Slip Op. 24-41

UNITED STATES COURT OF INTERNATIONAL TRADE

GARG TUBE EXPORT LLP and GARG TUBE LIMITED, **Plaintiffs,** **v.** **UNITED STATES,** **Defendant.** **and** **NUCOR TUBULAR PRODUCTS INC. and WHEATLAND TUBE,** **Defendant-Intervenors.**	**Before: Claire R. Kelly, Judge** **Court No. 21-00169** **PUBLIC VERSION**

OPINION AND ORDER

[Sustaining in part and remanding in part Commerce's final results and remand redetermination.]

Dated: April 8, 2024

Ned H. Marshak, Dharmendra N. Choudhary, and Jordan C. Kahn, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, argued for plaintiffs Garg Tube Export LLP and Garg Tube Limited.

Robert R. Kiepura, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. On the brief were Brian M. Boyton, Assistant Attorney General, Patricia M. McCarthy, Director, and Franklin E. White, Jr., Assistant Director. Of counsel was Brishailah Brown, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Alan H. Price, Robert E. DeFrancesco III, and Theodore P. Brackemyre, Wiley Rein LLP, of Washington, DC, argued for defendant-intervenor Nucor Tubular Products Inc.

Kelly, Judge: Before the Court is Plaintiffs Garg Tube Export LLP and Garg Tube Limited's ("Garg") motion for judgment on the agency record challenging the U.S. Department of Commerce's ("Commerce") final determination in its 2018–19 administrative review ("AR 18/19") of the antidumping duty ("AD") order on Welded Carbon Steel Standard Pipes and Tubes from India, 86 Fed. Reg. 14,872 (Mar. 19, 2021) ("Final Results") as amended by the Final Results of Redetermination Pursuant to Court Remand, filed by Defendant United States on March 20, 2023, ECF No. 42-2 ("Remand Results"). Garg challenges the reasonableness of Commerce's decision to (1) rely on an adverse inference when selecting from facts available with respect to the missing cost of production information for Garg's unaffiliated supplier, and (2) employ its differential pricing methodology. For the following reasons, the Court sustains Commerce's determination in part, and remands in part for further explanation or reconsideration.

BACKGROUND

Commerce initiated this administrative review on July 15, 2019. See Initiation of Antidumping and Countervailing Duty Administrative Review, 84 Fed. Reg. 33,739 (Dep't Commerce July 15, 2019). On October 10, 2019, Garg filed its Section A Questionnaire Response. See [Garg] Sect. A Resp. To Origin. Questionnaire at 1, PD

38–41, CD 5–8, bar code 3898821-01 (Oct. 10, 2019).[1] Garg identified an unaffiliated Indian company as one of its suppliers.[2] Id. at Exh. 14. Garg reported that its unaffiliated supplier did not have knowledge of the ultimate destination of the pipe and tube that it sold to Garg. See id. at 38. Commerce requested cost information directly from Garg's unaffiliated supplier. See re: Letter from Commerce to [Garg's] Suppliers Requesting Costs at 1, PD 136–38, CD 63–65 bar codes 3971275-01, 3971278-01, 3971282-01 (May 5, 2020). On December 19, 2019, Commerce also asked Garg to obtain cost information from its unaffiliated supplier. See [Commerce's] Order for [Garg] Suppl. Questionnaire at 1, PD 94, CD 35, bar code 3922259-01 (Dec. 19, 2019). On July 24, 2024, Commerce published the preliminary results. See Welded Carbon Steel Standard Pipes and Tubes from India; 2018-2019, 85 Fed. Reg. 44,860 (July 24, 2020) (preliminary results) and accompanying preliminary decision memo. at 8 ("Prelim. Decision Memo.").

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[1] On June 23, 2021, Defendant filed indices to the public and confidential administrative records underlying Commerce's final determination. See ECF No. 24-1–2. Citations to administrative record documents in this opinion are to the numbers Commerce assigned to such documents in the indices, and all references to such documents are preceded by "PD" or "CD" to denote public or confidential documents.

[2] Although Commerce identified multiple unaffiliated suppliers, Garg only challenges Commerce's determination with respect to [[ ]]. Pls.' Mot. J. Agency Rec. & Cmts. On Remand Redetermination at 1, 4, July 31, 2023, ECF No. 53 ("Garg Mot."); Def. Resp. [Garg Mot.] at 11 n.2, Nov. 20, 2023 ("Def. Resp.").

In the preliminary results, Commerce relied upon facts otherwise available as a substitute for the missing information that Garg's unaffiliated supplier did not supply. See Prelim. Decision Memo. at 10 (citing 19 U.S.C. § 1677e(a)(2)(A)–(C)).[3] Commerce also concluded that the unaffiliated supplier did not act to the best of its abilities and resorted to partial facts available with adverse inferences. Id. (citing 19 U.S.C. § 1677e(b)). In calculating the missing cost data, Commerce used the production cost data for the product control number with the highest calculated cost of production. Id. Commerce reasoned that the new methodology would further induce cooperation. Id. at 11. Commerce also concluded that a particular market situation existed in India affecting the material costs for hot-rolled coil—the primary material input in the production of pipe and tube—but that it lacked information to quantify a PMS adjustment for Garg's reported cost of production. Id. at 13–15.

On March 19, 2021, Commerce published its final results for the underlying review covering the period of December 1, 2019, to November 30, 2020. See Final Results and accompanying issues and decision memo. at 1 ("Final Decision Memo."). Commerce continued to apply an adverse inference when selecting facts available to calculate the unaffiliated supplier's missing cost information and concluded that Garg did not act to the best of its ability "in attempting to obtain the [supplier's] costs" because its efforts "did not serve as a strong inducement for the [supplier] in question

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

to cooperate." Id. at 41. Commerce also continued to employ its new methodology to calculate an adverse inference. See id. at 42. Commerce made a cost-based particular market situation adjustment to calculate the dumping margin for Garg. Id. at 19–23.

On February 2, 2023, Commerce requested, and the Court granted, remand for redetermination to comply with the U.S. Court of Appeals for the Federal Circuit's decision in Hyundai Steel Co., Ltd. v. United States, 19 F.4th 1346, 1352 (Fed. Cir. 2021). See Def.'s Consent Mot. To Remand at 1, Feb. 2, 2023, ECF No. 37; Order at 1, Feb. 2, 2023, ECF No. 40. Commerce filed its draft remand results on February 13, 2023, to which Garg responded on February 21, 2023. See [Commerce's] Draft Redetermination Pursuant to Court Remand at 1, PRD 1, bar code 4341219-01 (Feb. 13, 2023); Garg's Cmts. on Draft Remand at 1, PRD 3, bar code 4343901-01 (Feb. 21, 2023) ("Garg Draft Remand Cmts."). Commerce filed its Remand on March 20, 2023. See Remand Results at 1.

Garg filed its Motion for Judgment on the Agency Record and Comments on Remand redetermination on July, 31, 2023. Garg Mot. at 1. Defendant filed its response brief on November 20, 2023. Def. Resp. at 1. Defendant-Intervenors Nucor Tubular Products Inc. and Wheatland Tube ("Defendant-Intervenors") filed their response brief on the same day. See [Def.-Ints.] Resp. [Garg Mot.] & Cmts. On [Remand Results] at 1, Nov. 20, 2023, ECF No. 59, ("Def.-Ints. Resp."). Garg filed its

reply brief on January 19, 2024. See [Garg] Reply To [Def. & Def.-Ints. Resp.] at 1, Jan. 19, 2024, ECF No. 61 ("Garg Reply").

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the court authority to review actions contesting the final determination in an administrative review of an AD 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). The Court reviews the record as a whole made before the agency and may not supply a reasoned basis for the agency's action that the agency itself has not given. See 19 U.S.C. § 1516a(b)(1)–(2); SEC v. Chenery Corp., 332 U. S. 194, 196 (1947). The Court will, however, "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974).

DISCUSSION

I. Facts Available with an Adverse Inference[4]

Garg challenges Commerce's application of an adverse inference in selecting among the facts available, arguing that it was not supported by substantial evidence and contrary to law. Garg Mot. at 18–28.[5] Defendant argues that Commerce's use of an adverse inference in relying on the facts otherwise available with respect to the missing cost of production information for Garg's unaffiliated supplier is reasonable. Def. Resp. at 13–25. For the following reasons, Commerce's decision on the issue is remanded for further explanation or reconsideration.

Commerce ordinarily calculates a dumping margin based on information submitted by parties. See Nan Ya Plastics Corp. v. United States, 810 F.3d 1333, 1137–38 (Fed. Cir. 2016). Where information necessary to calculate a respondent's dumping margin is not available on the record, Commerce uses "facts otherwise available" in place of the missing information. See 19 U.S.C. § 1677e(a). Typically,

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[4] Parties and Commerce sometimes use the shorthand "AFA" or "adverse facts available" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. AFA, however, encompasses a two-part inquiry established by statute. See 19 U.S.C. § 1677e(a)–(b). It first requires Commerce to identify information missing from the record, and second, to explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when "selecting among the facts otherwise available." Id.

[5] Garg does not challenge Commerce's use of a new methodology in calculation of an adverse inference to be applied to the facts available. See Garg Reply at 8 ("Garg is not challenging the methodology used by Commerce to calculate AFA, assuming that this Court agrees that AFA should apply").

when adopting facts otherwise available, Commerce selects neutral facts from the record. See 19 U.S.C. § 1677e(b) (outlining criteria for when Commerce may use an adverse inference when selecting among the facts available).

Where Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," 19 U.S.C. § 1677e(b)(1), Commerce may apply "an inference that is adverse to the interests of that party in selecting among the facts otherwise available." 19 U.S.C. § 1677e(b)(1)(A). However, the statute requires Commerce to "find[] that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information" before resorting to the practice. 19 U.S.C. § 1677e(b)(1). A respondent cooperates to the "best of its ability" when it "has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

Commerce may use Section 1677e(b) to support an inference adverse to an interested party "when '[it] makes the separate determination that [the party] has failed to cooperate by not acting to the best of its ability.'" Mueller Comercial de Mexico, S. de R.L. De C.V. v. United States, 753 F.3d 1227, 1232 (Fed. Cir. 2014) (quoting Nippon Steel, 337 F.3d at 1381); see also Canadian Solar Int'l Ltd. v. United States, 378 F. Supp. 3d 1292, 1319 (Ct. Int'l Trade 2019) ("Canadian Solar I") (determining that Commerce cannot apply an adverse inference pursuant to

§ 1677e(b) against a cooperative party based upon Mueller); cf. Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1, at 835 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4199 ("[Under 19 U.S.C. § 1677e(b), Commerce] may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully"); Fine Furniture (Shanghai) Ltd. v. United States, 748 F.3d 1365, 1373 (Fed. Cir. 2014) (finding hypothetical countervailing duty rate derived from adverse inferences was improperly imposed against the cooperating party "since a remedy reaching a cooperating party would have no impact on the non-cooperating parties"); KYD, Inc. v. United States, 607 F.3d 760, 768 (Fed. Cir. 2010) ("Congress intended for Commerce to use [adverse inferences] to induce cooperation with its [AD] investigations").

Alternatively, the Court of Appeals for the Federal Circuit has concluded that Commerce may incorporate an adverse inference under Section 1677e(a) to calculate a cooperative respondent's margin in certain circumstances. Mueller, 753 F.3d at 1233. In Mueller, the Court of appeals explained that 19 U.S.C. § 1677e(a) "does not provide for the specific facts that should be used as a gap-filling mechanism." Id. at 1234. Commerce may apply an adverse inference under the section if doing so will "yield an accurate rate, promote cooperation, and thwart duty evasion." Canadian Solar Int'l Ltd. v. United States, 415 F. Supp. 3d 1326, 1333 (Ct. Int'l Trade 2019) ("Canadian Solar II"); see also Mueller 753 F.3d 1232–36. When imposing an adverse

inference under the section, Commerce's "predominant concern must be accuracy." Canadian Solar II, 415 F. Supp. 3d at 1333 (citing Mueller, 753 F.3d at 1232–36) (footnotes omitted).[6] Moreover, Commerce may rely on inducement or evasion rationales where reasonable under the circumstances and where this "predominant interest in accuracy is properly taken into account." Mueller, 753 F.3d at 1233.

Here, Commerce's application of facts available with an adverse inference is not reasonable on this record. In both the preliminary and final results, Commerce found the unaffiliated supplier failed to cooperate with the requests for information from Commerce and Garg as set forth in 19 U.S.C. § 1677e(b). Prelim. Decision Memo. at 10; Final Decision Memo. at 39–41. However, Commerce's basis for its

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[6] As explained in Canadian Solar I,

> Mueller was a cooperative respondent that lacked all the production cost information necessary for Commerce to calculate its antidumping margin. Mueller, 753 F.3d at 1230. Commerce requested data directly from Mueller's two main suppliers, but only one supplier provided the information. Id. Commerce used facts otherwise available pursuant to 19 U.S.C. § 1677e(a), concluding that the unavailable production cost data was related to acquisition cost data on the record.

378 F. Supp. 3d at 1316. Commerce inferred that all merchandise sold to Mueller by the uncooperative supplier came at a discount and therefore selected and used the most discounted transaction data from the one responsive supplier. Id. (citing Mueller, 753 F.3d at 1230). Commerce selected this data and calculated the unaffiliated supplier's cost of production which ultimately resulted in a higher dumping rate for Mueller. Id. Applying the inducement and evasion rationale, Mueller recognizes that a refusal to export goods produced by an uncooperative supplier "would potentially induce [the supplier] to cooperate." Mueller, 753 F.3d at 1235. However, "if the [respondent] has no control over the noncooperating suppliers," a resulting adverse inference might be unfair to the respondent. Id. (citing SKF USA Inc. v. United States, 630 F.3d 1365, 1375 Fed. Cir. 2011).

decision to apply facts available with an adverse inference against Garg is unclear. Commerce, as in the prior review, invokes Mueller "as the controlling judicial precedent." Final Decision Memo. at 39; Garg Tube Exp. LLP v. United States, 527 F. Supp. 3d 1362, 1372 (Ct. Int'l Trade 2021). However, Mueller involves imposition of facts available with an adverse inference in cases falling under subsection (a) rather than subsection (b). See Garg Tube Exp. LLP, 527 F. Supp. 3d at 1372 (citing Mueller, 753 F.3d at 1332–36). Here, as in the prior review, Commerce later invokes the wording of 19 U.S.C. § 1677e(b) when observing that Garg "did not act to the best of its ability in attempting to obtain the [supplier's] costs." See Final Decision Memo at 41; Garg Tube Exp. LLP, 527 F. Supp. 3d at 1372.

Defendant submits that although Commerce did not specifically invoke 19 U.S.C. § 1677e(b) as a basis for its decision to apply an adverse inference to facts available, it is nonetheless reasonably discernible that Commerce applied Section 1677e(b) to both Garg and its supplier. Def. Resp. at 20–21. The Defendant argues "Commerce's determination is reasonably discernible because it found that Garg Tube 'failed to act to the best of its ability' because its efforts 'did not serve as a strong inducement for the suppliers in question to cooperate.' See id. at 21 (citing Final Decision Memo. at 41). The Court cannot agree. It is unclear whether this statement indicates that Commerce applied Section 1677e(b) against the unaffiliated supplier, against Garg, or whether Commerce here acted pursuant to 19 U.S.C. § 1677e(a). See id. at 20 (acknowledging that "some of the [conflicting language in the final decision

memorandum regarding the applicability of Mueller and Garg's cooperation] appears in the final decision memorandum in this review"). Although Defendant makes an argument that this determination is based on Section 1677e(b), it is not reasonably discernible that Commerce based its determination on Section 1677e(b). The Court must review the decision made by the agency. See Chenery Corp., 332 U.S. at 196–97.

To the extent that Commerce relies upon 19 U.S.C. § 1677e(b), Commerce must also further support its determination. Defendant argues that Garg did not adequately compel its supplier to submit the required information. See Def. Resp. at 18. In particular, Defendant argues that Garg was on notice from the prior review that the supplier information would be required. Id. at 18–19. Defendant cites both the preliminary and the final decision memoranda to support its argument. Id. (citing Prelim. Decision at 10–11; Final Decision Memo. at 42). However, neither determination claims that Garg should have been aware that they needed to compel its unaffiliated supplier to submit the information as a condition of conducting business. See generally Prelim. Decision Memo.; Final Decision Memo. Commerce's reasoning instead focuses on the degree of the efforts made by Garg to compel supplier cooperation. Final Decision Memo. at 41 (noting Garg told its supplier once that its refusal to provide the requested cost data could affect their business relationship). Garg argues that the timing of this and the prior administrative review undercuts the Defendant's argument. Garg Reply at 6. However, Commerce never offered the

grounds supplied by Defendant to justify its determination in either the preliminary or the final results. Therefore, the Court will only address the decision made by the agency. See Chenery Corp., 332 U.S. at 196–97.

Further, to the extent that Commerce applies 19 U.S.C. § 1677e(a), Commerce must further support its determination. Commerce must address the factors invoked by Mueller, including how applying an adverse inference will lead to an "accurate rate, promote cooperation, and thwart duty evasion." Canadian Solar II, 415 F. Supp. 3d at 1333 (citing Mueller, 753 F.3d at 1232–36). Although Commerce does explain how the supplier's information is necessary to calculate an accurate rate, see Final Decision Memo. at 39, it does not explain how selecting an adverse inference leads to greater accuracy as required by Mueller. See 753 F.3d at 1233. Commerce merely states that "partial AFA to [Garg] is necessary to induce cooperation by [Garg's] suppliers in future segments." Final Decision Memo. at 41. However, Mueller specifically explains that an adverse inference based upon an inducement rationale where the respondent lacks control over the supplier is potentially unfair. 753 F.3d at 1235 ("if the cooperating entity has no control over the non-cooperating suppliers, a resulting adverse inference is potentially unfair to the cooperating party"). Commerce fails to explain Garg's control over its supplier that might warrant an adverse inference based upon inducement. Additionally, Commerce fails to explain how an adverse inference would thwart duty evasion. See id.

On Remand, Commerce should explicitly invoke the statutory provision on which it relies. If it relies upon 19 U.S.C. § 1677e(a), as applied by Mueller, it should explain the control exerted by Garg over its supplier as well as how the use of an adverse inference in selecting facts under Section 1677e(a) promotes accuracy or thwarts duty evasion. See 753 F.3d at 1235. If Commerce relies on 19 U.S.C. § 1677e(b), it must explain why, based on this record, Garg did not act to the best of its ability and do all that it could to cooperate. See Canadian Solar II, 415 F. Supp. 3d at 1333–34.

II. Differential Pricing

Garg challenges Commerce's application of its differential pricing methodology, arguing that (1) Commerce erred by applying the Cohen's *d* test;[7] (2) Garg exhausted its administrative remedies by challenging differential pricing in its comments to the draft remand; and (3) Commerce's calculation for the Cohen's *d* denominator is unreasonable and unsupported by substantial evidence. Garg Mot. at 28–36. Defendant counters that Garg failed to exhaust its administrative remedies to challenge Commerce's differential pricing methodology by waiting to raise the argument until remand, and that nonetheless Garg has misinterpreted the Court of Appeal's decision in Stupp Corp. v. United States, 5 F.4th 1341 (Fed. Cir. 2021)

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[7] Commerce applies the Cohen's *d* test as part of its differential pricing methodology which it has adopted to effectuate 19 U.S.C. § 1677f-1(d)(1)(B). See 19 U.S.C. § 1677f-1(d)(1)(B); Apex Frozen Foods Priv. Ltd. v. United States, 862 F.3d 1337, 1342 n.2 (Fed. Cir. 2017).

("Stupp III"). Def. Resp. at 25–33. Because Garg has failed to exhaust its administrative remedies, Commerce's differential pricing determination is sustained. Before an action may be heard by the Court, parties must exhaust their administrative remedies. 28 U.S.C. § 2637; see Corus Staal BV v. United States, 502 F.3d 1370, 1379 (Fed. Cir. 2007); see also Boomerang Tube LLC v. United States, 856 F.3d 908, 912–13 (Fed. Cir. 2017) (citing Kingdomware Techs., Inc. v. United States, 579 U.S. 162, 172 (2016), for the assertion that the word "shall" connotes a requirement in the context of 28 U.S.C. § 2637(d)). The exhaustion doctrine functions to "promote[] judicial efficiency and conserve judicial resources, by affording the agency the opportunity to rectify its own mistakes (and thus to moot controversy and obviate the need for judicial intervention)." Ta Chen Stainless Steel Pipe, Ltd. v. United States, 342 F. Supp. 2d 1191, 1206 (Ct. Int'l Trade 2004) (alterations in original). The Supreme Court has explained "[a] reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." Unemployment Comp. Cmm'n of Alaska v. Aragon, 329 U.S. 143, 155 (1946); see also Gerber Food (Yunnan) Co. Ltd., 601 F. Supp. 2d at 1379 (citing Aragon, 329 U.S. at 155).

There are certain exceptions to a party's duty to exhaust. A court, in its discretion, may determine that a parties need not exhaust their remedies if they can prove that an attempt to do so would be futile; that they "would be required to go

through obviously useless motions in order to preserve their rights." Corus Staal BV, 502 F.3d at 1379, 1381 (stating that application of exhaustion principles in trade cases is subject to the discretion of the judge of the Court of International Trade and explaining futility exception) (internal citations and quotations omitted); see Mittal Steel Point Lisas Ltd., 548 F.3d at 1384. However, the futility exception is narrow, and the probability of an adverse decision does not alleviate a party's requirement by statute or regulation to exhaust its administrative remedies. Corus Staal BV, 502 F.3d at 1379 (citing Commc'ns Workers of Am. v. Am. Tel. & Tel. Co., 40 F.3d 426, 432–33 (D.C. Cir. 1994)). Similarly, intervening judicial decisions that materially affect an issue before the Court serve as a basis to excuse a party's duty to exhaust. See Siemens Gamesa Renewable Energy v. United States, 621 F. Supp. 3d 1337, 1348 (Ct. Int'l Trade 2023) (citing Hormel v. Helvering, 312 U.S. 552, 558–59 (1941); Gerber Food (Yunnan) Co. Ltd., 601 F. Supp 2d. at 1380; cf. Papierfabrik Aug. Koehler AG v. United States, 36 CIT 1632, 1635 (2012) ("the intervening judicial decision exception applies because there was a change in the controlling law on the use of zeroing").

Moreover, the Court may also excuse exhaustion where the issue presented involves a "pure question of law." See Agro Dutch Indus. Ltd. v. United States, 508 F.3d 1024, 1029 (Fed. Cir. 2007); Itochu Bldg. Prods. v. United States, 733 F.3d 1140, 1146 (Fed. Cir. 2013). Such questions do not necessitate exhaustion because decisions on the merits can be made by "statutory construction alone" without further

development of the factual record. Agro Dutch Indus. Ltd., 508 F.3d at 1029 n.3. Simply because a question involves a statute does not render it a pure question of law. See Consol. Bearings Co. v. United States, 348 F.3d 997, 1003 (Fed. Cir. 2003) (rejecting the application of the pure question of law exception where the the issue required further factual development of the record). Rather, the Court implements a non-exhaustive list of requirements, necessitating that the plaintiff shall: "(a) raise a new argument; (b) this argument shall be of purely legal nature; (c) the inquiry shall require neither further agency involvement nor additional fact finding or opening up the record; and (d) the inquiry shall neither create undue delay nor cause expenditure of scarce party time and resources." See Consol. Bearings Co. v. United States, 166 F. Supp. 2d 580, 587 (Ct. Int'l Trade 2001) (collecting cases), rev'd and remanded on other grounds, 348 F.3d 997.

Here, Garg has failed to exhaust its administrative remedies with respect to its challenge to Commerce's differential pricing methodology. In the underlying review, Commerce applied its differential pricing methodology in its preliminary determination filed on July 20, 2020. See Prelim. Decision Memo. at 3–6. On December 7, 2020, Garg submitted its case brief to Commerce that contained "issues to be considered by [Commerce] in reaching its final determination." See Letter Barnes, Richardson & Colburn, LLP to Sec. Commerce Pertaining Antidumping Duty Review of Certain Welded Carbon Steel Standard Pipes and Tubes from India: [Garg's] Case Br. at 1, PD 222, CF 89, bar code 4062562-01 (Dec. 7, 2020) ("Garg

Agency Br."). However, at no point in Garg's agency brief did it challenge Commerce's application of its differential pricing methodology in the preliminary determination. See generally Garg Agency Br. The final results reflect Garg's decision, as Commerce again relied on the differential pricing methodology used in the preliminary determination without adjustments for any challenges by Garg. See Final Decision Memo. at 3, 32–43; Def. Resp. at 6–7.

It was only after Commerce filed its draft remand results that Garg contested Commerce's use of differential pricing for the first time. See Remand Results at 4; Garg Remand Cmts. at 2–10. Garg's challenge at this point in the proceeding was untimely. See 28 U.S.C. § 2637(d) ("the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies"); 19 C.F.R. § 351.309(c)(2) ("The case brief must present all arguments that continue in the submitter's view to be relevant to [Commerce's] final determination"). Therefore, Garg failed to exhaust administrative remedies before challenging Commerce's use of differential pricing methodology in its determination.

Furthermore, Garg fails to demonstrate that any exceptions to the exhaustion requirement applies. First, Garg's challenge does not fall within the futility exception. Garg alleges that any attempts to "frontally attack Cohen's *d*" would have been futile prior to Stupp III because "the law regarding Cohen's *d* appeared to have been settled" based upon consistent affirmation by the courts. Garg Mot. at 33–34;

see 5 F.4th at 1341.[8] Thus, Garg appears to argue that decisions of this Court foreclosed any argument challenging Commerce's differential pricing methodology. However, decisions by this Court are not binding. See Kaptan Demir Endustrisi ve Ticaret A.S. v. United States, 592 F. Supp. 3d 1332, 1337 n.1 (Ct. Int'l Trade 2022) (citing Algoma Steel Corp. v. United States, 862 F.2d 240, 243 (Fed.Cir. 1989)). The futility exception is narrowly construed, precluding invocation where an "adverse decision may have been likely." Corus Staal BV, 502 F.3d at 1379; see id. at 1378–81. That Garg believed Commerce would reject its argument is insufficient to fall within the bounds of the exception.

In a similar vein, Garg's appeal to the intervening judicial decision exception fairs no better. Garg reiterates that the Court of Appeals' decision in Stupp III "called into question" the "previously settled principle [] that Cohen's *d* conformed to law." See Garg Mot. at 34; 5 F.4th at 1360. To apply, a judicial decision must interpret existing law that would "materially alter the result" of the case. See Gerber Food (Yunnan) Co., 601 F. Supp. 2d at 1380 (citing Hormel, 312 U.S. at 558–59). It is

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[8] On January 8, 2019, the Court rendered its decision in Stupp Corp. v. United States, 359 F. Supp. 3d 1293, 1313 (Ct. Int'l Trade 2019) ("Stupp I"), which sustained Commerce's application of the Cohen's *d* differential pricing methodology. On March 7, 2019, the Court denied the defendant-intervenor's motion to reconsider Commerce's use of Cohen's *d*. See Stupp Corp. v. United States, 365 F. Supp. 3d 1373, 1379 (Ct. Int'l Trade 2019) ("Stupp II"). On July 15, 2021, The Court of Appeals vacated and remanded to Commerce this Court's decisions in Stupp I and Stupp II with instructions to further explain or reconsider its use of Cohen's *d* in its differential pricing methodology.

unclear why Garg believes Stupp "would materially alter the result" of the case. In Stupp III, the Court of Appeals vacated this Court's decision sustaining Commerce's use of the Cohen's *d* test with instructions to further explain the reasonableness of its application. See 5 F.4th at 1360; see also Stupp Corp. v. United States, 619 F. Supp. 3d 1314, 1318 (Ct. Int'l Trade 2023) ("Stupp IV"). The Court of Appeals did not hold that application of the test itself was unlawful. See Stupp III, 5 F.4th at 1360 ("we invite Commerce to clarify its argument [regarding application of Cohen's *d*]"). Consistent with the Court of Appeal's instruction, this Court again affirmed Commerce's use of the Cohen's *d* test as reasonable in light of the remand order.[9] See Stupp IV, 619 F. Supp. 3d at 1328. Moreover, as stated, a decision by this Court sustaining the use of a test used by Commerce does not render the law settled. See Kaptan Demir Endustrisi ve Ticaret, 592 F. Supp. 3d at 1337 n.1 (citing Algoma Steel Corp., 862 F.2d at 243) (recognizing that decisions by other trial courts are persuasive rather than controlling). Finally, Garg's argument that the "pure question of law" exception applies is also unpersuasive. Garg's asserts that Stupp III raised issues constituting pure questions of law "which do not require Commerce or the parties to evaluate the record in Garg's appeal." Garg Mot. at 34. Garg's characterization of the issue as purely one of law is incorrect. The exception applies where there is a

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[9] The parties in Stupp have again appealed the Court's decision, currently pending before the Court of Appeals. Notice of Docketing Appeal: Stupp Corp. v. United States, No. 23-1663 (Mar. 27, 2023).

"clear statutory mandate that does not implicate Commerce's interpretation of the statute under the second step of Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984)." Fuwei Films (Shandong) Co. v. United States, 35 CIT 1229, 1230–31 (2011). To the contrary, the question posed by Garg involves whether Commerce's methodology under the statute is reasonable, which necessarily involves a mix question of law and fact requiring further involvement by the agency. Thus, the pure question of law exception is inapplicable. Garg has failed to exhaust its administrative remedies, precluding judicial review of its challenge to Commerce's use of Cohen's *d* in its differential pricing methodology. Accordingly, Commerce's determination on the issue is sustained.

CONCLUSION

Commerce's decision to apply an adverse inference when selecting facts available is not supported by substantial evidence. Garg has failed to exhaust its administrative remedies with respect to its arguments regarding Commerce's differential pricing methodology and therefore Commerce's determination regarding its differential pricing methodology is sustained.

For the foregoing reasons, it is

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

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

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

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

ORDERED that the parties shall have 14 days thereafter to file the Joint Appendix; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing its second remand redetermination.

/s/ Claire R. Kelly
Claire R. Kelly, Judge

Dated: April 8, 2024
New York, New York