U.S. Court of International Trade

Slip Op. 16–9

APEX FROZEN FOODS PRIVATE LIMITED et al., Plaintiffs, v. UNITED STATES, Defendant, and AD HOC SHRIMP TRADE ACTION COMMITTEE, Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 14–00226
Public Version

[Sustaining U.S. Department of Commerce's final determination in the eighth administrative review of the antidumping duty order covering certain frozen warmwater shrimp from India.]

Dated: February 2, 2016

Robert Lewis LaFrankie, II, Hughes Hubbard & Reed LLP, of Washington, DC, argued for plaintiffs. With him on the brief were *Alexandra Bradley Hess* and *Matthew Robert Nicely*.

Patricia Mary McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, argued for defendant. With her on the brief were *Joshua Ethan Kurland*, Trial Attorney, *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of Counsel on the brief was *Scott Daniel McBride*, Senior Attorney, Office of the Chief Counsel for Trade and Compliance, U.S. Department of Commerce, of Washington, DC.

Nathaniel Jude Maandig Rickard, Picard, Kentz & Rowe, LLP, of Washington DC, argued for defendant-intervenor. With him on the brief was Jordan Charles Kahn.

OPINION

Kelly, Judge:

This matter is before the court on Plaintiffs Apex Frozen Foods Private Limited, et al.'s (collectively "Plaintiffs") motion for judgment on the agency record pursuant to USCIT Rule 56.2. Plaintiffs contest various aspects of the U.S. Department of Commerce's ("Commerce" or "Department") final determination in the eighth administrative review of the antidumping duty order on certain frozen warmwater shrimp from India, covering the period of February 1, 2012 through January 31, 2013. *See generally Certain Frozen Warmwater Shrimp From India*, 79 Fed. Reg. 51,309 (Dep't Commerce Aug. 28, 2014) (final results of antidumping duty review; 2012–2013) ("*Final Results*"), *as amended*, 79 Fed. Reg. 55,430 (Dep't Commerce Sept. 16, 2014) and accompanying Issues and Decision Memorandum for the

Final Results of the Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from India, A-533–840, (Aug. 20, 2014), *available at* http://enforcement.trade.gov/frn/summary/india/2014–20401–1.pdf (last visited Jan. 25, 2016) ("Final I&D Memo"); *see also Certain Frozen Warmwater Shrimp From India*, 70 Fed. Reg. 5,147 (Dep't Commerce Feb. 1, 2005) (notice of amended final determination of sales at less than fair value and antidumping duty order) ("Order"). For the reasons set forth below, Commerce's final results are supported by substantial evidence and in accordance with law.

BACKGROUND

Commerce issued the antidumping duty order covering certain frozen warmwater shrimp from India on February 1, 2005. *See* Order, 70 Fed. Reg. at 5,147. After receiving timely requests to conduct an administrative review from several companies, including domestic producer Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee ("Defendant-Intervenor"), on April 2, 2013 Commerce initiated the eighth administrative review of the Order for the period of February 1, 2012 through January 31, 2013. *See Certain Frozen Warmwater Shrimp From India and Thailand*, 78 Fed. Reg. 19,639, 19,639 (Dep't Commerce Apr. 2, 2013) (notice of initiation of antidumping duty administrative reviews); *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 78 Fed. Reg. 25,418, 25,420 (Dep't Commerce May 1, 2013); *see also* Request for Administrative Reviews at 1–2, PD 9 at bar code 3121314–01 (Feb. 28, 2013).

Pursuant to Section 777A(c)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677f-1(c)(2) (2012),[1] Commerce found it was not practicable to examine each of the known exporters and producers of subject merchandise and thus limited the review to the two companies that, according to U.S. Customs and Border Protection ("CBP") import data, accounted for the largest volume of subject merchandise exported to the United States to serve as mandatory respondents for the administrative review—(1) Devi Fisheries Limited and its affiliates Satya Seafoods Private Limited and Usha Seafoods (collectively "Devi Fisheries"); and (2) Falcon Marine Exports Limited and its affiliate K.R. Enterprises (collectively "Falcon Marine"). *See* Selection of Respondents for Individual Review at 1–2, 4,

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

PD 25 at bar code 3133307–01 (May 1, 2013); *see also* Decision Memorandum for the Preliminary Results of the 2012–2013 Administrative Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from India at 2, A-533–840, (Mar. 18, 2014), *available at* http://enforcement.trade.gov/frn/summary/india/201406559–1.pdf (last visited Jan. 25, 2016) ("Prelim. I&D Memo"). Accordingly, Commerce issued questionnaires to and received responses from Devi Fisheries and Falcon Marine from May 2013 through January 2014. *See* Prelim. I&D Memo at 2–3.

Commerce published its preliminary results on March 25, 2014. *See Certain Frozen Warmwater Shrimp From India*, 79 Fed. Reg. 16,285, 16,285 (Dep't Commerce Mar. 25, 2014) (preliminary results of antidumping duty administrative review; 2012–2013) ("*Prelim. Results*"); *see also* Prelim. I&D Memo at 1. After applying its differential pricing analysis, Commerce preliminarily found that the mandatory respondents' sales revealed a pattern of significant export price differences among purchasers, regions, or time periods and determined that "compar[ing] . . . the weighted average of the normal values to the export prices . . . of individual transactions" ("A-T") was appropriate to calculate dumping margins for both Devi Fisheries and Falcon Marine in the preliminary results. *See* Prelim. I&D Memo at 7; 19 C.F.R. § 351.414(b)(3) (2013);[2] *see also* 19 C.F.R. § 351.414(c)(1). For Devi Fisheries, the results of the differential pricing analysis led Commerce to apply A-T to all of Devi Fisheries' U.S. sales. *See* Calculations for Devi Fisheries Limited for the Preliminary Results at 1–2, CD 136 at bar code 3189206–01 (Mar. 18, 2014) ("Devi Fisheries' Prelim. Calcs."); *see also* Prelim. I&D Memo at 7. By contrast, the differential pricing analysis as applied to Falcon Marine led Commerce to apply A-T only to the portion of Falcon Marine's U.S. sales that constituted the observed pattern of significant price differences and compared "the weighted average of the normal values to the weighted average of the export prices" ("A-A") for all of its other U.S. sales. *See* Calculations for Falcon Marine Exports Limited for the Preliminary Results at 1–2, CD 145 at bar code 3189251–01 (Mar. 18, 2014) ("Falcon Marine Prelim. Calcs.") 19 C.F.R. § 351.414(b)(1); *see also* Prelim. I&D Memo at 7. Accordingly, Commerce preliminarily calculated weighted-average dumping margins of 1.97% for Devi Fisheries and 3.01% for Falcon Marine, from which Commerce assigned a rate of 2.49% to the other exporters and producers covered by the review. *See Prelim. Results*, 79 Fed. Reg. at 16,286–89.

[2] Further citations to Title 19 of the Code of Federal Regulations are to the 2013 edition, unless otherwise noted.

Commerce published the final results on August 28, 2014. *See generally Final Results*, 79 Fed. Reg. 51,309. Commerce continued to find that the mandatory respondents' sales exhibited a pattern of export prices of comparable merchandise that differ significantly among purchasers, regions, or time periods as per the results of the differential pricing analysis and made no changes to Devi Fisheries' or Falcon Marine's margin calculations from the preliminary results. *See id.* at 51,309; *see also* Final I&D Memo at 1, 22–26, 35–39. Additionally, Commerce reaffirmed its decision to reject portions of certain respondents'[3] (collectively "Respondents") case brief for containing untimely filed new factual information. *See* Final I&D Memo at 40–42.

Plaintiffs now challenge Commerce's determination in the final results on numerous grounds. First, Plaintiffs initially argued that Commerce did not have the legal authority to engage in a targeted dumping analysis or differential pricing analysis and thereafter apply A-T in the context of an antidumping duty administrative review. *See* Pls.' Rule 56.2 Mot. J. Agency R. 10–15, Apr. 3, 2015, ECF No. 36 ("Pls.' Mot."). Plaintiffs concede in their reply papers that recent precedent from the Court of Appeals for the Federal Circuit makes clear that Commerce has the authority to apply the alternative A-T method in reviews, however, Plaintiffs still contend that the Court of Appeals for the Federal Circuit's decision is not dispositive and controlling on all of the issues in this case. *See* Plaintiffs' Reply Brief 3, Sept. 30, 2015, ECF No. 57 ("Pls.' Reply"). Second, Plaintiffs contend Commerce violated the Administrative Procedure Act ("APA") by not following the APA's notice and comment rulemaking requirement before applying the differential pricing analysis. *See* Pls.' Mot. 18–20. Third, Plaintiffs argue that Commerce failed to comply with the so-called "limiting rule" and "allegation requirement" as provided within its regulations. *See id.* at 15–18. Fourth, Plaintiffs challenge certain aspects of Commerce's differential pricing analysis. *See id.* at 20–45. Specifically, Plaintiffs argue that Commerce (i) failed to establish a discernable pattern of export prices of comparable merchandise

[3] On May 2, 2014, certain respondents submitted a case brief disputing the propriety of the differential pricing analysis. *See generally* Respondents' Rejected Case Brief, PD 150–51 at bar code 3199459–01 (May 2, 2014). The respondents who submitted the case brief included the following companies: Falcon Marine, Devi Fisheries, Apex Frozen Foods Private Limited, Asvini Fisheries Private Ltd., Avanti Feeds Limited, Bluepark Seafoods Private Ltd., Five Star MarineExports Private Limited, Jagadeesh Marine Exports, Jayalakshimi Sea Foods Private Limited, Liberty-Group, Nekkanti Sea Foods Limited, Sagar Grandhi Exports Pvt. Ltd., SAI Marine Exports Pvt. Ltd., Sandhya Marines Limited, Sprint Exports Pvt. Ltd., Star Argo Marine Exports Private Limited, Suryamitra Exim Pvt. Ltd., and Wellcome Fisheries Limited.

that differ significantly among purchasers, regions, or time periods because of its use of averages and consideration of all sales in the analysis, *see id.* at 20–28, 43–45, (ii) failed to adequately explain why A-A could not account for such differences, *see id.* at 28–36, and (iii) improperly used, what Plaintiffs refer to as, "double-zeroing" in calculating Falcon Marine's antidumping duty margin. *See id.* at 37–43. Finally, Plaintiffs maintain that Commerce wrongfully rejected portions of Respondents' administrative case brief as untimely filed new factual information. *See id.* at 45–46. For these reasons, Plaintiffs argue that Commerce's determinations in the final results are unsupported by substantial evidence and otherwise not in accordance with law.

Defendant United States ("Defendant") argues that Commerce has the authority to engage in the differential pricing analysis and thereafter apply A-T in the context of administrative reviews, *see* Def.'s Resp. Opp'n Pls.' Rule 56.2 Mot. J. Agency R. 10–13, Aug. 13, 2015, ECF No. 43 ("Def.'s Resp."), the withdrawn regulations have never applied to administrative reviews, *see id.* at 14–17, the APA did not require Commerce to employ notice and comment rulemaking for its change in practice to the differential pricing analysis, *see id.* at 17–21, and Commerce properly rejected portions of Respondents' administrative case brief as untimely filed new factual information. *See id.* at 45–46. Defendant also maintains that Commerce's use and application of its newly implemented analysis in the final results are supported by substantial evidence and in accordance with law. *See id.* at 21–44.

The court holds that Commerce's final results are supported by substantial evidence and in accordance with law and are therefore sustained.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012),[4] which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

[4] Further citations to Title 28 of the U.S. Code are to the 2012 edition.

DISCUSSION

I. Commerce Has Authority to Use the Differential Pricing Analysis and Apply A-T in Administrative Reviews

Plaintiffs' Rule 56.2 motion argued that Commerce lacks authority to apply the alternative A-T methodology in administrative reviews. *See* Pls.' Mot. 10–15. Defendant and Defendant-Intervenor respond that, contrary to Plaintiffs' position, neither the antidumping duty statute nor the legislative history prohibit use of the differential pricing analysis or application of A-T in administrative reviews and in support cite to the Court of Appeals for the Federal Circuit's recent decision in *JBF RAK LLC v. United States*, 790 F.3d 1358 (Fed. Cir. 2015). *See* Def.'s Resp. 10–13; Def.-Intervenor Ad Hoc Shrimp Trade Action Committee's Resp. Pls.' Rule 56.2 Mot. J. Agency R. 8, 13–15, Aug. 13, 2015, ECF No. 42 ("Def.-Intervenor's Resp."). The court holds that Commerce has the authority to engage in its differential pricing analysis to decide which comparison methodology to use for calculating dumping margins and thereafter apply A-T in the context of an administrative review when appropriate.

To determine whether merchandise is being sold in the United States at less than fair value and, if so, to calculate the antidumping duty rate for the individually examined exporters and producers, Commerce must compare normal value to the export price of each entry of subject merchandise.[5] *See* 19 U.S.C. § 1675(a)(2)(A)(ii); 19 U.S.C. § 1677b(a); 19 U.S.C. § 1677(35)(A). The statute provides that Commerce shall ordinarily use A-A to calculate dumping margins in an investigation, but may use A-T as an alternative to the default A-A method if certain conditions are met. *See* 19 U.S.C. § 1677f-1(d)(1)(A)–(B). Congress, however, has not dictated which comparison methodology Commerce must use in administrative reviews nor has it provided for when Commerce may use A-T in reviews. The only further guidance the statute provides with respect to Commerce's use of A-T in a review is that when applying A-T, Commerce "shall limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale." 19 U.S.C. § 1677f-1(d)(2). Commerce's regulations pro-

[5] Normal value is the first sales price of the subject merchandise in the exporting country, *See* 19 U.S.C. § 1677b(a)(1)(A)–(B), or, if not sold in the exporting country, the sales price of the subject merchandise in a similar exporting country "other than the exporting country or the United States." 19 U.S.C. § 1677b(a)(1)(B)(ii); 19 U.S.C. § 1677b(a)(1)(C). Export price is the first sales price to an unaffiliated purchaser of the subject merchandise in the importing country, *i.e.*, United States, or an unaffiliated purchaser for exportation to the importing country. *See* 19 U.S.C. § 1677a(a). Commerce calculates a respondent's dumping margin by determining "the amount by which the normal value exceeds the export price of the subject merchandise." 19 U.S.C. § 1677(35)(A).

vide that Commerce will apply A-A to calculate dumping margins in investigations and reviews unless another method is appropriate in a particular case, but do not provide further guidance regarding what those circumstances may be. *See* 19 C.F.R. § 351.414(c)(1).[6]

As a result, to determine whether to employ an alternative method to calculate dumping margins in reviews, Commerce has by practice chosen to adopt the approach it uses in investigations, which follows the statutory directive under 19 U.S.C. § 1677f-1(d)(1)(B). In the preliminary results, Commerce explained that analogous to its approach in antidumping duty investigations, Commerce engages in an analysis consistent with § 1677f-1(d)(1)(B) in administrative reviews to "examine[ ] whether to use the [A-T] method as an alternative comparison method." Prelim. I&D Memo at 5. Therefore, as a matter of practice, Commerce applies A-T instead of the default A-A method in an administrative review if there is a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or time periods, provided that Commerce explains why the A-A method cannot account for those price differences. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8,101, 8,102 (Dep't Commerce Feb. 14, 2012) (announcing that Commerce intends to apply a comparison methodology in reviews in a manner that parallels investigations) ("*Final Modification*"). Accordingly, to evaluate whether the conditions for the A-T exception are met in a review, Commerce engages in the differential pricing analysis, which Commerce has used in recent investigations and reviews. *See id.*

In the preliminary results, Commerce stated that it employed the differential pricing analysis "pursuant to 19 CFR [§] 351.414(c)(1) and consistent with [19 U.S.C. § 1677f-1(d)(1)(B)]" and determined that the A-T comparison methodology was appropriate to apply to Devi Fisheries' and Falcon Marine's U.S. sales. *See* Prelim. I&D Memo at 5–7; *see also Prelim. Results*, 79 Fed. Reg. at 16,286. Commerce continued to apply the alternative A-T method to calculate Devi Fisheries' and Falcon Marine's dumping margins in the final results. *See* Final I&D Memo at 1–2; *see also Final Results*, 79 Fed. Reg. at 51,309.

---

[6] While a comparison of "the normal values of individual transactions to the export prices of individual transactions" ("T-T") is listed as a preferred method under 19 U.S.C. § 1677f-1(d)(1)(A), Commerce's regulations provide that the T-T methodology will rarely be employed by Commerce "such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made." 19 C.F.R. § 351.414(c)(2).

Plaintiffs concede in their reply that *JBF RAK LLC* is determinative on the issue of whether Commerce has the authority to apply the alternative A-T method in reviews. *See* Pls.' Reply 3. The appellant in *JBF RAK LLC*, a manufacturer and exporter of polyethylene terephthalate film from the United Arab Emirates, appealed a U.S. Court of International Trade decision, *see generally JBF RAK LLC v. United States*, 38 CIT __, 991 F. Supp. 2d 1343 (2014), challenging Commerce's targeted dumping analysis and disputing Commerce's authority to apply A-T in the context of an administrative review. *See JBF RAK LLC*, 790 F.3d at 1360–62. The Court of Appeals for the Federal Circuit held that Commerce viewed its analysis in investigations as instructive for administrative reviews and reasonably exercised its gap-filling authority by using A-T to calculate dumping margins in administrative reviews in appropriate circumstances. *See id.* at 1364. In affirming Commerce's decision to apply A-T in the context of an administrative review, the Court of Appeals for the Federal Circuit reasoned that "[t]he fact that the statute is silent with regard to administrative reviews does not preclude Commerce from filling gaps in the statute to properly calculate and assign antidumping duties." *See id.* at 1365 (internal quotations omitted). Because the Court of Appeals for the Federal Circuit has decided this very issue and the court is not presented with, nor does it observe, reasons that warrant dissimilar treatment, the court holds that Commerce had the authority to engage in an analysis to determine whether application of A-T was appropriate in this administrative review.

II. Commerce Complied with its Regulations

Plaintiffs argue that while Commerce may apply A-T in reviews, it must comply with its regulations codified at 19 C.F.R. § 351.414(f) (2008) here based on Plaintiffs' position that those regulations were in full force and effect for this review.[7] *See* Pls.' Mot. 15–18. Specifically, Plaintiffs argue that Commerce must comply with the "limiting

[7] In 2008, following two notices requesting comments on how Commerce should address targeted dumping in antidumping duty investigations, *see Targeted Dumping in Antidumping Investigations*, 72 Fed. Reg. 60,651, 60,651 (Dep't Commerce Oct. 25, 2007); *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations*, 73 Fed. Reg. 26,371, 26,371–72 (Dep't Commerce May 9, 2008), Commerce issued a notice that purportedly withdrew the regulations pertaining to the previous targeted dumping analyses used in antidumping duty investigations. *See generally Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74,930 (Dep't Commerce Dec. 10, 2008). Specifically, Commerce announced the withdrawal of 19 C.F.R. § 351.414(f) and (g) (2008), the former of which includes the limiting rule and the allegation requirement. *See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74,930 (Dep't Commerce Dec. 10, 2008). Following Commerce's 2008 withdrawal notice, an

rule"[8] and the "allegation requirement."[9] *See id.*; *see also* 19 C.F.R. § 351.414(f)(2)–(3) (2008). Plaintiffs contend that these regulatory provisions apply here because "[a]lthough Commerce's [targeted dumping] regulations are, by their own terms, limited to *investigations*, Commerce consistently relies on its [targeted dumping] investigation policies in [antidumping duty] reviews." Pls.' Mot. 16.

Defendant disagrees with Plaintiffs' contention because, regardless of whether the regulations were properly withdrawn, "the regulations by their explicit terms applied to *investigations* and not administrative reviews." Def.'s Resp. 14. Defendant also argues that Commerce promulgated those regulations to implement the statutory provision in 19 U.S.C. § 1677f-1(d)(1) and there is no corresponding statutory directive with respect to reviews. *See id.* at 16. Defendant-Intervenor adds that the regulations have since been revoked and nonetheless applied to the preceding targeted dumping analysis rather than the differential pricing analysis that was undertaken here. *See* Def.-Intervenor's Resp. 15–16.

Plaintiffs' argument is predicated upon the view that the regulation was in full force and effect for this proceeding. To support that view, Plaintiffs argue that the attempted withdrawal in 2008 was invalid according to *Gold East Paper (Jiangsu) Co. v. United States*, 37 CIT __, 918 F. Supp. 2d 1317 (2013). *See* Pls.' Mot. 15–16. Plaintiffs further argue that the validity of the subsequent withdrawal in 2014 is irrelevant because it was applicable to cases initiated on or after May 22, 2014, whereas the instant review was initiated before that date. *See* Pls.' Mot. 16 n.3. Defendant holds fast to its view that despite the

exporter challenged the withdrawal in the U.S. Court of International Trade claiming that the withdrawal was ineffective because Commerce did not comply with the APA's notice and comment requirements. *See Gold East Paper (Jiangsu) Co. v. United States*, 37 CIT __, __, 918 F. Supp. 2d 1317, 1325 (2013). The court in *Gold East Paper* agreed and explained that "[b]ecause Commerce failed to provide notice and comment before withdrawing the Limiting Rule, . . . the court finds that the repeal of the regulation was invalid and the Limiting Rule is still in force." *Gold East Paper*, 918 F. Supp. 2d at 1327.

In response to the court's decision in *Gold East Paper*, Commerce, notwithstanding its position that the 2008 withdrawal notice was proper, made a subsequent attempt to withdraw 19 C.F.R. § 351.414(f) (2008) and stated that Commerce will not apply the regulation, including the limiting rule and the allegation requirement, in antidumping duty investigations. *See Non-Application of Previously Withdrawn Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 79 Fed. Reg. 22,371, 22,371–72 (Dep't Commerce Apr. 22, 2014).

[8] The limiting rule provides that if in an investigation Commerce identifies a pattern of export prices that differ significantly among purchasers, regions, or periods of time, Commerce "normally will limit the application of [A-T] to those sales that constitute targeted dumping under (f)(1)(i) of this section." 19 C.F.R. § 351.414(f)(2) (2008).

[9] The allegation requirement provides that Commerce "normally will examine only targeted dumping described in an allegation." 19 C.F.R. § 351.414(f)(3) (2008).

decision in *Gold East Paper*, the regulations were properly withdrawn in 2008. However, whether the regulation was in full force and effect is of no consequence here.

The regulatory provisions that Plaintiffs argue Commerce failed to comply with do not apply to administrative reviews. The issue of whether the regulations were properly withdrawn is not before the court as the regulations by their terms only apply to investigations, which Plaintiffs concede in their argument. *See* Pls.' Mot. 16 (conceding that "Commerce's [targeted dumping] regulations are, by their own terms, limited to *investigations*"); *see also* 19 C.F.R. § 351.414(f) (2008). Thus, there is no regulation that expressly requires Commerce to apply the limiting rule and the allegation requirement in a review.

Further, the regulations have not otherwise been implemented as part of Commerce's current practice in reviews. As previously explained, Congress has not provided for when and how Commerce is to calculate dumping margins using A-T in reviews. Consequently, Commerce has developed a practice in administrative reviews of conducting an analysis that is guided by its approach in investigations to "examine[] whether to use the [A-T] method as an alternative comparison method." Prelim. I&D Memo at 5.

Where Commerce has developed a practice it must follow that practice or explain why in a given case it was reasonable to deviate from that practice. *See NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1328 (Fed. Cir. 2009). However, Commerce has decided from the outset not to incorporate the regulations as part of its practice of using the differential pricing analysis in reviews for the same reasons why it sought to withdraw the regulations altogether. Commerce explained that "the regulation was impeding the development of an effective remedy for masked dumping," which Congress has charged Commerce to counteract by authorizing it to use A-T to calculate dumping margins under appropriate circumstances. *See* Final I&D Memo at 14. Commerce further provided that the regulations were "promulgated without the benefit of any experience on the issue of targeted dumping" and "prevented the use of this comparison methodology to unmask dumping." *Id.* at 14. Thus, Commerce ultimately decided to withdraw the regulation because it "may have had the unintentional effect of preventing the Department from employing an appropriate remedy to unmask dumping" and "[s]uch an effect would have been contrary to congressional intent" as it would seemingly deny domestic producers the relief the antidumping duty scheme

envisions for them. *Id.* at 16. Commerce's reasons for withdrawing, or attempting to withdraw, the regulations suffice to demonstrate that it has not adopted the regulations as a matter of practice in its differential pricing analysis.[10]

Plaintiffs, however, maintain that "Commerce itself has made its [targeted dumping] regulations relevant in [antidumping duty] *reviews*, and it must comply with them or explain why it is reasonable not to do so in this case." Pls.' Mot. 16. At oral argument, Plaintiffs argued that Commerce's practice in reviews has incorporated the regulations applicable to investigations because its practice consistently relies upon the analysis used in investigations. *See* Oral Arg., 03:28–04:41, Dec. 11, 2015, ECF No. 62. However, as explained above, Commerce has not adopted the regulations as part of its practice of using the differential pricing analysis in reviews. The fact that Commerce looks to its approach in investigations as guidance for its practice in reviews does not mean that Commerce has made a wholesale adoption of every aspect, including statutory and regulatory constraints, of its approach in investigations. Although Commerce is permitted to extend particular statutory or regulatory provisions in other contexts, *see JBF RAK LLC*, 790 F.3d at 1364 (holding that Commerce's application of A-T in reviews in a manner that mirrors investigations is a reasonable exercise of its gap-filling discretion), it is by no means obligated to do so. Therefore, Commerce was not required to comply with the limiting rule and the allegation requirement in the final results.

III. Commerce's Change in Practice Did Not Trigger APA Rule Making Requirements

Plaintiffs contend that Commerce implemented its differential pricing analysis without following APA rule making requirements. *See* Pls.' Mot. 18–20. Defendant and Defendant-Intervenor explain that

[10] The court recognizes that Commerce has put the allegation requirement into practice in past reviews. *See, e.g.*, *JBF RAK LLC*, 790 F.3d at 1361–62. However, the fact that Commerce assessed whether the use of A-T was appropriate in response to an allegation of targeted dumping in past reviews could only bind the agency with respect to its previous practice of using a targeted dumping analysis in reviews. As explained in the court's discussion, Commerce has since changed its practice of using a targeted dumping analysis to a differential pricing analysis for determining whether to apply A-T in a given case and has decided not to apply the limiting rule and the allegation requirement in its current practice.

Commerce's shift from the *Nails* test[11] to the differential pricing analysis was a change in Commerce's practice rather than a rule and thus exempt from the APA's notice and comment rule making requirement. *See* Def.'s Resp. 17–21; Def.-Intervenor's Resp. 17–18. The court rejects Plaintiffs' argument based on fundamental administrative law principles.

Absent statutory restraints, agencies are generally free to develop policy through either rulemaking or adjudication. *SEC v. Chenery*, 332 U.S. 194, 202 (1947). Courts will not impose more procedures than those imposed by Congress or the agency. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524–525 (1978). Commerce is free to develop its approach for determining which comparison method to use in a given case through adjudication.

Nonetheless, Plaintiffs reason that the APA mandates notice and comment rulemaking pursuant to 5 U.S.C. § 553 because the differential pricing methodology is a "rule," which is defined as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *See* Pls.' Mot. 19–20; 5 U.S.C. § 551(4). However, the APA's notice and comment requirement applies to legislative rules and does not apply to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."[12] *See* 5 U.S.C.

[11] The *Nails* test, which derives its name from the cases in which it was first used, was established in 2008 in concurrent antidumping duty investigations as a methodology to address the criteria under 19 U.S.C. § 1677f-1(d)(1)(B) and was the predecessor to Commerce's recently implemented differential pricing analysis. *See Certain Steel Nails from the People's Republic of China*, 73 Fed. Reg. 33,977 (Dep't Commerce June 16, 2008) (final determination of sales at less than fair value); *Certain Steel Nails From the United Arab Emirates*, 73 Fed. Reg. 33,985 (Dep't Commerce June 16, 2008) (notice of final determination of sales at not less than fair value).

[12] Although the distinction between legislative rules, interpretive rules, and statements of policy may not always be obvious, the court notes that the Attorney General's Manual on the Administrative Procedure Act (1947), provides

> the following working definitions . . . : *Substantive rules* --rules, other than organizational or procedural under section 3(a)(1) and (2), issued by an agency pursuant to statutory authority and which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission pursuant to section 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78n). Such rules have the force and effect of law.
>
> *Interpretative rules* --rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.

§553(b)(A). While not binding on this Court, the court notes that the Court of Appeals for the D.C. Circuit has aptly addressed how to determine whether an agency rule is a legislative rule that must undergo notice and comment rulemaking by asking the following:

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.

Am. Mining Cong. v. Mine Safety Admin., 995 F.2d. 1106, 1112 (D.C. Cir 1993). Adopting this framework, none of the questions raised are answered affirmatively in this context. Congress has afforded Commerce the basis for agency action absent any rulemaking. Commerce's approach to uncovering dumping has developed, and continues to develop, over time as foreshadowed by the Supreme Court in *Chenery*.[13]

> *General statements of policy* --statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.
>
> Attorney General's Manual on the Administrative Procedure Act (1947), at 30 n.3 (internal citations omitted).

[13] The earliest variation of Commerce's approach to address the criteria under 19 U.S.C. § 1677f-1(d)(1)(B) was the *Pasta* test from Commerce's first encounter with targeted dumping. *See generally Certain Pasta From Italy*, 61 Fed. Reg. 30,326 (Dep't Commerce June 14, 1996) (notice of final determination of sales at less than fair value), *as amended*, 61 Fed. Reg. 38, 547 (Dep't Commerce June 14, 1996), *as amended* 61 Fed. Reg. 42,231 (Dep't Commerce Aug. 14, 1996); *see also Borden, Inc. v. United States*, 23 CIT 372, 373 (1999). After *Certain Pasta From Italy*, Commerce was presented with allegations of targeted dumping in two other proceedings, but Commerce ultimately found that the allegations were inadequate and did not proceed with a targeted dumping analysis. *See generally Fresh Tomatoes From Mexico*, 61 Fed. Reg. 56,608 (Nov. 1, 1996) (notice of preliminary determination of sales at less than fair value and postponement of final determination); *Stainless Steel Wire Rod from Taiwan*, 63 Fed. Reg. 10,836 (March 5, 1998) (notice of preliminary determination of sales at less than fair value and postponement of final determination).

Commerce's use of the *Pasta* test was short-lived and limited to the antidumping duty investigation of certain pasta from Italy because Commerce adopted the "P/2 test" when it next engaged in a targeted dumping analysis in *Coated Free Sheet Paper from the Republic of Korea*, 72 Fed. Reg. 60,630 (Dep't Commerce Oct. 25, 2007) (notice of final determination of sales at less than fair value). Commerce recognized the need for a standardized approach with regard to targeted dumping and filed a notice immediately following its determination in *Coated Free Sheet Paper from the Republic of Korea* requesting comments on developing a methodology for its targeted dumping determination in investigations. *See Targeted Dumping in Antidumping Investigations; Request for Comment*, 72 Fed. Reg. 60,651, 60,651 (Dep't Commerce Oct. 25, 2007).

Because Commerce's approach has and continues to evolve, it is not appropriate to "rigidify[] [Commerce's] tentative judgment into a hard and fast rule." *Chenery*, 332 U.S. at 202. Commerce's approach for determining whether to utilize the A-T exception is precisely the type of situation where the agency "retain[s] power to deal with the problems on a case-to-case basis . . . [allowing for] the case-by-case evolution of statutory standards." *Id.* at 203. Thus, Commerce's shift from the *Nails* test to the differential pricing analysis is not subject to notice and comment requirements.

Plaintiffs additionally argue that by requesting comments on the differential pricing analysis Commerce acknowledged that the change is subject to APA notice and comment requirements. *See* Pls.' Mot. 19 n.5; *see also Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. 26,720, 26,720 (Dep't Commerce May 9, 2014) ("*Request for Comments*"). Plaintiffs' assertion is erroneous. By simply requesting comment, Commerce did not in effect obligate itself to engage in notice and comment rule making. Commerce has not invoked its legislative authority simply by seeking input from interested parties.

Plaintiffs further argue that "Commerce arbitrarily changed from its so-called *Nails Test* to its new [differential pricing] analysis without adequate explanation or input." Pls.' Mot. 19. Plaintiffs are correct in that Commerce must adequately explain any changes to its practice to be entitled to deference. *See SKF USA Inc. v. United States*, 630 F.3d 1365, 1373 (Fed. Cir. 2011); *see also Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983) (explaining that "an agency must cogently explain why it has exercised its discretion in a given manner"); *Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 494 F.3d 1371, 1378 n.5 (Fed. Cir. 2007) (providing that "[w]hen an agency decides to change course, however, it must adequately explain the reason for a reversal of policy" to be afforded

In 2008, Commerce began using what is now known as the *Nails* test in investigations to determine if a foreign exporter or producer is engaging in targeted dumping. *See generally Certain Steel Nails From the People's Republic of China*, 73 Fed. Reg. 33,977 (Dep't Commerce June 16, 2008) (final determination of sales at less than fair value); *Certain Steel Nails From the United Arab Emirates* 73 Fed. Reg. 33,985 (Dep't Commerce June 16, 2008) (notice of final determination of sales at not less than fair value); *see also Mid Continent Nail Corp. v. United States*, 34 CIT 512, 513–15, 712 F. Supp. 2d 1370, 1372–74 (2010). For several years Commerce continued to utilize the *Nails* test to help decide whether the statutory preconditions are satisfied to employ A-T.

On March 4, 2013, Commerce made its most recent development to its approach, departing from its previous targeted dumping analysis, and first used what Commerce has coined the "differential pricing analysis" in the antidumping duty investigation of xanthan gum from the People's Republic of China. *See Xanthan Gum From the People's Republic of China*, 78 Fed. Reg. 33,351, 33,351–52 (Dep't Commerce June 4, 2013) (final determination of sales at less than fair value).

deference). However, the court finds that Commerce has provided an adequate explanation for its change in practice and sought input from interested parties.

Commerce's explanation for the shift from the *Nails* test to the differential pricing analysis need not confirm that the change is a better policy or methodology than its predecessor. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). "[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id.* "Thus, Commerce need only show that its methodology is permissible under the statute and that it had good reasons for the new methodology." *Huvis Corp. v. United States*, 570 F.3d 1347, 1353 (Fed. Cir. 2009).

Commerce explained that it continues to develop its approach with respect to the use of A-T "as it gains greater experience with addressing potentially hidden or masked dumping that can occur when the Department determines weighted-average dumping margins using the [A-A] comparison method." Final I&D Memo at 18 (internal quotations omitted). Commerce additionally explained that the new approach is "a more precise characterization of the purpose and application of [19 U.S.C. § 1677f-1(d)(1)(B)]" and is the product of Commerce's "experience over the last several years, . . . further research, analysis and consideration of the numerous comments and suggestions on what guidelines, thresholds, and tests should be used in determining whether to apply an alternative comparison method based on the [A-T] method." *Request for Comments*, 79 Fed. Reg. at 26,722. Commerce developed its approach over time, while gaining experience and obtaining input. Under the standard described above, Commerce's explanation is sufficient. Therefore, Commerce's adoption of the differential pricing analysis was not arbitrary.

IV. Differential Pricing Analysis

The statute provides that Commerce must compare normal value to the export price of each entry of subject merchandise in order to calculate dumping margins. *See* 19 U.S.C. § 1675(a)(2)(A)(ii); 19 U.S.C. § 1677b(a); 19 U.S.C. § 1677(35)(A). However, the statute does not dictate which comparison methodology Commerce must use in a review, nor when it may use A-T in a review. Commerce has stated in its regulations that it will apply A-A in reviews "unless another method is appropriate in a particular case." 19 C.F.R. § 351.414(c)(1). Commerce has adopted a practice in reviews of using the differential pricing analysis based upon the statutory provision applicable to investigations to determine whether application of A-T is

warranted.[14] According to Commerce's practice, it may use A-T rather than A-A in a review when (1) there is a pattern of export prices that differ significantly among purchasers, regions, or periods of time and (2) Commerce provides an explanation for why the pattern of significant price differences cannot be taken into account using A-A. Plaintiffs challenge (i) Commerce's use of weighted-average export prices to find prices that differ significantly, (ii) the inclusion of both higher and lower-priced sales in the analysis, (iii) Commerce's finding of a pattern of export prices that differ significantly, (iv) Commerce's explanation as to why A-A cannot account for such differences, and (v) Commerce's application of its mixed methodology. *See* Pls.' Mot. 20–45.[15] Each of Plaintiffs' specific challenges to Commerce's differential pricing analysis are unavailing as explained below.

A. Commerce's Analysis for Finding a Pattern of Export Prices that Differ Significantly is Reasonable.

In the first stage of the differential pricing analysis, Commerce employs two tests — (1) the Cohen's d test and (2) the ratio test — to identify a pattern of export prices that differ significantly. *See* Prelim. I&D Memo at 6–7. The Cohen's d test assesses whether export prices

[14] The statutory directive for investigations provides:

> (B) Exception
>
> [Commerce] may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise [(A-T)], if-
>
> (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
>
> (ii) [Commerce] explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) [(A-A)] or (ii) [(T-T)].

19 U.S.C. § 1677f-1(d)(1)(B). Commerce explained that "[a]lthough [19 U.S.C. § 1677f-1(d)(1)(B)] does not strictly govern the Department's examination of this question in the context of an administrative review, the Department nevertheless finds that the issue arising under 19 CFR [§] 351.414(c)(1) in an administrative review is analogous to the issue in . . . investigations. Accordingly, the Department finds the analysis that has been used in . . . investigations instructive for purposes of examining whether to apply an alternative comparison method in this administrative review." Final I&D Memo at 9. Commerce has thus adopted a practice to use an approach akin to the approach used in investigations, namely the differential pricing analysis, to determine whether to apply A-T in an administrative review. *See Final Modification*, 77 Fed. Reg. at 8,102; *see also Request for Comments*, 79 Fed. Reg. at 26,722.

[15] In articulating their specific challenges to Commerce's differential pricing analysis and responses thereto, Plaintiffs and Defendant sometimes allude to 19 U.S.C. § 1677f-1(d)(1)(B) as if the statute directly controls Commerce's determination in the instant review. *See, e.g.*, Pls.' Mot. 20, 21, 25, 28–29, 32, 35, 42; Def.'s Resp. 21, 25–26, 29, 31, 35. The court notes that Commerce is directly constrained by the statute only in investigations. Although Commerce's approach in reviews follows the language of the statute, Commerce is bound by its practice in reviews rather than the statute pertaining to investigations.

differ significantly among purchasers, regions, or periods of time, whereas the ratio test evaluates whether the price differences measured by the Cohen's d test are sufficient to exhibit a pattern. *See id.*; *Request for Comments*, 79 Fed. Reg. at 26,722. Plaintiffs argue Commerce's finding that the mandatory respondents' U.S. sales revealed a pattern of export prices that differ significantly among purchasers, regions, or time periods is unsupported by substantial evidence and not in accordance with law. *See* Pls.' Mot. 20–28. Plaintiffs argue Commerce improperly used averages to find significant price differences, *see id.* at 20–26, wrongly included higher-priced sales that passed the Cohen's d test in the ratio test, *see id.* at 43–45, and erroneously found a pattern of significant price differences. *See id.* at 26–28.

i. Commerce's Use of Averages in the Cohen's d Test

Plaintiffs argue that Commerce's use of weighted-average export prices as opposed to individual export prices in its Cohen's d analysis conflicts with the statute, is distortive, and lacks an adequate explanation. *See* Pls.' Mot. 21–26. Defendant explains that the statute does not restrict Commerce's discretion to use weighted-average export prices. *See* Def.'s Resp. 25–28.

The language of the statute, as implicated by Commerce's practice, requires Commerce to identify whether there is "a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time" before application of A-T is permitted. *See* 19 U.S.C. § 1677f-1(d)(1)(B)(i). The first stage of the differential pricing analysis answers this question by bifurcating the inquiry, *i.e.*, separately addressing whether there are significant price differences and whether those price differences are such that they constitute a pattern. Commerce uses the Cohen's d test to evaluate whether "the net prices [of comparable merchandise] to a particular purchaser, region, or period of time differ significantly from the net prices of all other sales of comparable merchandise." Prelim. I&D Memo at 6. To do so, Commerce preliminarily disaggregates the data collected from the individually examined respondents and sorts the sales of each CONNUM[16] into sales to particular purchasers, regions, and periods of time. *See id.* Each grouping of CONNUM sales specific to a purchaser, region, or time period forms a test group and the remaining sales of that CONNUM to all other purchasers, regions, or

[16] CONNUM is short for "control number" and is a product code consisting of a series of numbers reflecting characteristics of a product in the order of their importance used by Commerce to refer to particular merchandise. *See* Prelim. I&D Memo at 6; Def.'s Resp. 22–23.

time periods form a corresponding comparison group. *See* Final I&D Memo at 22.

Commerce performs the Cohen's d test by calculating the difference between the weighted-average sales prices of a test group and its corresponding comparison group, and subsequently comparing that difference in relation to the pooled standard deviation[17] of the two groups.[18] *See id.* at 24. The resulting value is known as the Cohen's d coefficient. *See id.* Commerce considers test group sales to pass the Cohen's d test if the resulting Cohen's d coefficient is equal to or greater than 0.8, which Commerce deems to be a strong indication of significant price differences. *See* Prelim. I&D Memo at 6. Conversely, Commerce views a Cohen's d coefficient value less than 0.8 as an indication that the price differences are not significant. *See id.* Each CONNUM's sales undergo several rounds of analysis to assess whether the export prices differ significantly by way of sales to particular purchasers, regions, or time periods. *See generally* Devi Fisheries' Prelim. Calcs.; Falcon Marine Prelim. Calcs.; *see also* Prelim. I&D Memo at 6. If the weighted-average sales price of a test group pass any of the rounds of the Cohen's d test, then all the sales within that test group are considered to have passed the Cohen's d test as a whole. *See* Devi Fisheries' Prelim. Calcs. at 84–85; Falcon Marine Prelim. Calcs. at 52. Thus, Commerce uses the Cohen's d test to assess whether a respondent's export prices differ significantly with respect to particular purchasers, regions, or periods of time.

Congress has granted Commerce considerable discretion to construct a methodology to apply in a review. Further, the court affords Commerce significant deference in determinations "involv[ing] complex economic and accounting decisions of a technical nature." *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996). Despite its wide discretion, Commerce "must cogently explain why it has exercised its discretion in a given manner," *State Farm*, 463 U.S. at 48–49, and the methodological approach must nevertheless be a "reasonable means of effectuating the statutory purpose" and its conclusions must be supported by substantial evidence in order to be afforded deference.[19] *Ceramica Regiomontana, S.A. v. United States*,

[17] A pooled standard deviation is a composite value representing the variance between multiple data sets, which in this case are the sales prices of the test group and the comparison group. *See* Final I&D Memo at 24.

[18] Commerce only conducts the Cohen's d test if: (1) the test group and its corresponding comparison group each have at least two transactions, and (2) the quantity of sales that make up the comparison group must account for at least five percent of the total quantity of sales of comparable merchandise. *See* Prelim. I&D Memo at 6.

[19] Here, Commerce has adopted a practice based upon the statutory directive for investigations, which requires the court to review Commerce's methodological approach for its reasonableness. However, Commerce is afforded significant deference even in the case of an

10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137, 1139 (Fed. Cir. 1987).

Here, Commerce has reasonably exercised its discretion and considered weighted-average export prices in the Cohen's d test. Neither the statute nor Commerce's practice require it to identify significant price differences through the use of individual export prices rather than weighted-average export prices. Commerce reasonably determines whether export prices differ significantly among purchasers, regions, or time periods by evaluating the relative difference between the weighted-averages of two subgroups of sales. As described above, the test group is comprised of sales to a particular purchaser, region, or time period, and the comparison group is comprised of sales to the other purchasers, regions, or time periods outside of the test group. Commerce then calculates the weighted-average of the export prices that comprise each of these groups and if the difference between the weighted-averages reaches a certain level, Commerce finds that the price differences are significant. The court can discern from Commerce's explanation that export prices differ significantly among purchasers (or regions or time periods) where Commerce observes significant price differences between the weighted-average of sales to a particular purchaser (or region, or time period) and the weighted-average of sales to all other purchasers (or regions, or time periods). The court finds the use of weighted-average export prices reasonable in this case. Significant price differences between the weighted-averages of export prices reasonably indicate that export prices differ significantly because the analysis "uses all of a respondent's reported U.S. sales of subject merchandise" and the weighted-averages are therefore representative of and account for all the export prices. Final I&D Memo at 34. Commerce's approach is thus able to effectuate the purpose of the analysis. While it may be possible in some situations that significant differences in the weighted-averages of export prices would not be indicative that the export prices of individual transactions differ significantly, there is no record evidence to suggest that is the case here. To show that Commerce's use of weighted-averages was improper here, Plaintiffs must demonstrate that Commerce's use of

investigation to implement the statutory directive because Congress has likewise not provided for how Commerce should determine whether application of A-T is appropriate. Specifically, Congress has not specified how Commerce is to discern "a pattern of export prices that differ significantly" or what form of "export prices" Commerce must consider in its pattern analysis. *See* 19 U.S.C. § 1677f-1(d)(1)(B)(i). Thus, in an investigation, the statute leaves it to Commerce's discretion to fill the gap and choose to either use weighted-average export prices or export prices of individual transactions so long as it is reasonable. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984); *Torrington Co. v. United States*, 82 F.3d 1039, 1044 (Fed. Cir. 1996) ("Any reasonable construction of the statute is a permissible construction."); *see also* 19 U.S.C. § 1677f-1(d)(1)(B)(i).

weighted-averages identified significant price differences where such price differences would not be found to be significant through use of individual export prices. Plaintiffs have not demonstrated that the case here is as such.

Plaintiffs' text-based arguments do not stand up to scrutiny. To support its position, Plaintiffs claim that the language under 19 U.S.C. § 1677f-1(d)(1)(B)(i) as implicated in Commerce's practice, "a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time," suggests that Congress intended that the requisite pattern finding must be based on individual export prices. *See* Pls.' Mot. 21–22. Plaintiffs emphasize that the word "differ" in the statute is plural, so they argue that the word is meant to relate to "export prices" rather than to "pattern." *See id.* At oral argument, Plaintiffs maintained that Commerce should instead conduct the Cohen's d test using export prices of individual transactions in the test group and weighted-average export prices in the comparison group. *See* Oral Arg., 32:00–32:33.

Even accepting Plaintiffs' assertion that the word "differ" modifies "export prices" does not lead to the conclusion that Commerce must use export prices of individual transactions rather than weighted-average export prices. Although Congress did not modify "export prices" with "weighted-average" in the statute, Congress similarly decided not to modify "export prices" with "individual transactions" as it had done in other provisions of the antidumping duty statute. *Compare* 19 U.S.C. § 1677f-1(d)(1)(A)(i) and 19 U.S.C. § 1677f-1(d)(1)(B) *with* 19 U.S.C. § 1677f-1(d)(1)(B)(i). Moreover, even if Congress intended for Commerce to establish that individual export prices differ significantly, it is not unreasonable for Commerce to fulfill that goal by looking to averages. Plaintiffs fail to demonstrate why Commerce's choice is unreasonable.[20]

[20] At oral argument, Plaintiffs further reasoned that because Congress has not directed Commerce which type of export prices to consider, Congress clearly intended for the default definition for export price to apply, which is found under 19 U.S.C. § 1677a(a). *See* Oral Arg., 24:49–25:37. Section 1677a(a) defines export price as "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States." 19 U.S.C. § 1677a(a). Plaintiffs argue that this definition requires Commerce to look at the actual export prices. However, nothing in Congress's definition for export price advances Plaintiffs' argument. This statutory provision does not stand for the proposition that Commerce is required to use export prices of individual transactions rather than weighted-average export prices in its practice for reviews.

Plaintiffs also assert that Commerce's use of averages in its Cohen's d calculations distorts the differential pricing analysis. *See* Pls.' Mot. 23–25. Plaintiffs argue that by using weighted-average export prices, Commerce masks individual sales prices and "smooth[s] out differences in individual export prices." *Id.* Averaging prices by definition smooths out differences in individual prices. However, smoothing out differences is not necessarily distortive where Commerce is called upon to determine whether there is a pattern of prices that differ significantly. To show distortion in this context, the relevant question is whether the use of averages reveals significant price differences (or fails to reveal significant price differences) that would not be identified (or would be) without the use of averaging. Plaintiffs fail to make such a showing.

Plaintiffs alternatively argue that Commerce must use monthly weighted-average export prices instead of annual or quarterly weighted-average export prices. *See id.* at 26. For evaluating sales to purchasers and regions for differential pricing, Commerce uses annual weighted-average sales prices in the test groups and comparison groups. *See* Def.'s Resp. 22; Prelim. I&D Memo at 6. For evaluating sales in certain periods of time for differential pricing, Commerce uses quarterly weighted-average sales prices in the test groups and comparison groups. *See* Def.'s Resp. 23; Prelim. I&D Memo at 6. Plaintiffs argue that Commerce should instead use monthly weighted-average export prices because "[l]arger averaging period[s] tend[] to amplify distortions." *See* Pls.' Mot. 26. Plaintiffs ground their argument in Commerce's regulations which require it to use monthly weighted-averages when applying A-A in reviews. *See* 19 C.F.R. § 351.414(d)(3).

The court is unconvinced. Plaintiffs fail to show why the use of monthly averages is either required by the statute or regulation, or why the use of annual or quarterly averages is unreasonable. Commerce's regulation instructs Commerce to apply A-A in reviews as follows:

> (d) Application of the average-to-average method—
>
> . . .
>
> (3) Time period over which weighted average is calculated. . . . When applying the average-to-average method in a review, [Commerce] normally will calculate weighted averages on a monthly basis and compare the weighted-average monthly export price or constructed export price to the weighted-average normal value for the contemporaneous month.

19 C.F.R. § 351.414(d)(3). Plaintiffs' argument misunderstands the function of the differential pricing analysis. The regulation cited by Plaintiffs is inapplicable in this context because it refers to Commerce's use of averages in using the A-A comparison methodology to calculate dumping margins. The differential pricing analysis provides Commerce with a method to identify if a respondent's sales exhibit a pattern of significant price differences, not calculate dumping margins. The regulation in no way restricts the time period over which Commerce calculates the weighted-averages it uses for purposes of finding significant price differences.

Finally, Plaintiffs argue that Commerce has not adequately explained that its use of weighted-averages in the Cohen's d test is consistent with 19 U.S.C. § 1677f-1(d)(1)(B)(i). *See* Pls.' Mot. 25–26. Commerce explained "neither the statute nor the regulations specify how the Department should examine whether there exists a pattern of prices that differ significantly" and therefore its use of weighted-averages is reasonable in light of that silence. *See* Final I&D Memo at 23. While Commerce's explanation could more completely articulate its rationale, Commerce's path is reasonably discernable. It is within Commerce's discretion to determine how to identify significant price differences. Commerce has found that the use of weighted-averages is able to reasonably accomplish its intended purpose of identifying significant price differences. *See id.* at 22–23. As stated above, Commerce reasonably concludes that export prices differ significantly among purchasers, regions, or time periods where it observes significant price differences between the weighted-average of test group sales and the weighted-average of comparison group sales. Implicit in Commerce's explanation is that significant price differences between the weighted-averages of export prices indicates whether the export prices differ significantly. Further, Commerce relies upon its prior use of weighted-averages in its application of the *Nails* test and found that to be reasonable and appropriate. *See id.* Plaintiffs are unable to demonstrate why the use of weighted-averages is unreasonable and unable to identify significant price differences. Although Commerce's explanation is not ideal, it is adequate.

Therefore, Commerce's use of annual and quarterly weighted-averages in the Cohen's d test to discern significant price differences is reasonable.

ii. Commerce's Consideration of All Sales in the Ratio Test

Plaintiffs claim that Commerce must limit the ratio test to "lower priced" sales that pass the Cohen's d test in order to comply with the

statute. *See* Pls.' Mot. 43–45. Plaintiffs argue "Commerce wrongly included 'higher' priced sales (i.e., sales with prices above the 'mean') in determining which sales 'pass' Cohen's d under the first step 'pattern' stage of its [differential pricing] analysis." Pls.' Reply 27. In response, Defendant reiterates Commerce's rationale for considering all sales explaining that Commerce was not required to limit its analysis because "'higher-priced sales are equally capable as lower-priced sales of creating a pattern of prices that differ significantly.'"[21] Def.'s Resp. 30 (quoting Final I&D Memo at 26).

Before Commerce may apply A-T to calculate a respondent's dumping margin, Commerce's practice in reviews requires that it first determine whether that respondent's sales exhibit a pattern of export prices that differ significantly among purchasers, regions, and periods of time. As stated previously, Commerce answers this question by separately addressing whether there are significant price differences and whether those price differences are such that they constitute a pattern. For the second prong of the inquiry, made relevant by Plaintiffs' claim here, Commerce applies the ratio test, which "assesses the extent of the significance of the price differences for all sales as measured by the Cohen's d test" by comparing the combined value of the respondent's U.S. sales that passed the Cohen's d test in relation to the value of all U.S. sales. *See* Prelim. I&D Memo at 6.

To discern whether the sales passing the Cohen's d test constitute a pattern, Commerce has devised the ratio test to categorize a respondent's pricing behavior. Commerce has chosen to consider all sales, regardless of whether they are higher or lower-priced sales, to evaluate the extent of the differentially priced sales. Commerce explained that all sales are relevant to its analysis because "[h]igher-priced sales and lower-priced sales do not operate independently . . . . Higher-or lower-priced sales could be dumped or could be masking other dumped sales . . . . By considering all sales, both higher-priced and lower-priced, the Department is able to analyze an exporter's

[21] In Plaintiffs' Rule 56.2 motion it is not clear whether Plaintiffs are challenging Commerce's consideration of higher priced sales as part of the Cohen's d test, or the inclusion of higher priced sales that pass the Cohen's d test as part of the ratio test, *i.e.*, the first or the second test in the first stage of the differential pricing analysis. *See* Pls.' Mot. 43. Because Defendant understood Plaintiffs' argument as asserting that Commerce was obligated to limit the application of the Cohen's d test to export prices "that reflect the 'mean of comparable merchandise' or lower," Defendant responds by explaining that Commerce properly considered all export prices in its Cohen's d calculations because "'higher-priced sales are equally capable as lower-priced sales of creating a pattern of prices that differ significantly.'" Def.'s Resp. 30 (quoting Final I&D Memo at 26). At oral argument, Plaintiffs clarified that its argument is that Commerce improperly considered sales priced higher than the mean in the ratio test. *See* Oral Arg., 1:03:10–1:03:42. While it remains unclear which "mean" Plaintiffs refer to, it is inconsequential because it has no bearing on the court's decision on this issue.

pricing behavior and to identify whether there is a pattern of prices that differ significantly." Final I&D Memo at 26. This practice is based upon a methodological approach that is reasonable and has been adequately explained. *See State Farm*, 463 U.S. at 48–49 ("[A]n agency must cogently explain why it has exercised its discretion in a given manner."); *Fujitsu General Ltd.*, 88 F.3d at 1039 (granting Commerce significant deference in determinations "involv[ing] complex economic and accounting decisions of a technical nature"); *Ceramica Regiomontana, S.A.*, 636 F. Supp. at 966, *aff'd*, 810 F.2d at 1139 (affording deference to Commerce's methodology so long as it reasonably effectuates the statutory purpose and is supported by substantial evidence). Commerce's practice in reviews requires it to identify a pattern of export prices that differ significantly among purchasers, regions, or periods of time. The inquiry is not limited to lower-priced export prices. It is appropriate for Commerce to consider all sales in its analysis because, in determining whether A-T is appropriate, Commerce is required to uncover significant differences in a respondent's export prices, which necessarily calls for looking at the differences in higher and lower-priced sales to assess whether those differences are in fact significant. Considering all sales allows Commerce to fully assess the breadth of a respondent's price differences. Thus, it is reasonable to examine all of a respondent's sales in its differential pricing analysis.

Nonetheless, Plaintiffs argue that Commerce "improperly increase[d] the pool of sales to which Commerce applies its alternative A-T methodology" by "includ[ing] all sales that 'passed' the Cohen's d test, regardless of whether the sales were priced higher or lower than sales in the test group." Pls.' Mot. 43. Plaintiffs argue that Commerce should only consider lower-price sales that pass the Cohen's d test "for purposes of determining the 33/66 test" in order to be consistent with the statutory scheme. *Id.* at 45. Plaintiffs base their argument on the notion that Commerce must limit its analysis to dumped sales.

Plaintiffs' argument is inapposite because it misconstrues the function of the test that Commerce has established. All sales are subject to the differential pricing analysis because its purpose is to determine to what extent a respondent's U.S. sales are differentially priced, not to identify dumped sales. *See* Final I&D Memo at 25–26. Commerce is not restricted in what type of sales it may consider in assessing the existence of such a pattern so long as its methodological choice enables Commerce to reasonably determine whether application of A-T is appropriate. *See* 19 C.F.R. § 351.414(c)(1).

Plaintiffs' reliance on legislative history to support their argument is unavailing. *See* Pls.' Mot. 43 (citing Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, vol. 1, at 843 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4178 ("SAA")). Plaintiffs assert that, according to the SAA, "the whole point of Commerce's [differential pricing] analysis and A-T remedy is to combat 'targeted *dumping*.'" *Id.* Plaintiffs yet again fail to recognize that the subject of Commerce's inquiry is differentially priced sales, not dumped sales. *See* Final I&D Memo at 25–26. Contrary to Plaintiffs' argument, the SAA also explains "an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions." SAA at 4177–78. Therefore, the SAA also supports the view that consideration of both lower and higher-priced sales may be appropriate in determining whether application of A-T is necessary to unmask dumping. For the reasons discussed above, Plaintiffs are unable to demonstrate that Commerce's decision to consider all sales in the ratio test was unreasonable.

iii. Commerce's Pattern Determination is Supported by Substantial Evidence

Because of the challenges discussed above, Plaintiffs argue that Commerce's finding that the mandatory respondents' U.S. sales exhibited a pattern of export prices that differ significantly among purchasers, regions, or time periods is not supported by substantial evidence. *See* Pls.' Mot. 26–28; Pls.' Reply 12–13. Plaintiffs insist that there is no particular reason why certain sales passed the Cohen's d test while other sales did not pass because "pricing differences among sales that 'passed' Cohen's d and those that failed were often minuscule." Pls.' Mot. 27. Defendant in response explains "that certain select prices that pass and fail the Cohen's *d* test are close in value does not mean that the differences between the sales, as well as the thousands of other sales, are not statistically significant." Def.'s Resp. 33.

The fact that the price differences between sales that pass and do not pass the Cohen's d test were at times small in absolute terms does not undermine Commerce's pattern determination. Indeed, "small differences may be significant for one industry or one type of product but not for another." Final I&D Memo at 24 (quoting SAA at 843). Commerce explained that its analysis has been developed to identify significant price differences depending on what is considered significant for a particular industry or product. *See id.* "Specifically, the

Cohen's *d* coefficient measures the significance of the difference in the weighted-average sales price between the test and comparison groups relative to the variances of the individual sales prices within each group." *Id.* Therefore, Commerce's approach accounts for what degree of price differences is necessary to be deemed significant by comparing sales prices in relation to the average price variation between sales prices of a CONNUM, *i.e.*, the test group and comparison group. The significance of the price difference is determined by the "variance[] of the individual sales prices within each group." *Id.* "Thus, if there is little variance in prices among purchasers in a particular industry, regions, or time periods, then small differences, in absolute terms, may be significant. On the other hand, if individual sale prices within each comparison group . . . have a greater variability . . . [,] then there must be greater differences in the weighted-average sale prices between the two groups for the difference to be significant." *Id.* The fact that the price differences among the sales passing and not passing the Cohen's d test are insignificant in absolute terms does not mean that the relative differences are not significant for purposes of identifying a pattern of significant price differences. Implicit in Commerce's approach is that the relative significance of the differences is what matters. Accordingly, Commerce's pattern determination is supported by substantial evidence.

B. Commerce Has Explained Why A-A Cannot Account for the Pattern of Significant Price Differences

Plaintiffs challenge Commerce's determination that A-A cannot account for the pattern of significant price differences. *See* Pls.' Mot. 28–36. Defendant responds that Commerce provided an adequate explanation by evaluating whether the differences in the A-A margin in comparison to the A-T margin are "meaningful." *See* Def.'s Resp. 34. Commerce has adequately explained why A-A cannot account for the pattern of significant price differences.

Once Commerce establishes that there is a pattern of significant price differences, Commerce's practice in reviews requires it to explain whether A-A cannot account for such price differences before deciding to apply A-T.[22] Commerce has chosen to answer whether A-A

[22] The court acknowledges that the statute governing Commerce's authority to apply A-T in investigations conditions its use upon Commerce providing an explanation for why A-A and T-T cannot account for the observed pattern of significant price differences. *See* 19 U.S.C. § 1677f-1(d)(1)(B)(ii). However, Commerce's practice in reviews evidently differs from the statutory requirements in that regard because in reviews Commerce has only provided an explanation for why A-A cannot account for the significant price differences observed in the first stage of the differential pricing analysis. Because Commerce is not bound by the statute, but rather, it is bound by its practice, and Plaintiffs apparently have not challenged

cannot account for such price differences by engaging in its meaningful differences analysis, which is the second stage of the differential pricing analysis. *See* Prelim. I&D Memo at 7; Final I&D Memo at 3, 22. In its meaningful differences analysis, Commerce examines whether A-A can account for the significant price differences attributable to the subject sales that pass both the Cohen's d test and ratio test. *See* Prelim. I&D Memo at 7. To answer this inquiry, Commerce determines whether the A-T margin, calculated in the manner suggested by the preceding Cohen's d and ratio tests, yields a meaningful difference in comparison to the A-A calculated margin. *See id.* In other words, Commerce's meaningful difference analysis calls for a comparison of margins calculated by applying A-A and A-T in the manner suggested by the ratio test. *See id.* Commerce finds a meaningful difference in the calculated margins if (1) the A-T calculated margin crosses the *de minimis* threshold while the A-A calculated margin remains *de minimis*, or, (2) if both calculated margins are above *de minimis*, the A-T calculated margin is 25% greater than the A-A calculated margin.[23] *See id.* If such a finding is made, Commerce proceeds to apply A-T as dictated by the first stage of the analysis to calculate the respondent's antidumping duty rate. *See id.* Put simply, Commerce finds that A-A cannot account for the significant price differences if there is a meaningful difference between the A-A calculated margin as compared to the A-T calculated margin. *See id.* ; Final I&D Memo at 3, 22.

Here, Commerce calculated a margin of 0.00% for both respondents when using A-A, however, it calculated a margin of 1.97% for Devi Fisheries and 3.01% for Falcon Marine when using A-T as directed by the ratio test. *See* Devi Fisheries' Prelim. Calcs. at 2; Falcon Marine's Prelim. Calcs. at 2. Thus, Commerce determined that the A-A method could not account for the significant price differences among the mandatory respondents' U.S. sales because the A-T calculated margin resulted in a meaningful difference in relation to the A-A calculated margin. *See* Devi Fisheries' Prelim. Calcs. at 1–2; Falcon Marine's Prelim. Calcs. at 1–2. For Devi Fisheries, Commerce explained that "when comparing the weighted-average dumping margins calculated

Commerce's failure to explain why T-T cannot account for the pattern of significant price differences, the court does not opine on whether Commerce provided an adequate explanation for why T-T in addition to A-A cannot account for the significant price difference, as Commerce is required by statute in an investigation.

[23] Because the latter is not implicated in this case, the court's discussion is limited to assessing whether Commerce's conclusion in the second stage of the differential pricing analysis, that application of A-T was appropriate here because the A-T calculated margin crossed the *de minimis* threshold while the A-A calculated margin remained *de minimis*, provided an adequate explanation for why A-A cannot account for the significant price differences.

using the average-to-average method for all U.S. sales and the average-to-transaction method for all U.S. sales, there is a meaningful difference in the results (*i.e.*, the margin moves across the *de minimis* threshold)." Devi Fisheries' Prelim. Calcs. at 2. Similarly, for Falcon Marine, Commerce explained that "when comparing the weighted-average dumping margins calculated using the average-to-average method for all U.S. sales and the 'mixed alternative' methodology, there is a meaningful difference in the results (*i.e.*, the margin moves across the *de minimis* threshold)." Falcon Marine's Prelim. Calcs. at 2. As a result, Commerce proceeded to apply A-T in some form to calculate the mandatory respondents' dumping margins. *See* Devi Fisheries' Prelim. Calcs. at 2; Falcon Marine's Prelim. Calcs. at 2.

The court must address whether Commerce's explanation for why A-A cannot account for the pattern of significant price differences is reasonable. *See State Farm*, 463 U.S. at 48–49; *Fujitsu General Ltd.*, 88 F.3d at 1039; *Ceramica Regiomontana, S.A.*, 636 F. Supp. at 966, *aff'd*, 810 F.2d at 1139. Commerce's rationale presumes that A-A cannot account for the pattern of significant price differences if the difference in the margins calculated using A-A and A-T is meaningful. As stated previously, Commerce's explanation posits that there is a meaningful difference where the A-A calculated margin is *de minimis* and the A-T calculated margin is not *de minimis*. Implicit in Commerce's meaningful differences analysis is that A-A can account for some degree of price differences. There may be instances where the identified prices differences do not mask dumping or the masked dumping itself is *de minimis*. However, where the amount of uncovered masked dumping results in an A-T calculated margin that is not *de minimis*, and the A-A calculated margin would be *de minimis*, it is reasonable for Commerce to presume that A-A cannot account for the pattern of significant price differences because, unlike A-T, A-A cannot uncover the dumping that was masked by the differentially priced sales. The fact that A-A was unable to calculate more than a negligible dumping margin while A-T was able to is reason enough to demonstrate that A-A could not account for the pattern of significant price differences here.[24]

[24] In other instances, the Court has found that Commerce has failed to satisfy its obligation to explain why A-A cannot account for the pattern of significant price differences. *See, e.g.*, *Beijing Tianhai Industry Co. v. United States*, 39 CIT __, __–__, 106 F. Supp. 3d 1342, 1349–51 (2015). Here, however, the court finds that Commerce's explanation for why A-A cannot account for the pattern of significant price differences is adequate given the circumstances.

Admittedly, the language of the statute and legislative history suggest that A-A will more often than not be able to account for the price differences identified pursuant to 19 U.S.C.

Moreover, reasonableness in a review is particularly tied to the objective of the review itself. Administrative reviews have unique "transactional accuracy interests," and, as a result, the objective of a review is to uncover dumping with greater specificity. *See Union Steel v. United States*, 713 F.3d 1101, 1104 (Fed. Cir. 2013). In furtherance of that objective, it is reasonable for Commerce to presume that A-A cannot account for the price differences in instances where A-A is unable to uncover any dumping at all and A-T is able to do so. Therefore, Commerce's explanation that A-A could not account for the significant price differences here is reasonable.

Plaintiffs argue that Commerce improperly considered all sales in the meaningful difference analysis rather than limiting the analysis to targeted sales. *See* Pls.' Mot. 31–33. Plaintiffs contend that Commerce's requirement to explain why A-A cannot account for "such differences" is in direct reference to the export prices that exhibited significant price differences, *i.e.*, passed the Cohen's d test, which

§ 1677f-1(d)(1)(B)(i). *See* 19 U.S.C. § 1677f-1(d)(1)(B)(ii); SAA at 843. However, the statutory directive for investigations, which now guides Commerce's approach in reviews, was written during a time when zeroing under A-A was allowed and indeed the norm in investigations. In such a case it might be rare that A-A could not account for differences and in those rare cases such an explanation would more easily present itself. Now that A-A no longer entails zeroing, *see generally Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dep't Commerce Dec. 27, 2006), Commerce is left in a difficult position because the statutory language remains the same despite the dramatic change in the A-A method. It is now unlikely that A-A could account for the price differences because A-A now provides offsets for negative dumping, which may mask those price differences rather than account for such differences.

Nonetheless, there are cases where despite the finding of a pattern of export prices that differ significantly, A-A will be able to account for those differences. For example, A-A would be able to account for the pattern of significant price differences if the respondent's dumping, if any, is not masked by the significant price differences.

Where the dumping is masked by the significant price differences, it is unlikely that A-A will be able to account for those price differences. In those cases, Commerce has implemented a practice of using the meaningful differences analysis, which effectively presumes that A-A cannot account for the pattern of significant price differences if the A-T calculated margin crosses the *de minimis* threshold while the A-A calculated margin remains *de minimis*. To provide an explanation, Commerce must draw a connection between the differences and the efficacy of A-A as compared to A-T. Here, Commerce observed the differences in the margins calculated by the two methods and presumed that the significant price differences cannot be accounted for by A-A because "when comparing the weighted-average dumping margins . . . , there is a meaningful difference in the results (*i.e.*, the margin moves across the *de minimis* threshold)." Devi Fisheries' Prelim. Calcs. at 2; Falcon Marine's Prelim. Calcs. at 2. The court can discern from Commerce's explanation that A-A cannot account for the pattern of significant price differences because A-A masked the dumping that was occurring as revealed by the A-T calculated margin. Thus, the meaningful difference between the margins demonstrated that A-A is not equipped to uncover the mandatory respondents' dumping. Although the court finds Commerce's explanation to be less than ideal, Commerce adequately explained why A-A cannot account here.

Plaintiffs refer to as targeted sales. *See id.* at 32. Plaintiffs are unable to point to any authority that restricts Commerce from comparing margins encompassing all sales rather than comparing margins limited to the sales that passed the Cohen's d test. It is reasonable for Commerce to judge whether A-A is able to account for the price differences by assessing its ability to do so against all sales, as it would ultimately need to be able to do so when calculating the dumping margin.

Similarly, Plaintiffs' argument that Commerce's meaningful differences analysis "was mostly just measuring the effect of zeroing" lacks merit. *Id.* at 34. Plaintiffs contend that if Commerce were to eliminate zeroing on the A-T side of the comparison or zero for both the A-T and A-A margin calculations, the difference between the A-T and A-A margins for the mandatory respondents are minimal. *See id.* While Plaintiffs may be correct that the A-T and A-A margins would be nearly identical if one were to either eliminate zeroing or zero on both sides of the comparison, that fact does not present an arguable issue because zeroing is used in conjunction with A-T and has been affirmed as reasonable by the Court of Appeals for the Federal Circuit.[25] The purpose of A-T is to reveal those cases where offsetting masks dumping, and that purpose is achieved by zeroing. Indeed, without zeroing the A-A and A-T comparison methodologies "would always be mathematically equivalent, obviating any benefit derived from having an alternative comparison methodology in the statute." Def.'s Resp. 40. The zeroing characteristic of A-T is inextricably linked to the comparison methodology and its effect in the meaningful difference analysis does not render the approach unreasonable. Thus, despite Plaintiffs' contentions, Commerce's determination that A-A could not account for the significant price differences here is reasonable.

[25] The A-T method, unlike the A-A comparison method, is typically used in conjunction with "zeroing where negative dumping margins (i.e., margins of sales of merchandise sold at nondumped prices) are given a value of zero and only positive dumping margins (i.e., margins for sales of merchandise sold at dumped prices) are aggregated." *See Union Steel*, 713 F.3d at 1104 (internal quotations omitted); *see also Final Modification*, 77 Fed. Reg. at 8,101. Zeroing has been found as a reasonable interpretation of "dumping margin" in 19 U.S.C. § 1677(35)(A). *See, e.g.*, *Timken Co. v. United States*, 26 CIT 1072, 1085–86, 240 F. Supp. 2d 1228, 1242–44 (2002) *aff'd*, 354 F.3d 1334, 1340–45 (Fed. Cir. 2004) (determining that zeroing in an administrative review was a reasonable interpretation of an ambiguous statute); *Corus Staal BV v. Dep't of Commerce*, 27 CIT 388, 395–400, 259 F. Supp. 2d 1253, 1260–65 (2003) *aff'd*, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (determining that zeroing in an antidumping duty investigation was a reasonable interpretation of an ambiguous statute).

C. Commerce's Application of the Mixed Comparison Methodology

Plaintiffs argue that in applying the mixed comparison methodology[26] and aggregating the A-T and A-A margins to calculate Falcon Marine's weighted-average dumping margin, Commerce improperly used what Plaintiffs refer to as "double-zeroing." *See* Pls.' Mot. 37–43. Defendant responds that Plaintiffs' claim lacks a legal basis for restricting Commerce's discretion, and Commerce's approach is reasonable because it allows Commerce to avoid potential remasking of dumping. *See* Def.'s Resp. 41–44.

In those cases where between 33% and 66% of the value of a respondent's U.S. sales pass the Cohen's d test, Commerce applies a hybrid methodology whereby it applies A-T only to a portion of a respondent's sales. *See* Prelim. I&D Memo at 6. Under this hybrid methodology, Commerce calculates two weighted-average dumping margins, one using A-T with zeroing, and a second margin using A-A with offsets of negative dumping to the other sales. Commerce then aggregates the two calculated margins and in the process prevents any excess negative dumping from the A-A calculated margin from negating the A-T calculated margin. Plaintiffs' challenge lies in the last step of the methodology.

Here, Commerce calculated a combined margin of 3.01% for Falcon Marine by applying A-T to its sales that passed the Cohen's d test and applying A-A to the sales that did not pass the Cohen's d test. *See* Falcon Marine's Prelim. Calcs. at 2. Commerce aggregated the two calculated margins but did not allow the A-A calculated margin to provide for additional offsets while aggregating the margins. Commerce justified its method with the following explanation:

> The [A-A] method and the [A-T] method are different comparison methods which are provided for in the act and regulations and which are distinct and independent from each other. . . . To calculate the weighted-average dumping margin for a respon-

[26] According to Commerce's practice, the ratio test supports applying A-T to all U.S. sales, whether passing the Cohen's d test or not, if the value of the sales passing the Cohen's d test accounts for at least 66% of the value of all sales. *See* Prelim. I&D Memo at 6. Within this threshold, Commerce views the extent of the significance of the price differences to be so pervasive as to warrant applying A-T to all U.S. sales. Conversely, the ratio test does not support application of the alternative A-T method to any sales if the sales passing the Cohen's d test account for 33% or less of the value of all sales. *See id.* Commerce views sales under this category fall short to constitute a pattern of significant price differences. However, the ratio test supports application of a mixed methodology, combining two margins calculated by applying A-T only to those sales passing the Cohen's d test and A-A to all other sales, if the sales passing the Cohen's d test account for more than 33% but less than 66% of the value of all sales. *See id.* Thus, Commerce has fashioned remedies dependent upon which threshold the respondent's pricing behavior falls under.

> dent whose sales have been evaluated using more than one comparison method, the Department reasonably aggregates the results of each of these distinct comparison methods . . . . To allow for offsets when combining the results of the mixed comparison approach would defeat the purpose of the [A-T] method . . . . Such an approach would allow the results of the [A-A] method to reduce or completely negate the results of the [A-T] method prescribed by [19 U.S.C. § 1677f-1(d)(1)(B)]. Instead, by preserving the results of the [A-T] method, the Department ensures that the purpose of the [A-T] method of uncovering masked dumping is fulfilled, just as it is when the Department applies the [A-T] method as a singular comparison method.

Final I&D Memo at 35–36.

Plaintiffs do not challenge Commerce's decision to apply a hybrid methodology, nor the thresholds it has established. Instead, Plaintiffs contend that although Commerce must necessarily calculate two separate rates, A-T for the differentially priced sales and A-A for the other sales, it should allow the remaining non-dumped sales from the latter group to offset the dumping in the former rather than zero them when the two rates are combined. *See* Pls.' Mot. 37–43. Given that there is no legal authority that constrains how Commerce is to apply A-T when appropriate or arrive at the final margin in its hybrid methodology, the court must only address whether Commerce's methodology is reasonable. *See Fujitsu General Ltd.*, 88 F.3d at 1039; *Ceramica Regiomontana, S.A.*, 636 F. Supp. at 966, *aff'd*, 810 F.2d at 1139.

Commerce has crafted an analysis that applies A-T in proportion to the degree of a respondent's impermissible pricing behavior. Such a scheme is consistent with the fact that the antidumping duty regime is intended to be remedial as opposed to punitive. *See Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1027 (Fed. Cir. 2007) ("The purpose of the antidumping statute is to prevent foreign goods from being sold at unfairly low prices in the United States to the injury of existing or potential United States producers."). To calculate Falcon Marine's weighted-average dumping margin in the mixed comparison methodology, Commerce had the option to aggregate the two calculated margins by either providing for or not providing for offsets where there was negative dumping in the sales subject to A-A. Commerce has made the discretionary decision not to provide for offsets to calculate the weighted-average dumping margin for a respondent whose dumping has been assessed using more than one comparison method. Commerce's method of aggregating two separate

weighted averages, one with offsets and one without, is reasonable because it proportionately applies the remedy across the sales. It is not unreasonable for Commerce to decline to use offsets during the aggregation stage because, as explained by Commerce, without such offsets, the masked dumping uncovered by the analysis is preserved and the A-T remedy nonetheless remains confined to the differentially priced sales by "summing the amount of dumping and the U.S. sales value for each of these methods." Final I&D Memo at 35–36.

Plaintiffs' argument that "double-zeroing" results in an arbitrary and unfair rate is belied by its own example. *See* Pls.' Mot. Attach. 1 at 1. In a comparison of positive dumping and negative dumping on both A-A and A-T sales, Plaintiffs contend Falcon Marine receives a 3.01% rate with double-zeroing and a 1.52% rate without double-zeroing. But Plaintiffs fail to consider the fact that the 3.01% rate is a rate that is derived from dividing its A-T sales by the value of all its sales, both sales that were found to be differentially priced and those that were not.[27] *See id.* at 1 n.2. The A-T rate has already been offset by virtue of the aggregation of the two rates because the 3.01% rate is a function of the value of the dumped sales relative to the total value of all sales. Thus, Commerce's aggregation method is reasonable because the remedy for Falcon Marine's pricing behavior has been limited to address the masked dumping by proportionally applying the remedy across all sales.

Plaintiffs' proposition to provide for further offsets could render the A-T method ineffective in situations where a respondent's U.S. sales fall between the 33% and 66% threshold and result in a negative dumping margin in the A-A side of the equation. As Defendant points out, Plaintiffs are supporting "double-offsetting" in the process of arguing that Commerce has "double-zeroed." *See* Def.'s Resp. 44. It is reasonable for Commerce to prevent the A-A margin from diminishing the A-T margin for the same reasons why the A-T method does not provide for offsets for negative dumping. Margins calculated using A-T only trend upwards due to the inherent nature of the methodol-

[27] Plaintiffs argue that Commerce should further offset the total amount of dumping with Falcon Marine's negative dumped sales before aggregating the A-T and A-A calculated margins, *i.e.*, ([[ ]] – [[ ]]) / [[ ]], for an antidumping duty rate of 1.52%. *See* Pls.' Mot. Attach. 1 at 1. Commerce has instead chosen to aggregate the A-T and A-A calculated margins by dividing the total amount of the uncovered dumping by the value of all sales, *i.e.*, [[ ]] / [[ ]], to arrive at an antidumping duty rate of 3.01%. *See* Falcon Marine Prelim. Calcs. at 70 (providing the value of the dumped sales and all sales). Commerce has fashioned a remedy calling for an intermediary application of A-T that is proportionate to the degree of masked dumping in relation to the value of all sales. *See* Falcon Marine Prelim. Calcs. at 70 (providing the value of the dumped sales and all sales subject to A-T).

ogy. To declare Commerce's refusal to offset the A-T margin with the A-A margin unreasonable would in turn undermine the A-T method as a whole.

V. Commerce's Rejection of Respondents' Administrative Case Brief Was Reasonable and in Accordance with Law

Plaintiffs contend that Commerce's rejection of Respondents' case brief was unsupported by substantial evidence and not in accordance with law. *See* Pls.' Mot. 45. Defendants argue that Respondents "filed untimely new factual information in their initial case brief." Def's Resp. 45. Commerce properly rejected Respondents' case brief for containing untimely filed new factual information.

Commerce's regulations specify deadlines for when parties must make submissions. *See e.g.*, 19 C.F.R. § 351.301(a) (providing that "[t]his section sets forth the time limits for submitting factual information"). For reviews commenced prior to May 10, 2013, any submission of factual information is due no later than "140 days after the last day of the anniversary month" of the antidumping duty order. 19 C.F.R. § 351.301(b)(2). The regulations define factual information as "(i) [i]nitial and supplemental questionnaire responses; (ii) [d]ata or statements of fact in support of allegations; (iii) [o]ther data or statements of facts; and (iv) [d]ocumentary evidence."[28] 19 C.F.R. § 351.102(b)(21). Notwithstanding 19 C.F.R. § 351.301(b)(2), interested parties may submit factual information to rebut factual information submitted by another interested party "prior to the deadline," or, "[i]f

[28] Commerce modified its regulation providing for the definition of factual information. The regulation now provides the following definition:

> (21) Factual information. "Factual information" means:
>
> (i) Evidence, including statements of fact, documents, and data submitted either in response to initial and supplemental questionnaires, or, to rebut, clarify, or correct such evidence submitted by any other interested party;
>
> (ii) Evidence, including statements of fact, documents, and data submitted either in support of allegations, or, to rebut, clarify, or correct such evidence submitted by any other interested party;
>
> (iii) Publicly available information submitted to value factors under § 351.408(c) or to measure the adequacy of remuneration under § 351.511(a)(2), or, to rebut, clarify, or correct such publicly available information submitted by any other interested party;
>
> (iv) Evidence, including statements of fact, documents and data placed on the record by the Department, or, evidence submitted by any interested party to rebut, clarify or correct such evidence placed on the record by the Department; and
>
> (v) Evidence, including statements of fact, documents, and data, other than factual information described in paragraphs (b)(21)(i)–of this section, in addition to evidence submitted by any other interested party to rebut, clarify, or correct such evidence.

19 C.F.R. § 351.102(b)(21) (2015). However, this definition for factual information only applies to proceedings initiated on or after May 10, 2013. *See Definition of Factual Information and Time Limits for Submission of Factual Information*, 78 Fed. Reg. 21,246, 21,246 (Dep't Commerce Apr. 10, 2013). Because the instant review was commenced on April 2, 2013, the former version of the definition for factual information governs this case.

factual information is submitted less than 10 days before, on, or after . . . the application deadline for submission of such factual information, . . . no later than 10 days after the date such factual information is served on the interested party." *See* 19 C.F.R. § 351.301(c)(1). When Commerce rejects factual information as untimely, it disregards it in making any determination, and the record reflects it for the sole purpose of "documenting the basis for rejecting the document." 19 C.F.R. § 351.104(a)(2).

On May 2, 2014, Respondents submitted a case brief disputing the propriety of the differential pricing analysis. *See generally* Respondents' Rejected Case Brief, PD 150–51 at bar code 3199459–01 (May 2, 2014). Commerce rejected Respondents' case brief for containing expert economic analysis and excerpts from a U.S. International Trade Commission ("ITC") Staff Report, which Commerce considered to be untimely filed new factual information pursuant to 19 C.F.R. § 351.301(b)(2). *See* First Rejection Letter at 1, PD 153 at bar code 3199778–01 (May 5, 2014); First Rejection Memorandum, PD 154 at bar code 3199858–01 (May 6, 2014). Respondents re-filed the case brief with the rejected information redacted. Respondents twice sought reconsideration but were rejected. *See generally* Respondents' Case Brief, PD 156–57 at bar code 3200354–01 (May 8, 2014); Second Rejection Letter, PD 164 at bar code 3201803–01 (May 14, 2014); Second Request for Reconsideration, PD 167 at bar code 3202381–01 (May 16, 2014); Second Rejection Memorandum, PD 168 at bar code 3202864–01 (May 20, 2014); Letter from Commerce Pertaining to New Factual Information, PD 170 at bar code 3206406–01 (June 2, 2014).

Commerce reasonably rejected Respondents' case brief for containing untimely filed new factual information. Because Respondents submitted their case brief on May 2, 2014, any new factual information was untimely as the deadline for such information was July 18, 2013. *See* 19 C.F.R. § 351.301(b)(2). Commerce noted that the information consisted of "1) an analysis submitted by the respondents' affiant, including this individual's credentials; 2) citations to, and information from, statistical reference materials; and, 3) data from other U.S. government agencies," and concluded that "[s]uch categories of information are more than mere argument." Final I&D Memo at 40. As Commerce correctly concluded, Respondents' expert economic opinion included statistical references, analysis, and mathematical formulae not previously submitted on the administrative record. Thus, the expert opinion provided evidentiary support for Respondents' argument using information that was not on the record. Even if Respondents' expert opinion only analyzed information al-

ready on the record, the expert analysis "clearly assumes the weight of evidence and, as such, amounts to [d]ata or statements of fact in support of allegations, i.e., factual information." *See PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 760–61 (Fed. Cir. 2012) (internal quotations omitted). Similarly, Respondents' excerpt of the ITC Staff Report included data not previously on the administrative record "submitted for the purpose of the facts contained therein." Final I&D Memo at 42. Thus, Commerce's determination that Respondents' case brief contained untimely new factual information is supported by substantial evidence and in accordance with law.

Plaintiffs contend that Commerce improperly rejected the information in their case brief because such information was argument, not new factual information. *See* Pls.' Mot. 46. However, Plaintiffs do not provide any authority to support their conclusory claim that Respondents' submission contained argument rather than factual information.

Plaintiffs alternatively assert that Respondents' case brief rebutted new information placed on the record by Commerce in the preliminary results. *See* Pls.' Mot. 46; Pls.' Reply 28–29. As a preliminary matter, Commerce's preliminary determination does not contain new factual information. In its preliminary determination, Commerce makes its findings based on information that has been timely submitted and placed on the record. Further, Commerce's regulation permits the submission of new factual information to rebut information submitted by an interested party, not Commerce. *See* 19 C.F.R. § 351.301(c)(1) (providing that "[a]ny interested party may submit factual information to rebut, clarify, or correct factual information submitted by any other interested party") "Interested party" includes, among others, foreign manufacturers, foreign exporters, foreign producers, or U.S. importers, but does not include Commerce. *See* 19 U.S.C. § 1677(9).[29] In fact, Commerce is separately listed as "Department" under 19 C.F.R. § 351.102(b)(15) and "Administering authority" under 19 U.S.C. § 1677(1)." The regulation confers a limited right to submit new information as rebuttal only after another interested party has submitted factual information and fails to offer the support Respondents need.[30]

[29] The regulations do not expressly provide for a definition of "interested party," but incorporate terms defined in the Tariff Act of 1930, as amended, that are not defined in the relevant regulations. *See* 19 C.F.R. § 351.102(a), (b)(17), (b)(42) (directing attention to 19 U.S.C. § 1677(9)(A)–(G) for definitions of domestic and respondent interested party).

[30] Even if Commerce were considered an interested party, Plaintiffs still cannot avail themselves of the rebuttal exception, as the exception confers the right to rebut information submitted by an interested party no later than 10 days after such submission. *See* 19 C.F.R. § 351.301(c)(1). Respondents did not submit the new factual information until 45 days after

Plaintiffs contend that Commerce's rejection of Respondents' case brief denied Respondents a meaningful opportunity to comment because the Cohen's d test was first announced in the preliminary results, promulgated on March 25, 2014, long after the July 18, 2013 deadline for submitting new factual information. *See* Pls.' Mot. 46; Pls.' Reply 28–29. At oral argument, Plaintiffs further argued that Respondents were first given notice of the specifics of the analysis and determined there was a need to obtain an expert to make a challenge when the preliminary results were issued. *See* Oral Arg., 1:58:40–2:00:38.

Respondents had notice and a meaningful opportunity to comment upon the Cohen's d test before the preliminary results were issued. Respondents were entitled to "'notice and a meaningful opportunity to be heard.'" *PSC VSMPO-Avisma Corp.*, 688 F.3d at 761–62 (quoting *LaChance v. Erickson*, 522 U.S. 262, 266 (1998)). Respondents' case brief contained both specific and general challenges with respect to Commerce's differential pricing analysis. As Commerce noted, the Cohen's d test was announced in a post-preliminary analysis memo promulgated on March 4, 2013 in connection with the investigation of xanthan gum from the People's Republic of China, before the instant review had even been initiated. *See Xanthan Gum From the People's Republic of China*, 78 Fed. Reg. at 33,351 n.2 (citing to the March 4, 2013 post-preliminary differential pricing analysis); *see also* Final I&D Memo at 41. Further, Commerce cited to two other administrative reviews where it employed the Cohen's d test prior to the July 18, 2013 deadline. *See* Final I&D Memo at 41 n.156 (citing *Circular Welded Carbon Steel Pipes and Tubes From Thailand*, 78 Fed. Reg. 21,105 (Dep't Commerce Apr. 9, 2013) (preliminary results of antidumping duty administrative review; 2011–2012); *Certain Activated Carbon From the People's Republic of China*, 78 Fed. Reg. 26,748 (Dep't Commerce May 8, 2013) (preliminary results of antidumping duty administrative review; 2011–2012)). Thus, Respondents were given adequate notice to timely submit the factual information necessary to at least make its facial challenges to the analysis.

Moreover, despite Plaintiffs' position that Respondents needed information regarding the specific calculations in the differential pric-

the preliminary results were issued. While the case brief was timely, the factual information contained therein was untimely even for rebuttal purposes. The court recognizes that Commerce has since amended its regulations to provide interested parties a single opportunity "to submit factual information to rebut, clarify, or correct factual information placed on the record of the proceeding by the Department by a date specified by the Secretary." 19 C.F.R. 351.301(c)(4) (2015). However, this provision only applies to proceedings initiated on or after May 10, 2013. *See Definition of Factual Information and Time Limits for Submission of Factual Information*, 78 Fed. Reg. 21,246, 21,246 (Dep't Commerce Apr. 10, 2013).

ing analysis in order to meaningfully comment, Respondents failed to request that Commerce extend the deadline for interested parties to submit factual information. *See id.* at 41. Respondents had the opportunity to submit factual information challenging the Cohen's d test in a timely fashion, at least for its general challenges to Commerce's analysis, but failed to do so. Respondents' sole opportunity to comment was not in its case brief as Plaintiffs claim.

Lastly, Plaintiffs citation to *Wuhu Fenglian Co. v. United States*, 37 CIT __, 836 F. Supp. 2d 1398 (2012), as support for its argument is inapposite. Plaintiffs argue that *Wuhu* stands for the proposition that "Commerce abuses its discretion if it does not allow a party to rebut information placed on the record by Commerce, even if there is no regulation requiring such a practice." Pls.' Mot. 45–46. In that case, Commerce had placed CBP data on the record and the court found it abused its discretion by not allowing parties to rebut that information simply because the regulations do not authorize interested parties to do so. However, CBP data used for the purposes of supplementing the record cannot be analogized with the issuance of preliminary results. Commerce does not place new factual information on the record through issuance of the preliminary results. Preliminary results embody Commerce's preliminary findings after it considers the information that has been timely submitted and placed on the record. Thus, there was no new factual information for the Respondents to rebut. Commerce did not abuse its discretion when it rejected Respondents' case brief for containing untimely filed factual information.

CONCLUSION

For the reasons discussed above, the court determines that the final results are supported by substantial evidence and in accordance with law. Therefore, Plaintiffs' motion for judgment on the agency record is denied and the final results are sustained. Judgment will be entered accordingly.

Dated: February 2, 2016
New York, New York

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

Slip Op. 16–10

CP KELCO (SHANDONG) BIOLOGICAL COMPANY LIMITED and CP KELCO US, INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 15–00328

[Granting Defendant's motion to dismiss for lack of subject matter jurisdiction.]

Dated: February 9, 2016

Nancy Aileen Noonan, Arent Fox LLP, of Washington DC, for Plaintiffs. With her on the brief were *Matthew L. Kanna* and *Julia Ann Lacovara*.

Loren Misha Preheim, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director. Of counsel was *Heather Noel Doherty*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Kelly, Judge:

Plaintiff CP Kelco (Shandong) Biological Company Limited ("CP Kelco Shandong") and Plaintiff CP Kelco US, Inc. (collectively "Plaintiffs") bring this action pursuant to 28 U.S.C. § 1581(i)(2) and (4) (2012)[1] for judicial review of a decision by the U.S. Department of Commerce ("Commerce" or "Department") during the impending second administrative review of the antidumping duty order covering xanthan gum from the People's Republic of China. *See generally* Compl., Dec. 22, 2015, ECF No. 1; *see also Xanthan Gum From the People's Republic of China*, 78 Fed. Reg. 43,143 (Dep't Commerce July 19, 2013) (amended final determination of sales at less than fair value and antidumping duty order). Plaintiffs' Complaint claims that Commerce's decision to deny CP Kelco Shandong's request for treatment as a voluntary respondent and to instead consider Deosen Biochemical Ltd. and Deosen Biochemical (Ordos) Ltd. (collectively "Deosen") as a potential mandatory respondent in the administrative review is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or facts." Compl. ¶¶ 38–54.

On December 23, 2015, Plaintiffs filed an application for a temporary restraining order ("TRO") and a motion for a preliminary injunction ("PI") requesting the court to restrain and enjoin Commerce from reviewing Deosen's questionnaire responses and from selecting Deo-

[1] Further citations to Title 28 of the U.S. Code are to the 2012 edition.

sen as a mandatory respondent. *See generally* Pls.' Appl. TRO & Mot. Prelim. Inj. & Mem. P. & A. in Supp., Dec. 23, 2015, ECF No. 11 ("Appl. TRO & Mot. PI"). Plaintiffs concurrently filed a petition for writ of mandamus requesting that the court compel Commerce to select CP Kelco Shandong as a voluntary respondent in the review. *See generally* Pet. Writ Mandamus, Dec. 23, 2015, ECF No. 13. On the same day, Defendant United States ("Defendant") filed a motion to dismiss the action pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction or, alternatively, pursuant to USCIT Rule 12(b)(6) for failure to state a claim upon which relief may be granted.[2] *See generally* Def.'s Mot. Dismiss and Opp'n Pls.' Mot. Prelim. Inj., Appl. TRO, & Pet. Writ Mandamus, Dec. 23, 2015, ECF No. 15 ("Def.'s Mot. Dismiss"). Defendant's motion to dismiss also opposed Plaintiffs' application for a TRO, motion for a PI, and petition for writ of mandamus.[3] *See generally id.*

On December 30, 2015, the court determined that Plaintiffs were unable to demonstrate that a TRO or PI was appropriate under the circumstances. *See* Confidential Mem. and Order 5–15, Dec. 30, 2015, ECF No. 21 ("Mem. and Order"). Specifically, the court determined under the applicable standard that: (1) Plaintiffs could not demonstrate that they would be irreparably harmed without the relief of a TRO or PI because "even reading Plaintiffs' allegations in its complaint in a light most favorable, Plaintiffs still fail to allege that allowing Commerce to conclude its standard administrative review process will result in any harm that cannot be remedied by judicial review," *id.* at 7; (2) "it is unlikely that Plaintiffs will be able to establish that review under 28 U.S.C. § 1581(c) is manifestly inad-

[2] Defendant denominated its defense for failure to state a claim under USCIT Rule 12(b)(5). *See* Def.'s Mot. Dismiss and Opp'n Pls.' Mot. Prelim. Inj., Appl. TRO, & Pet. Writ Mandamus 1, Dec. 23, 2015, ECF No. 15. However, as of July 1, 2015, the enumerated defenses under USCIT Rule 12 were renumbered to conform with the Federal Rules of Civil Procedure such that the defense for a failure to state a claim is now made under USCIT Rule 12(b)(6). The court will refer to Defendant's motion to dismiss on this ground by its current designation throughout this opinion.

[3] Plaintiffs also filed a motion to expedite the briefing and the court's disposition on their petition for writ of mandamus. *See generally* Motion for Expediting Plaintiffs' Writ of Mandamus, Dec. 23, 2015, ECF No. 14. After a telephone conference held on December 28, 2015 to confer with counsel, the court granted Plaintiffs' motion to expedite in part and issued a scheduling order directing (1) Plaintiffs to respond to Defendant's motion to dismiss and reply to Defendant's response to Plaintiffs' petition for writ of mandamus on or before January 4, 2016 at 1:00 PM; (2) Defendant to reply to Plaintiffs' response to Defendant's motion to dismiss on or before January 11, 2016 at 1:00 PM; and (3) that if Defendant's motion to dismiss is denied, the court would set a hearing date, if one is needed, within 10 days of such denial regarding Plaintiffs' petition for writ of mandamus. *See* Scheduling Order 2, Dec. 28, 2015, ECF No. 20.

equate giving the Court jurisdiction over this case under 28 U.S.C. § 1581(i) and thus unlikely that Plaintiffs will succeed on the merits," *id.* at 13; (3) "Plaintiffs have shown no hardship it will encounter by having to wait for Commerce to conclude its administrative process except for the delay of judicial review," *id.* ; and (4) "[t]he public interest favors allowing Commerce to complete its process." *Id.* at 14. As a result, the court denied Plaintiffs' application for a TRO and motion for a PI. *See id.* at 15. The court, however, deferred its decision on Plaintiffs' petition for writ of mandamus and Defendant's motion to dismiss until those issues were fully briefed. *See id.* at 2.

On January 4, 2016, Plaintiffs filed their response to Defendant's motion to dismiss together with their reply to Defendant's response to Plaintiffs' petition for writ of mandamus arguing that the Court has jurisdiction under 28 U.S.C. § 1581(i) because review pursuant to any of the enumerated jurisdictional grounds under § 1581, specifically § 1581(c), would be manifestly inadequate and that Plaintiffs have stated a claim upon which relief can be granted. *See generally* Pls.' Resp. Def.'s Mot. Dismiss and Reply Def.'s Opp'n Pls.' Pet. Writ Mandamus and Mem. Support Thereof, Jan. 4, 2016, ECF No. 27 ("Pls.' Resp. Mot. Dismiss"). On January 11, 2016, Defendant filed its reply to Plaintiffs' response to Defendant's motion to dismiss refuting Plaintiffs' claim that review under 28 U.S.C. § 1581(c) would be manifestly inadequate and that Plaintiffs' claim is ripe for review. *See generally* Def.'s Reply Support Mot. Dismiss, Jan. 11, 2016, ECF No. 29. For the reasons discussed below, the court now dismisses Plaintiffs' action because the Court lacks subject matter jurisdiction over Plaintiffs' claims.

BACKGROUND

Commerce initiated the second administrative review of the antidumping duty order covering xanthan gum from the People's Republic of China on September 2, 2015. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 80 Fed. Reg. 53,106, 53,106, 53,108–09 (Dep't Commerce Sept. 2, 2015). Shortly thereafter, CP Kelco Shandong requested that Commerce select and review it as a voluntary respondent. *See* Confidential App. Pet. Writ Mandamus and Mem. P. & A. Supp. Appl. TRO & Mot. Prelim. Inj. App. 4, Dec. 23, 2015, ECF No. 12 ("App. Pet. Mandamus"). On September 29, 2015, Commerce found that it was not practicable to examine all respondents and thus limited the review to individually examine the companies accounting for the largest volume of exports of subject merchandise to serve as mandatory respondents—Neimenggu Fufeng

Biotechnologies Co., Ltd. (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.)/Shandong Fufeng Fermentation Co., Ltd. (collectively "Fufeng") and A.H.A. International Co., Ltd. ("AHA"). *See generally id.* at App. 6. Accordingly, Commerce issued questionnaires to Fufeng and AHA. *See generally id.* at Apps. 7, 8. Commerce also informed respondents that once companies seeking voluntary respondent treatment timely submit the information requested from the mandatory respondents, *i.e.*, questionnaire responses, it would "evaluate the circumstances at that time to decide whether to individually examine the voluntary respondent(s)." *See id.* at App. 6 at 2.

On October 29, 2015, CP Kelco Shandong voluntarily submitted its Section A questionnaire response. *See generally id.* at App. 9. On October 30, 2015, AHA and Deosen submitted a letter requesting that Commerce issue a full questionnaire to Deosen rather than AHA because they claimed that Deosen and its affiliates controlled and set the prices of sales from AHA to the U.S. export market. *See id.* at App. 10 at 3. Plaintiffs allege that on November 4, 2015, CP Kelco Shandong submitted comments objecting to AHA's and Deosen's request because Commerce had already selected mandatory respondents, Commerce did not select Deosen as a mandatory respondent, and "Deosen did not timely submit comments regarding the selection of mandatory respondents." Appl. TRO & Mot. PI 8; *see also* App. Pet. Mandamus App. 11.

On November 13, 2015, rather than fully grant AHA's and Deosen's request, Commerce elected to issue a full questionnaire to Deosen while still requiring that AHA respond to the questionnaire Commerce issued to it "for further evaluation of which party is the proper respondent." App. Pet. Mandamus App. 14 at 1. On that same day, CP Kelco Shandong voluntarily submitted its Section C and D questionnaire responses, at which time CP Kelco Shandong timely provided Commerce with all the information requested from Fufeng and AHA. *See generally id.* at Apps. 12, 13.

AHA submitted its Section A questionnaire response on November 23, 2015, however, AHA filed a letter on November 30, 2015 in lieu of a Section C and D questionnaire response taking the position that

> AHA does not have reviewable U.S. Sales to report for the instant period of review in the response to the Section C questionnaire. If AHA were to submit a response to the Section C questionnaire issued to AHA, the response would contain no data. Similarly, if AHA were to submit a response to the Section D questionnaire, there would be no matching sales to allow any analysis and calculation. All of AHA's exports to the U.S. were sold by Deosen.

Id. at App. 19 at 1–2. CP Kelco Shandong renewed its request to be selected as a voluntary respondent and requested Commerce to find that AHA "is no longer suitable for treatment as a mandatory respondent in the . . . proceeding based on AHA's refusal to fully participate as a mandatory respondent." *Id.* at App. 20. Deosen submitted its Section A questionnaire response on December 9, 2015 and received an extension to submit its Section C and D questionnaire responses no later than December 30, 2015. *See generally id.* at Apps. 23, 26.

On December 16, 2015, Commerce denied CP Kelco Shandong's request for voluntary respondent treatment pursuant to Section 782(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677m(a) (2012),[4] because "consideration of available resources, including current and anticipated workload and deadlines coinciding with the proceeding in question, does not support selection of a voluntary respondent." *Id.* at App. 24 at 4–5. Commerce determined that "the additional individual examination of Kelco Shandong would be unduly burdensome for the Department and inhibit the timely completion of the administrative review." *Id.* Additionally, Commerce did not dismiss AHA as a mandatory respondent as per CP Kelco Shandong's request and proceeded to "determin[e] which company, AHA or Deosen, is the proper respondent to serve as one of the two mandatory respondents in this review." *Id.* at 5.

Plaintiffs commenced this action on December 22, 2015 under 28 U.S.C. § 1581(i)(2) and (4), claiming that Commerce's decision to deny CP Kelco Shandong's request for treatment as a voluntary respondent and to instead inquire as to whether Deosen should be selected as a mandatory respondent in the administrative review is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or facts." Compl. ¶¶ 38–54. Plaintiffs filed a petition for writ of mandamus to compel Commerce to select CP Kelco Shandong as a voluntary respondent in the review arguing that CP Kelco Shandong "is being deprived of its right to demonstrate that the xanthan gum it has exported from the People's Republic of China was not sold at less than fair value" and that "CP Kelco U.S., as the importer of record, will not have its cash deposits made on the subject entries refunded even though the subject merchandise was not sold at less than fair value." Pet. Writ Mandamus 3. In response, Defendant moved to dismiss Plaintiffs' Complaint pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction, or, in the alternative, pursuant to

[4] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

USCIT Rule 12(b)(6) for failure to state a claim. *See generally* Def.'s Mot. Dismiss. Before the court can reach the merits, the court must first decide whether the Court has jurisdiction over Plaintiffs' action pursuant to 28 U.S.C. § 1581(i).[5]

STANDARD OF REVIEW

The party seeking the Court's jurisdiction has the burden of establishing that jurisdiction exists. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). Moreover, "[w]here, as here, claims depend upon a waiver of sovereign immunity, a jurisdictional statute is to be strictly construed." *Celta Agencies, Inc. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1348, 1352 (2012) (citing *United States v. Williams*, 514 U.S. 527, 531 (1995)).

DISCUSSION

Defendant argues the Court does not have jurisdiction over Plaintiffs' action under 28 U.S.C. § 1581(i) because jurisdiction under another enumerated jurisdictional basis will be available to Plaintiffs. *See* Def.'s Mot. Dismiss 6–8. Specifically, Defendant argues that Plaintiffs may seek relief pursuant to 28 U.S.C. § 1581(c) after Commerce issues its final determination in the administrative review, and, as a result, the Court lacks jurisdiction under 28 U.S.C. § 1581(i). *See id.* at 8. Defendant further argues that Plaintiffs have failed to state a claim upon which relief can be granted because Plaintiffs "cannot demonstrate that Commerce's decision not to select it as a voluntary respondent constitutes final agency action." *Id.* at 15. Plaintiffs in response argue the Court has jurisdiction pursuant to 28 U.S.C. § 1581(i) because the remedies afforded to Plaintiffs by any other subsection of § 1581 would be manifestly inadequate to grant Plaintiffs the relief they seek. *See* Pls.' Resp. Mot. Dismiss 4–9. Plaintiffs also argue that Commerce's actions are final because Commerce "will conclusively not review CP Kelco (Shandong) as a voluntary respondent" and Commerce "clearly indicated it will expend its limited resources reviewing the full questionnaire response of Deosen." *Id.* at 13–14. The court finds that 28 U.S.C. § 1581(i) does not confer the Court with jurisdiction to review Plaintiffs' claims at this time because 28 U.S.C. § 1581(c) provides Plaintiffs with adequate means

[5] When faced with motions to dismiss under both USCIT Rule 12(b)(1) and USCIT Rule 12(b)(6), the court, absent good reason to do otherwise, should ordinarily decide the USCIT Rule 12(b)(1) motion first because "[w]hether 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." *Bell v. Hood*, 327 U.S. 678, 682 (1945). Thus, the court need not address whether Plaintiffs' Complaint states a claim upon which the Court can grant relief if the court first determines that the Court does not have jurisdiction over Plaintiffs' action.

for judicial review of Commerce's determination. Therefore, Plaintiffs' claims must be dismissed for lack of jurisdiction because the harm for which they seek relief may be adequately remedied in an action under 28 U.S.C. § 1581(c). *See, e.g.*, *Chemsol, LLC v. United States*, 755 F.3d 1345, 1349 (Fed. Cir. 2014); *Norman G. Jensen, Inc. v. United States*, 687 F.3d 1325, 1329 (Fed. Cir. 2012); *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006); *Miller & Co v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), cert. denied, 484 U.S. 1041 (1988).

It is a long-standing principle that "federal courts . . . are courts of limited jurisdiction." *Norcal / Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 358 (Fed. Cir. 1992) (quoting *Aldinger v. Howard*, 427 U.S. 1, 15 (1976), *superseded by statute on other grounds*, Judicial Improvements Act, Pub. L. No. 101–650, 104 Stat. 5089). Plaintiffs have the burden of establishing that jurisdiction exists. *See Norsk Hydro Can., Inc.*, 472 F.3d at 1355. Under 28 U.S.C. § 1581(i), the Court exercises residual jurisdiction over certain actions not provided for under the specific grants of jurisdiction outlined in § 1581(a)–(h). *See* 28 U.S.C. § 1581(i). The Court has jurisdiction under 28 U.S.C. § 1581(i) in "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for-- . . . (2) tariffs, duties fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; . . . or (4) administration and enforcement with respect to matters referred to in . . . subsections (a)-(h) of this section." *Id.*

However, 28 U.S.C. § 1581(i) "shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable . . . under section 516A(a) of the Tariff Act of 1930." *Id.* Congress intended "that any determination specified in section 516A of the Tariff Act of 1930, or any preliminary administrative action which, in the course of the proceeding, will be, directly or by implication, incorporated in or superceded by any such determination, is reviewable exclusively as provided in section 516A." H.R.Rep. No. 96–1235, at 48 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3759–60. Thus, jurisdiction under 28 U.S.C. § 1581(i) may not be invoked if jurisdiction under another subsection is or could have been available, unless the other available route for review is shown to be manifestly inadequate. *See, e.g.*, *Chemsol, LLC*, 755 F.3d at 1349; *Norman G. Jensen, Inc.*, 687 F.3d at 1329, *Int'l Custom Prods., Inc.*, 467 F.3d at 1327; *Miller & Co*, 824 F.2d at 963.

The statute envisions that an interested party may contest Commerce's determinations in periodic reviews of antidumping duty orders and specifically provides for recourse through judicial review.

See 28 U.S.C. § 1581(c); 19 U.S.C. § 1516a(a)(2)(B)(iii). Under 28 U.S.C. §1581(c), the Court "shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930." 28 U.S.C. § 1581(c). As a result, the Court has jurisdiction to review actions contesting Commerce's final determination in an administrative review of an antidumping duty order. *See* 28 U.S.C. § 1581(c); 19 U.S.C. § 1516a(a)(2)(B)(iii).

Plaintiffs allege three counts in their Complaint. First, Plaintiffs contest Commerce's "decision to not select CP Kelco (Shandong) for individual examination pursuant to . . . 19 U.S.C. § 1677m(a)." *See* Compl. ¶¶ 40–44. Second, Plaintiffs claim Commerce wrongfully "issue[d] a full questionnaire to Deosen prior to choosing Deosen as a mandatory respondent while CP Kelco (Shandong)'s voluntary responses to the questionnaire were timely filed weeks before Deosen's responses to the questionnaire have been or will be filed." *See id.* ¶¶ 45–49. Lastly, Plaintiffs challenge Commerce's failure "to select CP Kelco (Shandong) for individual examination pursuant to . . . 19 U.S.C. § 1677m(a)." *See id.* ¶¶ 50–54.

Judicial review of Commerce's final determination in the administrative review pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) can adequately provide Plaintiffs with the remedies they seek. Plaintiffs' counts in their Complaint claim that Commerce has thus far conducted the administrative review in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or facts." *See id.* ¶¶ 38–54. Such claims are adequately and routinely reviewed in a case brought pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) once Commerce issues its final determination. In such a case, the Court can set aside Commerce's finding that it would be unduly burdensome to individually examine an additional respondent, if that finding is unsupported by substantial evidence or otherwise not in accordance with law. *See, e.g.*, *Grobest & I-Mei Indus (Vietnam) Co. v. United States*, 36 CIT __, 853 F. Supp. 2d 1352 (2012) (holding Commerce wrongfully rejected a voluntary respondent request and ordering Commerce to individually review that respondent on remand); *see also* 19 U.S.C. § 1516a(b)(1)(B)(i) (specifying the standards of review for the actions brought before the Court). As the court noted in its previous Memorandum and Order, "a court can review each and every one of [Plaintiffs'] counts after Commerce issues its final determination and grant such relief as may be warranted. . . . [I]f, as Plaintiffs allege, Commerce improperly refused to investigate CP Kelco Shandong, then a court upon review of Commerce's determination can remand to the agency for acting contrary to law or for a determination that was

unsupported by substantial evidence on the record." Mem. and Order 8. Thus, an action brought pursuant to 28 U.S.C. § 1581(c) is available for Plaintiffs to challenge Commerce's determination at issue here.

Plaintiffs do not refute that jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) would be available in the future, but argue instead that recourse through a case brought on those grounds would be manifestly inadequate. *See* Pls.' Resp. Mot. Dismiss 4–9. When jurisdiction under another subsection of 28 U.S.C. § 1581 "is or could have been available, the party asserting § 1581(i) jurisdiction has the burden to show how that remedy would be manifestly inadequate." *Miller & Co.*, 824 F.2d at 963. However, as discussed below, Plaintiffs have not met their burden to demonstrate that review under 28 U.S.C. § 1581(c) would be manifestly inadequate.[6]

Plaintiffs claim that review under 28 U.S.C. § 1581(c) is manifestly inadequate because "Plaintiffs cannot wait until the conclusion of the proceeding and issuance of the final results to bring their claim to the Court because by the time final results are published, the harm will have occurred: the Department will have improperly exhausted the resources it currently possesses to review CP Kelco (Shandong) as a voluntary respondent." Pls.' Resp. Mot. Dismiss 5. Plaintiffs' claim is without merit. The court has previously addressed this concern:

> Plaintiffs . . . claim that allowing Commerce to spend resources after the point when Commerce should have selected CP Kelco Shandong as a voluntary respondent will insulate Commerce from review. This claim cannot withstand scrutiny. The statute may give Commerce discretion based upon its available resources at a given point in time, *see* 19 U.S.C. § 1677m(a)(2), however, if Commerce abuses that discretion or otherwise acts contrary to law the court is empowered to remedy such conduct. Plaintiffs seem to think Commerce could rely upon a lack of resources to defend a claim that it had impermissibly expended resources. Such logic allows Commerce to enlarge its discretion or authority simply by expending resources. The fact that Commerce might spend resources is not what gives its authority or discretion; Congress gives Commerce that authority or discretion. If Plaintiffs are correct and Commerce was required to

[6] Plaintiffs make much of the fact that the court can find that jurisdiction under 28 U.S.C. § 1581(c) is manifestly inadequate despite previously determining that Plaintiffs would not be irreparably harmed without injunctive relief because both are separate determinations. *See* Pls.' Resp. Mot. Dismiss 7–9; *see also* Mem. and Order 6–11. The court does not disagree that the two are separate inquiries that require separate determinations, but nonetheless determines that jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) adequately provides Plaintiffs with relief if warranted.

> investigate CP Kelco Shandong or improperly considered Deosen, then a court can so find and remand the final determination.

Mem. and Order 10–11. Plaintiffs claim that waiting for Commerce to issue its final determination would preclude or render review meaningless because Commerce will have already exhausted whatever resources it may have had to review CP Kelco Shandong. Plaintiffs inexplicably and incorrectly discount the Court's ability to remand to Commerce to either reconsider its decision to deny CP Kelco Shandong's voluntary respondent request or individually examine CP Kelco Shandong as a voluntary respondent. Commerce does not have the ability to evade review or avoid compliance with a remand order by expending resources on another respondent.

Plaintiffs next argue that review under 28 U.S.C. § 1581(c) is manifestly inadequate because the statutory provision requires a court to determine whether individual examination of a voluntary respondent would be unduly burdensome at the time in the proceeding when the respondent seeking review timely filed its questionnaire responses. *See* Compl. ¶ 6. This argument misconstrues the statute as well as the nature of the Court's review under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). Commerce informed respondents that once companies seeking voluntary respondent treatment timely submit the questionnaire responses, it would "evaluate the circumstances at that time to decide whether to individually examine the voluntary respondent(s)." App. Pet. Mandamus Apps. 6 at 2, 24 at 2. As explained in the court's prior Memorandum and Order,

> in a case brought under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), the court can apply the statute as written to events that have already occurred. The court does so routinely. If the court needs to look at the burden imposed upon the agency at the time in the proceeding when the voluntary respondent timely filed its responses to the questionnaire, there is no reason a reviewing court cannot do that. In fact, the statute specifically refers to the number of investigations being conducted as of the "date of the determination." *See* 19 U.S.C. § 1677m(a)(2)(c). If a court were to find that Commerce acted improperly, the court can remedy such conduct upon review pursuant to its § 1581(c) jurisdiction.

Mem. and Order 13. Thus, Plaintiffs' concern here is misplaced because a court would likewise review Commerce's determination that

it would be unduly burdensome and inhibit timely completion of the review to individually examine CP Kelco Shandong based on the circumstances known at the time the determination was made.

Plaintiffs further claim that even if a court were to grant the requested relief in a case brought under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), that relief "would be manifestly inadequate because it could take months after the final results are issued" and "[d]uring that time, CP Kelco will continue to labor under the significant burden of not knowing it will be assigned an antidumping margin based on its own, non-dumped sales of subject merchandise." Pls.' Resp. Mot. Dismiss 7. However, the fact that judicial review and the relief afforded therefrom may be delayed until Commerce issues its final determination in a review is insufficient to make judicial review under 28 U.S.C. § 1581(c) manifestly inadequate. *See Gov't of People's Republic of China v. United States*, 31 CIT 451, 461, 483 F. Supp. 2d 1274, 1282 (2007) (citing *FTC v. Standard Oil*, 499 U.S. 232, 244 (1980)). Neither the burden of participating in the administrative proceeding nor the business uncertainty caused by such a proceeding is sufficient to constitute manifest inadequacy. *See id.* Plaintiffs argue that the delay and uncertainty regarding their antidumping duty obligations renders relief provided after Commerce's final determination manifestly inadequate. Specifically, Plaintiffs argue that "opportunity costs and lost sales are not something that can be financially remedied by the Court voiding Deosen's individual margin months after the date of publication of the final results." Pls.' Resp. Mot. Dismiss 7. However, resorting to the established administrative procedures is not manifestly inadequate even if it will exact a significant financial burden. *See Int'l Custom Prods., Inc. v. United States*, 791 F.3d 1329, 1338 (Fed. Cir. 2015).

Nonetheless, Plaintiffs invoke *Dofasco v. United States*, 28 CIT 263, 326 F. Supp. 2d 1340 (2004), *aff'd*, 390 F.3d 1370 (Fed. Cir. 2004), as support for jurisdiction pursuant to 28 U.S.C. § 1581(i) to challenge the individual examination and calculation of a margin for Deosen. *See* Pls.' Resp. Mot. Dismiss 4–5. In *Dofasco*, the plaintiff sought to halt an administrative review before it had begun because the plaintiff claimed that the review was unlawfully commenced. *See Dofasco*, 28 CIT at 265, 326 F. Supp. 2d at 1342. The court found that requiring the plaintiff to wait until the review had been completed to determine whether a review request was timely would have made any relief meaningless. *See id.* at 270, 326 F. Supp. 2d at 1346. Therefore, the court found that 28 U.S.C. § 1581(c) would be manifestly inadequate

in that case because "the review that the plaintiff seeks to prevent will have already occurred by the time relief under another provision of section 1581 is available." *Id.* The court in *Dofasco* found that the Court had jurisdiction under 28 U.S.C. § 1581(i) because the plaintiff claimed Commerce had acted beyond its authority by initiating an administrative review pursuant to untimely requests. Here, Plaintiffs claim that Commerce has failed to follow the statute. "[M]ere . . . assertions that an agency failed to follow a statute" do not render the remedy under 28 U.S.C. § 1581(c) manifestly inadequate. *See Miller & Co.*, 824 F.2d at 964 (citing *Am. Air Parcel*, 718 F.2d at 1550–51).

Plaintiffs additionally emphasize that, according to *Dofasco*, exercising jurisdiction under 28 U.S.C. § 1581(i) is appropriate where "***the opportunity for full relief*** *would be lost by awaiting the final determination*." Pls.' Resp. Mot. Dismiss 5 (quoting *Dofasco*, 28 CIT at 270, 326 F. Supp. 2d at 1346). However, Plaintiffs here would not forego the relief they are potentially entitled to if it were to wait for a final determination. Plaintiffs ultimately seek individual examination of CP Kelco Shandong. Plaintiffs are under the false impression that allowing Commerce to proceed would effectively preclude Plaintiffs from obtaining full relief—to be reviewed as a voluntary respondent. *See id.* 5–6. Plaintiffs speculate that even if a court were to remand to Commerce, Commerce will claim to have expended whatever resources it may have had in reviewing Deosen and yet again determine that it would be unduly burdensome to review CP Kelco Shandong. *See id.* However, as explained above, allowing Commerce to proceed in the review and requiring Plaintiffs to await Commerce's final determination would not preclude or negatively impact Plaintiffs' ability to receive the relief that they seek if warranted. If their claim is successful they will be able to obtain the relief that they seek. Thus, the court's rationale for exercising jurisdiction under 28 U.S.C. § 1581(i) in *Dofasco* does not apply here."[7]

[7] Plaintiffs additionally argue that this action is unique from other cases that reviewed Commerce's refusal to individually examine a respondent, specifically Grobest & I-Mei Indus (Vietnam) Co. and Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States, 33 CIT 1126, 637 F. Supp. 2d 1260 (2009). *See* Pls.' Resp. Mot. Dismiss 9–11. Both of these cases were reviewed by the court pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. 1581(c), but Plaintiffs argue that this action is unique because Commerce is considering reviewing a third respondent despite the fact that Commerce has stated repeatedly that it has the resources to examine two companies and CP Kelco Shandong has timely filed its questionnaire responses. *See* id. at 11. Regardless of the factual distinctions between the cases, Plaintiffs' challenge is with respect to Commerce's refusal to individually examine CP Kelco Shandong as a voluntary respondent, a determination which is within the purview of the Court's jurisdiction under 28 U.S.C. § 1581(c). For purposes of jurisdiction, the facts here do not warrant treating this case differently from

Plaintiffs' reliance on the court's decision in *Nakajima All Co. v. United States*, 12 CIT 585, 691 F. Supp. 358 (1988) ("*Nakajima II*"), is similarly misplaced. Plaintiffs argue that in that case, "the Court granted a writ of mandamus under its § 1581(i) jurisdiction when it found that the plaintiff 'incurred financial burdens of lost sales volume due to the added cost of deposit rates and other opportunity costs connected with restricted resources.'" Pls.' Resp. Mot. Dismiss 6–7 (quoting *Nakajima II*, 12 CIT at 592, 691 F. Supp. at 364). While the court in *Nakajima II* granted the plaintiff a writ of mandamus for those reasons, the court's earlier decision makes clear that it exercised jurisdiction over the plaintiff's action on other grounds. In *Nakajima All Co. v. United States*, 12 CIT 189, 682 F. Supp. 52 (1988) ("*Nakajima I*"), the plaintiff's grounds for jurisdiction under 28 U.S.C. § 1581(i) were different from those asserted by Plaintiffs here. In that case, the plaintiff challenged "the undue delays Commerce has experienced between its initiation of the subject 751 reviews, and the completion and publication of the preliminary and final results of those reviews." *Nakajima I*, 12 CIT at 194, 682 F.Supp. at 57. The court in *Nakajima I* found that "[s]uch challenged actions are not provided for under § 1516a and § 1581(c) or any other subsection of 1581." *Id.* Here, however, the determinations that Plaintiffs challenge are provided for under § 1516a and § 1581(c).

Lastly, Plaintiffs assert that judicial review of their claims at this juncture would promote administrative efficiency because it would prevent Commerce from expending its resources by individually examining Deosen. *See* Pls.' Resp. Mot. Dismiss 13. This argument basically posits that the court should intervene in the middle of the administrative process in order to prevent the agency from making a mistake and thereby conserve resources. In addition to the fact that this argument assumes that Commerce has in fact erred, Congress has not envisioned an administrative process where the Court is to co-administer the statute with Commerce with each decision that it makes. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967); *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 166 (1967). Commerce, not the Court, is charged with carrying out its statutory and regulatory obligations. The Court has been granted authority to hear Plaintiffs' claims and review the manner in which Commerce has performed its duties once Commerce issues its final determination. *See* 28 U.S.C. § 1581(c); 19 U.S.C. § 1516a(a)(2)(B)(iii). If Plaintiffs do not agree with Commerce's conclusion that reviewing CP Kelco Shan-

cases such as Grobest & I-Mei Indus (Vietnam) Co. Moreover, the facts Plaintiffs contend make this case unique do not have any bearing on whether review pursuant to 28 U.S.C. § 1581(c) is manifestly inadequate.

dong would be unduly burdensome, Plaintiffs have the opportunity to comment on that decision following Commerce's preliminary determination. *See* 19 C.F.R. § 351.309(c)(1)(ii) (2013). In the event that Commerce maintains its position on the matter in its final determination despite Plaintiffs' complaints, then the appropriate time for Plaintiffs to bring an action contesting Commerce's final determination is within thirty days after the date Commerce publishes its final determination in the federal register, not during the pendency of the review.[8] *See* 28 U.S.C. § 1581(c); 19 U.S.C. § 1516a(a)(2)(B)(iii); 19 U.S.C. § 1516a(a)(2)(A)(i)(I).

Plaintiffs are thus unable to demonstrate that the Court has jurisdiction over the action pursuant to 28 U.S.C. § 1581(i). Plaintiffs have not satisfied their burden to show why any harm caused by Commerce's refusal to review CP Kelco Shandong as a voluntary respondent cannot be adequately redressed in a case brought pursuant to 19 U.S.C. § 1581(c). Although Plaintiffs seek immediate relief under 28 U.S.C. § 1581(i), jurisdiction over such claims may only be exercised when there is no other available or adequate basis for jurisdiction. Therefore, the Court does not have jurisdiction over Plaintiffs' action because review under 28 U.S.C. § 1581(c) and the relief provided for in such an action is available and adequate.

The court need not address whether Plaintiffs have stated a claim upon which the Court can grant relief because "[w]hether 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." *See Bell v. Hood*, 327 U.S. 678, 682 (1945); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (providing that a court acts beyond its authority by "resolv[ing] contested questions of law when its jurisdiction is in doubt"); *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 318 (D.C. Cir. 2012) (affirming dismissal on jurisdictional grounds rather than on the merits). Because the Court does not have subject matter jurisdiction over Plaintiffs' action, the court does not reach whether Plaintiffs' action should be dismissed pursuant to USCIT Rule 12(b)(6).

---

[8] In arguing that jurisdiction under 28 U.S.C. § 1581(c) is manifestly inadequate, Plaintiffs further argue that "[a] future remand by this Court on this issue may provide the Department with further justification that reviewing a voluntary respondent is "unduly burdensome" in another segment of this proceeding, or in other proceedings in which the Department is asked to individually examine voluntary respondents." Pls.' Resp. Mot. Dismiss 12. The court does not address this argument because it discusses hypothetical consequences that a remand order from a 28 U.S.C. § 1581(c) case may have on other proceedings other than the proceeding that is the subject of this action, not whether 28 U.S.C. § 1581(c) is manifestly inadequate, and is thus irrelevant for purposes of determining whether the Court has jurisdiction over Plaintiffs' action.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss for lack of subject matter jurisdiction is granted and Plaintiffs' petition for writ of mandamus is denied as moot. The court shall enter judgment dismissing this action.

Dated: February 9, 2016
New York, New York

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

Slip Op. 16–11

SHENYANG YUANDA ALUMINUM INDUSTRY ENGINEERING CO., Plaintiff, v. UNITED STATES, Defendant.

Before: Donald C. Pogue,
Senior Judge
Consol. Court No. 14–00106[1]

[Redetermination remanded for further consideration in accordance with this opinion.]

Dated: February 9, 2016

James R. Cannon, Jr., *John D. Greenwald*, and *Thomas M. Beline*, Cassidy Levy Kent, LLP, of Washington, DC, for Plaintiff Yuanda.

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

William E. Perry, *Emily Lawson*, and *Kate Kennedy*, Dorsey & Whitney LLP, of Seattle, WA, for Consolidated Plaintiff Permasteelisa.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. With him 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 was *Scott D. McBride*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

David M. Spooner and *Christine J. Sohar Henter*, Barnes & Thornburg, LLP, of Washington, DC, for Defendant-Intervenor, the Curtain Wall Coalition.

OPINION AND ORDER

Pogue, Senior Judge:

In this action, Plaintiffs Shenyang Yuanda Aluminum Industry Engineering Co., Ltd. and Yuanda USA Corporation (collectively "Yuanda"); Jango Curtain Wall Americas Co. ("Jangho"); and Per-

[1] This action is consolidated with court numbers 14–00107 and 14–00108. Order, July 16, 2014, ECF No. 28.

masteelisa North America Corp., Permasteelisa South China Factory, and Permasteelisa Hong Kong Ltd. (collectively "Permasteelisa"), challenge the decision,[2] made by Defendant, the U.S. Department of Commerce ("Commerce"), that Yuanda's unitized curtain wall, i.e., a complete curtain wall, unitized and imported in phases pursuant to a sales contract, is within the scope of the antidumping and countervailing duty orders (the "AD&CVD Orders" or the "Orders") on aluminum extrusions from the People's Republic of China ("PRC").[3]

Currently before the court are Plaintiffs' renewed motions for judgment on the agency record pursuant to USCIT Rule 56.2, arguing that Commerce's affirmative scope ruling is not in accordance with law, unsupported by substantial evidence, and arbitrary and capricious.[4] Defendant opposes Plaintiffs' motions.[5] Defendant-Intervenors, Walters & Wolf, Architectural Glass & Aluminum Company, and Bagatelos Architectural Glass Systems, Inc. (collectively the "Curtain Wall Coalition" or "CWC") join in opposition to the motions.[6]

The court has jurisdiction pursuant to § 516A(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi) and 28 U.S.C. § 1581(c) (2012).[7]

Because Commerce's scope ruling redefines key terms contrary to the plain language of the AD&CVD Orders, it is not in accordance

---

[2] Compl., ECF No. 9 (Yuanda's complaint); Compl., Ct. No. 14–00107, ECF No. 8 (Jangho's complaint); Compl., Ct. No. 14–00108, ECF No. 8 (Permasteelisa's complaint).

[3] *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 are produced and imported pursuant to a contract to supply curtain wall), ECF No. 34–1 ("Yuanda Scope Ruling"); Final Results of Redetermination Pursuant to Ct.Remand, ECF No. 68–1 ("Redetermination"); *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").

Yuanda USA Corp is an importer and Shenyang Yuanda Aluminum Industry Engineering Co., Ltd. is a foreign producer and exporter of curtain wall units. Jangho is a foreign producer of subject merchandise. Permasteelisa North America Corp. is an importer and Permasteelisa Hong Kong Ltd. is a foreign producer of subject merchandise. Yuanda Scope Ruling, ECF No. 34–1, at 1–2.

[4] Mem. of P. & A. in Supp. of Yuanda's Am. Mot. for J. on the Agency R., ECF Nos. 79 (conf. ver.) & 80 (pub. ver.) ("Yuanda's Br."); Am. Mem. in Supp. of Pl. Jangho's Mot. for J. on the Agency R., ECF No. 78 ("Jangho Br."); Mem. of P. & A. in Supp. of [Permasteelisa's] Rule 56.2 Mot. for J. on the Agency R., ECF No. 39 (as amended by Notice of Withdrawal, ECF No. 84) ("Permasteelisa's Br.").

[5] Def.'s Resp. to Pl.'s & Consol. Pl.'s Rule 56.2 Mots. for J. on the Agency R., ECF No. 85 ("Def.'s Resp.").

[6] Def.-Intervenors' Opp'n to Pls.' Mots. & Am. Brs. For J. on the Agency R., ECF No. 87 ("CWC's Resp.").

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

with law; because it does not reasonably consider the characteristics of Plaintiffs' merchandise and the evidence that weighs against the agency's determination, it is unsupported by substantial evidence; because it offers insufficient reasons for treating similar products differently, it is arbitrary and capricious. Accordingly, the court remands to Commerce for further consideration in accordance with this opinion.

BACKGROUND

I. The Antidumping and Countervailing Duty Orders on Aluminum Extrusions

The issues presented here arise from Commerce's AD&CVD Orders on aluminum extrusions from the PRC.[8] The AD&CVD Orders followed a March 31, 2010, petition by the Aluminum Extrusions Fair Trade Committee and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (collectively, "Petitioners"), alleging that "[certain] aluminum extrusions imported from the [PRC] are being subsidized and sold at less than normal value."[9] Commerce made final affirmative determinations of subsidization and sales at less than fair value[10]; the International Trade Commission similarly made a final affirmative determination of material injury to U.S. industry.[11] Commerce then issued the AD&CVD Orders.[12]

II. The Language of the Order

The AD&CVD Orders on aluminum extrusions were "written in general terms,"[13] to cover "aluminum extrusions," which are defined as "shapes and forms,[14] produced by an extrusion process, made from

---

[8] *See* AD Order, 76 Fed. Reg. 30,650; CVD Order, 76 Fed. Reg. 30,653.

[9] *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce March 31, 2010) (petition for the imposition of antidumping and countervailing duties) at 1, *reproduced in* Pub. App. to [Yuanda's Br.], ECF No. 83–3 at Tab 10("Petition").

[10] *Aluminum Extrusions from the [PRC]*, 76 Fed. Reg. 18,524 (Dep't Commerce Apr. 4, 2011) (final determination of sales at less than fair value) and accompanying Issues & Decision Mem., A-570967, POI July 1, 2009 – Dec. 31, 2009 (Apr. 4, 2011) ("Final ADI&D Mem."); *Aluminum Extrusions from the [PRC]*, 76 Fed. Reg.18,521 (Dep't Commerce Apr. 4, 2011) (final affirmative countervailing duty determination).

[11] Certain Aluminum Extrusions from China, USITC Pub. 4229, Inv. Nos. 701-TA-475 & 731-TA-1177 (May 2011) ("ITC Final Determination").

[12] AD Order, 76 Fed. Reg. at 30,650; CVD Order, 76 Fed. Reg. at 30,653.

[13] *See* 19 C.F.R. § 351.225(a).

[14] Aluminum extrusions "are produced and imported in a wide variety of shapes and forms, including, but not limited to, hollow profiles, other solid profiles, pipes, tubes, bars, and

[certain] aluminum alloys."[15] They may have a variety of finishes, "both coatings and surface treatments,"[16] and may be "fabricated, i.e., prepared for assembly."[17]

Aluminum extrusions "described at the time of importation as parts for final finished products" such as "window frames, door frames, solar panels, curtain walls, or furniture," to be "assembled after importation," are subject to the order if such parts "otherwise meet the definition of aluminum extrusions,"[18] that is, they are shapes or forms made from the covered aluminum alloys and made by an extrusion process.[19] The AD&CVD Orders also cover "aluminum extrusion components that are attached (e.g., by welding or fasteners) to form subassemblies, i.e., partially assembled merchandise."[20]

The AD&CVD Orders exclude "finished merchandise containing aluminum extrusions as parts" so long as such merchandise is "fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels."[21] The AD&CVD Orders also exclude "finished goods containing aluminum extrusions that are entered unassembled in a 'finished goods kit.'"[22] A finished goods kit is "a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled 'as is' into

rods." AD Order, 76 Fed. Reg. at 30,650; CVD Order, 76 Fed. Reg. at 30,654. Drawn aluminum (aluminum extrusions that are "drawn subsequent to extrusion") also fall within the AD&CVD Orders. *Id.*

[15] AD Order, 76 Fed. Reg. at 30,650; CVD Order, 76 Fed. Reg. at 30,653.

[16] *See* AD Order, 76 Fed. Reg. at 30,650; CVD Order, 76 Fed. Reg. at 30,654 ("The types of coatings and treatments applied to subject aluminum extrusions include, but are not limited to, extrusions that are mill finished (i.e., without any coating or further finishing), brushed, buffed, polished, anodized (including bright-dip anodized), liquid painted, or powder coated.").

[17] AD Order, 76 Fed. Reg. at 30,650; CVD Order, 76 Fed. Reg. at 30,654; *see id.* ("Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, knurled, swedged, mitered, chamfered, threaded, and spun.").

[18] AD Order, 76 Fed. Reg. at 30,650–51; CVD Order, 76 Fed. Reg. at 30,654,

[19] AD Order, 76 Fed. Reg. at 30,650; CVD Order, 76 Fed. Reg. at 30,653.

[20] AD Order, 76 Fed. Reg. at 30,651; CVD Order, 76 Fed. Reg. at 30,654.

[21] *Id.* Aluminum extrusion "identified with reference to their end use, such as fence posts, electrical conduits, door thresholds, carpet trim, or [certain] heat sinks . . . are subject merchandise if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation." *Id.*

[22] *Id.*

a finished product."[23] Subassemblies may be excluded as well, provided that they enter the United States as part of or as "finished goods" or "finished goods kits."[24]

III. Interpreting the Scope of an Order

Where, as here, there is a question as to "whether a particular product is included within the scope of an antidumping or countervailing duty order," Commerce follows an interpretive framework, provided in the agency's regulations, to determine the answer.[25] First, relying on the description of the product contained in the scope-ruling request, Commerce looks to the plain language of the underlying order.[26] If the terms of the order are dispositive, then the order governs.[27]

Second, if the order is ambiguous, Commerce "consider[s] the regulatory history, as contained in the so-called '(k)(1) materials'" — named for the regulatory subsection in which they appear.[28] 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."[29] If the (k)(1) materials disambiguate the language of the order, then Commerce will issue its scope ruling.[30]

---

[23] *Id.* However, "[a]n imported product will not be considered a 'finished goods kit' and therefore excluded from the scope of the investigation merely by including fasteners such as screws, bolts, etc. in the packaging with an aluminum extrusion product." *Id*.

[24] *Id.* ; *see Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Sept. 24, 2012) (preliminary side mount valve controls scope Ruling) at 7 ("SMVC Scope Ruling") (adopted unchanged in *Aluminum Extrusions from the [PRC]*, A-570967 & C-570–968 (Dep't of Commerce Oct. 26, 2012) (final side mount valve controls scope ruling)), *reproduced in* Def.'s App. Accompanying [Def.'s Resp.], ECF No. 86 at Tabs 3 & 4.

[25] 19 C.F.R. § 351.225(a).

[26] *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002).

[27] *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1383 (Fed. Cir. 2005) ("[A] predicate for the interpretive process is language in the order that is subject to interpretation." (quoting *Duferco Steel*, 296 F.3d at 1097); *ArcelorMittal Stainless Belgium N.V. v. United States*, 694 F.3d 82, 84 (Fed. Cir. 2012) ("If Commerce determines that the language at issue is not ambiguous, it states what it understands to be the plain meaning of the language, and the proceedings terminate. On the other hand, if Commerce finds that the scope language is ambiguous, it then looks to two sets of factors spelled out in [19 C.F.R. § 351.225(k)] to determine the intended scope of the order.").

[28] *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1302(Fed. Cir. 2013).

[29] 19 C.F.R. § 351.225(k)(1).

[30] *Id*. at § 351.225(d).

Third, if the (k)(1) materials "are not dispositive," Commerce will initiate a scope inquiry.[31] Specifically, Commerce "will further consider: (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."[32]

Commerce's interpretations of its own scope rulings are given "significant deference,"[33] however, "Commerce cannot 'interpret' an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms."[34]

IV. The Scope Ruling on Curtain Wall Units and Other Parts of a Curtain Wall System from the PRC

The Yuanda Scope Ruling challenged in this case is the second scope ruling Commerce has issued relevant to unitized curtain wall.[35] Prior to the Yuanda Scope Ruling, on October 11, 2012, Defendant-Intervenors, the CWC, applied for a ruling from Commerce, pursuant 19 C.F.R. § 351.225, to confirm that "parts of curtain wall[s],"[36] defined as "curtain wall sections, falling short of the final finished curtain wall that envelopes an entire building structure," including,

---

[31] *Id*. at §§ 351.225(e), (k)(2); *see also Walgreen Co. of Deerfield, IL v. United States*, 620 F.3d 1350, 1352 (Fed. Cir. 2010).

[32] 19 C.F.R. § 351.225(k)(2).

[33] *Duferco Steel*, 296 F.3d at 1094–95.

[34] *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001).

[35] Commerce has also issued a third scope ruling on curtain wall units with non-PRC aluminum extrusions. *See Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce March 14, 2013) (final scope ruling on Tesla curtain walls with non-PRC extrusions). However, this determination is not relevant here because, unlike there, the country of origin of Yuanda's aluminum extrusions is not at issue.

[36] *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968(Dep't of Commerce Oct. 11, 2012) (amended scope request regarding curtain wall units and other parts of a curtain wall system) at 1–2, *reproduced in* Pub. App. to [Yuanda's Br.], ECF No. 83–1, at Tab 2 at Ex. B ("CWC Am. Scope Request"). Originally, the Northern California Glass Management Association ("NCGMA") submitted the scope ruling request for "curtain wall units and parts for curtain walls." *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Oct. 11, 2012) (letter re amended scope request regarding curtain wall units and other parts of a curtain wall system) at 2, *reproduced in* Pub. App. to [Yuanda's Br.], ECF No. 83–1, at Tab 2 at Ex. B. However, because Commerce found that the "NCGMA [did] not adequately demonstrate[] how it qualifies as an interested party under [19 U.S.C. § 1677(9)(E)]," three members of the NCGMA, Walters & Wolf, Architectural Glass & Aluminum Company, and Bagatelos Architectural Glass Systems, Inc., filed an amended scope request on NCGMA's behalf, as the Curtain Wall Coalition. *Id.* at 3. Commerce subsequently found that the CWC had standing as an interested party. *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 9–10.

but not limited to individual curtain wall units (i.e., "unitized . . . modules that are designed to be interlocked with each other, like pieces of a puzzle").[37] Both Yuanda and Jangho submitted comments in opposition.[38]

In the CWC Scope Ruling, Commerce determined, based on the description of the product in CWC's application,[39] that the language of the AD&CVD Orders and the "descriptions of the merchandise in the investigation" are "dispositive": curtain wall parts, as defined in the CWC's Scope Request, fell within the scope of the Orders.[40] While Yuanda and Jangho argued that "a complete curtain wall unit" could be excluded from the scope of the AD&CVD Orders under the "finished goods kit" exclusion, Commerce declined to rule on the application of this exclusion because the CWC's scope request "[did] not seek a scope ruling on complete curtain walls units, but rather 'parts of curtain walls,' and [its] scope ruling [was] limited to the products discussed in the CWC's Amended Scope Request."[41]

Yuanda and Jango challenged the CWC Scope Ruling before the Court of International Trade ("CIT"), but the CIT affirmed Commerce's finding that "curtain wall units and other parts of curtain wall systems fall within the scope of the [AD&CVD] Orders."[42] The plaintiffs appealed this decision to the Federal Circuit, but the Federal Circuit affirmed.[43]

---

[37] CWC Am. Scope Request, ECF No. 83–1 at Tab 2 at Ex 2, at 8–9.

[38] CWC Scope Ruling, *supra* note 36, at 2. Overgaard Ltd, a foreign producer of curtain wall units, and Bucher Glass Inc., an importer, also submitted comments in support of Yuanda's opposition. *Id*.

[39] The CWC defined curtain wall system as "an aluminum extrusion framed non-weight bearing exterior wall, secured to and supported by the structural frame of a building," which functions as the "outer cover of typically multi-level buildings uniquely designed to envelope an entire building and provide architectural and functional goals." CWC Am. Scope Request, ECF No. 83–1 at Tab 2 at Ex 2, at 7. "A curtain wall includes numerous parts and components including curtain wall units that are pieces which comprise a curtain wall system. *Id*. at 2.

[40] CWC Scope Ruling, *supra* note 36, at 10 ("[T]he products described in CWC's Amended Scope Request are within the scope of the [AD&CVD] Orders."); *see also* CWC Am. Scope Request, ECF No. 83–1 at Tab 2 at Ex 2, at 2 ("This request covers curtain wall units and other parts of a curtain wall system, which are assembled to create a complete curtain wall that covers the outside of a building."); *id*. at 8–9 ("The merchandise covered by this scope request is curtain wall sections, falling short of the final finished curtain wall that envelopes an entire building structure. Certain curtain wall parts are unitized into modules that are designed to be interlocked with each other, like pieces of a puzzle. The units are assembled at a production facility and shipped to site for installation.").

[41] CWC Scope Ruling, *supra* note 36, at 9.

[42] *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, __CIT __, 961 F. Supp. 2d 1291, 1294 (2014) ("*Yuanda I*").

[43] *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351, 1353 (Fed. Cir. 2015)(affirming) ("*Yuanda II*").

V. The Scope Ruling on Curtain Wall Units that are Produced and Imported Pursuant to a Contract to Supply Curtain Wall

On March 26, 2013, while *Yuanda I* was still pending before the CIT, Yuanda filed its own scope ruling request, pursuant to 19 C.F.R. § 351.225, to confirm that complete curtain wall units sold "pursuant to [a] contract[] to supply [a] complete curtain wall [system]" were excluded from the scope of the AD&CVD Orders.[44] Jangho and Permasteelisa submitted comments in support of Yuanda's application; the CWC submitted comments in opposition.[45] Commerce found that "the description of the products [in Yuanda's application] and the scope language, as well as the descriptions of the merchandise in prior scope rulings and determinations of [Commerce] and the [International Trade Commission ("ITC")] [were] dispositive."[46] Relying on these sources, Commerce determined that Yuanda's products are subject to the AD&CVD Orders.[47]

Yuanda, Jangho, and Permasteelisa appealed the ruling to this Court. In their initial motions for summary judgment in this action, Plaintiffs brought attention to the fact that Commerce had not considered the "description of the merchandise contained in the [P]etition,"[48] in particular, an exhibit from that Petition that listed "unassembled unitized curtain walls" as non-subject merchandise under the "finished goods kit" exclusion.[49] Commerce requested a remand to consider this evidence and argument.[50] The court granted the Defendant's motion for voluntary remand.[51]

In the resulting redetermination, Commerce found that Yuanda's unassembled curtain wall units were within the scope of the

---

[44] *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce March 26, 2013) (scope ruling request regarding complete and finished curtain wall units that are produced and imported pursuant to a contract to supply a complete curtain wall) at 1–2, *reproduced in* Pub. Appx. To [Yuanda's Br.], ECF No. 83 at Tab 1 ("Yuanda Scope Request").

[45] Yuanda Scope Ruling, *supra* note 3, at 2.

[46] *Id.* at 20.

[47] *Id.*

[48] *See* 19 C.F.R. § 351.225(k)(1).

[49] Petition, ECF No. 83–3 at Tab 10, at Exhibit I-5; *see* Mem. of P. & A. in Supp. of Yuanda's Mot. for J. on the Agency R., ECF No. 38–1, at 4, 14; Mem. in Supp. of Pl. Jangho's Mot. for J. on the Agency R., ECF No. 37–1, at 14; [Permasteelisa's] Rule 56.2 Mot. for J. on the Agency R., ECF No. 39, at 4, 24; *see also* Mot. to Supp. the Admin. Record, ECF No. 33 (requesting that the administrative record be amended to include the Petition);Order, Sept. 18, 2014, ECF No. 36 (granting the motion to supplement the administrative record to include the Petition).

[50] Def.'s Consent Mot. for Voluntary Remand, ECF No. 49.

[51] Order, Dec. 9, 2014, ECF No. 50.

AD&CVD Orders unless all necessary parts for an entire curtain wall were present "at the time of importation," i.e., in the same entry, on a single Customs and Border Protection ("CBP") 7501 Entry Summary form.[52] Plaintiffs' renewed motions for judgment on the agency record are now before the court.[53] On December 10, 2015 the court heard oral argument on Plaintiffs' motions.[54]

VI. The Product at Issue as Described in Yuanda's Scope Ruling Request

Yuanda requested a scope ruling to confirm that "complete, finished unitized curtain wall units . . . sold to building developers, general contractors and/or glazing companies pursuant to contracts to supply them with curtain wall systems," were excluded from the scope of the AD&CVD Orders.[55] This product is also referred to as "complete curtain wall units"[56] to be assembled into a curtain wall (curtain wall and curtain wall system being used interchangeably) and "unassembled unitized curtain walls."[57]

A curtain wall, according to Yuanda, is a set of interlocking "curtain wall units that form a non-load bearing wall on a floor or part of a building."[58] Each curtain wall unit is "produced to the exacting architectural specifications of the building on which it is to be installed."[59] A "'complete and finished' unitized curtain wall unit is produced by fabricating a frame (generally from extruded aluminum), adding to it thermal insulation, filling it (generally with glass), sealing the infill, drilling holes, attaching additional metal or plastics, and shipping to the job site for installation."[60]

---

[52] Redetermination, ECF No. 68–1, at 16.

[53] *See* Yuanda's Br., ECF Nos. 79 & 80; Jangho Br., ECF No. 78; Permasteelisa's Br., ECF No. 39 (as amended by Notice of Withdrawal, ECF No. 84).

[54] Oral Arg., Dec. 10, 2015, ECF No. 99; *see* Tr. of Oral Arg., ECF No. 100.

[55] Yuanda Scope Request, ECF No. 83 at Tab 1, at 1–2.

[56] This term appears to have been adopted to describe the merchandise at issue here to be in keeping with the CWC Scope Ruling, where Commerce declined to consider whether a "complete curtain wall unit" could be excluded as a finished goods kit. *See* CWC Scope Ruling, *supra* note 36, at 9; Yuanda Scope Request, ECF No. 83 at Tab 1, at 7.

[57] *See* Yuanda Scope Request, ECF No. 83 at Tab 1, at 7; Redetermination, ECF No. 68–1, at 34.

[58] Yuanda Scope Request, ECF No. 83 at Tab 1, at 7; *see also id*. at 8 ("Because curtain wall units form a wall of a building or part of a building when they are joined together, they are designed to meet thermal expansion and contraction, buildings way and movement, water diversion, thermal efficiency, and structural integrity." (citation omitted)).

[59] *Id.* at 7.

[60] *Id*. at 8; *see* Ex. 1 to Yuanda Scope Request, ECF No. 83 at Tab 1 (providing diagrams and photos illustrating the fabrication, finishing, and installation process of Yuanda's unitized curtain wall).

Because "complete curtain wall units form part of a larger curtain wall system specifically designed for a building," unassembled curtain wall units "are sold and delivered to the job site in segments pursuant to the schedule stipulated in the contract to supply the larger system."[61] If that system is "for a multi-story skyscraper," then it may require shipments of curtain wall units and installation hardware "over a period of months," with "[e]ach entry dovetail[ing] with the contractor's construction schedule so that complete curtain wall units can be immediately installed onto the building when the container arrives at the job site."[62]

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."[63] The court will set aside agency actions found to be arbitrary and capricious.[64]

DISCUSSION

I. Individual Curtain Wall Units Are Within the Scope of the AD&CVD Orders as "Parts of . . . Curtain Walls"

The AD&CVD Orders on aluminum extrusions cover, as the name indicates, "aluminum extrusions," that is, "shapes and forms, produced by an extrusion process, made from [certain] aluminum alloys."[65] Aluminum extrusions "described at the time of importation as parts for final finished products" such as "curtain walls," to be "assembled after importation," are subject to the AD&CVD Orders as long as they "otherwise meet the definition of aluminum extrusions."[66] "A single [curtain wall] unit" is not a whole "curtain wall," and as such, is a "part" or "subassembly" of a curtain wall.[67]

At issue here is whether "curtain wall units . . . produced and imported pursuant to a contract to supply a complete curtain

[61] Yuanda Scope Request, ECF No. 83 at Tab 1, at 8–9.

[62] *Id.* at 9.

[63] 19 U.S.C. § 1516a(b)(1)(B)(i).

[64] *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)).

[65] AD Order, 76 Fed. Reg. at 30,650; CVD Order, 76 Fed. Reg. at 30,653; *see also Meridian Products, LLC v. United States*, Ct No. 13–00246, ECF No. __, at 4–5, 10 (CIT 2015) (explaining that the AD&CVD Orders are meant to cover aluminum extrusions).

[66] AD Order, 76 Fed. Reg. at 30,650–51; CVD Order, 76 Fed. Reg. at 30,653–54.

[67] *Yuanda II*, 776 F.3d at 1357–58 (citing *Yuanda I*, __ CIT __, 961 F. Supp. 2d at 1298–99)).

wall,"[68] – may be properly excluded from the scope of the AD&CVD Orders under one of the pertinent exclusions, that is, either as a "finished good" or as a "finished goods kit."[69]

II. Finished Goods Exclusion

The finished goods exclusion provides that "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry" are excluded from the scope of the AD&CVD Orders.[70]

Following the Federal Circuit's statement that a single curtain wall unit is a part for a final finished good (a curtain wall), and therefore not a finished good in and of itself,[71] Plaintiffs here withdrew their arguments that a complete, unitized curtain wall imported pursuant to a sales contract was a finished good,[72] even though the Federal Circuit's holding was for a different product (i.e., curtain wall parts and individual curtain wall units) than that at issue here,[73] and

[68] *See* Yuanda Scope Ruling, *supra* note 3, at 1.

[69] Plaintiffs argue that "the subject curtain wall units and curtain walls were not part of the underlying injury determination by the [ITC]." Jangho's Br., ECF No. 78, at 17; *see* Yuanda's Br., ECF Nos. 79 & 80, at 31; Permasteelisa's Br., ECF No. 39, at 22–27. However, this question has already been decided. *Yuanda I* and *Yuanda II* concluded that the ITC injury determination was broad enough to include curtain wall products. *Yuanda I*, 961 F. Supp. 2d at 1299 (finding curtain wall products within the scope of the ITC's injury determination in the absence of "any statute or regulation that makes an individual product's inclusion within the scope of an order contingent upon the initiation by Commerce or the ITC of a specific investigation regarding that product"); *Yuanda II*, 776 F.3d at 1358 (finding that the ITC's injury determination supported Commerce's scope ruling for curtain wall parts because the injury determination discussed "high-rise curtain wall products" (internal quotation marks and citations omitted)).

[70] AD Order, 76 Fed. Reg. at 30,651; CVD Order, 76 Fed. Reg. at 30,654.

[71] *Yuanda II*, 776 F.3d at 1358–59.

[72] *Compare* Yuanda's Br., ECF No. 79 (not arguing the finished goods exclusion); Jangho's Br., ECF No. 78 (same) *with* Yuanda's Br., ECF No. 38–1 at 24–25 (arguing that the finished goods exclusion was appropriate); Jangho's Br., ECF No. 37–1, at 13–14 (same); Notice of Withdrawal, ECF No. 84, at 2 (amending Permasteelisa's brief to withdraw "[a]ll argument regarding whether the 'finished goods' exclusion" applies).

[73] *Yuanda II*, 776 F.3d at 1358 ("A single unit does not a curtain wall make, nor is it a finished product. . . . A part or subassembly, here a curtain wall unit, cannot be a finished product.); *see also Yuanda I*, __ CIT at __, 961 F. Supp. 2d at 1298–99 ("An individual curtain wall unit, on its own, has no consumptive or practical use because multiple units are required to form the wall of a building. Therefore, a curtain wall unit's sole function is to serve as a part for a much larger, more comprehensive system: a curtain wall. All of this being the case, it is clear that curtain wall units are not finished merchandise but, rather, are parts for curtain walls."); CWC Scope Ruling, *supra* note 36, at 1 (considering "curtain wall units and other parts of curtain wall systems"mfa.pl Scope Request, ECF No. 83–1 at Tab 2 at Ex 2,, at 1–2, 8–9 (defining the product at issue in the CWC Scope Ruling as "parts of curtain walls," namely "curtain wall sections, falling short of the final finished curtain

arguably outside the jurisdiction conferred for review of the underlying CWC Scope Ruling.[74]

III. Finished Goods Kit Exclusion

The AD&CVD Orders provide that "finished goods" that contain aluminum extrusions and are entered "unassembled in a 'finished goods kit'" are excluded from the scope of the order.[75] A product may be excluded as a finished goods kit if it is "[1] a packaged combination of parts that [2] contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and [3] requires no further finishing or fabrication, such as cutting or punching, and [4] is assembled 'as is' into a finished product."[76]

Initially, Commerce's analysis of the "finished goods kit" exclusion focused on whether all the parts to assemble a complete downstream product were present "at the time of importation."[77] Commerce subsequently "identified a concern with this analysis."[78] Namely, if a product was "designed to work with other parts to form a larger structure,"[79] or "system,"[80] then requiring all of the necessary parts for a final finished good at the time of importation could "lead to

wall that envelopes an entire building structure," including, but not limited to individual curtain wall units, i.e., "unitized . . . modules that are designed to be interlocked with each other, like pieces of a puzzle").

[74] *See* CWC Scope Ruling, *supra* note 36 at 8–10 (providing, in a discussion section that is a model of opacity, no mention, let alone analysis, of the finished goods exclusion, despite the issue having been raised before the agency, *id*. at 6–7). This Court (and by extension the Federal Circuit) requires that administrative remedies be exhausted. 28 U.S.C. § 2637(d); *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir.1998) (citing *McKart v. United States,* 395 U.S. 185, 193 (1969)). Where administrative remedies have not been exhausted, "judicial review of administrative action is inappropriate," *Sharp Corp. v. United States*, 837 F.2d 1058, 1062 (Fed. Cir.1988), since it is "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).

[75] AD Order, 76 Fed. Reg. at 30,650; CVD Order, 76 Fed. Reg. at 30,654.

[76] AD Order, 76 Fed. Reg. at 30,651; CVD Order, 76 Fed. Reg. at 30,654.

[77] *See* Final AD I&D Mem., *supra* note 10, at Cmt. 3H at 28(finding that because "a baluster kit" was "a packaged collection of individual parts, which comprise a single element of a railing or deck system," it could not "represent a finished product"); *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Oct. 31, 2011) (final scope ruling on certain modular aluminum railing systems) at 14 (finding that "[b]ecause these individual component products at issue [modular aluminum railing systems] do not contain all of the parts required to assemble a final finished railing system, the products do not constitute complete and finished products") ("Modular Railing Scope Ruling").

[78] SMVC Scope Ruling, *supra* note 24, at 7.

[79] Final AD I&D Mem., *supra* note 10, at Cmt. 3H at 28

[80] Modular Railing Scope Ruling, *supra* note 77, at 14.

unreasonable" or even "absurd results" that unduly "expand the scope of the [AD&CVD Orders]" outside the "intended . . . aluminum extrusions."[81]

"[U]pon further reflection of the language in the scope of the [AD&CVD Orders]," Commerce "revis[ed] the manner in which it determines whether a given product is a 'finished good' or 'finished goods kit.'"[82] Specifically, the AD&CVD Orders expressly exclude "subassemblies, i.e., partially assembled merchandise" when "imported as part of [a] finished goods kit."[83] Reliance on whether all the parts for complete downstream product are present at the time of importation[84] "fails to account" for this language "allow[ing] for the exclusion of 'subassemblies,' i.e., merchandise that is 'partially assembled' and inherently part of a larger whole."[85] Instead, this language indicates that, when a product is a subassembly, it "may be excluded from the scope"[86] provided that"[1] [it] require[s] no further 'finishing' or 'fabrication' prior to assembly, [2] contain[s] all the necessary hardware and components for assembly, and [3] [is] ready for installation at the time of assembly, and [3] [is] ready for installation at the time of entry."[87]

---

[81] SMVC Scope Ruling, *supra* note 24, at 7 (quoting AD Order, 76 Fed. Reg. at 30,650; CVD Order, 76 Fed. Reg. at 30,653 ("The merchandise covered by this order is aluminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements . . . .")). Commerce explained that "[a]n interpretation of 'finished goods kit' which requires all parts to assemble the ultimate downstream product [at the time of importation] may lead to absurd results, particularly where the ultimate downstream product is, for example, a fire truck," or indeed a "larger structure, such as a house." SMVC Scope Ruling, *supra* note 24, at 7.

[82] SMVC Scope Ruling, *supra* note 24, at 6–7.

[83] With a finished good kit defined as "a packaged combination of parts that contains, at the time of importation, all of the necessary parts [to fully assemble a final finished good] and requires no further finishing or fabrication, such as cutting or punching, and is assembled 'as is' into a finished product." *Id.* (emphasis omitted) (quoting AD Order, 76 Fed. Reg. at 30,651; CVD Order, 76 Fed. Reg. at 30,654).

[84] Commerce phrases this in terms of "simply examining whether [a product] is part of a larger structure or system," not present at the time of importation. *See id*. at 7.

[85] *Id.* at 7.

[86] *Id.*

[87] [Valeo] Final Results of Redetermination Pursuant to Ct. Remand, Ct. No. 12–00381, ECF No. 20–1 ("Valeo Redetermination"), at 8 (citing SMVC Scope Ruling, *supra* note 24, at 7). Further, subassemblies made entirely from aluminum extrusions cannot be so excluded. AD Order, 76 Fed. Reg. at 30,651; CVD Order, 76 Fed. Reg. at 30,654; *see Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Nov. 19, 2012) (final scope ruling on motor cases, assembled and housing stators) at 14.

Thus, while Commerce's initial test for the finished goods kit exclusion remains the general rule,[88] when subassemblies are at issue, Commerce's "finished goods" and "finished goods kit" analysis no longer focuses on whether all the parts for the ultimate downstream product (e.g., the fire truck, the building) are present "at the time of importation"; rather the emphasis is on how finished and ready for installation in the ultimate downstream product the subassembly is.[89]

Here, Commerce has determined that, based on the plain language of the AD&CVD Orders and the (k)(1) materials, "a unitized curtain wall shipped as curtain wall units can be excluded as a 'finished goods kit,' but only if all of the necessary curtain wall units are imported at the same time in a manner that they can be assembled into a finished curtain wall upon importation."[90] Commerce makes this determination on the basis that a finished goods kit must include "all of the necessary parts" to assemble a final finished good at the time of

[88] *See, e.g.*, *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Dec. 2, 2013) (final scope ruling on Traffic Brick Network, LLC's event decor parts and kits) ("Traffic Brick Scope Ruling") at 10 ("[W]e find Traffic Brick's Pipe Kits and Pipe and Drape Kits to be excluded from the scope of the [AD&CVD Orders] because they are finished goods kits that contain at the time of importation all parts necessary to fully assemble a complete display structure."); *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Sept. 12, 2013) (final scope ruling on Law St. Enterprises, LLC's disappearing door screens) ("Law St. Scope Ruling") at 9 ("The disappearing screens do not constitute finished good kits because, at the time of importation, like parts are packaged together for shipment, meaning that all of the pieces necessary to assemble a final finished product (i.e., a disappearing screen) are not packaged together at the time of importation." Further, "Side Mount Valve Controls are . . . distinguishable from disappearing screens because they are 'subassemblies'(merchandise that is partially assembled and inherently part of a larger whole) that entered the United States as finished goods kits)."); *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Apr. 19, 2013) (final scope ruling on 5 Diamond Promotions, Inc.'s aluminum flag pole sets) (Diamond Scope Ruling") at 9 ("Although the flag pole sets require no further fabrication once imported, the flag pole sets do not constitute finished good kits because at the time of importation, similarly-sized unassembled flag pole sections are bundled together for shipment, meaning that all of the sections necessary to assemble a final finished product (*i.e.*, the flag pole) are not packaged together as a complete set in one package.").

[89] *See, e.g.*, *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Nov. 21, 2013) (final scope ruling on Kam Kiu's subparts for metal bushings) at 9 ("Kam Kiu's subparts [are not excluded as subassemblies because they] are incomplete and unfinished, resembling standard extrusions that require additional finishing before being installed."); *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Nov. 19, 2012) (final scope ruling on motor cases, assembled and housing stators) at 14 ("We find that the assembled motor cases housing stators at issue meets the criteria for exclusion as outlined in the SMVC Scope Ruling. As noted above, the assembled motor cases housing stators at issue do not consist entirely of extruded aluminum. Further, we find that the assembled motor cases housing stators require no further finishing or fabrication upon importation.").

[90] Redetermination, ECF No. 68–1, at 16.

importation, i.e. "at the same time, as part of the same entry," listed on the same CBP 7501 form.[91] Because "[t]he evidence on the record indicate[d] that many curtain walls are constructed in stages," and Yuanda "in particular does not import all the necessary curtain wall units to assemble a curtain wall at one time," Commerce reasoned that the finished goods kit exclusion could not apply.[92] Commerce declined to consider the subassemblies test because it believes curtain wall units are not, by definition, subassemblies.[93]

Commerce's determination is unreasonable because (1) it is contrary to the terms of the AD&CVD Orders, having defined "subassembly" contrary to the plain language of the Orders; (2) it fails to adequately consider or address the description of the merchandise at issue and the (k)(1) materials, making the determination unsupported by substantial evidence; and (3) it draws distinctions between small and large unitized curtain wall systems, and between unitized curtain wall systems and similar products in a way that is arbitrary and capricious.

A. Commerce Has Interpreted the AD&CVD Orders Contrary to Their Terms

"[A] scope determination is not in accordance with the law if it changes the scope of an order or interprets an order in a manner contrary to the order's terms."[94]

The AD&CVD Orders define "subassembl[y]" as "partially assembled merchandise."[95] This definition is important because a subassembly may be excluded from the scope of the AD&CVD Orders "provided that they enter the United States as 'finished goods' or 'finished goods kits.'"[96] Subassemblies may be finished goods or a finished goods kit (and therefore excluded) if they satisfy the subassemblies test: "[1] they require no further 'finishing' or 'fabrication'

[91] *Id*. at 15 (citations omitted).

[92] *Id.* at 17.

[93] *Id*. at 35–36.

[94] *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); *Eckstrom Indus*., 254 F.3d at 1072.

[95] AD Order, 76 Fed. Reg. at 30,651; CVD Order, 76 Fed. Reg. at 30,654; *see also* Valeo Redetermination, Ct. No. 12–00381, ECF No. 20–1, at 8 (sustained, unchallenged, in Order, June 20, 2013, Ct. No. 12–00381, ECF No. 23) (defining subassembly as "merchandise that is 'partially assembled' and inherently part of a larger whole.") (quoting SMVC Scope Ruling, *supra* note 24, at 7).

[96] SMVC Scope Ruling, *supra* note 24, at 7 (quoting AD Order, 76 Fed. Reg. at 30,651; CVD Order, 76 Fed. Reg. at 30,654).

prior to assembly,[97] [2] contain all the necessary hardware and components for assembly, and [3] are ready for installation at the time of entry."[98]

Here, Commerce defines subassembly, without reference to the language of the AD&CVD Orders, as a "unique subsidiary component of a larger finished product,"[99] and determines that, based on this definition, unitized curtain wall cannot be a subassembly because curtain wall units "ha[ve] no identity of [their] own other than as a part of a curtain wall."[100] But Commerce's analysis is contrary to the plain language of the AD&CVD Orders. There is nothing in the language of the Orders that requires "uniqueness" or "individual identity" from a subassembly. A subassembly is defined as "partially assembled merchandise."[101] Indeed, Commerce's own application of the subassemblies test contradicts this "uniqueness" requirement.[102]

---

[97] Defendant-Intervenor argues that the unitized curtain wall at issue here cannot be excluded under the finished goods kit exclusion because it requires "further fabrication and assembly after importation." CWC Reply, ECF No. 87, at 30–32. Because Commerce did not reach this question, *see* Redetermination, ECF No. 68–1, at 41–42, the court also does not reach this question.

[98] Valeo Redetermination, Ct. No. 12–00381, ECF No. 20–1, at 8 (citing SMVC Scope Ruling, *supra* note 24, at 7). Further, subassemblies made entirely from aluminum extrusions cannot be so excluded. AD Order, 76 Fed. Reg. at 30,651; CVD Order, 76 Fed. Reg. at 30,654; *see Aluminum Extrusions from the [PRC]*, Final Scope Ruling, A-570–967 & C-570–968 (Dep't of Commerce Nov. 19, 2012) (final scope ruling on motor cases, assembled and housing stators) at 14. This prohibition is not at issue here because unitized curtain wall is made from a variety of materials, including aluminum extrusions. *See* Yuanda Scope Request, ECF No. 83 at Tab 1, at 8 (Yuanda's unitized curtain wall "is produced by fabricating a frame (generally from extruded aluminum), adding to it thermal insulation, filling it (generally with glass), sealing the infill, drilling holes, [and] attaching additional metal or plastics."); Ex. 1 to Yuanda Scope Request, ECF No. 83 at Tab 1 (providing diagrams and photos explaining fabrication, finishing, and installation process of Yuanda unitized curtain wall).

[99] Redetermination, ECF No. 68–1, at 35 (citing SMVC Scope Ruling, *supra* note 24, at 7).

[100] *Id.* at 36 (quoting Yuanda Scope Ruling, ECF No. 34–1, at 25).

[101] AD Order, 76 Fed. Reg. at 30,651; CVD Order, 76 Fed. Reg. at 30,654.

[102] *See, e.g.*, *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce July 25, 2014) (final scope ruling on fan blade assemblies) at 16 (finding that fan blades, to be installed in a cooling system, although not unique, were subassemblies and finished goods, and therefore excluded); *id*. at 17 (explaining that the Yuanda Scope Ruling, ECF No. 34–1, does not stand for the proposition that "a final finished good must have a consumptive use on its own in order to be excluded from the scope of the [AD&CVD] Orders."); *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Nov. 23, 2015) (final scope ruling on Dometic Corp.'s lateral arm assemblies) at 11 (finding the lateral arm assemblies excluded as "subassemblies that qualify for the finished merchandise exclusion" because they "entered the United States as finished merchandise and subsequently were integrated into a larger system," and "require no further assembly or fabrication after importation; they are ready for immediate use," without mention of any uniqueness or individual identity requirement).

Commerce also asserts that the subassemblies test need not be considered here because "there is specific scope language identifying parts for curtain walls as subject to the [AD&CVD Orders]" and "both the CIT and [Federal Circuit] have affirmed [Commerce's] conclusion that curtain wall units are 'parts of curtain walls.'"[103]

"[P]arts for . . . curtain walls," however, are included within the scope of the AD&CVD Orders only insofar as they "otherwise meet the definition of aluminum extrusions."[104] The exclusions are part of the definition of aluminum extrusions, i.e, in the same way that parts for curtain walls made with non-PRC aluminum are excluded, parts for curtain walls that are a finished good kit or a subassembly finished good kit are excluded.[105] That parts for curtain walls are within the scope does not prevent Yuanda's unitized curtain wall from being excluded.[106] "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used[. . .]."[107]

Further, the decisions to which Commerce cites do not, as Commerce suggests, support the proposition that the inclusion of "parts for . . . curtain walls" precludes consideration of any exclusion.[108] In the CWC Scope Ruling, Commerce found that "the products described in CWC's Amended Scope Request are within the scope of the Orders."[109] The CWC's Amended Scope Request covered "parts of cur-

---

[103] Redetermination, ECF No. 68–1, at 36 (citing *Yuanda I*, __ CIT at __, 961 F. Supp. 2d at 1297–98; *Yuanda II*, 776 F.3d at 135659).

[104] AD Order, 76 Fed. Reg. at 30,651; CVD Order, 76 Fed. Reg. at 30,654.

[105] To suggest, as Commerce has done here, that excluding Yuanda's unitized curtain wall would render the provision for "parts for . . . curtain walls" a nullity, is a false contrapositive. *See* Yuanda Scope Ruling, ECF No. 34–1, at 23 ("Because the scope language expressly includes parts of curtain walls, and because a curtain wall unit is part of a curtain wall, we would read out of the scope the inclusion of parts of curtain walls were we to find that a curtain wall unit is finished merchandise that is not covered by the scope."). As the CWC pointed out in their scope ruling request, "[a] curtain wall includes numerous parts and components including curtain wall units." CWC Am. Scope Request, ECF No. 83–1 at Tab 2 at Ex.2, at 2; *see also* American Architectural Manufacturers Assoc., *Curtain Wall Design Guide Manual* (2005), Ex. 2 to Yuanda Scope Request, *reproduced in* Pub. App. to [Yuanda's Br.], ECF No. 83 at Tab 1 ("AAMA Manual"), at 3–9 (explaining that there are five main types of curtain wall systems, including stick systems, unit systems, and unit and mullion systems, all having different parts of various degrees of preassembly).

[106] *See* Petition, ECF No. 83–3 at Tab 10, at Ex. I-5 (listing "unassembled unitized curtain walls" as excluded from the scope under the finished goods kit exclusion).

[107] *NLRB v. Federbush Co.,* 121 F.2d 954, 957 (2d Cir. 1941) (L.H and, J.).

[108] *Cf.* Redetermination, ECF No. 68–1, at 9–17 (finding that curtain wall units may be excluded from the scope of the AD&CVD Orders as a finished goods kit if all parts to assemble a final, finished curtain wall were present at the time of importation).

[109] CWC Scope Ruling, *supra* note 36, at 10.

tain walls,"[110] defined as "curtain wall sections, falling short of the final finished curtain wall," including, but not limited to, curtain wall units, i.e., "modules that are designed to be interlocked with each other, like pieces of a puzzle."[111] The CIT and Federal Circuit affirmed this ruling.[112] However, because the "scope ruling was limited to the products discussed" in the CWC's scope request, Commerce did not consider, indeed expressly declined to consider, whether the specific products of any interested party could be properly excluded under any of the AD & CVD Orders' enumerated exclusions.[113] This Court sustained that decision.[114] At no point did Commerce consider the products at issue here,[115] nor the applicability of any scope exclusions

[110] CWC Am. Scope Request, ECF No. 83–1 at Tab 2 at Ex 2, at 2.

[111] *Id*. at 8–9; *see also* CWC Scope Ruling, *supra* note 36, at 3 ("The CWC states that curtain wall parts fall short of the final finished curtain wall that envelopes an entire building structure. Certain curtain wall parts are assembled into modules that are designed to be interlocked with either curtain wall parts, like pieces of a puzzle."). *But cf. id*. at 9 ("[W]e note that CWC's Amended Scope Request does not seek a scope ruling on complete curtain wall units, but rather 'parts of curtain walls,' and this scope ruling is limited to the products discussed in the CWC's Amended Scope Request.").

[112] *Yuanda I*, 961 F. Supp. 2d at 1294 ("Because curtain wall units are 'parts for' a finished curtain wall, the court's primary holding is that curtain wall units and other parts of curtain wall systems fall within the scope of the [AD&CVD Orders]."); *Yuanda II*, 776 F.3d at 1359 ("The scope language explicitly includes "parts for ... curtain walls" and curtain wall units are parts of a finished curtain wall.").

[113] CWC Scope Ruling, *supra* note 36, at 9.

[114] *Yuanda I*, 961 F. Supp. 2d at 1301 ("The court finds that Commerce properly confined its inquiries to the request made by the CWC . . . . That is, an inquiry as to whether a particular entry, or even product, would qualify for an exception to the scope language simply goes far beyond the CWC's request."); *see also Yuanda II*, 776 F.3d 1351 (providing no discussion of the finished goods kit exclusion nor the subassemblies test). The court in *Yuanda II* appears to have misstated when it says that "Commerce explicitly considered whether Yuanda's merchandise fell into one of the enumerated exclusions." 776 F.3d at 1358. Further any such misstatement would also be mere dicta because Yuanda's merchandise was never at issue before Commerce, CWC Scope Ruling, *supra* note 36, at 9 ("[T]his scope ruling is limited to the products discussed in the CWC's Amended Scope Request."), and Commerce explicitly declined to consider Yuanda's merchandise and the applicability of the AD&CVD Order exclusions thereto, *id*. at 9 ("[W]e note that the CWC's Amended Scope Request does not seek a scope ruling on [the product described by Yuanda,] complete curtain wall units, but rather 'parts for curtain walls,' and this scope ruling is limited to the products discussed in the CWC's Amended Scope Request."). *See* 28 U.S.C. § 2637(d) (requiring exhaustion of administrative remedies for jurisdiction).

[115] *Yuanda II* refers to the product at issue in the CWC Scope Ruling as "Yuanda's curtain wall units." *See, e.g.*, *Yuanda* II, 776 F.3d at 1354 ("Commerce initiated a scope investigation of the [AD&CVD Orders] and determined Yuanda's curtain wall units were within the scope."). However, this is a misnomer, as Yuanda's merchandise, curtain wall units or otherwise, were not at issue before Commerce. CWC Scope Ruling, *supra* note 36, at 9 ("[T]his scope ruling is limited to the products discussed in the CWC's [ ] Scope Request."); *id*. at 1 (considering "curtain wall units and other parts of curtain wall[s]" as described in

thereto.[116] The CWC Scope Ruling, and the cases affirming it, cannot be cited for an interpretation and finding that was not considered or discussed.

If anything, *Yuanda I* and *Yuanda II* may be cited for the opposite proposition, as both found that individual curtain wall units were subject merchandise at least in part because curtain wall units were subassemblies of curtain walls,[117] and declined, expressly or impliedly, to consider the subassembly exclusion as applied to any specific product, including Plaintiff's, because that would go "far beyond the [underlying] CWC's [Scope Ruling] Request," and therefore the scope of Commerce's determination and the courts' jurisdiction.[118] That is, the courts affirmatively answered the threshold question as to whether a curtain wall unit was a subassembly,[119] but left to

the CWC Am. Scope Request); *Yuanda I*, __ CIT at __, 961 F. Supp. 2d at 1300 ("Commerce properly confined its inquiries to the request made by the CWC . . . . That is, an inquiry as to whether a particular entry, or even product, would qualify for an exception to the scope language simply goes far beyond the CWC's request."). "Yuanda's curtain wall units" could not have been at issue before the Federal Circuit if they were not at issue already before Commerce. *See* 28 U.S.C. § 2637(d) (requiring exhaustion of administrative remedies for jurisdiction); *see also Sandvik Steel*, 164 F.3d at 599 (Fed.Cir. 1998) (citing *McKart*, 395 U.S. at 193).

[116] CWC Scope Ruling, *supra* note 36, at 9; *Yuanda I*, __ CIT at __, 961 F. Supp. 2d at 1300–01; *Yuanda II*, 776 F.3d at 1353 ("[The CWC Amended Scope Request] asked Commerce to issue a scope ruling confirming that curtain wall units and other parts of curtain wall systems are subject to the scope of the [AD&CVD Orders]." (internal quotation marks, emphasis, and citation omitted)).

[117] Specifically, the court in *Yuanda I* notes that "'[t]he scope includes the aluminum extrusion components that are attached(e.g., by welding or fasteners) to form subassemblies, i.e., partially assembled merchandise,'" __ CIT at __, 961 F. Supp. 2d at 1296 (quoting AD Order, 76 Fed. Reg. at 30,651), that "[c]urtain wall units are assembled into completed curtain walls by, among other things, fasteners," id. at 1297 (internal citations omitted), and that "[p]laintiffs necessarily concede that absolutely no one purchases for consumption a single curtain wall piece or unit" because "a number of curtain wall units are attached to form the completed curtain wall, the final finished product," *id.* at 1278 (internal quotation marks and citation omitted). On this basis the court concluded that "[c]urtain wall units are therefore undeniably components that are fastened together to form a completed curtain wall," tracking the subassembly language from the AD&CVD Orders, and are thus "'parts for,' and 'subassemblies' for, completed curtain walls" and "fall within the scope of the [AD&CVD] Orders. *Id*. at 1278; *see* AD Order, 76 Fed. Reg. at 30,651; CVD Order, 76 Fed. Reg. at 30,654. *Yuanda II* affirms this analysis. *Yuanda II*, 776 F.3d at 1358.

[118] *Yuanda I*, __ CIT at __, 961 F. Supp. 2d at 1301; *see* CWC Scope Ruling, *supra* note 36, at 9; *Yuanda I*, 961 F. Supp. 2d at 1300–01 ("The court finds that Commerce properly confined its inquiries to the request made by the CWC . . . . That is, an inquiry as to whether a particular entry, or even product, would qualify for an exception to the scope language simply goes far beyond the CWC's request."); *Yuanda II*, 776 F.3d 1351 (providing no discussion of the finished goods kit exclusion nor the subassemblies test); *see also* 28 U.S.C. § 2637(d) (requiring exhaustion of administrative remedies for jurisdiction).

[119] Indeed, as the *Yuanda I* and *II* analysis implies, a curtain wall unit must be considered a subassembly rather than a "part" on the plain language of the AD&CVD Orders: "[P]arts"

Commerce the question of how the subassembly exclusion affected the status of any specific unitized curtain wall product. The court in *Yuanda I* indicated that "[i]f [P]laintiffs wished treatment for their specific products under the 'finished goods kit' exception," whether general or subassembly-specific, "their route was to file a petition of their own seeking the benefit of the exclusion" for their specific product, making the finished good kit exclusion a question "for another day."[120] This is that day.

While Commerce "enjoys substantial freedom to interpret and clarify its antidumping duty orders, it can neither change them, nor interpret them in a way contrary to their terms."[121] Here, Commerce has changed and expanded the terms of the AD&CVD Orders by redefining "subassembly" and ignoring the scope language that limits products covered. Accordingly, Commerce's Redetermination is not in accordance with law.

B. Commerce's Ruling is Unsupported by Substantial Evidence

"[T]he substantial evidence standard requires review of the entire administrative record" and asks, in light of that evidence, whether that determination was reasonable.[122] "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."[123]

In the scope ruling at issue here, the administrative record includes the (k)(1) materials – "[t]he descriptions of the merchandise contained in the petition, [Commerce's] initial investigation, and the [prior] determinations of [Commerce] (including prior scope determi-

of final finished merchandise are "included in the scope" if they "otherwise meet the definition of aluminum extrusions," AD Order, 76 Fed. Reg. at 30,651; CVD Order, 76 Fed. Reg. at 30,654, i.e., are shapes and forms made of the covered aluminum alloys and produced by an extrusion process, AD Order, 76 Fed. Reg. at 30,650; CVD Order, 76 Fed. Reg. at 30,654. Subassemblies are "partially assembled merchandise" including both "aluminum extrusion component[s] attached [together] (e.g., by welding or fasteners)" and "non-aluminum extrusion components." *Id.* A curtain wall unit is more than extruded aluminum shapes and forms; they include "non-aluminum extrusion components" – glass, plastics, and other metals. *Yuanda Scope Request*, *supra* note 3, at 8; *see* Ex. 1 to Yuanda Scope Request, ECF No. 83 at Tab 1 (providing diagrams and photos explaining fabrication, finishing, and installation process of Yuanda unitized curtain wall).

[120] *Yuanda I*, __ CIT at __, 961 F. Supp. 2d at 1301.

[121] *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998) (internal citations, and quotation and alteration marks, omitted).

[122] *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006).

[123] *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951).

nations) and the [International Trade] Commission,"[124] – which provide the regulatory history, to aid in the interpretation of the language of the AD&CVD Orders.[125]

Here, Commerce was confronted with the fact that a (k)(1) material, the previously neglected Petition, expressly lists "unassembled unitized curtain walls" as excluded merchandise under the "finished goods kit" exclusion.[126]

Commerce tries to construe this statement as evidence for its conclusion that "a unitized curtain wall shipped as curtain wall units can be excluded as a 'finished goods kit,' . . . only if all of the necessary curtain wall units" to make a complete curtain wall are "imported at the same time," i.e., entered on the same 7501 form.[127] However, as Commerce points out, the Petition "provides no further clarification on what ['at the time of importation'] [means] in relation to 'unassembled unitized curtain walls' or any other product."[128]

Commerce looks to other documents of varying relevance and reliability for confirmation of its interpretation. First, Commerce relies on another (k)(1) material, a preliminary scope memorandum from the investigation, in which Commerce found that "unitized curtain wall and its assorted parts" (i.e., "the separately packaged assorted component parts (an aluminum frame and aluminum bracket)") were within the scope of the AD&CVD Orders as parts for curtain walls.[129] This determination is of limited relevance because it was made before the final determination in which Commerce amended the scope of the AD&CVD Orders to clarify that subassemblies could fall within the

[124] *Mid Continent Nail Corp.*, 725 F.3d at 1302 (quoting 19 C.F.R. § 351.225(k)(1)) (alterations original).

[125] *Smith Corona Corp. v. United States*, 915 F.2d 683, 685 (Fed. Cir. 1990) ("The class or kind of merchandise encompassed by a final antidumping order is determined by the order, which is interpreted with the aid of the antidumping petition, the factual findings and legal conclusions adduced from the administrative investigations, and the preliminary order.").

[126] Petition, ECF No. 83–3 at Tab 10, at Ex. I-5.

[127] Redetermination, ECF No. 68–1, at 16; *id.* at 10 ("[I]t appears . . . that Petitioner intended that curtain walls which are composed of curtain wall units which enter the United States unassembled, and meet the requirements of the 'finished goods kit' exclusion language of the scope, could be considered a 'finished goods kit' and be excluded from the scope . . . .").

[128] *Id.* at 11–12.

[129] *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Oct. 27, 2010) (preliminary determination comments on the scope of the investigations) at 11, *reproduced in* Redetermination, ECF No. 68–2, at Attach. 2. Specifically, Commerce "preliminarily determined that curtain wall components exported by [Yuanda] are covered by the scope because [Yuanda] has not established that it imports its merchandise in a kit that contains at the time of importation all of the necessary parts to fully assemble a finished good." *Id.* at 11–12. Commerce notes that the Petitioner supported the agency's position. *Id.* at 11; Redetermination, ECF No. 68–1, at 13.

finished goods kit exclusion.[130] Further, the product described in this preliminary determination ("separately packaged assorted parts" of curtain walls) is parallel to that discussed in the CWC Scope Ruling (curtain wall units and parts),[131] in contrast to the complete curtain wall units imported pursuant to a sales contract.[132] Commerce does not account for these differences in its evaluation of the determination.

Second, Commerce argues that its finding that complete curtain wall units imported pursuant to a sales contract are not excluded as a finished goods kit unless "all of the necessary parts to assemble the finished good . . . [are] imported at the same time, as part of the same entry,"[133] is in keeping with its prior scope determinations.[134] Commerce cites to three final scope rulings discussing the finished goods kit exclusion.[135] While all three rulings do emphasize the "at the time of importation" requirement,[136] all three were decided before Commerce revised its interpretation of the AD&CVD Orders to provide for situations where it was unreasonable to require all necessary parts "at the time of importation," i.e., the subassemblies exclusion.[137] What is perhaps more telling is that Commerce does not address the other prior scope rulings that go against its determination here, i.e.,

[130] *See* Final AD I&D Mem., *supra* note 10, at 18 (amending, at Petitioner's request, to add the phrase "'unless imported as part of the "kit" defined further below' at the end of the last sentence in the fourth paragraph so that the resulting sentence reads: 'The scope includes aluminum extrusions that are attached (e.g., by welding or fasteners) to form subassemblies, i.e., partially assembled merchandise unless imported as part of a "kit" defined further below.'").

[131] CWC Scope Ruling, *supra* note 36, at 1.

[132] Yuanda Scope Ruling, *supra* note 3, at 1.

[133] Redetermination, ECF No. 68–1, at 15.

[134] These are also (k)(1) materials. *See Mid Continent Nail Corp*., 725 F.3d at 1302 (quoting 19 C.F.R. § 351.225(k)(1)).

[135] Redetermination, ECF No. 68–1, at 15 (citing *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Aug. 17, 2012) (final scope ruling on Solarmotion controllable sunshades) ("Solarmotion Scope Ruling") at 11; *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Dec. 13, 2011) (final scope ruling on Ameristar Fence Products' aluminum fence and post parts) ("Ameristar Scope Ruling") at 6; *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Dec. 9, 2011) (final scope ruling on window kits) ("Window Kits Scope Ruling") at 5).

[136] Solarmotion Scope Ruling, *supra* note 135, at 11; Ameristar Scope Ruling, *supra* note 135, at 6; Window Kits Scope Ruling, *supra* note 135, at 5.

[137] In fact, none of these cases even provide discussion of whether the products at issue there were subassemblies, much less whether they could be excluded as such. *See* Solarmotion Scope Ruling, *supra* note 135; Ameristar Scope Ruling, *supra* note 135; Window Kits Scope Ruling, *supra* note 135.

that did not require all parts for the complete downstream product "at the time of importation" because the products at issue were subassemblies.[138]

Third, Commerce offers a letter, written by Petitioners specifically for this scope proceeding, supporting Commerce's position,[139] and a news article quoting Petitioner's counsel as having said that a curtain wall system would have to "contain all of the window glass at the time of entry to be excluded."[140] Neither of these documents is appropriate support, as they are not (k)(1) materials.[141] The former is a *post hoc* rationalization made for the purposes of litigation; the latter Commerce itself has previously dismissed as irrelevant.[142]

In contrast, Commerce does not consider the ample evidence on the administrative record defining and explaining the product at issue here. Commerce does not consider whether a single-entry, unitized curtain wall is a real product, outside the realm of its own ungainly semantic gymnastics, that is imported with any regularity into the United States.[143] This makes Commerce's interpretation unreasonable.[144] Indeed, Petitioners themselves provided in other (k)(1) ma-

---

[138] *See, e.g.*, Valeo Redetermination, Ct. No. 12–00381, ECF No. 20–1, at 8–9; SMVC Scope Ruling, *supra* note 24, at 6–7 (however this ruling is discussed at Redetermination, ECF No. 68–1, at 35–36, where Commerce declines to apply the subassembly exclusion); Traffic Brick Scope Ruling, *supra* note 88, at 10; Law St. Scope Ruling, *supra* note 88, at 9; Diamond Scope Ruling, *supra* note 88, at 9.

[139] *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (June 7, 2013) (rebuttal comments in response to Yuanda's Comments regarding Commerce's Initiation of a formal scope inquiry), *reproduced in* Redetermination, ECF No 68–2, at Attach. 4.

[140] Redetermination, ECF No. 68–1, at 14 (quoting "Petitioner's counsel in National Glass Magazine).

[141] *See* 19 C.F.R. § 351.225(k)(1).

[142] *See* Yuanda Scope Ruling, *supra* note 3, at 26 ("[W]e do not find that this quote, which was not on the record of the investigation, can be considered to embody the intent of the petitioner.").

[143] *See* CWC Scope Ruling, *supra* note 36, at 6 ("Petitioners reiterate CW[C]'s contention that it is simply not possible for a complete curtain wall to enter as a 'kit' because the entire installation process is designed to work with other parts to form a larger structure and represent a collection of individual parts that comprise a single element as opposed to complete system." (footnotes omitted)); Yuanda Scope Request, ECF No. 83 at Tab 1, at 8–9 (indicating that Yuanda's practice is to deliver unitized curtain wall, given its size and complexity, to job sites in phases); Ex. 1 to Yuanda Scope Request, ECF No. 83 at Tab 1 (providing illustration of curtain wall units shipped to building sites in sets to assembled into curtain wall systems); *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Apr. 26, 2013) (comments in opposition to the scope request regarding complete curtain wall units) at 20, *reproduced in* Yuanda's App., ECF No. 83–1 at Tab 2 ("[C]urtain wall units are imported with many entries in a multitude of containers and numerous shipments to construct a complete curtain wall for a particular project.").

[144] *Cf. Polites v. United States*, __ CIT __, 755 F. Supp. 2d 1352, 1357 (2011) (finding that Commerce's interpretation of an order was "unreasonable" because "nothing in the record

terials that "it is simply not possible for a complete curtain wall to enter as a 'kit'" – i.e., all at once.[145] Petitioners could not have intended to use a product as an example in their petition that, by Petitioners' own admission, does not exist. "An exclusion from a scope determination must . . . encompass merchandise which is or may be imported into the United States in order to act as a meaningful exclusion; anything less renders the exclusion hollow and improperly changes the meaning of the exclusion."[146] Even if such a product existed but was rarely imported, insisting upon such an interpretation would render the exclusion "insignificant, if not wholly superfluous."[147]

Commerce has therefore "entirely failed to consider an important aspect of the problem,"[148] i.e., the actual nature of the products it is considering. "The substantiality of evidence must take into account

demonstrates merchandise matching this definition is imported into the United States or is even possibly imported into the United States").

[145] CWC Scope Ruling, *supra* note 36, at 6 ("Petitioners reiterate CW[C]'s contention that it is simply not possible for a complete curtain wall to enter as a 'kit' because the entire installation process is designed to work with other parts to form a larger structure and represent a collection of individual parts that comprise a single element as opposed to complete system."(footnotes omitted)).

[146] *Polites*, __ CIT at __, 755 F. Supp. 2d at 1357.

[147] *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted). Commerce expresses concern that, if the exclusion were made to cover "numerous imports over an unspecified period of time," of curtain wall units imported pursuant to a contract to supply a curtain wall, "it would appear to be very difficult if not impossible, for CBP to administer, monitor, and enforce an exclusion to the [AD&CVD Orders] which would be contingent on piecemeal imports over a period of time." Redetermination, ECF No. 68–1, at 17. Plaintiffs point out that such monitoring could be as simple as referencing the entry documents: Yuanda produces and exports curtain wall units pursuant to a contract to supply a curtain wall. Each commercial invoice accompanying Yuanda's 7501 forms is coded to a specific contract. "Hence, to determine whether the complete curtain wall was delivered, it is only a matter of tying the commercial invoices to the contract terms." Yuanda Br., ECF Nos. 79 & 80, at 24 (citing Ex. 3 to Yuanda Scope Request, ECF No. 83 at Tab 1 (providing example contract for unitized curtain wall to be delivered in phases); *see also* Jangho Br., ECF No. 78, at 12-17.

As Commerce states elsewhere, ease or difficulty of administration is not a valid basis for scope rulings. Redetermination, ECF No. 68–1, at 37 (Commerce's scope determination must be based "on the language of the scope of the [AD&CVD Orders], the language of the Petition, the underlying investigation, the Department's interpretation of the scope in other scope rulings, and the factual information on the record of this proceeding."). It is not a question of policy, as Defendant suggests, *see* Def.'s Br., ECF No. 85, at 33, but rather a list of factors prescribed by regulation, *see* 19 C.F.R. § 351.225(k) – and *expressio unius est exclusio alterius*.

[148] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Although the Court in *State Farm* was discussing the "arbitrary or capricious"(rather than the "substantial evidence") standard of review, this reasoning is also relevant here because an agency determination that is arbitrary is *ipso facto* unreasonable.

whatever in the record fairly detracts from its weight."[149] Commerce has not done so here, leaving its ruling unreasonable.

C. Commerce Has Made Arbitrary Distinctions Between Subject and Non-Subject Products

An agency determination is arbitrary and capricious if the agency has treated similarly situated parties or products differently "without reasonable explanation."[150]

Here, in finding that only unitized curtain walls entered with all parts on a single 7501 form are excluded from the scope of the AD&CVD Orders, Commerce makes several distinctions between similar products without reasonable explanation. First, Commerce has drawn a distinction between (hypothetical) small (i.e., capable of being entered on a single 7501 form) and all other curtain wall systems. This distinction is not based on any quality or aspect of the constituent units, indeed the units could be identical in all but number, and thereby treats products that are effectively the same differently under the AD&CVD Orders.

Similarly, Commerce's ruling draws an arbitrary distinction between window walls and curtain walls. Window walls are excluded from the scope of the AD&CVD Orders under the finished goods kit exclusion.[151] Under Commerce's interpretation, unitized curtain walls, largely, if not entirely, are not.[152] While Commerce acknowledges that the Plaintiffs allege similarities between window walls and curtain walls, Commerce considers these similarities irrelevant, finding the differences dispositive.[153]

Commerce finds two differences: First, "unlike parts for curtain walls, such as curtain wall units, window walls are not specifically identified as subject merchandise in the scope of the [AD&CVD Orders]."[154] However, this distinction has no real meaning. That parts for curtain walls are within the scope does not prevent unassembled

See, e.g., *Ward v. Sternes*, 334 F.3d 696, 704 (7th Cir. 2003) (noting that "a decision [that] is so inadequately supported by the record as to be arbitrary [is] therefore objectively unreasonable") (quotation marks and citations omitted).

[149] *Universal Camera*, 340 U.S. at 488.

[150] *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003) (citation omitted).

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

[152] Redetermination, ECF No. 68–1, at 16.

[153] *Id.* at 32.

[154] Redetermination, ECF No. 68–1, at 33.

unitized curtain wall from being excluded.[155] Moreover, industry publications on the record show that window walls are a type of curtain wall[156] – such that "parts for . . . curtain walls" means parts for window walls as well, making both listed as subject merchandise. Second, Commerce finds that curtain walls and window walls "are not comparable for purposes of [Commerce's] analysis," because "[w]indow walls, once assembled, are each a finished good" whereas curtain wall units "which attach to other curtain wall units, are parts for the finished good, the curtain wall itself."[157] This is again, a meaningless distinction that does not consider the definition of the product at issue here and belies the similarities between the two products, namely, that both are interlocking, aluminum-framed, widow-like products shipped in phases and installed in sections.[158] Indeed, Commerce makes no effort to account for the evidence on the record indicating that window walls and curtain walls are substantially similar products.

Accordingly, Commerce has treated similarly situated products differently without reasonable explanation.

CONCLUSION

As Commerce anticipated elsewhere, an interpretation of "finished goods kit" that requires "all parts to assemble the ultimate downstream product" to enter at the same time, on the same 7501 Form, "where the ultimate downstream product" is "a fire truck" or "a larger

[155] *See* Petition, ECF No. 83–3 at Tab 10, at Ex. I-5 (listing "unassembled unitized curtain walls" as excluded from the scope under the finished goods kit exclusion). *Cf. Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1073 (Fed. Cir. 2001) ("The Government's argument essentially reduces to an interpretation of the Order as covering *any* stainless steel butt-weld pipe fittings under fourteen inches in diameter. This construction is belied by the terms of the Order itself, which indicate that it applies only to '*certain* stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14" in diameter.'" (emphasis original)).

[156] A window wall is "[a] type of metal curtain wall installed between floors or between floor and roof and typically composed of vertical and horizontal framing members, containing operable sash or ventilators, fixed lights or opaque panels or any combination thereof." AAMA Manual, ECF No. 83 at Tab 1, at 2. Further, the terms window wall and curtain wall "still mean different things to different people. Often they are used interchangeably with no clear distinction being made between them." *Id*. Their meanings are "interrelated and overlapping." *Id.*

[157] Redetermination, ECF No. 67, at 33–34.

[158] Window Wall Scope Ruling, *supra* note 151, at 5 ("A window wall must be installed in sections and [is] imported as completed sections in phases with each phase comprising of approximately 30 or more cartons."); Yuanda Scope Request, ECF No. 83 at Tab 1, at 8; AAMA Manual, ECF No. 83 at Tab 1, at 2, 5.

structure, such as a house" or an entire building façade, has led to an "unreasonable," if not "absurd" result.[159]

Accordingly, the court remands to Commerce for further consideration in accordance with this opinion. Commerce shall have until March 22, 2016 to complete and file its remand redetermination. Plaintiffs shall have until April 5, 2016 to file comments. Defendant and Defendant-Intervenor shall have until April 15, 2016 to file any reply.[160]

IT IS SO ORDERED.

Dated: February 9, 2016
New York, NY

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

Slip Op. 16–12

THE BARDEN CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Chief Judge
Leo M. Gordon, Judge
Gregory W. Carman, Senior Judge
Consol. Court No. 06–00435

[Plaintiff's motion for judgment on the agency record denied; certain claims dismissed for lack of standing; judgment for Defendants.]

Dated: February 10, 2016

Max F. Schutzman, *Andrew T. Schutz*, and *Kavita Mohan*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, New York, for Plaintiff The Barden Corporation.

Martin M. Tomlinson, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Frank E. White, Jr.*, Assistant Director. Of counsel on the brief were *Suzanna Hartzell-Baird* and *Jessica Miller*, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection, of Washington, DC.

Patrick V. Gallagher, Jr., Attorney-Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for Defendant U.S. International Trade Commission. With him on the brief were *Dominic Bianchi*, General Counsel, and *Robin L. Turner*, Acting Assistant General Counsel for Litigation.

Terence P. Stewart, *Geert De Prest*, and *Patrick J. McDonough*, Stewart and Stewart, of Washington, DC, for Defendant-Intervenors Timken US Corporation and MPB Corporation.

---

[159] *See* SMVC Scope Ruling, *supra* note 24, at 7.

[160] Because the court remands, it does not reach the issue of whether Commerce must clarify or amend the instructions issued to CBP regarding the suspension date of the entries at issue to include Plaintiffs Jangho and Permasteelisa. *See* Jangho's Br., ECF No. 78, at 23; Permasteelisa's Br., ECF No. 39, at 38.

OPINION

Gordon, Judge:

Plaintiff, The Barden Corporation ("Barden"), a domestic producer of antifriction bearings ("AFBs"), initiated these consolidated actions[1] against the United States asserting constitutional challenges to the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"), Pub. L. No. 106–387, §§ 1001–03, 114 Stat. 1549, 1549A-72–75 (2000), codified at 19 U.S.C. § 1675c (2000),[2] repealed by Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(a), 120 Stat. 4, 154 (2006).[3]

Barden applied for, but was denied, shares for Fiscal Years ("FYs") 2007, 2008, and 2009 of CDSOA distributions of antidumping duties assessed under various AFB antidumping duty orders issued in 1989.[4] U.S. Customs and Border Protection ("Customs" or "CBP") denied Barden's applications for FYs 2007, 2008, and 2009 under a provision of the CDSOA (the "acquisition provision") that makes a domestic producer ineligible to receive CDSOA distributions if it was "acquired by a company or business that is related to a company that opposed the investigation" resulting in the issuance of the relevant antidumping duty order. 19 U.S.C. § 1675c(b)(1). As to FYs 2010 and 2011, Barden made no application for CDSOA distributions.

Regarding claims for FYs 2007, 2008, and 2009, Barden raises two as-applied challenges to the constitutionality of the acquisition provision. First, Barden claims that Customs violated Barden's constitutional right to equal protection by denying Barden CDSOA eligibility without a rational basis, asserting that Barden is situated similarly to other domestic producers that received CDSOA distributions. Second, Barden claims that Customs applied the acquisition provision retroactively and thereby violated Barden's right to due

---

[1] Under Consol. Court No. 06–00435 are Court Nos. 07–00063, 08–00350, 08–00389, 10–00050, and 12–00247.

[2] Citations to 19 U.S.C. § 1675c are to the 2000 edition of the United States Code. All other citations to the United States Code are to the 2012 edition.

[3] Congress repealed the CDSOA in 2006, but the repealing legislation provided that "[a]ll duties on entries of goods made and filed before October 1, 2007, that would [but for the legislation repealing the CDSOA], be distributed under [the CDSOA] shall be distributed as if [the CDSOA] had not been repealed . . . ." Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(b), 120 Stat. 4, 154 (2006). In 2010, Congress further limited CDSOA distributions by prohibiting payments with respect to entries of goods that as of December 8, 2010 were "(1) unliquidated; and (2)(A) not in litigation; or (B) not under an order of liquidation from the Department of Commerce." Claims Resolution Act of 2010, Pub. L. No. 111–291, § 822, 124 Stat. 3064, 3163 (2010).

[4] *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom*, 54 Fed. Reg. 20,900, 20,900–11 (Dep't of Commerce May 15, 1989).

process. For FYs 2010 and 2011, Barden challenges Customs' application of the acquisition provision of the CDSOA to Barden under the First Amendment, equal protection doctrine, and due process clause.

Before the court is Plaintiff's motion for judgment upon the agency record, submitted under USCIT Rule 56.1. Plaintiff seeks (1) declaratory relief stating that the acquisition provision as applied to it is unconstitutional on equal protection and retroactivity grounds, and (2) an affirmative injunction requiring Customs to distribute CDSOA funds to Barden. For the reasons set forth below, the court denies Plaintiff's Rule 56.1 motion and will enter judgment for Defendants.

I. BACKGROUND

The background of this litigation is summarized briefly below and provided in detail in *Barden Corp. v. United States*, 36 CIT ___, 864 F. Supp. 2d 1370 (2012) ("*Barden I*"). The court presumes familiarity with the CDSOA, the underlying antidumping duty investigations, the procedural history of the decisions by the U.S. International Trade Commission ("ITC") and Customs regarding the CDSOA distributions for the subject fiscal years, and the underlying facts in this action as described in *Barden I*.

Barden expressly supported the petition underlying the antidumping duty investigation that resulted in the 1989 antidumping duty orders on AFBs. In 1991, Barden was acquired by FAG Kugelfischer Georg Schaefer KGaA, a German producer of AFBs whose U.S. affiliate, FAG Bearings Corporation, opposed the AFBs antidumping duty petition. *See* Compl. ¶ 10, ECF No. 4.[5] In 2002, FAG Kugelfischer Georg Schaefer KGaA, FAG Bearings Corporation, and Barden were acquired by INA-Schaeffler KG, another German producer of AFBs. *Id.* INA's U.S. manufacturing affiliate, INA Bearing Co., Inc., also opposed the antidumping duty petition. Br. in Supp. of Pl.'s Rule 56.1 Mot. for J. Upon the Agency R. 4, ECF. No. 95 ("Barden's Br.") (citing INA Bearing Co., Inc. Producer's Questionnaire Responses, Docs. 4–5, ECF No. 86–7).

In December 2000, as required by the CDSOA, the ITC transmitted to Customs a list of antidumping and countervailing duty orders in effect as of January 1, 1999, along with a list of those companies that had indicated "public" support for the petition seeking initiation of the antidumping duty investigation on AFBs. *See* Letter from USITC to Customs Re: List of Entities Indicating Public Support of Petition (Dec. 29, 2000), Doc. 5, ECF No. 95–1. Inclusion on the ITC's list of supporters of the petition is a necessary, but not a sufficient, condition

[5] Citations to the "Complaint" are to the complaint Plaintiff filed in Court No. 06–00435, unless otherwise specified.

for receiving distributions under the CDSOA. The initial ITC list of supporters of the petition resulting in the AFBs orders did not include Barden because Barden had not waived confidentiality for its expression of support for the petition. As a result, Customs' notices of intent to distribute for FYs 2004, 2005, and 2006 did not include Barden.

Barden initially was excluded from Customs' notice of intent to distribute for FY 2007. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 72 Fed. Reg. 29,582 (Dep't of Homeland Security May 29, 2007). However, it subsequently filed the necessary waiver of confidentiality and certifications with the ITC. *See* Letter from Barden and Schaeffler Containing Certifications for FY 2007 (July 27, 2007), Doc. 7, ECF No. 95–1. Thereafter, the ITC added Barden to the FY 2007 list of supporters of the petition. *See* Letter from USITC to Customs Re: Revision of Commission's List of Petitioners to Include Barden (Aug. 3, 2007), Doc. 8, ECF No. 95–1. Customs nevertheless denied Barden's application for FY 2007 CDSOA distributions because Barden was not included on the ITC's initial list. *See* Letter from CBP to Barden Denying Barden's Request for CDSOA Disbursements (Sept. 21, 2007), Doc. 9, ECF No. 95–1. Barden requested reconsideration. *See* Letter from Barden to CBP Requesting Reconsideration of CDSOA Disbursements (Dec. 20, 2007), Doc. 10, ECF No. 95–1.

Customs denied the request for reconsideration, reasoning that Barden "appears to have been acquired by a company that opposed the antidumping duty investigations." Letter from CBP to Barden Denying Reconsideration for 2007 CDSOA Disbursements (Jan 15, 2008), Doc. 11, ECF No. 95–1. Customs later rejected Barden's certifications and requests for distributions for FYs 2008 and 2009, using the same rationale. *See* Letters from CBP to Barden Denying Reconsideration for 2008 and 2009 CDSOA Disbursements (Sept. 5, 2008 & Aug. 19, 2009), Docs. 12–13, ECF No. 95–1.

The court previously dismissed Barden's First and Fifth Amendment challenges to the distributions for FYs 2004, 2005, and 2006. Regarding FY 2004, the court held that the claims against the ITC were time-barred and that no relief could be granted for the claims against Customs. *Barden I*, 36 CIT at ___, 864 F. Supp. 2d at 1376–77. The court also dismissed Barden's claims for FYs 2005 and 2006 for failure to state a claim upon which relief can be granted, on the ground that Barden, prior to 2007, failed to provide the required waiver of confidential treatment for its support of the petition. *Id.* at ___, 864 F. Supp. 2d at 1377–78. For the same reason, the court concluded that Barden's constitutional challenge to the retroactive

aspect of the CDSOA failed for FYs 2005 and 2006. *Id.* at ___, 864 F. Supp. 2d at 1378–79. Finally, the court held that Barden's remaining constitutional claims for FYs 2005 and 2006, which challenged the petition support requirement, were foreclosed by the binding precedent of *SKF USA, Inc. v. U.S. Customs and Border Protection*, 556 F.3d 1337 (Fed. Cir. 2009) ("*SKF*"), *cert. denied*, 560 U.S. 903 (2010). *Barden I*, 36 CIT at ___, 864 F. Supp. 2d at 1378.

The court, however, denied motions to dismiss by Defendants and Defendant-Intervenors directed to Barden's claims for CDSOA disbursements for FYs 2007, 2008, and 2009. The court stated that "[b]ecause the acquisition clause has not been subjected to judicial challenge on constitutional grounds, either in *SKF* or in any other case, the questions of whether the acquisition clause is permissible under the First Amendment and whether that clause is permissible under the equal protection guarantee remain matters of first impression." *Id.* at ___, 864 F. Supp. 2d at 1380. The court declined to consider the constitutional and related questions, including those pertaining to retroactivity, at the pleading stage, when the administrative record was not yet before the court. *Id.*

II. DISCUSSION

The court exercises subject matter jurisdiction pursuant to 28 U.S.C. § 1581(i)(4). *See id.* at ___, 864 F. Supp. 2d at 1373 (citing *Furniture Brands Int'l, Inc. v. United States*, 35 CIT ___, ___, 807 F. Supp. 2d 1301, 1307–10 (2011)). The court reviews the constitutionality of a statute *de novo*. *See Princess Cruises, Inc. v. United States*, 201 F.3d 1352, 1357 (Fed. Cir. 2000).

Congress enacted the CDSOA in 2000 to provide annual distributions to "affected domestic producers" ("ADPs") of duties collected on outstanding antidumping and countervailing duty orders, such as the antidumping duty orders on AFBs, to offset "qualifying expenditures" of those ADPs. 19 U.S.C. § 1675c(a). The statute defines an ADP generally as any manufacturer remaining in operation that "was a petitioner or interested party in support of the petition with respect to which an antidumping duty order . . . has been entered." 19 U.S.C. § 1675c(b)(1) (the "petition support requirement").

The definition of an ADP is in turn limited by the acquisition provision, which provides: "Companies, businesses, or persons . . . who have been acquired by a company or business that is related to a company that opposed the investigation shall not be an affected domestic producer." *Id.* A company or business is "related to" another if, *inter alia*, it "directly or indirectly controls or is controlled by the other" or "a third party directly or indirectly controls both" companies

or businesses. 19 U.S.C. § 1675c(b)(5). A company or business "shall be considered to directly or indirectly control another party if the party is legally or operationally in a position to exercise restraint or direction over the other party." *Id.*

A. CLAIMS RELATING TO FYS 2007, 2008, AND 2009

The court first considers Barden's as-applied constitutional claims seeking CDSOA disbursements for FYs 2007, 2008, and 2009. Barden's claims are, in essence, that the acquisition provision was applied to it in violation of its right to equal protection and, due to an alleged retroactive application, also in violation of its right to due process. In its complaints, Barden had also included First Amendment challenges to the acquisition provision for these fiscal years. *See Barden I*, 36 CIT at ___, 864 F. Supp. 2d at 1379–80. In its Rule 56.1 motion and supporting briefs, Barden asserts only the equal protection and due process retroactivity claims. Therefore, the First Amendment claims with respect to FYs 2007, 2008, and 2009 have been waived. *See* USCIT R. 56.1(c)(1) (stating that "the briefs submitted on the motion . . . must include a statement setting out . . . [t]he issues of law presented together with the reasons for contesting or supporting the administrative determination").

I. EQUAL PROTECTION

A party may challenge federal economic legislation on equal protection grounds under the due process clause of the Fifth Amendment. *See U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 173–177 (1980) (identifying the standard governing a Fifth Amendment equal protection challenge to the Railroad Retirement Act of 1974 as the same standard applying to a Fourteenth Amendment equal protection challenge to state legislation); *see also Mathews v. De Castro*, 429 U.S. 181, 182 n.1 (1976) ("It is well settled that the Fifth Amendment's Due Process Clause encompasses equal protection principles."). For an equal protection claim, a plaintiff maintains that it "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). "[A] classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (quoting *Heller v. Doe*, 509 U.S. 312, 319–20 (1993)). The statute will be upheld if "there is any reasonably conceivable state of facts that could provide a

rational basis for the classification." *Id.* (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). A rational basis may be found if "there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision-maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Id.* (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)).

To examine whether a rational basis exists to support a statute challenged on equal protection grounds, the court first must "deduce the independent objectives of the statute" and then must "analyze whether the challenged classification rationally furthers achievement of those objectives." *Fritz*, 449 U.S. at 187 (Brennan, J., concurring). The burden is on the party raising the constitutional challenge "'to negative every conceivable basis which might support [the statute],' whether or not the basis has a foundation in the record." *Heller*, 509 U.S. at 320–21 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

The U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") has discussed the purposes underlying both the petition support requirement and the acquisition provision of the CDSOA. In an action challenging the constitutionality of the petition support requirement, the Court of Appeals concluded that "[t]he purpose of the [CDSOA]'s limitation of eligible recipients was to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings." *SKF*, 556 F.3d at 1352; *accord Schaeffler Group USA, Inc. v. United States*, 786 F.3d 1354, 1363–64 (Fed. Cir. 2015). The CDSOA "shifts money to parties who successfully enforce government policy." *SKF*, 556 F.3d at 1356–57. The Court of Appeals in *Candle Corp. of America v. U.S. Int'l Trade Comm'n*, 374 F.3d 1087, 1094 (Fed. Cir. 2004) ("*Candle Corp.*"), construed the acquisition provision. The Court of Appeals held that the acquisition provision denied eligibility for CDSOA benefits not only to a domestic producer acquired by a business related to a company that opposed the investigation but also to a domestic producer acquired by a company that itself opposed the investigation. *Id.* The Court of Appeals concluded that "[t]he purpose of the statute is quite clear—to bar opposers of antidumping investigations from securing payments either directly or through the acquisition of supporting parties." *Id. Candle Corp.*, a case of statutory construction, did not involve questions regarding the constitutionality of the acquisition provision.

The dual purposes of the CDSOA—rewarding those who helped enforce U.S. antidumping laws by filing or supporting petitions and precluding rewards that benefit opponents of an investigation—are intertwined. The purpose of the petition support requirement, as identified by the Court of Appeals, could be defeated if the statute did not contain the acquisition provision. For instance, a party that opposed an antidumping duty investigation could acquire a petition supporter to benefit, directly or indirectly, from CDSOA distributions even though it had opposed the very investigation resulting in the relevant antidumping duty order. There is at least a "plausible policy reason," *Armour*, 132 S. Ct. at 2080, for differentiating between a domestic producer acquired by an opponent of an investigation, or by a business related to an opponent of an investigation, and one not so acquired. Therefore, the court must conclude that "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Id.*

Barden argues that it cannot reasonably be differentiated from other domestic producers. According to Barden, "the mere fact of a company's stock ownership bears no reasonable relation to the essential purpose of the CDSOA." Barden's Br. 8. Similarly, Barden maintains that its support of the AFBs petitions "place[s] it squarely within the category of injured parties that should be rewarded" pursuant to the CDSOA's purpose as divined by the Court of Appeals in *SKF*. *Id.* at 13. Barden contends that its "later acquisition by a German company, whose related affiliate opposed the petition," does not "invalidate" Barden's entitlement to a CDSOA distribution. *Id.* However, as Defendant United States points out, Barden's argument "ignores the economic reality that a benefit to a subsidiary company . . . necessarily benefits the parent company, either directly or indirectly." Def. U.S. Customs and Border Prot.'s Resp. to Pl.'s Rule 56.1 Mot. for J. Upon the Agency R. 17, ECF No. 102. By defining "related to" in terms of legal or operational control, *see* 19 U.S.C. § 1675c(b)(5), Congress furthered its intention to ensure that opponents of investigations would not benefit, directly or indirectly, from CDSOA disbursements derived from petition support.

Barden also argues that distinguishing an acquired company from a non-acquired company on grounds of ownership is arbitrary because it could allow the distribution of CDSOA benefits to a domestic producer who acts contrary to the legislative purpose. Barden's Br. 16 (submitting that the acquisition provision permits ADPs to import dumped merchandise, purchase a foreign company and dump subject merchandise, oppose continued duties in sunset reviews, or move

operations to a target country and directly dump subject merchandise). This appears to be an argument that Congress could have done *more* to restrict rewards and acted arbitrarily by not doing so. Even were the court to accept the premise apparently underlying Barden's argument, it still would be "compelled under rational-basis review to accept [the] legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321. The court must uphold a statute "even if it does not do a perfect job of selecting those cases that appear to be appropriate subjects of congressional concern." *Black v. Sec'y of Health & Human Servs.*, 93 F.3d 781, 788 (Fed. Cir. 1996). Whether Congress should have placed further restrictions upon the receipt of CDSOA distributions is not a question for the court. *See Beach Commc'ns*, 508 U.S. at 315–16 ("Defining the class of persons subject to a regulatory requirement—much like classifying governmental beneficiaries—inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.") (internal quotations and citations omitted). In an equal protection context, the court must uphold distinctions established by Congress where "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 313.

The court concludes that the acquisition provision does not abridge the equal protection guarantee of the Fifth Amendment because a rational relationship exists between the restriction it imposes and the overall purposes of the CDSOA. *See Armour*, 132 S. Ct. at 2080.

II. RETROACTIVITY

Barden grounds its due process retroactivity claim upon a contention that Customs applied the CDSOA retroactively and therefore impermissibly disqualified Barden from receiving disbursements for FYs 2007, 2008, and 2009 based on Barden's acquisition by FAG Kugelfischer Georg Schaefer KGaA. Rep. Br. in Supp. of Pl.'s Rule 56.1 Mot. for J. Upon Agency R. 13, ECF No. 109 ("Barden's Reply"). According to Barden, the disqualifying acquisition occurred in 1991, long prior to the 2000 enactment of the CDSOA. *Id.* ; Compl. ¶ 10; Barden's Br. 4. Defendants Customs and ITC, and Defendant-Intervenor Timken, argue that Barden lacks standing to raise a retroactivity challenge to the constitutionality of the CDSOA. The court agrees.

As noted above, Customs issued a letter denying Barden's request for reconsideration of the earlier denial of benefits for FY 2007,

reasoning that Barden "appears to have been acquired by a company that opposed the antidumping duty investigations." Letter from CBP to Barden Denying Reconsideration for 2007 CDSOA Disbursements (Jan. 15, 2008), Doc. 11, ECF No. 95–1. Customs stated the same reason for denying Barden's requests to receive CDSOA disbursements for FYs 2008 and 2009. *See* Letters from CBP to Barden Denying Reconsideration for 2008 and 2009 CDSOA Disbursements (Sept. 5, 2008 & Aug. 19, 2009), Docs. 12–13, ECF No. 95–1. CBP's finding that Barden "appears to have been acquired by a company that opposed the antidumping duty investigations" (a finding that Barden does not contest in this litigation) is vague. Customs' denial letters, using the singular word "company," refer to only one acquisition. The letters do not specify whether the referenced acquisition was the one that took place in 1991 or the one that took place in 2002, nor do they specify the entity Customs found to have "opposed the antidumping duty investigations." The record as a whole does not reveal whether Barden was denied ADP eligibility based on an acquisition that occurred prior to the 2000 enactment of the CDSOA or one that occurred thereafter.

Barden grounds its retroactivity claim in an assertion that Customs disqualified Barden based on the 1991 acquisition. Barden's Reply 13. If, instead, Customs was referring in its denial letters to the 2002 acquisition, Barden would lack standing to bring any due process claim on the ground of retroactivity. Therefore, for purposes of analyzing the standing issue presented by Barden's retroactivity claim, the court presumes that Customs was referring to the 1991 acquisition in its denial letters.

Standing is a "threshold jurisdictional question" stemming from Article III of the Constitution, which "extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (quoting U.S. Const. art. III, § 2). Based on this limitation, as well as "the separation-of-powers principles underlying that limitation," the Supreme Court has "deduced a set of requirements that together make up the 'irreducible constitutional minimum of standing.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "The plaintiff must have suffered or be imminently threatened with a concrete and particularized injury in fact that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Id.* (internal quotations and citations omitted).

For purposes of standing, Barden can show that it incurred an injury by reason of CBP's denial letters. However, in addition to demonstrating that it experienced an injury in fact caused by the action being challenged, a plaintiff must demonstrate for standing that a favorable judicial decision on its claim could redress that injury. *See Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015). If the court were to presume that Customs applied the statute to Barden in an impermissibly retroactive manner based on the 1991 acquisition, Barden still would need to demonstrate that it qualified for CDSOA benefits during FY 2007, 2008, or 2009. Barden cannot make this showing.

Barden states that it was "acquired in 2002 by INA-Schaeffler KG, a bearing producer based in Germany" that, according to Barden, "did not support the original AFBs investigation." Compl. ¶ 10. The court assumes that non-support of the investigation is insufficient to trigger disqualification under the acquisition provision. However, opposition does trigger disqualification. *See* 19 U.S.C. § 1675c(b)(1). It appears that Barden's acquirer went beyond mere non-support and actually opposed the investigation. Barden stated that INA-Schaeffler KG "*opposed* the original AFBs investigation," adding that INA Bearing Co., Inc., the U.S. production affiliate of INA-Schaeffler KG, "opposed the petition as well." Barden's Br. 4 (emphasis added) (citing INA Producer's Questionnaire Response, Doc. 4, ECF No. 86–7).

To obtain a CDSOA distribution in any form for FY 2007, 2008, or 2009, Barden would have to make two showings. First, Barden would have to contradict its own assertions and show that its 2002 acquirer, INA-Schaeffler KG, did not oppose the AFBs investigation. Second, Barden would also have to demonstrate that the opposition of INA Bearing Co. to the petition (and therefore, the investigation) would not have disqualified Barden from receiving a benefit. Based upon the representations Barden has made in this litigation, the court concludes that Barden would not succeed. Barden has made the unqualified statement that INA-Schaeffler KG "opposed the original AFBs investigation." Barden's Br. 4. Due to Barden's characterization in its brief of INA Bearing Co., Inc. as the "U.S. production affiliate" of INA-Schaeffler KG, Barden also would fail in attempting to show that INA-Schaeffler KG is not "related to" INA Bearing Co., Inc. within the meaning of the acquisition provision. Barden's representations indicate, at least, a relationship between the two companies characterized by a level of direct or indirect control sufficient to meet the related party definition in the CDSOA. *See* 19 U.S.C. § 1675c(b)(5) ("For purposes of this paragraph, a party shall be considered to

directly or indirectly control another party if the party is legally or operationally in a position to exercise restraint or direction over the other party.").

In sum, Barden could not demonstrate its qualification for a CDSOA benefit for FY 2007, 2008, or 2009 even if the court were to conclude that the CDSOA was retroactively applied in a constitutionally impermissible way. Therefore, the court must dismiss for lack of standing Plaintiff's due process retroactivity claims.

B. CLAIMS RELATING TO FYS 2010 AND 2011

Barden's complaint in Court No. 12–00247 asserts constitutional challenges to the CDSOA in relation to distributions for FYs 2010 and 2011 based on First Amendment, equal protection, and due process retroactivity grounds. Barden did not address these claims in its Rule 56.1 motion or supporting briefs and thus appears to have waived them.[6] *See* USCIT Rule 56.1(c). However, the court does not reach the issue of waiver because the court concludes that it has no jurisdiction over these claims.

The court must determine whether standing, and thus jurisdiction, exists even when no party raises the issue. *See Steel Co.*, 523 U.S. at 94 (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)). As discussed above, standing is a threshold question implicating whether the court is able to use the judicial powers granted by the U.S. Constitution. *Id.* at 102 (quoting U.S. Const. art. III, § 2). "For the court to pronounce upon the meaning or the constitutionality of a . . . federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Id.* at 101–02.

Barden's standing problem for FYs 2010 and 2011 is not for lack of alleging injury. Barden claims that its competitors received CDSOA distributions in these years while Barden did not. This claim suffices to allege an injury for standing purposes. However, Barden's allegations and the administrative record establish that Customs did not cause Barden's injury.

In the context of standing, causation requires "a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Id.* at 103 (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)). The "complained-of conduct" may take the form of an adverse agency decision. *See, e.g., Ashley Furniture Indus., Inc. v. United States*, 734 F.3d 1306 (Fed. Cir. 2013)

[6] The court notes that Court No. 12–00247 was consolidated with Court No. 06–00435 on February 11, 2014. Order, ECF No. 88. Thereafter, on February 14, 2014, the court issued its scheduling order for briefing on the merits of remaining claims in this consolidated action. Order, ECF No. 89.

(challenging CBP decision not to provide plaintiff with CDSOA distribution). On occasion, the complained-of conduct may be an agency's failure to act. *See, e.g., Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1061 (Fed. Cir. 2012) (finding standing where plaintiff alleged injury caused by Customs' failure to take required discrete agency action). However, agency inaction will give rise to standing only where "a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (examining a claim under the Administrative Procedure Act, 5 U.S.C. § 706 *et seq.*); *accord Sioux Honey*, 672 F.3d at 1061 (applying *Norton's* limitation on challenges to agency inaction to the issue of standing in the Customs context).

The record here indicates that Plaintiff never applied for a distribution of CDSOA funds for FY 2010 or 2011. As Barden admits, "Barden did not file certifications with Customs for fiscal years 2010 and 2011." Complaint at ¶ 37, Court No. 12–00247, ECF No. 5. Pursuant to regulation, Customs distributes CDSOA funds only in response to certifications filed by producers. 19 C.F.R. § 159.63 (2012).[7] That regulation requires, among other things, that "[i]n order to obtain a distribution of the offset, each affected domestic producer must submit a certification . . . that must be received within 60 days after" Customs publishes a notice of distributions. *Id.* at § 159.63(a). The certification must indicate "that the affected domestic producer desires to receive a distribution," list "qualifying expenditures incurred," and "demonstrate that the domestic producer is eligible to receive a distribution as an affected domestic producer." *Id.* The regulation does not require Customs to decide whether to distribute CDSOA funds to a producer absent a certification. Not only has Barden admitted that it filed no certifications for FYs 2010 and 2011, it also has failed to challenge the requirement in 19 C.F.R. § 159.63 that it do so. Since Barden filed no certifications for FYs 2010 and 2011, there was nothing for Customs to decide regarding Barden. Unlike in FYs 2007, 2008, and 2009, Customs was not called on to apply the CDSOA or its acquisition clause to Barden for FYs 2010 and 2011. Thus, Customs did not refuse to give Barden a CDSOA distribution for those years. Customs neither took agency action nor unlawfully withheld required agency action respecting Barden for FYs 2010 and 2011. Barden's injury was caused by Barden alone—

[7] In December 2012, a minor modification of this section was made. *See Technical Corrections to U.S. Customs and Border Protection Regulations*, 77 Fed. Reg. 73,309 (Dep't of Homeland Security Dec. 10, 2012) ("removing the words 'Office of Finance' and adding in their place the words 'Office of Administration'"). The provision otherwise remains in effect in unchanged form to the present. All further citations to the Code of Federal Regulations are to the 2012 edition.

through its failure to apply for a distribution—not by any action or refusal of action on the part of Customs.

This case is akin to *Simon v. Eastern Kentucky. Welfare Rights Orginization*, in which indigent individuals and associations of indigents sued the IRS for granting favorable tax treatment to hospitals that refused to provide plaintiffs with certain services. 426 U.S. at 28. The Supreme Court rejected standing because "[i]t is purely speculative whether the denials of service specified in the complaint fairly can be traced to [the IRS]'s 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." *Id.* at 42–43. Here, the break in causation is even more stark: Barden's own failure to file certifications, rather than the action of a third party, was the cause of Barden's injuries in FYs 2010 and 2011.

Barden's complaint seeking a remedy for FYs 2010 and 2011 asserts that "Barden did not file certifications with Customs for fiscal years 2010 and 2011 as, based upon the blanket denials in years 2007, 2008 and 2009, it would have been futile to do so." Compl. ¶ 37, Court No. 12–00247, ECF No. 5. But futility, although often recognized as a possible exception to the requirement that a party exhaust administrative remedies prior to bringing a judicial challenge to an agency action, will not suffice where, as here, the issue is not exhaustion but jurisdiction due to a lack of standing.

Barden also asserts in its complaint for FYs 2010 and 2011 that it has standing because "[t]he Court can redress Barden's injury by ordering the requested relief." *Id.* ¶ 9. However, the court could not provide any remedy in the circumstance Barden has pled. Barden failed to comply with the essential regulatory requirement of filing the necessary certifications for Customs to consider. *See* 19 C.F.R. § 159.63. Therefore, even were Barden to succeed on the merits of its constitutional claims, the court still would lack the power to order Customs to provide Barden CDSOA distributions in the absence of certifications. This inability is another reason why the court concludes that Barden lacks standing to assert its constitutional claims for FYs 2010 and 2011.

As Plaintiff lacks standing, the court has no jurisdiction over Plaintiff's claims arising from FYs 2010 and 2011. Consequently, the court *sua sponte* dismisses the claims in the 2012 complaint.

IV. CONCLUSION

For the aforementioned reasons, the court determines that the acquisition provision of the CDSOA is supported by a rational basis and therefore satisfies the equal protection guarantee of the Constitution. The court determines that Barden lacks standing to challenge

the CDSOA on due process retroactivity grounds and also lacks standing to assert claims relating to FYs 2010 and 2011. Barden's motion for judgment on the agency record is denied. The court will enter judgment for Defendants.

Dated: February 10, 2016
New York, New York

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