Commerce found that Jangho's merchandise was subject to the review, and that Jangho was still part of the PRC-wide entity and therefore still subject to the PRC wide rate. *Id.*, Cmt. 6 at 31.

Commerce further found that, because liquidation of Jangho's entries had been suspended prior to the initiation of the Yuanda scope inquiry and Jangho's entries were ultimately "properly subject" to the Order and review – pursuant to the findings in both the *Yuanda Scope Ruling* and *CWC Scope Ruling* (as affirmed in *Yuanda I*) – 19 C.F.R. § 351.225(l)(3) "did not prohibit[] [Commerce] from assessing duties on [Jangho's] entries as a result of [the] administrative review." Id., Cmt. 5 at 26–27 (citing *Yuanda Scope Ruling* at 20–27; *Yuanda I*, __ CIT at __, 961 F. Supp. 2d at 1302–03).[13]

[13] While Commerce noted that Jangho did not request the Yuanda scope inquiry, it did not discuss what effect this has on Jangho's entries. *Id.*

Commerce also found that there was no evidence on the record indicating that Jangho had imported window wall units during the period of review, making the question of their exclusion meaningless. *AD I&D Mem.*, Cmt. 6 at 31.

B. Countervailing Duty Administrative Review

In the CVD Review, Jangho was not selected as a mandatory respondent. *Final CVD Determination*, 79 Fed. Reg. at 78,790. As a cooperating, non-selected respondent, Jangho's imports were assessed the "non-selected [CVD] rate" for the period of review. *Final CVD Determination*, 79 Fed. Reg. at 78,789–90. Jangho argued, as it had in the AD Review, that its "finished curtain wall unit imports fall outside the scope of the aluminum extrusion orders" and that, if not, "antidumping and countervailing duties may only be assessed on or after the date of initiation of [Commerce's] formal scope inquiry on finished curtain wall units" – that is, the initiation date of the Yuanda scope inquiry, May 10, 2013. Case Br. of [Jangho Before Commerce], C-570–968 (Aug. 18, 2014) at 1, *reproduced in* Def.'s App., Ct. No. 15–24, ECF No. 35, at Tab 6. Commerce found that, because Jangho's imports had been suspended prior to the initiation of the Yuanda scope inquiry and were clearly within the Order's scope, Jangho's retroactivity concerns were unfounded, *CVD I&D Mem.*, Cmt. 21 at 91–93, and Jangho's imports were subject to the non-selected CVD rate for the period of review, *Final CVD Determination*, 79 Fed. Reg. at 78,790.

C. Jangho's Appeal to the CIT

Jangho appealed both the *AD* and *CVD Final Determinations* to this Court. Compl., Ct. No. 15–23, ECF No. 11 (challenging the *Final AD Determination*); Compl., Ct. No. 15–24 ECF No. 11.[14] Jangho's motions for judgment on the agency record pursuant to USCIT Rule 56.2 followed. *See* Pl.'s Br., Ct. No. 15–23, ECF No. 31–1; Pl.'s Br., Ct. No. 15–24 ECF No. 32–1.

STANDARD OF REVIEW

The court will sustain Commerce's determinations unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). The court will set aside agency actions found to be arbitrary and capricious. *Changzhou Wujin Fine Chem. Factory Co., Ltd. v. United States*, 701 F.3d 1367, 1377 (Fed. Cir. 2012) (citing *Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.*, 419 U.S. 281, 284 (1974)).

[14] Jangho's entries during the period of review have not been liquidated pursuant to these Final Determinations because of a preliminary injunction on those entries in *Yuanda*, Consol. Ct. No. 14–106. *See* Message No. 5026307 (Jan. 26, 2015) *reproduced in* Ct. No. 15–24 ECF No. 35 at Tab 9.

DISCUSSION

I. Jangho's Curtain Wall Products

In making scope rulings, Commerce has "substantial freedom to interpret and clarify" AD and CVD orders. *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096 (Fed. Cir. 2002) (quotation marks and citations omitted). However, in so doing, Commerce must follow "the methodology set forth in its regulation[s]." *Id.*[15] It cannot "interpret[] an order in a manner contrary to the order's terms." *Allegheny Bradford Corp. v. United States*, 28 CIT 830, 842, 342 F. Supp. 2d 1172, 1183 (2004) (citing *Duferco Steel*, 296 F.3d at 1094—95). Commerce's determination must also be supported by a reasonable reading of the record evidence. 19 U.S.C. § 1516a(b)(1)(B)(i); *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006). It must present a "rational connection between the facts found and the choice made," *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962), and it cannot be arbitrary and capricious, *Changzhou Wujin*, 701 F.3d at 1377.

Commerce's determination here is not within these meets and bounds.

A. Commerce's Scope Determination Failed to Follow the Methodology Set Forth in its Own Regulations.

In the *Final AD Determination*, Commerce identified as an issue "[w]hether [it] [s]hould [m]ake a [s]cope [r]uling on Jangho's [c]urtain [w]all [u]nits." *AD I&D Mem.*, Cmt. 6 at 28. Commerce found that the administrative review was, in both "procedural and evidentiary" terms, insufficient to make a full scope determination. *AD I&D Mem.*, Cmt. 6 at 30 (asserting that Commerce could not determine whether Jangho's merchandise was properly excluded "as part of a 'finished goods kit,'" without a scope inquiry). However, because Jangho had not requested a scope inquiry pursuant to 19 C.F.R. § 351.225(c), Commerce, rather than conducting such an inquiry, concluded that Jangho's merchandise was within the scope of the Orders. *AD I&D Mem.*, Cmt. 6 at 30; *see CVD I&D Mem.*, Cmt. 21 at 91–92 (finding that assessment of duties prior to a scope inquiry proper because curtain wall units "were within the scope of the order pursuant to the unambiguous scope language covering parts for curtain walls"). The question now is whether this determination is in accordance with Commerce's own regulations – specifically, whether the onus to request a scope inquiry lay solely with Jangho, as Commerce asserts, or whether Commerce, having found its own determination insufficient, was obligated to self-initiate a scope inquiry.

[15] Commerce has promulgated detailed regulations governing when and how scope rulings are made. *See* 19 C.F.R. § 351.225.

1. Commerce's Obligation to Initiate a Scope Inquiry

Commerce conducts scope inquiries and "issues 'scope rulings'" to "clarify the scope of an [AD or CVD] order." 19 C.F.R. § 351.225(a). Under its own regulations, if Commerce "determines from available information that an inquiry is warranted to determine whether a product is included within the scope of [an order]," Commerce "will initiate an inquiry." 19 C.F.R. § 351.225(b).

Here, Commerce has determined "from available information that an inquiry is warranted to determine whether [Jangho's merchandise] is included within the scope of the [Order]." 19 C.F.R. § 351.225(b); *AD I&D Mem.*, Cmt. 6 at 30.[16] As such, Commerce was, by its own regulation, obligated to initiate a scope inquiry. 19 C.F.R. § 351.225(b) (providing that if Commerce determines "from available information" that a scope inquiry is warranted, it "will initiate an inquiry"). The language of the regulation is imperative, not precatory. [17]

Accordingly, Commerce's failure to initiate a scope inquiry after finding on "available evidence" that a scope inquiry was required, was contrary to the plain language of the regulation and therefore not in accordance with law.[18]

2. Jangho's Obligation to Request a Scope Inquiry

Under the same regulation, "[a]ny interested party" may request a scope ruling. 19 C.F.R. § 351.225(c). While 19 C.F.R. § 351.225(c) "provides a detailed process for filing scope ruling requests," interested parties may make "use of the administrative review process as an avenue for challenging the scope of [AD and CVD] orders." *Mukand Int'l, Ltd. v. United States*, 29 CIT 1526, 1535 n. 11, 412 F. Supp.

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[16] In the *Final CVD Review* Commerce does not so much address the scope issue as conclude that Jangho's merchandise is unambiguously subject to the Orders such that assessment of duties prior to a scope inquiry is proper. *See CVD I&D Mem.*, Cmt. 21 at 91–93; *see* AD I&D Mem., Cmt. 5 at 26–28 (same).

[17] Defendant seems to argue that 19 C.F.R. § 351.225(b) allows Commerce to make scope determinations on "available information," such that Commerce's decision to include Jangho's merchandise without a scope inquiry was proper. *Tr. of Oral Arg.*, June 15, 2016, Ct. Nos. 15–23 & 15–24, ECF Nos. 48 & 46, at 28–30. By its plain language, as discussed above, the regulation does not. Further, while "the burden falls on the importer to demonstrate that its imported products should be excluded from the scope of an antidumping investigation," *NTN Bearing Corp. of Am. v. United States*, 997 F.2d 1453, 1458 (Fed. Cir. 1993) (citations omitted), this burden of production does not discharge Commerce from undertaking the requisite administrative procedures: "[D]iscretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decision making." *Bennett v. Spear*, 520 U.S. 154, 172 (1997).

[18] *See Tesoro Hawaii Corp. v. United States*, 405 F.3d 1339, 1347 (Fed. Cir. 2005) ("When there is no ambiguity in the meaning of the regulation, 'it is the duty of the courts to enforce it according to its obvious terms and not to insert words and phrases so as to incorporate therein a new and distinct provision.'" (quoting *Gibson v. United States*, 194 U.S. 182, 185 (1904)).

2d 1312, 1319 n. 11 (2005), *aff'd*, 502 F.3d 1366 (Fed. Cir. 2007) (internal citation omitted).[19] Indeed, where, as here, a scope issue arises in the course of an administrative review, Commerce has the express authority to "conduct [a] scope inquiry in conjunction with that review." 19 C.F.R. § 351.225(f)(6).

When addressing scope issues in the course of a review, Commerce must "utilize[] and abide[] by the statutory and regulatory provisions that authorize [it] to investigate [scope issues]." *AMS Assocs*, 737 F.3d at 1344. If "the meaning and scope of an existing antidumping order is clear," then Commerce need not "initiate a formal scope inquiry," *id.*, and may make the determination in the course of the review, *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1378–79 (Fed. Cir. 2003) (holding that a formal scope inquiry and ruling was unnecessary when Commerce's determination "neither changed the companies entitled to the decreased rate, nor modified the type of products covered by the . . . order"); *Xerox Corp. v. United States*, 289 F.3d 792, 795 (Fed. Cir. 2002) (holding formal scope inquiry unnecessary where the product at issue was "clearly outside the order" such that "the scope of the order [was] not in question"). If, however, as Commerce has concluded here, the agency cannot resolve the scope issue "on the basis of the plain language of the scope description or the clear history of the original investigation," *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,328 (Dep't of Commerce May 19, 1997) (providing the administrative history of 19 C.F.R. § 351.225), if "the scope of the original [] order [is] unclear," then Commerce must conduct a formal scope inquiry, *AMS Assocs.*, 737 F.3d at 1344.

Here, Plaintiff has used, as it may, the administrative review process to challenge the scope of the Orders with regard to its own merchandise. *Mukand Int'l*, 29 CIT at 1535 n. 11, 412 F. Supp. 2d at 1319 n. 11, *aff'd,* 502 F.3d 1366.[20] The onus was then on Commerce to

[19] *Cf. AMS Assocs., Inc. v. United States*, 737 F.3d 1338, 1340 (Fed. Cir. 2013) (finding that Commerce, wrongly, "chose not toinitiate a formal scope inquiry pursuant to 19 C.F.R. § 351.225. . . despite requests by [plaintiff]" in the course of an administrative review).

[20] Defendant seems to argue that (1) Jangho raised the issue only with respect to Yuanda's merchandise, and (2) if Jangho raised the issue with respect to its own merchandise, it was not sufficient – it had to expressly request its own scope inquiry. *See* Tr. of Oral Arg., June 15, 2016, Ct. Nos. 15–23 & 15–24, ECF Nos. 48 & 46, at 31–33.

The first is directly contrary to the record. *See, e.g.*, Jangho's Sect. A Questionnaire Resp., Ct. No. 15–23, ECF No. 35, at Tab 4, at A-2. ("Please note that for reasons explained in detail to [Commerce] in the pending [Yuanda] scope inquiry on finished curtain wall units from China, *Jangho's imported finished curtain wall units . . . fall outside the scope of the aluminum extrusions orders*." (emphasis added)); [Jangho] Case Br. [before Commerce], Ct. No. 15–23, ECF No. 35–5 at Tab 36 (arguing that Jangho's merchandise, not Yuanda's, is not subject merchandise); Case Br. of [Jangho Before Commerce], Ct. No. 1524, ECF No. 35 at Tab 6, at 1 ("[I]t is Jangho's view that its finished curtain wall unit imports fall outside the scope of the aluminum extrusions orders . . . ."), 2–4 (arguing that duties should not be assessed on Jangho's entries prior to the initiation of a formal scope inquiry given the ambiguity of the Orders). Indeed, Plaintiff has argued persistently to Commerce, since at least November 2012, that its curtain wall imports fall outside the scope of the Orders – not

address the issue, whether in the review itself, or, if necessary, in a formal scope inquiry. *AMS Associates*, 737 F.3d at 1344.

Where, as here, Commerce cannot resolve the scope issue presented by Plaintiffs on the "plain language" or "clear history" of the Orders, *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,327–28, where Commerce's own decision "confirm[s] this lack of clarity," *AMS Associates*, 737 F.3d at 1344, Commerce must "conduct a formal scope inquiry" before it finds Plaintiff's merchandise within the scope of the Order, *id*. at 1340.[21]

Accordingly, by failing to adequately address the scope issue after Plaintiff raised it in the course of an administrative review, by failing to initiate a scope inquiry after finding one necessary, Commerce has failed to follow "the methodology set forth in its [own] regulation." *See Duferco Steel*, 296 F.3d at 1096.

B. Commerce's Scope Analysis is Not Based on a Reasonable Reading of the Record Evidence.

In addition to its procedural insufficiencies, Commerce's scope determination is substantively flawed. Commerce has determined that Jangho's merchandise is within the scope of and subject to the Orders. *AD I&D Mem*., Cmt. 6 at 30; *CVD I&D Mem*., Cmt. 21 at 91 (finding Jangho's merchandise "properly subject to [the CVD] review"), 92 (citing to the *Yuanda Scope Ruling* to establish that the Orders unambiguously include "certain curtain wall units" under their "parts for curtain walls" provision, rendering proper the suspension of liquidation for Jangho's entries prior to the initiation of that scope inquiry). However, this determination cannot be sustained because it is not supported by any record evidence, much less a reasonable reading thereof. *See Nippon Steel*, 458 F.3d at 1351.[22]

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only here, but in two formal scope determinations, *CWC Scope Ruling; Yuanda Scope Ruling*, and in the resultant challenges to those determinations both before this Court and the CAFC, *Yuanda I*, __ CIT __, 961 F. Supp. 2d 1291; *Yuanda II*, 776 F.3d 1351; *Yuanda III*, __ CIT __,146 F.Supp.3d 1331.

The second is incorrect. Specifically, interested parties may raise and argue issues of scope during administrative reviews, *Mukand Int'l*, 29 CIT at 1535 n. 11, 412 F. Supp. 2d at 1319 n. 11, *aff'd,* 502 F.3d 1366, and Commerce must address such issues in keeping with its statutory and regulatory obligations. *AMS Assocs.*, 737 F.3d at 1344.

[21] As such, Defendant's concern that Commerce will be obligated to initiate a scope inquiry for "everyone who's made an assertion that they're not subject to the order," Tr. of Oral Arg., June 15, 2016, Ct. Nos. 15–23 & 15–24, ECF Nos. 48 & 46, at 34, is unfounded. As the CAFC has already explained, "[i]mporters cannot circumvent antidumping orders by contending that their products are outside the scope of existing orders when such orders are clear as to their scope. Our precedent evinces this understanding. We have not required Commerce to initiate a formal scope inquiry when the meaning and scope of an existing antidumping order is clear." *AMS Assocs*., 737 F.3d at 1344 (citations omitted).

[22] Plaintiff attempts to "incorporate by reference the arguments" it made about the scope of the Orders as a consolidated plaintiff in another, related, proceeding, *Shenyang Yuanda Aluminum Industry Engineering Co. v. United States*, Consol. Ct. No. 14–00106. Pl.'s Br., Case No. 15–23, ECF No. 31–1, at 9. Such incorporation, as Defendant argues, is improper.

Commerce asserts that Plaintiff imports "stand alone parts of a curtain wall," and makes its findings based on that assertion, but the agency does not cite to any evidence or provide any description of the actual product at issue. *AD I&D Mem.*, Cmt. 6 at 30–31; *see CVD I&D Mem.*, Cmt. 21 at 91–92. Commerce's analysis is not tethered in any way to the administrative record.[23] Commerce "must make findings that support its decision, and those finding must be supported by substantial evidence." *Burlington Truck Lines*, 371 U.S. at 168 (citations omitted).

C. Commerce's determination was arbitrary and capricious.

Commerce does not address Plaintiff's arguments both here and below, that inclusion of its unitized curtain wall imports within the scope of the Orders is inconsistent with Commerce's determination that window wall imports are excluded from that same scope[24] because the products are "virtually identical." Pl.'s Br., Ct. No. 15–23, ECF No. 31–1, at 13–14; *see* [Jangho] Case Br. [before Commerce], Ct. No. 15–23, ECF No. 35–5 at Tab 36, at 4–5. By not addressing this argument, Commerce has "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).[25] Indeed, by failing

See United States v. Great Am. Ins. Co. of New York, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived."). However, as Plaintiff points out, this is of little relevance here because Plaintiff, in addition to "incorporating by reference," has raised much of these arguments here. Pl.'s Rule 56.2 Reply Br., Ct No. 15–23, ECF No. 39, at 9–10. Accordingly, Plaintiff's arguments as raised and relevant here are considered *infra*.

[23] Indeed, the evidence in the record seems to indicate that Jangho imports complete curtain wall units pursuant to a contract to supply a curtain wall, *Yuanda III*, __ CIT at __, 146 F.Supp.3d at 1339–40; *Yuanda Scope Ruling* at 1, 6–7, rather than stand alone parts thereof, *Yuanda II*, 776 F.3d at 1357–58 (citing *Yuanda I*, __ CIT __, 961 F. Supp. 2d at 1298–99); *CWC Scope Ruling* at 3, 10 . *See* [Jangho] Separate Rate Application, Ct. No. 15–23, ECF No. 35, at Tab 3 at 6 ("Jangho America sells curtain wall units and installation. The company is awarded a bid on a particular project. Jangho America is paid based upon the terms of contract relating to a specific project."); Jangho's Sect. A Questionnaire Resp., Ct. No. 15–23, ECF No. 35, at Tab 5 at A-8 ("The sales and negotiation process for Jangho is as follows. Jangho Americas bids on projects to sell and install curtain wall units. When awarded a bid, Jangho Americas enters into a contract with the building contractor for the project."); Jangho's Sect. A Questionnaire Resp., Ct. No. 15–23, ECF No. 35, at Tab 6 at A-17-A-18 ("Jangho produces and exports finished curtain wall units. The finished curtain wall units are designed and manufactured to meet the needs of a specific project. A finished curtain wall unit is an architecturally designed product, similar to a window, used as an outer covering of a building.").

This uncertainty is magnified by Commerce's discussion in *AD I&D Mem.*, Cmt. 5 at 27 and *CVD I&D Mem.*, Cmt. 21 at 92, where Commerce likens Jangho's products to both those at issue in the *Yuanda Scope Ruling* and *Yuanda I* to find those decisions applicable.

[24] *See Aluminum Extrusions from the [PRC]*, Final Scope Ruling, A570–967 & C-570–968 (Dep't of Commerce June 19, 2014) (final scope ruling on finished window [wall] kits) ("*NR Window Walls*"), at 1.

[25] *See Yuanda III*, __ CIT at __, 146 F.Supp.3d at 1352–54 (holding that Commerce's determination that unitized curtain walls are within the scope of the Orders and window walls are not, "[drew] an arbitrary distinction between window walls and curtain walls").

to offer any explanation for the distinction drawn between unitized curtain walls and window walls, Commerce has treated similarly situated products differently "without reasonable explanation." *See Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003) (citation omitted). This renders Commerce's determination arbitrary and capricious.

II. The Applicability of the Yuanda Scope Ruling

Plaintiff has persistently argued that there is a relevant scope ruling covering its merchandise, one that it fully participated in as an interested party importing the same product as the applicant, the *Yuanda Scope Ruling* (as modified by subsequent litigation). Pl.'s Rule 56.2 Reply Br., Ct No. 1523, ECF No. 39, at 9–10. Commerce, without analysis or support, determined below that "scope rulings" *per se* "apply only to specific merchandise from a specific importer or exporter," faulting Jangho for not requesting a "scope ruling covering its specific merchandise." *AD I&D Mem.*, Cmt. 6 at 30–31. Here, it argues that, because the *Yuanda Scope Ruling* is based on facts particular to Yuanda, the ruling cannot apply to Jangho. Def.'s Resp., Ct. No. 15–23, ECF No. 34, at 22–23; Def.'s Resp., Ct. No. 15–24, ECF No. 34, at 14.

A. The plain language of the regulation indicates that scope rulings are product not party specific.

An agency is bound by the unambiguous, plain meaning of its own regulations.[26] Plain meaning is a function of context,[27] discerned from "the text of the regulation as a whole," *Lengerich v. Dep't of Interior*, 454 F.3d 1367, 1370 (Fed. Cir. 2006) (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414–15 (1945)), with an eye to its "object and policy." *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1040 (Fed. Cir. 2016) (internal quotation marks and citation omitted).

Here, by the plain language of the regulation, scope rulings are issued with respect to "particular products," 19 C.F.R. § 351.225(a),[28]

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[26] *Roberto v. Dep't of Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006) ("If the regulatory language is clear and unambiguous, the inquiry ends with the plain meaning. However, if the regulation is silent or ambiguous, the court then gives deference to the agency's own interpretations." (citation omitted)).

[27] *See Beecham v. United States*, 511 U.S. 368, 372 (1994) ("The plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences.").

[28] *See* 19 C.F.R. § 351.225(b) (Commerce may self-initiate a scope inquiry "to determine whether a product is included within the scope of an antidumping or countervailing duty order."); 19 C.F.R. § 351.225(c)(1) ("Any interested party may apply for a ruling as to whether a particular product is within the scope of an order or a suspended investigation."); 19 C.F.R. §351.225(c)(1)(i) (The application "must contain . . . to the extent reasonably available to the interested party . . . [a] detailed description of the product, including its technical characteristics and uses, and its current U.S. Tariff Classification number.")

not particular interested parties, producers or importers.[29] When Commerce self-initiates a scope inquiry it is because there are questions as to whether "a product is included within the scope of an [order]." 19 C.F.R. § 351.225(b). "[A]ny interested party," may request a scope ruling to determine whether "a particular product" is " within the scope of an order." 19 C.F.R. § 351.225(c)(1). The regulation uses the indefinite article, not the possessive: an interested party requests a scope ruling for "a particular product," not "its particular product." Indeed, "any interested party" includes interests and entities that do not have their own entries or merchandise,[30] that is, no product particular solely to them upon which to premise a scope ruling request.[31]At no point does the regulation instruct Commerce to consider who produced or imported the product as part of what the regulation defines as "particular." Rather, a scope ruling application

[29] Commerce's product-centered language here contrasts with Commerce's producer or importer-focused language elsewhere. *See, e.g.*, 19 C.F.R. § 351.107 (providing for, in direct, clear language, the establishment of producer and/or exporter specific cash deposit rates).

[30] Commerce defines "interested party" as "(i) [a] foreign manufacturer, producer, or exporter of subject merchandise; (ii) The United States importer of subject merchandise; (iii) A trade or business association a majority of the members of which are producers, exporters, or importers of subject merchandise; (iv) The government of a country in which subject merchandise is produced or manufactured or from which such merchandise is exported; (v) A manufacturer, producer, or wholesaler in the United States of a domestic like product; (vi) A certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product, (vii) A trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States, (viii) An association, a majority of whose members is composed of interested parties described in subparagraph (C), (D), or (E) of section 771(9) of the Act with respect to a domestic like product, and (ix) A coalition or trade association as described in section 771(9)(G) of the Act." 19 C.F.R. § 351.102(b) (29).

[31] Indeed, it is unclear what purpose the *CWC Scope Ruling* could possibly serve other than to apply to the products of other parties, given that the CWC represents domestic interests that do not import any product. *See CWC Scope Ruling* at 2.

In a footnote, Defendant acknowledges this conflict, arguing that "[s]cope rulings issued to producers, exporters or importers apply specifically to the requesting party as the ruling is based on the particular facts and situation of that requesting party. In contrast, rulings requested by the domestic manufacturers apply generally to the merchandise reviewed." Def.'s Resp., Ct. No. 15–23, ECF No. 34, at 23 n. 4. Defendants cites solely to the *Yuanda Scope Ruling* (as applying only to Yuanda) and the *CWC Scope ruling* (applying to all curtain wall imports) as examples. *Id*.

Given Commerce's own lack of explanation, Defendant's statement is "nothing more than . . . a *post hoc* rationalization advanced" by counsel in order "to defend past agency action against attack." *Christopher v. Smith Kline Beecham Corp.*, 132 S. Ct. 2156, 2166–67 (2012) (internal citations, quotation marks, and alteration marks omitted). It is therefore entitled to no deference beyond its power to persuade. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

"In any event, '[a]rguments raised only in footnotes . . .are waived.'" *Kennametal, Inc. v. Ingersoll Cutting Tool Co.*, 780 F.3d 1376, 1383 (Fed. Cir. 2015) (quoting *Otsuka Pharm. Co. v. Sandoz, Inc.*, 678 F.3d 1280, 1294 (Fed. Cir. 2012)).Commerce must set forth the basis of its decisions "with such clarity as to be understandable," as "[i]t will not do for a court to be compelled to guess at the theory underlying the agency's action." *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947).

must include "to the extent reasonably available to the interested party . . . [a] detailed description of the product, including its technical characteristics and uses, and its current U.S. Tariff Classification number." 19 C.F.R. § 351.225(c) (1) (i). Scope rulings on the application are made on the basis of that detailed description in conjunction with "the descriptions of the merchandise" as contained in the regulatory history. *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1302 (Fed. Cir. 2013) (citing 19 C.F.R. § 351.225(k) (1)).[32]

Further, this reading is in keeping with the purpose of the regulation itself – clarity of scope and predictability of administration[33] – and the statutory framework in which it operates, specifically the allocation of authority between Commerce and CBP.[34]

As such, Commerce's unsupported assertion that its "scope rulings" *per se* "apply only to specific merchandise from a specific importer or exporter," *AD I&D Mem.*, Cmt. 6 at 31, is contrary to the unambiguous language of the controlling regulation, 19 C.F.R. § 351.225. Moreover, it is directly contrary to the purpose of the regulation and undermines the statutory allocation of authority between Commerce and Customs for the agency to insist, as Defendant does, that interested parties cannot rely on Commerce's determinations, but rather that such parties, "even CBP itself," must take a "gamble" or "a chance" when they "look to Commerce's previous scope rulings for guidance in determining whether to declare merchandise at the border as subject, or not subject, to an antidumping order." Def.'s Resp., Ct. No. 15–23, ECF No. 34, at 15–17 (discussing the applicability of a

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[32] Specifically, Commerce considers "[t]he descriptions of the merchandise contained in the petition, [the] initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [International Trade] Commission." 19 C.F.R. § 351.225(k) (1). If these detailed descriptions are not dispositive, Commerce will consider the"(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k) (2).

[33] The object of scope rulings is to "clarify the scope of an order." 19 C.F.R. § 351.225(a). Commerce's asserted purpose in promulgating 19 C.F.R. § 351.225 was to "translate the principles of the implementing legislation into specific and predictable rules, thereby facilitating the administration of these laws and providing greater predictability for private parties affected by these laws." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,296.

[34] Applying Commerce's substantive determinations to the facts of a particular entry or entries is one of Custom's central functions. *See LDA Incorporado v. United States*, __ CIT __, 79 F. Supp. 3d 1331, 1340 (2015) ("The factual analysis and application of the scope to the goods in question are decisions of Customs."); *see* Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69,273, 69,274–75 (Dec. 3, 1979), *effective under* Exec. Order No. 12,188 of January 2, 1980, 45 Fed. Reg. 989, 993 (1980). "While Congress gave the role of determining the scope of an antidumping or countervailing duty order to Commerce, CBP, incident to its function of fixing the amount of duties chargeable, must make factual findings to determine 'what the merchandise is, and whether it is described in an order.'" *Sunpreme Inc. v. United States*, __ CIT __, 145 F. Supp. 3d 1271,1284–85 (2016) (quoting *Xerox*, 289 F.3d at 794–95; citing 19 U.S.C. § 1516a(2)(B)(vi); 19 U.S.C. § 1677(25)).

window wall scope ruling to Plaintiffs' alleged widow wall imports, *see infra*).

Accordingly, Commerce's *per se* restriction of its scope ruling to a particular interested party rather than to a particular product is contrary to the plain language of the regulation.

B. Commerce's Determination regarding the inapplicability of the Yuanda Scope Ruling is Unreasonable.

While each scope ruling must be made "upon the facts and circumstances of the specific case before it," if the facts and circumstances of another interested party are the same, Commerce "must remain consistent and any deviations must be explained." *Mid Continent Nail Corp. v. United States*, __ CIT __, 770 F. Supp. 2d 1372, 1382 (2011) (citing *SKF USA Inc. v. United States*, 630 F.3d 1365, 1373 (Fed. Cir. 2011)).

Below, Commerce did not directly address the applicability of the *Yuanda Scope Ruling*.[35] Before the court, Defendant now argues that, because the *Yuanda Scope Ruling* is based on "information particular to Yuanda," it cannot apply to Jangho, Def.'s Resp., Ct. No. 15–24, ECF No. 34, at 14 – that is, the facts that make the product particular are particular to Yuanda. However, because Commerce did not make any factual findings based on the record – however limited – to define Jangho's merchandise, much less explain why it is substantively different from Yuanda's merchandise (and therefore should be subject to substantively different treatment),[36] this argument cannot hold. "Commerce is obligated to follow prior precedent absent some legitimate reason for departing from it." *Belgium v. United States*, 551 F.3d 1339, 1349 (Fed. Cir. 2009).[37] Commerce has not provided a legitimate reason – or any reason – here. If Commerce finds that it lacks

[35] Instead, Commerce faults Jangho for failing to request "a scope ruling covering its specific merchandise," *AD I&D Mem.*, Cmt. 6 at 30, while also using the *Yuanda Scope Ruling* and this Court's affirmance of the *CWC Scope Ruling* in *Yuanda I*, to support its determination that "certain curtain wall units" were "within the scope of the [Orders] pursuant to the unambiguous scope language," such that suspension of (and therefore assessment of duties on) Jangho's entries prior to initiation of that scope inquiry was proper under *AMS Assocs.*, 737 F.3d 1338, *AD I&D Mem.*, Cmt. 5 at 27; *CVD I&D Mem.*, Cmt. 21 at 92.

[36] *See supra* Discussion Section I Part C.

[37] Defendant goes so far as to argue that there is "simply no basis in statute or regulation [to find that] all of Commerce's scope rulings are somehow binding on all physically similar products, no matter the identity of the exporter or importer, or unique facts particular to the sale and shipment of the merchandise at issue." Def.'s Resp., Ct. No. 15–23, ECF No. 34, at 17. Defendant ignores the agency's obligation to take actions and render decisions that are neither arbitrary norcapricious. *Changzhou Wujin*, 701 F.3d at 1377. An agency action is "arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." *RHP Bearings Ltd. v. United States*, 288 F.3d 1334, 1347 (Fed. Cir. 2002) (internal quotation marks and citation omitted).

sufficient factual information, it may reopen the record[38] or even initiate a scope inquiry for Jangho[39] in keeping with its regulatory obligation,[40] but it may not assert the inapplicability of the *Yuanda Scope Ruling* because of factual differences without providing a reasonable basis on the record for such a finding.[41]

C. *The Procedural Effect of the Yuanda Scope Ruling*

While Plaintiff and Defendant both argue at length over the issue of whether or not Jangho's merchandise is properly suspended pursuant to 19 C.F.R. § 351.225(l),[42] since Commerce has yet to determine whether Jangho's products may be properly considered within the scope of the Orders, or whether the *Yuanda* or *CWC Scope Ruling* applies, this question is not yet ripe for consideration. *See AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 386 (1999).[43]

III. Jangho's Window Wall Products

Plaintiff argues that its window wall imports should also be excluded from the scope of the AD Order, and hence the second AD administrative review, pursuant to Commerce's decision in *NR Window Walls*. Pl.'s Br., Ct. No. 15–23, ECF No. 31–1, at 15–18. In the administrative review, however, Commerce found that there was no evidence on the record indicating that Jangho had actually imported window wall units during the period of review, and, as such, questions of scope were irrelevant. *AD I&D Mem.*, Cmt. 6 at 31.[44] To counter Commerce's finding, Plaintiff now offers a collection of cites to the record that, it claims, establishes that some of its entries were window wall units. Pl.'s Br., Ct. No. 15–23, ECF No. 31–1, at 15–17.

A. *Plaintiff failed to exhaust its administrative remedies with regard to its factual arguments.*

A plaintiff must exhaust administrative remedies before seeking judicial relief. *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599

[38] 19 C.F.R. § 351.301(c)(4) ("The Department may place factual information on the record of the [antidumping or countervailing duty] proceeding at any time.").

[39] *See* 19 C.F.R. §§ 351.225(b), (f)(6).

[40] *See supra* Discussion Section I Part A.

[41] *Cf.* 19 C.F.R. § 351.225(k)(1) (instructing Commerce to consider "prior scope determinations" when the scope language of an order is unclear).

[42] Pl.'s Br., Ct. No. 15–23, ECF No. 31–1, at 18–23; Pl.'s Br., Ct. No. 15–24, ECF No. 32–1, at 6–14; Def.'s Resp., Ct. No. 1523, ECF No 34, at 21–28; Def.'s Resp., Ct. No. 15–24, ECF No. 34, at 11–21.

[43] Indeed, if Jangho's merchandise is found outside the scope of the order, Commerce has no authority to assess duties on those entries not yet liquidated. *See Belgium*, 551 F.3d at 1349–50.

[44] Commerce further concluded that, even if Jangho had imported such units, those imports would still be subject to the order, regardless of the existing scope ruling excluding window wall units, because Jangho had not requested a scope ruling specific to its products. *Id.*

(Fed. Cir. 1998); *see* 28 U.S.C. § 2637(d). This applies "with particular force" where, as here and in trade cases more generally, "the agency [applies] its special expertise," *Corus Staal BV v. United States*, 502 F.3d 1370, 1379–80 (Fed. Cir. 2007) (internal citation and quotation marks omitted). This "protects[s] the agency's interest in being the initial decision maker in implementing the statutes defining its tasks," and promotes the "development of an agency record that is adequate for later court review and by giving an agency a full opportunity to correct errors and thereby narrow or even eliminate disputes needing judicial resolution." *Itochu Bldg. Products v. United States*, 733 F.3d 1140, 1145 (Fed. Cir. 2013) (internal citations omitted).

Here, while Plaintiff did argue before Commerce that its window wall units should be excluded, Plaintiff did not establish that it had actually imported window wall units during the period of review. [Jangho] Case Br. [before Commerce], Ct. No. 15–23, ECF No. 35–5, at Tab 36 at 6. Even if, as Plaintiff now argues,[45] the administrative record contains direct, but non-obvious evidence of Jangho's window wall imports, Plaintiff has not developed its argument so that Commerce could be the "initial decisionmaker" and build a record of agency decision making adequate for judicial review. *See Itochu*, 733 F.3d at 1145. Plaintiff had and took the opportunity to raise its window wall unit argument before Commerce; the onus was on the Plaintiff to develop that argument and direct Commerce to the pertinent facts. It did not, and, as such, it failed to exhaust its administrative remedies, with regard to those missed or omitted factual arguments, without valid excuse or exception. *See Corus Staal*, 502 F.3d at 1380–81; *Essar Steel, Ltd. v. United States*, 753 F.3d 1368, 1375 (Fed. Cir. 2014); *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1380–81 (Fed. Cir. 2013).

B. Commerce's finding that Jangho did not import window wall units during the period of review was based on a reasonable reading of the record evidence.

Commerce, lacking any record evidence to indicate otherwise, concluded that Jangho had not produced window walls during the period of review. *AD I&D mem.*, Cmt 6 at 31. Commerce's determination is reasonable on the record evidence, even if the court were to consider

[45] Plaintiff argues now that "the administrative record . . . contains direct evidence of Jangho's window wall imports" – though none of that evidence is obvious because "Commerce's questionnaires never requested Jangho report by name the final end product being imported into the United States." Pl.'s Br., Ct. No. 15–23, ECF No. 31–1, at 15. However, Commerce did, in clear contradiction to Plaintiff's excuse, request that Jangho "[p]rovide a description of the types of merchandise under consideration produced and/or sold by [Jangho]." Jangho's Sect. A Questionnaire Resp., Ct. No. 15–23, ECF No. 35, at Tab 6 at A 17. Jangho answered that it "produce[d] and export[ed] finished curtain wall units." *Id.*

Plaintiff's new factual arguments. Plaintiff points to a collection of indirect references and images that might suggest that Jangho produced windows or window walls at some point. *See* Pl.'s Br., Ct. No. 15–23, ECF No. 31–1, at 15–16; Pl.'s Rule 56.2 Reply Br., Ct No. 15–23, ECF No. 39, at 5–7. In contrast, throughout its questionnaire responses Jangho refers to its product as "finished curtain wall units," or some variation thereon, without reference to window wall products.[46] When asked directly to describe the merchandise at issue, Jangho answered that it "produces and exports finished curtain wall units," without mention of window wall units. Jangho's Sect. A Questionnaire Resp., Ct. No. 15–23, ECF No. 35, at Tab 6 at A-17. Considering the record as a whole, Commerce's finding was reasonable, and must be sustained. *See Nippon Steel*, 458 F.3d at 1351.[47]

CONCLUSION

For the foregoing reasoning, Commerce's determination is affirmed in part and remanded in part.

The court remands to Commerce for further consideration in accordance with this opinion. Commerce shall have until October 28, 2016 to complete and file its remand redetermination. Plaintiffs shall have until November 10, 2016 to file comments. Defendant and Defendant-Intervenor shall have until November 21, 2016 to file any reply.

IT IS SO ORDERED.

Dated: September 19, 2016
New York, NY

/s/Donald C. Pogue
DONALD C. POGUE, SENIOR JUDGE

[46] *See, e.g.*, [Jangho] Separate Rate Application, Ct. No. 15–23, ECF No. 35, at Tab 3 at 6; Jangho's Sect. A Questionnaire Resp., Ct. No. 15–23, ECF Nos. 35 & 35–1, at Tabs 4–6, 8, at A-2, A-8, A-17-A-18, A-20, Ex. A-11 (Sample Transaction Documents; [Jangho's] Sect. C Questionnaire Resp., A-570–967 (Dec. 9, 2013) at C-22 *reproduced in* Def.'s App., ECF No 35–2 at Tab 23; [Jangho's] Sect. D Questionnaire Resp., A-570–967 (Dec. 12,2013) at D-7 *reproduced in* Def.'s App., ECF No 35–3 at Tab 28.

[47] Because Commerce's determination that Jangho did not import window wall units during the period of review was based on a reasonable reading of the record evidence, the court does not reach the question of whether Jangho's window wall imports should be excluded in keeping with *NR Window Walls*.