Shenyang Yuanda Alum. Indus. Eng'g Co. v. United States
Consol. Court No. 14-00106 (February 9, 2016)
FINAL RESULTS OF REDETERMINATION
PURSUANT TO COURT REMAND

I. Summary

The Department of Commerce ("the Department") prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade ("CIT" or "the Court") in *Shenyang Yuanda Alum. Indus. Eng'g Co. v. United States*, Consol. Court No. 14-00106, Slip Op. 16-11 (February 9, 2016) ("*Yuanda III*" or the "Court's Order"). These final remand results concern the Department's March 27, 2014, scope ruling regarding the antidumping duty ("AD") and countervailing duty ("CVD") *Orders*[1] on aluminum extrusions from the People's Republic of China ("PRC") with respect to Yuanda USA Corporation, and Shenyang Yuanda Aluminum Industry Engineering Co., Ltd.'s (collectively, "Yuanda") curtain wall units that are produced and imported pursuant to a long-term contract to supply a complete curtain wall,[2] as amended by the Department's prior Final Results of Redetermination Pursuant to Court Remand (March 11, 2015) ("First Remand Redetermination").

The Court directed the Department on remand to further consider its analysis in accordance with the Court's opinion,[3] holding that the Department's analysis of Yuanda's merchandise was unreasonable. Specifically, the Court held that: 1) because the Department's

[1] *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 FR 30650 (May 26, 2011) and *Aluminum Extrusions From the People's Republic of China: Countervailing Duty Order*, 76 FR 30653 (May 26, 2011) (collectively, "*Orders*").

[2] *See* the Department's memorandum, "Final Scope Ruling on Curtain Wall Units that are Produced and Imported Pursuant to a Contract to Supply a Curtain Wall," dated March 27, 2014 ("Yuanda Scope Ruling").

[3] *See Yuanda III* at 48.

"scope ruling redefines key terms contrary to the plain language of the AD&CVD Orders, it is not in accordance with law;" 2) "because it does not reasonably consider the characteristics of Plaintiff's merchandise and the evidence that weighs against the agency's determination, it is unsupported by substantial evidence," and 3) "because it offers insufficient reasons for treating similar products differently, it is arbitrary and capricious."[4]

More specifically, the Court explained that 1) the Department failed to account for the amendment of the scope in the underlying investigation in which it clarified "that subassemblies could fall within the finished goods kit exclusion," [5] and how the agency's subassembly test applies to Yuanda's merchandise, taking into consideration that subassemblies language in the scope of the *Orders*;[6] 2) the Department's "ruling draws an arbitrary distinction between window walls and curtain walls";[7] and 3) the Department's scope ruling was "unreasonable" because the Department did "not consider whether a single-entry, unitized curtain wall is a real product . . . that is imported with any regularity into the United States."[8] The Department has addressed each of those Court findings in the Analysis section of this remand.

For the reasons described herein, we respectfully disagree with the Court's holding that, among other conclusions, an interpretation of a scope exclusion based on the plain meaning of its terms, which has already been applied to numerous products, is unreasonable if certain types of finished products (*i.e.*, curtain walls) are not generally imported and constructed in a manner which would allow those products to benefit from that exclusion. Nonetheless, on remand the Department has addressed the issues raised by the Court and concluded that there is no record

[4] *Id*. at 4.
[5] *Id*. at 36-40.
[6] *Id*. at 29-35.
[7] *Id*. at 44-45.
[8] *Id*. at 41.

evidence that an importer ships a complete curtain wall, regardless of size, to the United States under a single CBP Section 7501 Entry Summary Form ("CBP 7501 Form"). The Court found the Department's analysis of the finished goods kits exclusion with respect to curtain wall units imported pursuant to a long-term curtain wall contract, requiring that all parts to assemble the finished good be imported at the same time, to be unreasonable because the Department "does not consider the ample evidence on the administrative record defining and explaining the product at issue… {and} does not consider whether a single-entry, unitized curtain wall is a real product… imported with any regularity into the United States."[9] Accordingly, consistent with the Court's holding in this regard, we have determined in this final remand redetermination, under respectful protest,[10] that Yuanda's curtain walls units shipped pursuant to a long-term contract are excluded from the scope of the antidumping and countervailing duty orders.

On April 4, 2016, we issued draft results of redetermination pursuant to remand and allowed parties to comment.[11] Because our Draft Results placed new factual information onto the record of the instant proceeding, we also allowed parties an opportunity to submit factual information to rebut, clarify, or correct this information. Parties timely submitted rebuttal information on April 8, 2016, and comments on the Draft Results on April 13, 2016. These comments are addressed below.

II. Scope of the *Orders*

The merchandise covered by these *Orders* is aluminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by The Aluminum Association

[9] *Yuanda III* at 41-42.

[10] *See Viraj Group, Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003)(*Viraj*).

[11] *See* "*Shenyang Yuanda Alum. Indus. Eng'g Co. Ltd v. United States*, Court No. 14-00106: Draft Results of Redetermination Pursuant to Court Remand," released April 4, 2016 ("Draft Results").

commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents). Specifically, the subject merchandise made from aluminum alloy with an Aluminum Association series designation commencing with the number 1 contains not less than 99 percent aluminum by weight. The subject merchandise made from aluminum alloy with an Aluminum Association series designation commencing with the number 3 contains manganese as the major alloying element, with manganese accounting for not more than 3.0 percent of total materials by weight. The subject merchandise is made from an aluminum alloy with an Aluminum Association series designation commencing with the number 6 contains magnesium and silicon as the major alloying elements, with magnesium accounting for at least 0.1 percent but not more than 2.0 percent of total materials by weight, and silicon accounting for at least 0.1 percent but not more than 3.0 percent of total materials by weight. The subject aluminum extrusions are properly identified by a four-digit alloy series without either a decimal point or leading letter. Illustrative examples from among the approximately 160 registered alloys that may characterize the subject merchandise are as follows: 1350, 3003, and 6060.

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 rods. Aluminum extrusions that are drawn subsequent to extrusion (drawn aluminum) are also included in the scope.

Aluminum extrusions are produced and imported with a variety of finishes (both coatings and surface treatments), and types of fabrication. 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. Aluminum extrusions may also be fabricated,

i.e., prepared for assembly. Such operations would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, knurled, wedged, mitered, chamfered, threaded, and spun. The subject merchandise includes aluminum extrusions that are finished (coated, painted, *etc*.), fabricated, or any combination thereof.

Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture. Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. The scope includes the aluminum extrusion components that are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise unless imported as part of the finished goods 'kit' defined further below. The scope does not include the non-aluminum extrusion components of subassemblies or subject kits.

Subject extrusions may be identified with reference to their end use, such as fence posts, electrical conduits, door thresholds, carpet trim, or heat sinks (that do not meet the finished heat sink exclusionary language below). Such goods are subject merchandise if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation.

The following aluminum extrusion products are excluded: aluminum extrusions made from aluminum alloy with an Aluminum Association series designations commencing with the number 2 and containing in excess of 1.5 percent copper by weight; aluminum extrusions made from aluminum alloy with an Aluminum Association series designation commencing with the number 5 and containing in excess of 1.0 percent magnesium by weight; and aluminum extrusions made from aluminum alloy with an Aluminum Association series designation commencing with the number 7 and containing in excess of 2.0 percent zinc by weight.

The scope also excludes finished merchandise containing aluminum extrusions as parts that are 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. The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a "finished goods kit." A finished goods kit is understood to mean 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. An 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.

The scope also excludes aluminum alloy sheet or plates produced by other than the extrusion process, such as aluminum products produced by a method of casting. Cast aluminum products are properly identified by four digits with a decimal point between the third and fourth digit. A letter may also precede the four digits. The following Aluminum Association designations are representative of aluminum alloys for casting: 208.0, 295.0, 308.0, 355.0, C355.0, 356.0, A356.0, A357.0, 360.0, 366.0, 380.0, A380.0, 413.0, 443.0, 514.0, 518.1, and 712.0. The scope also excludes pure, unwrought aluminum in any form.

The scope also excludes collapsible tubular containers composed of metallic elements corresponding to alloy code 1080A as designated by the Aluminum Association where the tubular container (excluding the nozzle) meets each of the following dimensional characteristics: (1) length of 37 millimeters (mm) or 62 mm, (2) outer diameter of 11.0 mm or 12.7 mm, and (3) wall thickness not exceeding 0.13 mm.

Also excluded from the scope of these *Orders* are finished heat sinks. Finished heat sinks are fabricated heat sinks made from aluminum extrusions the design and production of which are organized around meeting certain specified thermal performance requirements and which have been fully, albeit not necessarily individually, tested to comply with such requirements.

Imports of the subject merchandise are provided for under the following categories of the Harmonized Tariff Schedule of the United States ("HTS"): 7610.10.00, 7610.90.00, 7615.10.30, 7615.10.71, 7615.10.91, 7615.19.10, 7615.19.30, 7615.19.50, 7615.19.70, 7615.19.90, 7615.20.00, 7616.99.10, 7616.99.50, 8479.89.98, 8479.90.94, 8513.90.20, 9403.10.00, 9403.20.00, 7604.21.00.00, 7604.29.10.00, 7604.29.30.10, 7604.29.30.50, 7604.29.50.30, 7604.29.50.60, 7608.20.00.30, 7608.20.00.90, 8302.10.30.00, 8302.10.60.30, 8302.10.60.60, 8302.10.60.90, 8302.20.00.00, 8302.30.30.10, 8302.30.30.60, 8302.41.30.00, 8302.41.60.15, 8302.41.60.45, 8302.41.60.50, 8302.41.60.80, 8302.42.30.10, 8302.42.30.15, 8302.42.30.65, 8302.49.60.35, 8302.49.60.45, 8302.49.60.55, 8302.49.60.85, 8302.50.00.00, 8302.60.90.00, 8305.10.00.50, 8306.30.00.00, 8418.99.80.05, 8418.99.80.50, 8418.99.80.60, 8419.90.10.00, 8422.90.06.40, 8479.90.85.00, 8486.90.00.00, 8487.90.00.80, 8503.00.95.20, 8516.90.50.00, 8516.90.80.50, 8708.29.50.60, 8708.80.65.90, 9401.90.50.81, 9403.90.10.40, 9403.90.10.50, 9403.90.10.85, 9403.90.25.40, 9403.90.25.80, 9403.90.40.05, 9403.90.40.10, 9403.90.40.60, 9403.90.50.05, 9403.90.50.10, 9403.90.50.80, 9403.90.60.05, 9403.90.60.10, 9403.90.60.80, 9403.90.70.05, 9403.90.70.10, 9403.90.70.80, 9403.90.80.10, 9403.90.80.15, 9403.90.80.20, 9403.90.80.30, 9403.90.80.41, 9403.90.80.51, 9403.90.80.61, 9506.11.40.80, 9506.51.40.00, 9506.51.60.00, 9506.59.40.40, 9506.70.20.90, 9506.91.00.10, 9506.91.00.20, 9506.91.00.30, 9506.99.05.10, 9506.99.05.20, 9506.99.05.30, 9506.99.15.00, 9506.99.20.00, 9506.99.25.80,

9506.99.28.00, 9506.99.55.00, 9506.99.60.80, 9507.30.20.00, 9507.30.40.00, 9507.30.60.00, 9507.90.60.00, and 9603.90.80.50.

The subject merchandise entered as parts of other aluminum products may be classifiable under the following additional Chapter 76 subheadings: 7610.10, 7610.90, 7615.19, 7615.20, and 7616.99 as well as under other HTS chapters. In addition, fin evaporator coils may be classifiable under HTS numbers: 8418.99.80.50 and 8418.99.80.60. While HTS subheadings are provided for convenience and customs purposes, the written description of the scope of the *Orders* is dispositive.

III. Background

For purposes of thoroughness, we provide background information with respect to three separate proceedings: the underlying investigation, the CWC Scope Ruling covering all Chinese exports of curtain wall units to the United States, and the Yuanda Scope Ruling.[12]

A. The Department's Investigation

1) Information With Respect to Curtain Walls and Curtain Wall Units

During the Department's underlying investigation, there were three places on the record in which curtain walls and curtain wall units were referenced. First, the Petitioner[13] included in the scope of the Petition the following description of subject merchandise, which remains part of the scope of the existing *Orders*:

> Subject aluminum extrusions may be described at the time of importation ***as parts for final finished products that are assembled after importation, including,*** but not limited to, window frames, door frames, solar panels,

[12] The vast majority of the records for the underlying investigation and the CWC Scope Ruling are not on the record before the Court. However, all relevant documents for this analysis are either on the record of the underlying proceeding or attached to the draft results of redetermination. The draft results, along with all other documents in this segment, will be submitted to the Court as part of the court record.

[13] Petitioner is the Aluminum Extrusions Fair Trade Committee.

> ***curtain walls***, or furniture. Such parts that otherwise meet the definition of aluminum extrusions are included in the scope.[14]

Second, in Exhibit I-5 to the Petition,[15] in providing examples of merchandise otherwise included in the scope, but intended to be excluded under the "finished goods kit" exclusion, "unassembled unitized curtain walls" were included:

EXHIBIT I-5

SUMMARY OF SUBJECT AND NON-SUBJECT MERCHANDISE PRODUCT TYPES AND EXAMPLES
Non-Subject Merchandise

Product Type	**Product Examples**
Unassembled products containing aluminum extrusions, *e.g.* "kits" that at the time of importation comprise all necessary parts to assemble finished goods	Shower frame kits, window kits, unassembled unitized curtain walls

Third, following initiation of the investigation, the Department set aside a period of time for parties to raise issues regarding product coverage by the scope upon which it initiated. Yuanda, which the Department called "CNYD" at the time, made a request for its "unitized curtain walls and component parts to be considered as a 'kit'" under the "finished goods kit" exclusion.[16] Yuanda explained that its merchandise was "customized based on specific curtain wall projects, and thus cannot be sold individually" and that "the construction process requires the unitized curtain wall and its assorted parts to be shipped at separate times and in separate

[14] *See* "Petition for the Imposition of Antidumping and Countervailing Duties: In the Matter of Aluminum Extrusions From the People's Republic of China, Volume I: General Information and Injury," dated March 31, 2010 ("Petition"), at 4. Relevant language of the Petition, and Exhibit I-5 thereto, was placed on the record of the instant proceeding in Attachment 1 of the First Remand Redetermination.

[15] *Id*. at Exhibit I-5.

[16] *See* Preliminary Determination: Comments on the Scope of the Investigations (October 27, 2010) at 4 ("Preliminary Scope Determination") (referencing Yuanda's May 11, 2010, submission). Relevant pages of the Preliminary Scope Determination were placed on the record of the instant proceeding at Attachment 2 to the First Remand Redetermination. The Department's preliminary scope determination was unchanged in the *Final Determinations*. *See Aluminum Extrusions From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 76 FR 18524, 18525 (April 4, 2011) ("*AD Final Determination*") and accompanying Issues and Decision Memorandum ("IDM"); *Aluminum Extrusions From the People's Republic of China: Final Countervailing Duty Determination*, 76 FR 18521, 18521 (April 4, 2011) (collectively, "*Final Determinations*").

batches, according to the construction schedule."[17] Yuanda argued that "in the end the unitized curtain wall and its assorted parts result in a complete set, or 'kit.'"[18]

Petitioner stated in its response to Yuanda's request that Yuanda had "failed to demonstrate that the 'unitized curtain wall and assorted aluminum curtain extrusions' met the scope exclusion for 'finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry' or that they are 'finished goods containing aluminum extrusions that are entered unassembled in a 'kit.'"[19] Petitioner pointed out that Yuanda acknowledged that its "unitized curtain wall and assorted aluminum curtain extrusions" consisted "of various aluminum extrusions components that are not shipped in a 'fully and permanently assembled' form and are not imported together as a kit."[20] Petitioner argued that on this basis, the language of the "finished goods kit" exclusion was not satisfied and the Department should not determine that Yuanda's merchandise was excluded. In full, the Department found in the Preliminary Scope Determination as follows:

> The language of these investigations as articulated in the Petition and the *Notice of Initiation* explicitly states that curtain walls assembled after importation are within the scope: "subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation including, but not limited to, window frames, door frames, solar panels, *curtain walls*, or furniture." Emphasis added. Further, the scope excludes "kits" and defines a "kit" 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. We agree with Petitioner that CNYD has not established that the curtain wall components it exports comprise a kit that includes all necessary parts to assemble a final finished good, as specified by the scope. Rather, CNYD has in fact stipulated that its components do not enter as complete kits as defined by the scope of these investigations. Thus, the Department has preliminarily determined that curtain wall components exported by CNYD are covered by the scope because CNYD has not established that it imports its merchandise in a kit that

[17] *See* Preliminary Scope Determination at 11, Comment 6.
[18] *Id*.
[19] *Id*.
[20] *Id*.

contains at the time of importation all of the necessary parts to fully assemble a finished good.[21]

Other than the continued reference to curtain wall parts in the scope throughout the investigation, and references to the use of aluminum extrusions in fabricating curtain walls in the ITC investigation, there is no further reference to curtain walls and curtain wall units.

2) Information With Respect to the Subassembly Language in the Scope

In addition to the "parts" language described above, the Petition also included language in the proposed scope which stated that "The scope includes aluminum extrusions that are partially assembled into subassemblies of finished merchandise, whether or not the extrusions are attached by welding or fasteners."[22]

Exhibit I-5 to the Petition also provided a description of subject merchandise intended to be covered by this language:

EXHIBIT I-5

SUMMARY OF SUBJECT AND NON-SUBJECT MERCHANDISE
PRODUCT TYPES AND EXAMPLES
Subject Merchandise

Product Type	**Product Examples**
Aluminum extrusions partially assembled into intermediate goods	Two or more aluminum extrusions partially assembled (*e.g.*, via welding, mechanical fasteners, or other attachment mechanism) into an intermediate good where the aluminum extrusions constitute the essential material component of the subassembly

The Department initiated its investigations based on language which was amended slightly: "The scope includes aluminum extrusions that are attached (*e.g.*, by welding or

[21] *Id.*
[22] *See* Petition at 4-5.

fasteners) to form subassemblies, *i.e.*, partially assembled merchandise."[23] That language was left unchanged in the *Preliminary Determinations*.[24]

However, following an inquiry from the Department,[25] just over a month before the Department issued its *Final Determinations* in the investigations, Petitioner placed a submission on the record stating that it wished "to clarify the intent of the Petition with respect to the application of antidumping and countervailing duties to entries of aluminum extrusion subassemblies or subject aluminum extrusions imported together with non-subject components that do not meet the definition of a 'kit'."[26] Petitioner stated that it wished "to make clear that the intent of the Petition is to cover and apply duties only to aluminum extrusion components of such entries and not to the non-subject components."[27] It emphasized the importance of importers to identify the subject and non-subject components of merchandise subject to the presumptive orders:

> Thus, importers of such products would be required to separately identify, classify, and value the subject and non-subject components at the time of entry in order for U.S. Customs and Border Protection ("CBP") to apply antidumping and countervailing duties as intended. If the importer failed to separately identify the separate components of the imported product, however, CBP would have no choice but to apply antidumping and countervailing duties to the entire value of the entry, including the non-subject components.[28]

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[23] *See Aluminum Extrusions from the People's Republic of China: Initiation of Antidumping Duty Investigation*, 75 FR 22109, 22114 (April 27, 2010) and *Aluminum Extrusions from the People's Republic of China: Initiation of Countervailing Duty Investigation*, 75 FR 22114, 22117 (April 27, 2010).

[24] *See, e.g., Aluminum Extrusions from the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value*, 75 FR 69403, 69404 (November 12, 2010).

[25] *See AD Final Determination*, 76 FR at 18526, and accompanying Issues and Decision Memorandum at Comment 3, Part B (describing a Department memorandum to the File, "Telephone Call to Petitioners Regarding Scope," dated February 8, 2011).

[26] *See* Petitioner's submission, "Petitioner's Response to the Department's Inquiry Regarding the Subassemblies and Unfinished Kits," dated March 9, 2011 (also described in the *Final Determination*) ("Petitioner's Scope Amendment Letter") at Attachment 1 of Draft Results.

[27] *Id.*

[28] *Id.*

Petitioner then submitted suggested modifications to the subassembly and "finished goods kit" exclusion language to reflect this clarification "of the intent of the Petition."[29]

In the AD *Final Determination* IDM, the Department stated that it agreed with the Petitioner "that these changes reflect the intent of the petition and do not thwart the statutory mandate to provide the relief requested in the petition," and "accepted the modifications to the scope proposed in the Petitioners' Scope Clarification Letter."[30]

Accordingly, the subassembly language and "finished goods kit" language was modified in the *Final Determination* in a manner reflected in the current scope provisions, with the underlined and bolded text reflecting the additions:

> The scope includes **the** aluminum extrusion **components** that are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise **unless imported as part of the finished goods 'kit' defined further below. The scope does not include the non-aluminum extrusion components of subassemblies or subject kits**.
>
> The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a "**finished goods** kit." A **finished goods** kit is understood to mean 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. An 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.**

B. The CWC Scope Ruling

On October 11, 2012, the Curtain Wall Coalition ("CWC"),[31] requested that the Department "issue a scope ruling confirming that curtain wall units and other parts of curtain wall systems" are subject to the scope of the *Orders*.[32] The CWC represents domestic producers

[29] *Id*.
[30] *See* IDM at Comment 3, Part B.
[31] The CWC consists of Walters & Wolf, Architectural Glass & Aluminum, and Bagatelos Architectural Glass Systems, Inc.

of curtain wall units and curtain walls, and its request identified curtain wall units, in general, exported to the United States from China. Specifically, it requested "issuance of a scope ruling that parts of curtain walls, including curtain wall units, are included in the scope of the orders covering aluminum extrusions from the People's Republic of China."[33] In its request, CWC cited to the Department's analysis in the Preliminary Scope Determination of Yuanda's merchandise, stating that the agency "found that the exclusion for 'kits' does not apply to curtain wall units and parts because it did not include all the necessary parts and components for a final finished curtain wall."[34] CWC stated that this was reasonable because "'curtain wall units' fall within the scope of the aluminum extrusion orders because these products are imported as aluminum extrusion frames, with or without the infill material, for further assembly into a curtain wall system for further installation in construction and building."[35]

CWC contended in its scope request that it was being injured primarily by exports from four Chinese companies, and in particular the purportedly biggest two exporters, Yuanda and "Beijing Jangho Curtain Wall Co., Ltd. ("Jangho").[36] CWC explained that "{c}urtain wall units are unfinished goods, which cannot be imported as a 'finished goods' or 'a kit' of a finished good, because curtain wall units and kits comprise only parts of a curtain wall system."[37] CWC explained that its request covered "curtain wall sections, short of the final finished curtain wall," that "certain curtain wall parts are unitized into modules that are designed to be interlocked with each other, like pieces of a puzzle," a "unitized curtain wall system is comprised of many curtain

[32] *See* CWC Scope Request Regarding Curtain Wall Units and Other Parts of a Curtain Wall System, dated October 11, 2012 ("CWC Scope Request"), cover sheet at 1-2. The CWC Scope Request was submitted to the underlying record of this proceeding in Exhibit B of CWC's Opposition Comments.
[33] *Id*. at 22.
[34] *Id*. 18-19.
[35] *Id*. at 19.
[36] *Id*. at 3 -5 (with exhibits providing extensive data on Yuanda's and Jangho's exports).
[37] *Id*. at 6.

wall units," and that "no one, absolutely no one purchases for consumption a single curtain wall piece or unit."[38] CWC alleged that Yuanda, Jangho and "other Chinese importers" "have increased the number of curtain walls imported into the U.S. Market since" the *Orders* "were imposed," "largely to strategically evade the current tariffs."[39]

With respect to the finished merchandise and "finished goods kit" exclusions, CWC argued that a curtain wall unit cannot be finished merchandise, because "a curtain wall unit is only a part of a unitized curtain wall system" and "curtain wall units are only parts for a later final finished good that will be used in building construction."[40] Further, CWC argued that unitized curtain walls and parts could not meet the "finished goods kit" exclusion based on: 1) the plain language of the language of the scope that "explicitly covers curtain walls assembled after importation;"[41] 2) the Department's Preliminary Scope Determination; and 3) the fact that additional components, such as "gaskets, fasteners, splices, anchor components, screws, nuts and bolts, steel embeds, and insulation" were still necessary to add to the building to complete a curtain wall.[42]

Following CWC's Scope Request, there were multiple submissions on the record of that proceeding in which several interested parties, including Yuanda, Jangho, Overgaard Limited and Bucher Glass Inc. ("Overgaard and Bucher"), and CWC, argued whether or not curtain wall units are "parts of curtain walls," explicitly included in the scope, and whether or not the finished merchandise or "finished goods kit" exclusions to the scopes of the *Orders* apply.[43]

[38] *Id*. at 9.
[39] *Id*. at 14.
[40] *Id*. at 21.
[41] *Id*.at 21.
[42] *Id*. at 22.
[43] *See* the Department's memorandum, "Final Scope Ruling on Curtain Wall Units and Other Parts of a Curtain Wall System," dated November 30, 2012 ("CWC Scope Ruling") at 5-8 (referencing the numerous arguments and submissions on the record). The CWC Scope Ruling was submitted to the underlying record of this

In the CWC Scope Ruling, the Department cited to both the "parts" language of the scope of the *Orders*, as well as its analysis in the Preliminary Scope Determination, in determining that "curtain wall units and other parts of a curtain wall systems" are subject merchandise.[44] With respect to the arguments of the curtain wall importers and exporters that a finished curtain wall, exported in multiple shipments of curtain wall units over many months pursuant to a long-term contract, could possibly be excluded under the "finished goods kit" exclusion, the Department explicitly declined to address that claim, stating that CWC had not sought a scope ruling on that question.[45]

Finally, Yuanda, Jangho, and Overgaard & Bucher had pointed to language in the scope which states the following: "The scope also excludes finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass . . . ." They argued that "curtain wall units, where the in-fill is glass, are by definition windows, which are listed in the scope as examples of finished merchandise."[46] Each claimed that the Department should determine that the finished merchandise exclusion to the scope of the *Orders* should therefore apply to curtain wall units, because those units were *de facto* windows with glass in-fill.[47] The Department rejected this finished merchandise exclusion argument, stating that "{c}oncerning arguments of Yuanda, Jangho and Overgaard & Bucher that curtain wall units with glass are excluded from the scope of the *Orders*, like windows with glass, the scope of the *Orders* specifically includes curtain walls and window frames, but specifically excludes windows with glass. The scope does not

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proceeding in Exhibit D of CWC's April 26, 2013 letter, "Aluminum Extrusions from the People's Republic of China: Comments in Opposition to the Scope Request Regarding Complete Curtain Wall Units" ("CWC Opposition Comments").

[44] *Id*, at 1, 9.

[45] *Id*. at 9.

[46] *Id*. at 6 (Yuanda), 7 (Jangho) and 8 (Overgaard & Bucher).

[47] *Id*.

specifically exclude curtain walls with glass."[48] Accordingly, the Department determined that the argued finished merchandise exclusion did not apply. The Department concluded its analysis by determining that "because both the scope of the *Orders* and the description of the merchandise in the initial investigation explicitly state that curtain walls are included within the scope of the *Orders*, the Department finds that the products at issue are included."[49]

Yuanda, Jangho, Overgaard & Bucher appealed the CWC Scope Ruling, and the CIT affirmed the Department's determination. The CIT held that "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 Orders."[50] The Court explained that "Curtain wall units" are "undeniably components that are fastened together to form a complete curtain wall. Thus, they are "parts for," and "subassemblies for," completed curtain walls.[51] The Court explicitly rejected the argument that "the term 'parts for' somehow means smaller or less manufactured than a curtain wall unit," finding that "there is nothing in the 'parts for' language that would suggest this kind of restriction, and the court will not add any."[52] Furthermore, the Court agreed with the Department that "the *Orders* separately and intentionally distinguish windows from curtain wall units, and that the 'finished merchandise' exception does not encompass curtain wall units."[53] The Court held that in determining "what is significant" for the "finished merchandise" exclusion is if a product is a "stand-alone completed and finished

[48] *Id*.
[49] *Id*.
[50] *See Shenyang Yuanda Aluminum Industry Engineering, Inc. v. United States*, 961 F. Supp. 2d 1291, 1293 (CIT 2014) ("*Yuanda I*").
[51] *Id*. at 1298.
[52] *Id*.
[53] *Id*.

product," and it determined that "curtain wall units are not finished merchandise, but, rather, are parts for curtain walls."[54]

The plaintiffs appealed the CIT's decision, and the Court of Appeals for the Federal Circuit ("Federal Circuit") held that Yuanda's curtain wall units were "parts . . . within the plain language of the Orders."[55] Affirming the CIT's holding that curtain wall units are not finished windows, the Federal Circuit also held that "Yuanda's products do not fall within the 'finished merchandise' exception," and that "the CIT correctly determined that Yuanda's curtain wall parts are not finished merchandise . . . ."[56]

C. The Yuanda Scope Ruling

On March 26, 2013, Yuanda filed its scope request, arguing that its merchandise is excluded from the *Orders* under two different exclusion provisions in the scope of the *Orders*.[57] First, it argued that each of its "curtain wall units" (consisting of aluminum extrusion frames and glass or another infill material that make up a curtain wall) were finished merchandise, and therefore should be excluded based on the "finished goods" exclusion.[58] Second, Yuanda argued that certain "complete and finished curtain wall units that are produced and imported pursuant to a contract to supply a complete curtain wall" were outside the scope of the *Orders* because each shipment was part of a "finished goods kit," and once all the pieces of the kit were imported and

[54] *Id*. at 1298-1299.
[55] *Shenyang Yuanda Aluminum Industry Engineering, Inc. v. United States*, 776 F.3d 1351, 1357 (Fed. Cir. 2015) ("*Yuanda II*").
[56] *Id*. at 1358-1359.
[57] *See* Yuanda's submission, "Aluminum Extrusions from the People's Republic of China; 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," dated March 26, 2013 ("Yuanda Scope Request").
[58] *Id*. at 9-11, 13-22.

assembled in the United States, in accordance with the contract, the result was a "finished good" -- the curtain wall.[59]

As part of its argument that curtain wall units that are "produced and imported pursuant to a contract to supply a complete curtain wall" are subject to the finished merchandise and finished goods kit exclusions, Yuanda argued that the Department's subassemblies test, first articulated in its Side Mount Valve Controls ("SMVC") Scope Ruling,[60] applied because "complete curtain wall units installed onto a building are like SMVC units installed onto a firetruck."[61] Furthermore, Yuanda attached as Exhibit 5 to its scope request an article in the periodical "National Glass Magazine" in which Petitioner's legal counsel stated: "The scope of the aluminum extrusions investigation excludes finished merchandise, such as a curtain wall, that contains aluminum extrusions, as long as the product is fully and permanently assembled at the time of entry or is entered unassembled but contains all of the parts necessary to assemble the final finished good . . . In our view, a curtain-wall system would need to contain all of the window glass at the time of entry to be excluded. If it did not, it would not be 'completed,' or capable of completion, at the time of entry."

The CWC filed a response to Yuanda's Scope Request on April 26, 2013.[62] In response to Yuanda's claim that the subassembly test of the SMVC Scope Ruling applied in this case, the CWC argued that the subassemblies test could only apply where "the components constitute a finished good," and they could only constitute a finished good if "(i) no further finishing or

[59] *Id*. at 11-22.

[60] *See* the Department's scope determination memoranda, "Initiation and Preliminary Scope Ruling on Side Mount Valve Controls," dated September 24, 2012, and "Final Scope Ruling on Side Mount Valve Controls," dated October 26, 2012 (affirming the Department's preliminary scope ruling in full) (collectively, "SMVC Scope Ruling"). The SMVC Scope Ruling was provided to the underlying record in the Department's March 27, 2014, memorandum, "Inclusion of Aluminum Extrusions Final Scope Rulings."

[61] *See* Yuanda Scope Request at 13-15.

[62] *See* CWC's Opposition Comments.

fabrication prior to assembly is required and (ii) all the necessary hardware and components for assembly are ready for installation at the time of entry."[63] The CWC argued that neither of these factors applied in this case because "curtain wall units require both additional finishing and processing and numerous additional parts and hardware to properly install the unit into a larger structure – the curtain wall."[64] Yuanda and Jangho subsequently responded to the CWC's submission on May 3 and May 6, 2013, respectively,[65] both arguing that the CWC's argument would "lead to absurd results," because just as the downstream product in the SMVC Scope Ruling was a fire truck, in this case it would be the entire wall, or more, of a building.

On May 10, 2013, the Department initiated a formal scope inquiry, pursuant to 19 CFR 351.225(e), and the CWC, Yuanda, Jangho, and Permasteelisa[66] all submitted additional comments on the record. In addition, on June 7, 2013, Petitioner submitted comments citing to the Department's Preliminary Scope Determination and the CWC Scope Ruling for support of its claim that "unitized curtain walls" are covered by the scope of the orders because they do "not enter with all the parts necessary to assemble a final finished good."[67] Petitioner also explained that because Yuanda's curtain wall units "require further fabrication once they enter the United States to complete the curtain wall, such as waterproofing with adjacent units as well as 'on site cutting and punching for proper installation,'" on this basis, as well, they "do not enter as a 'kit' or a 'final finished good."[68]

[63] *Id*. at 21.
[64] *Id*. at 22.
[65] *See* Yuanda's Response to CWC's letter, dated May 3, 2013, at 13, 18; *see also* Jangho's Response to CWC April 26, 2013 Submission, dated May 6, 2013, at 8-10.
[66] Permasteelisa North America Corp., Permasteelisa South China Factory and Permasteelisa Hong Kong Limited (collectively "Permasteelisa")
[67] *See* Petitioner's Rebuttal Comments in Response to Yuanda's Comments regarding the Department's Initiation of a Formal Scope Inquiry, dated June 7, 2013.
[68] *Id*. at 2-4.

The Department issued the Yuanda Scope Ruling on March 27, 2014, and determined that the products at issue were subject merchandise, covered by the *Orders*.[69] With respect to curtain wall units imported in stages pursuant to a long-term contract, the Department determined that "curtain wall units imported in various combinations and staged to ultimately form a curtain wall are not finished goods" because, even when "imported in a shipment of two or more units," the imported merchandise was still merely parts of curtain walls, and parts of curtain walls are expressly covered by the scope of the *Orders*.[70] The Department concluded that the language of the scope of the *Orders* did not provide for the exclusion of parts of curtain walls imported over time pursuant to a long-term contract, nor did any additional information on the record indicate that the finished goods kit exclusion in the scope of the *Orders* was intended to apply to such curtain wall parts.[71]

With respect to the subassembly test articulated in the SMVC Scope Ruling, the Department determined the following:

> Yuanda and Jangho argue that the Final SMVC Scope Ruling supports a finding that so-called curtain wall "kits" are excluded from the scope of the *Orders*. The subassemblies test discussed in the Final SMVC Scope Ruling is designed to avoid the unreasonable application of the "finished goods" exclusion in the scope for certain partially assembled downstream products, while remaining consistent with the scope language that excludes merchandise like windows with glass or doors with glass or vinyl, each of which includes all of the parts necessary to assemble a complete window or door, but is necessarily assembled into a larger structure, such as a house. The test provides that products that might otherwise be considered subassemblies of larger downstream products may be excluded from the scope provided that they enter the United States as finished goods or finished goods kits and require no further finishing or fabrication. While a curtain wall unit is a component of a larger structure, *i.e.*, a building, it cannot be construed to be a finished product itself because it has no identity of its own other than as part of a curtain wall, and curtain wall parts are specifically covered by the scope.[72]

[69] *See* Yuanda Scope Ruling at 20-28.
[70] *Id*. at 24.
[71] *Id*.
[72] *Id*. at 25.

Yuanda, Jangho and Permasteelisa subsequently appealed the Department's determination, and the Court permitted the Department to amend its scope ruling through remand redetermination to reassess the record evidence and arguments in light of Exhibit I-5 to the Petition, which had not been raised during the scope ruling proceedings, but was raised in submissions to the Court.[73]

Section 19 CFR 351.225(d) states that if the Department "can determine, based solely upon the application and the descriptions of the merchandise referred to in paragraph (k)(1) of this section, whether a product is included within the scope of an order," the Department "will issue a final ruling." Based on the information in Yuanda's "application," which included the National Glass Magazine article expressing the Petitioner's counsel's views, and the factors listed in 19 CFR 351.225(k)(1), the Department revised its analysis on remand.[74] In addition, the Department took into consideration all of the remaining evidence on the record, the arguments and submissions of the parties on the record, including the Petitioner.[75] The Department continued to find in its remand redetermination that Yuanda's merchandise was covered by the scope of the *Orders* and, in addressing Jangho's subassembly test argument, primarily cited back to its analysis in the Yuanda Scope Ruling.[76]

On February 9, 2016, this Court remanded the Department's redetermination for further analysis. On April 4, 2016, we issued draft remand results to the parties and allowed them the opportunity to comment.[77] Our redetermination analysis, as provided to interested parties in and

[73] *Shenyang Yuanda Alum. Indus. Eng'g Co. Ltd. v. United States*, Consol. Ct. No. 14-00106, dated December 9, 2014.
[74] *See First Remand Redetermination* at 9-18.
[75] *Id*.
[76] *Id*. at 9-18, 35-36.
[77] *See* Draft Results at 37-38.

materially unchanged from the Draft Results, is provided in "Section IV: Analysis", below. Petitioner, the CWC, Jangho, and Permasteelisa timely submitted rebuttal factual information on April 8, 2016.[78] Yuanda, Petitioner, the CWC, Jangho, and Permasteelisa timely submitted comment on the Draft Results on April 13, 2016.[79] For reasons outlined in Comment 7, below, the Department further solicited limited rebuttal on certain information contained in the CWC's Draft Results Comments.[80] Yuanda, Jangho, and Permasteelisa timely submitted rebuttal comment on April 22, 2016.[81] All affirmative comments and rebuttal comments are addressed in "Section V. Interested Party Comments", below.

IV. Analysis

Pursuant to *Yuanda III*, we are addressing the following: 1) the subassembly language in the scope of the *Orders* (including the language which was added to the scope of the *Orders*

[78] *See* Letter from Petitioner, "Aluminum Extrusions from the People's Republic of China: Submission of Factual Information," dated April 13, 2016 ("Petitioner's Factual Submission"); Letter from the CWC, "Aluminum Extrusions from the People's Republic of China; Scope Inquiry - Complete and Finished Curtain Walls Units: Factual Information Submission," dated April 13, 2016 ("CWC's Factual Submission"); Letter from Jangho, "Draft Redetermination - Rebuttal Factual Information Aluminum Extrusions from the People's Republic of China," dated April 13, 2016 ("Jangho's Factual Submission"); and Letter from Permasteelisa, "Aluminum Extrusions from The People's Republic of China; Rebuttal Factual Information in Connection with the Department's Draft Remand Redetermination," dated April 13, 2016 ("Permasteelisa's Factual Submission").

[79] *See* Letter from Yuanda, "Aluminum Extrusions from the People's Republic of China: Comments on Draft Redetermination Issued Pursuant to Court Order in Shenyang Yuanda Alum. Indus. Eng'g Co. v. United States, Slip Op. 16-11 (Feb. 9, 2016)," dated April 13, 2016 ("Yuanda's Draft Results Comments"); Letter from Petitioner, "Aluminum Extrusions from the People's Republic of China: Comments on the Department's Draft Remand Results," dated April 13, 2016 ("Petitioner's Draft Results Comments"); Letter from the CWC, "Aluminum Extrusions from the People's Republic of China; Scope Inquiry – Complete and Finished Curtain Walls Unites: Comments on Draft Remand Redetermination Results," dated April 13, 2016 ("CWC's Draft Results Comments"); Letter from Jangho, "Draft Redetermination Comments: Shenyang Yuanda Aluminum Indus. Eng'g Co. V. United States, Consol. Court No. 14-00106: Aluminum Extrusions from the People's Republic of China," dated April 13, 2016 ("Jangho's Draft Results Comments"); and Letter from Permasteelisa, "Shenyang Yuanda Alum. Indus. Eng'g Co. v. United States, Consol. Court No. 14-00106; (February 9, 2016): Comments on Draft Results of Redetermination," dated April 13, 2016 ("Permasteelisa's Draft Results Comments").

[80] *See* the Department's memorandum to all interested parties, "Comments on New Factual Information Relied Upon in the CWC's Comments on the Draft Results of Redetermination," dated April 18, 2016 ("New Factual Memorandum").

[81] *See* letter from Yuanda, "Comments on New Factual Information," dated April 22, 2016 ("Yuanda's Rebuttal Comments"); *See* letter from Permasteelisa, "Comments on New Factual Information in Connection with the Department's Draft Remand Redetermination," dated April 22, 2016 ("Permasteelisa's Rebuttal Comments"); *See* letter from Jangho, "New Factual Information Rebuttal," dated April 22, 2016 ("Jangho's Rebuttal Comments");

during the investigation after the Petitioner explained their views on the "finished goods kit" exclusion language and Yuanda's merchandise) and the subassembly test established subsequent to the issuance of the *Orders* as first enumerated in the SMVCs ruling and whether the subassembly test applies to Yuanda's merchandise;[82] 2) an explanation of why the distinctions drawn by the Department between window walls and curtain wall units is not arbitrary,[83] and 3) an analysis of the record to "consider whether a single-entry, unitized curtain wall is a real product . . . that is imported with any regularity into the United States."[84]

A) The Subassembly Language of the Petition and the Department's Subassembly Test

The language of the scope of the *Orders* pertaining to "parts" and "subassemblies" is as follows (the "subassemblies" portion is underlined):

> Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture. Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. <u>The scope includes the aluminum extrusion components that are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise unless imported as part of the finished goods 'kit' defined further below. The scope does not include the non-aluminum extrusion components of subassemblies or subject kits.</u>

Notably, the "parts" language which precedes the "subassemblies" language provides specific examples of parts of final finished products that are assembled after importation: window frames, door frames, solar panels, curtain walls and furniture. For many of these listed parts, the scope exclusion for "finished merchandise containing aluminum extrusions as parts as fully and permanently assembled and completed at the time of entry" contains examples of the finished versions of the merchandise: "finished

[82] *See Yuanda III* at 36-40.
[83] *Id.* at 44-45.
[84] *Id.* at 41.

windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels." No example of a finished "curtain wall" that is "fully and permanently assembled and completed at the time of entry" is included in that text, but both the CIT and Federal Circuit held that the "finished merchandise" exclusion would only apply to Yuanda's merchandise if the curtain wall, the finished merchandise under the scope, was fully and permanently assembled and completed at the time of entry.[85]

To the extent that subassemblies are excluded as part of a "finished goods kit," the following language applies:

> The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a "finished goods kit." A finished goods kit is understood to mean 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.

As explained above, the scope of the *Orders* was modified in the Final Determination to add in some of this clarifying language, through a request of the Petitioner. The Petitioner indicated that it wanted "to make clear that the intent of the Petition is to cover and apply duties only to aluminum extrusion components of such entries and not to non-subject components."[86] Petitioner recognized that many subassemblies subject to the *Orders* contained a combination of both aluminum extrusions and other non-aluminum extrusion products, and it wished to clarify the scope so that "importers of such products" would know to "separately identify, classify, and

[85] *See Yuanda I*, 961 F. Supp. 2d at 1297-1299 and *Yuanda II*, 776 F.2d 1351, 1356-1359.
[86] *See* Petitioner's Scope Amendment Letter at 1 (provided at Attachment 1 of Draft Results).

value the subject and non-subject components at the time of entry in order for" CBP "to apply antidumping and countervailing duties as intended."[87]

To be clear, the Petitioner did not indicate anywhere in the investigation that it intended its requested amendments to the scope to undermine or overrule its view that Yuanda's merchandise was not excluded under the "finished goods kit" exclusion because "at the time of importation, all of the necessary parts to fully assemble" Yuanda's "final finished good," a curtain wall, were not present. Furthermore, Petitioner's interpretation of the "final finished good," is consistent with the CIT and Federal Circuit's analysis that the "finished merchandise" in the first exclusion to the scope is a completed curtain wall.[88]

Thus, to the extent that a curtain wall unit or units are "subassemblies," *i.e.*, "partially assembled merchandise," under the language of the scope, those units may be "imported as part of" an excluded "finished goods kit," but only if the finished good is, itself, a curtain wall, and all of the "finished goods kit" criteria are satisfied.

With respect to the Department's subassembly test, as first articulated in the SMVC Scope Ruling, the Department recognized that an "interpretation of 'finished goods kit' which requires all parts to assemble the ultimate downstream product may lead to absurd results, particularly where the ultimate downstream product is, for example, a fire truck."[89] The Department explained that based on the "subassemblies" language in the scope, subassemblies could be excluded if they met two requirements: 1) the subassemblies must, themselves, enter into the United States as fully assembled "finished merchandise" or in pieces as a "finished

[87] *Id*. at 1-2.
[88] *See Yuanda I*, 961 F. Supp. 2d at 1295-1299; *Yuanda II*, 776 F. 3d at 1356-1359.
[89] *See* SMVC Scope Ruling at 7.

goods kit" and 2) the "subassemblies" must "require no further "finishing or fabrication"[90] to be incorporated into the downstream product. The Department explained that this was "consistent with scope language that excludes merchandise like windows with glass or doors with glass or vinyl, each of which includes all the parts necessary to assemble a complete window or door, but are necessarily assembled into a larger structure, such as a house."[91] As the Court has recognized, the Department has applied this test to many different products since the SMVC Scope Ruling, and found products to meet the subassembly test and warrant exclusion.[92]

For curtain walls, the first part of the subassemblies test could only apply if the curtain wall unit or curtain wall units which compose the curtain wall could, themselves, enter the United States as fully assembled "finished merchandise" or as a "finished good" in pieces as a "finished goods kit." However, the scope itself states that the "finished good" is the curtain wall, an interpretation which has been affirmed by the Federal Circuit. Thus, unlike the subassemblies which the Department has determined to have passed the subassemblies test, parts of curtain walls, such as Yuanda's curtain wall units, cannot pass the subassemblies test because the scope specifically provides that they are not a finished good under these *Orders*, as confirmed by the CIT's holding that "curtain wall units are not finished merchandise, but, rather, are parts for curtain walls."[93]

The Court stated in its opinion that, under the Department's subassemblies test, the Department "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

[90] *Id.*
[91] *Id.*
[92] *See Yuanda III* at 29, footnote 102, citing the Department's July 25, 2014, ruling on fan blade assemblies and November 23, 2015, final scope ruling on lateral arm assemblies.
[93] *See Yuanda I* at 1298-1299.

on how finished and ready for installation in the ultimate downstream product the subassembly is."[94] This description of the Department's subassemblies test is not entirely correct: Under the Department's SMVC subassemblies test, the Department first must determine if a subassembly is a finished good, either fully assembled or shipped in pieces as a kit, capable of installation in the ultimate downstream product upon importation. In particular, in determining if the subassembly is a finished good, shipped in pieces as a kit, the Department will focus on whether or not all of the pieces which make up the finished good are imported under the same entry. The Department explained this analysis in the First Remand Redetermination, and the subassemblies test, which is based on the language of the scope exclusion itself, has in no way changed for purposes of the Department's "finished goods kit" analysis.[95]

In implementing the "finished goods kit" exclusion, the Department applies the same requirement to both subassemblies and downstream products. Thus, whether those finished goods are subassemblies imported in pieces, capable of installation in the ultimate downstream product upon importation, or the ultimate downstream product itself, again, imported in pieces, the "at the time of importation" language in the scope applies equally.

As part of its analysis, the Court noted that the CIT in *Yuanda I* and the CAFC in *Yuanda II* both referenced curtain wall units as being "parts for" curtain walls, as well as "subassemblies."[96] The CIT and the Federal Circuit, in referring to curtain wall units as both

[94] *See Yuanda III* at 25.

[95] *See* First Remand Redetermination at 14-16, 26-30 (citing to cases in which the Department has addressed the factual situation in which multiple shipments have either entered the United States under one entry, or not entered the United States under one entry: Final Scope Ruling on Window Kits, dated December 9, 2011, at 5 ("Window Kits Scope Ruling"); Final Scope Ruling on Solarmotion Controllable Sunshades, dated August 17, 2012, at 11 ("Sunshades Scope Ruling"); and Final Scope Ruling on Ameristar Fence Product's Aluminum Fence and Post Parts, dated December 13, 2011, at 6). Each of these final scope rulings were provided in Attachment 3 to the First Remand Redetermination.

[96] *See Yuanda III* at 34, n. 117 (citing to *Yuanda I*, 961 F. Supp. 2d at 1298 and *Yuanda II*, 776 F.3d at 1358).

"parts for" a curtain and "subassemblies" were relying on the language of the scope itself. Curtain wall units can be reasonably considered both a "part for" an ultimate curtain wall, as well as a "subassembly," as that term refers to "partially assembled merchandise" in the scope of the *Orders*.[97] However, even if curtain wall units can be considered subassemblies under the scope definition of that term, that fact alone does not mean that curtain wall units pass the Department's subassemblies test, as set forth in the SMVC Scope Ruling. For the reasons provided above, Yuanda's curtain wall units are not fully assembled finished merchandise, nor finished goods, imported in pieces. Accordingly, they do not meet the first criteria of the Department's subassemblies test.

Furthermore, with respect to the second part of the subassemblies test, the Department stated in the Yuanda Scope Ruling that because it determined "that curtain wall units imported in various combinations and stages to ultimately form a curtain wall are not finished goods kits, we do not find it necessary to address the CWC's arguments that Yuanda's curtain wall units require additional finishing or fabrication before being installed . . . ."[98] Again, in the First Remand Redetermination, the Department determined that it did "not need to reach an analysis of whether Yuanda's merchandise 'requires no further finishing or fabrication, such as cutting or punching, and is assembled 'as is' into a finished product.'"[99] Accordingly, the Court held that it did not reach this question in its holding.[100]

For purposes of a fulsome application of the subassemblies test on remand, we find it is necessary to emphasize that the products at issue in this case are <u>not</u> a completed

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[97] In *Yuanda I*, the CIT stated that "the determinative factor for exclusion under the 'finished merchandise' provision is not whether a product is in-filled with glass or vinyl. Rather, what is significant is whether the product itself, once in-filled, is a stand-alone completed and finished product. *Yuanda I* at 1298.

[98] *See* Yuanda Scope Ruling at 24.

[99] *See* First Remand Redetermination at 42.

[100] *See Yuanda III* at 27-28, n. 97.

curtain wall, but numerous shipments of curtain wall units throughout a lengthy period of time with the ultimate goal of being attached together to form a curtain wall. This is significant for purposes of the second part of the Department's subassemblies test because, for a given entry to pass the subassemblies test, the finished good (assembled or imported in pieces) must "require no further finishing or fabrication, such as cutting or punching," to be installed in the downstream product, and, in fact, must be "ready for installation "as is." In this case, even if curtain wall units were a final, finished good, which the Federal Circuit has rejected, the evidence on the record indicates that, in addition to fasteners, there are additional procedures which are needed to install a curtain wall unit into a curtain wall.[101]

Specifically, the record reflects that in addition to the curtain wall units, (1) rubber, elastomeric lineal gaskets are used to waterproof and weatherproof the interlocking of adjacent curtain wall units and (2) the top of curtain wall unit frames must be adjoined with a dynamic silicone that spreads the gap between the two curtain wall units to assure a watertight installation.[102] In addition, (3) aluminum trim is cut and punched to fit gaps in the forming curtain, to accommodate for imperfections.[103] The additional procedures listed above demonstrate that curtain wall units are not ready to be installed upon importation "as is," such that they could satisfy the subassemblies test.

This case is similar to the Department's Metal Bushing Scope Ruling.[104] In that case, the respondent stated that "upon importation in the United States, the subparts require grit blasting, paint primer, an application of adhesive paint, and a rubber filler

[101] *See* CWC Opposition Comments at 16-18 and Exhibit 2.A.
[102] *Id*.
[103] *Id*.
[104] *See* Metal Bushings Scope Ruling.

before the subparts are ready to be assembled into a complete metal bushing."[105] The Department determined that the product required "additional finishing before being installed," and therefore did not meet the requirements of the scope exclusion language.[106] The respondent subsequently appealed the Department's scope ruling, and the CIT affirmed the Department's determination, holding that, because after importation, the automotive bushings were "prepped for assembly and joined using a rubber filler," "as imported, the merchandise" was not "a kit containing all the components for assembly 'as is' into a finished good."[107] In response to the arguments that that the merchandise should be excluded under the SMVC subassemblies test because to do otherwise would allow an "absurd result," the Court explained that "Plaintiffs' argument ignores the obvious distinction that the merchandise in SMVCs, as imported, was ready for assembly into a complete control valve... whereas" in the case before it "the Subparts required the addition of the essential rubber component."[108]

Accordingly, for the reasons provided, neither the subassemblies language added to the scope of the *Orders* at the end of the investigations, nor the Department's subassemblies test, support exclusion of Yuanda's curtain wall units imported pursuant to a long-term contract under the finished goods kits exclusion to the scope of the *Orders*.

[105] *Id*. at 9.
[106] *Id*.
[107] *See Kam Kiu Aluminum Products v. United States*, 91 F. Supp. 3d 1341, 1346 (CIT 2015).
[108] *Id*. at 1347 (citing also to "Final Results of Redetermination Pursuant to Court Remand Aluminum Extrusions from the People's Republic of China Valeo, Inc.," dated February 13, 2013 ("Valeo Scope Ruling"), *aff'd Valeo, Inc. v. United State*s, Slip Op. 9-11 (Ct. No. 12-00381) (May 14, 2013), at 10, (*i.e.*, the products in the Valeo Scope Ruling "were 'ready for assembly without any additional hardware or parts' at the time of importation").

B) The Department's Reliance on the Scope to Distinguish Between Window Walls and Curtain Wall Units

The Court found in *Yuanda III*, that the Department made "no effort to account for the evidence on the record indicating that window walls and curtain walls are substantially similar products" and "Accordingly, Commerce has treated similarly situated products differently without reasonable explanation."[109] As the Department explained in its Window Walls Kits Scope Ruling: (1) window walls, unlike curtain walls, do not envelope or enclose the entire façade of a building, and (2) the "American Architectural Manufacturers Association (AAMA) defines curtain walls as 'exterior wall cladding,' whereas it defines window walls as a 'fenestration system.'"[110] In addition, as the Department explained in the First Remand Redetermination, (3) unlike Yuanda's completed curtain walls, window wall kits "contain at the time of importation, all of the necessary parts to be fully assembled into the final, finished good, including the glass panes."[111]

The Department explained in Window Walls Kits Scope Ruling, however, window walls share the same function and same placement within the structure of a building as a "finished window with glass," which is listed as "finished merchandise" specifically covered by the finished merchandise exclusion to the scope of the *Orders*.[112] The same does not hold true with respect to curtain wall units, as affirmed by the Federal Circuit.[113] Furthermore, because curtain wall units imported pursuant to a long-term contract do not satisfy the Department's

[109] *See Yuanda III* at 47.

[110] *See* the Department's memorandum, "Final Scope Ruling on Finished Window Wall Kits," dated June 19, 2014, at 7 ("Window Walls Kits Scope Ruling"). The Window Walls Kits Scope Ruling was provided to the underlying record in Attachment 5 to the First Remand Redetermination. *See also* First Remand Redetermination at 33-34.

[111] *See* First Remand Redetermination at 34.

[112] *See* Window Walls Kits Scope Ruling at 8-10.

[113] *See Yuanda II*, 776 F.3d at 1359 ("Under the doctrines of expression *unius est exclusion alterius* and *noscitur a sociis*, that finished windows with glass are excluded by name means that walls with glass are necessarily included, leaving aside that curtain walls are also specifically included by name").

subassembly test, as explained above, and do not satisfy the requirements of the "finished goods kit" exclusions to the scope of the *Orders*, unlike window walls, as explained in the Window Walls Kits Scope Ruling, the articulated differences between the two cases provide a clear line of demarcation between the reasons for the different treatment of these products.

We note that many of the Department's antidumping and countervailing duty scopes exclude otherwise physically similar products from in-scope merchandise,[114] while other scopes have even excluded *physically identical* products, but from different areas of the investigated country.[115] Under 19 CFR 351.225(d), the Department's analysis under a scope ruling focuses on the language of the scope, including its exclusions, and the factors listed under 19 CFR 351.225(k)(1). In this case, the Department concluded that Yuanda's curtain wall units imported pursuant to a contract were subject to the *Orders*, while in its Window Walls Kits Scope Ruling, based on the same analysis, the Department determined that window walls were excluded from the scope of the *Orders*.

[114] *See, e.g., Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture from the People's Republic of China*, 70 FR 329, 332-333 (January 4, 2005)(excluding numerous pieces of wooden bedroom furniture from the scope, including infant cribs, waterbeds, and jewelry armoires).

[115] *See, e.g., Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada*, 67 FR 15545 (April 2, 2002) (excluding softwood lumber products otherwise covered by the scope if exported from certain Canadian provinces). The Court held that in the First Remand Redetermination the Department drew "a distinction between (hypothetical) small" curtain walls and "all other curtain wall systems," and that because this was a distinction based only on the number of curtain wall units, the Department treated "products effectively the same differently under the AD & CVD Orders." *Yuanda III* at 44-45. However, in its analysis in the First Remand Redetermination, the Department only applied the plain language of the scope to require that a "finished good" (*i.e.*, a curtain wall) shipped in parts be capable, at the time of importation, to be fully assembled. The Department did not make any factual distinction based on size, and the Department may lawfully treat physically similar products differently based on the language of the scope and its exclusions. In any case, as discussed above, we have determined in the instant remand that even if curtain wall unit imports were capable of being analyzed under the framework for considering whether a subassembly constitutes an excluded finished good kit, the alleged kits still could not be assembled "as is" without further finishing. Accordingly, the Department would require more than merely a different number of curtain wall units for the finished goods kit exclusion to apply under that scenario – it would require all of the necessary parts to assemble those parts into a finished good.

C) The Shipping and Construction Experience of Curtain Wall Exporters and Importers

Finally, the Court held that the Department did "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. This makes Commerce's interpretation unreasonable."[116] Citing the CIT case, *Polites v. United States*, the Court held that 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. Even if such a product existed but was rarely imported, insisting upon such an interpretation would render the exclusion 'insignificant, if not wholly superfluous."[117]

In *Polites*, at issue was an exclusion to antidumping and countervailing duty orders on circular welded carbon quality steel pipe from the People's Republic of China for "finished scaffolding."[118] The question before the Department was the meaning of the term "finished scaffolding," and the Department defined that term on remand to cover "fully assembled scaffolding" and "scaffolding kits which contain, at the time of importation, all the necessary components to assemble a scaffold."[119] The Court found the requirement that the scaffolding be "fully assembled" at the time of importation to "render the 'finished scaffolding' exclusion mere surplusage" because it would be "prohibitively expensive and impractical to import."[120] The Court recognized that "terms of an antidumping and countervailing duty order are triggered

[116] *See Yuanda III* at 41-42.
[117] *Id*. at 42-43, citing *Polites v. United States*, 755 F. Supp. 2d 1352, 1357 (CIT 2011). The separate decision with respect to "scaffolding kits" was appealed, and affirmed in *Polites v. United States*, 2012 U.S. App. LEXIS 4727 (Fed. Cir. 2012).
[118] *See Polites*, 755 F. Supp. 2d at 1357.
[119] *Id*. at 1356.
[120] *Id*. at 1357.

when merchandise is imported into the United States," and an exclusion may only "encompass merchandise which is or may be imported into the United States in order to act as a meaningful exclusion."[121]

Respectfully, the Department does not agree that the analysis of the Court in *Polites* undermines the Department's analysis of curtain wall units exported pursuant to a long-term contract in the Scope Ruling and First Remand Redetermination. First, in *Polites*, the exclusion was specific to a single product: a "finished scaffolding." Therefore, the Court determined that it would be unreasonable for the Department to interpret that term to speak to a product that does not exist, rendering "the exclusion hollow." In this case, however, the exclusion at issue covers "finished goods kits," which are "understood to mean 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." As the Department explained in the First Remand Redetermination, the Department has found multiple distinct products, (20 or more, in fact), to be excluded under this exclusion.[122] In each of those cases, merchandise which was imported into the United States was excluded under the "finished goods kit" exclusion, and in each of those cases the record reflected that the parts for the finished goods kit all were imported into the United States under one entry. Thus, the Department's interpretation of "at the time of importation" according to its plain meaning of the scope language has not, pursuant to the analysis articulated by the Court in *Polites*, rendered the "finished goods kit" exclusion "hollow." Put another way, just because the industry for one particular product, among many distinct products covered by the scope of the *Orders*, does not conduct its commercial

[121] *Id*.
[122] *See, e.g.*, Window Kits Scope Ruling and Sunshades Scope Ruling.

transactions in a manner that meets the importation requirements of the language of the "finished goods kit" exclusion, this does not mean that the Department's interpretation of that exclusion, is "superfluous."

Second, as the Court held in *Polites*, the "terms of an antidumping and countervailing duty order are triggered when merchandise is imported into the United States."[123] We agree with this understanding of the antidumping and countervailing duty law, for the reasons the Department explained at length in the First Remand Redetermination.[124] When the Department issues its suspension and/or liquidation instructions to CBP, it directs CBP to suspend from liquidation, or liquidate, merchandise which has been imported into the United States. This is consistent with the requirements of the "finished goods kits" exclusion, which focuses on the ability for parts of a kit to be assembled "at the time of importation." In the Yuanda Scope Ruling, the Department considered the actual product at the time of importation – the curtain wall units shipped under a single entry – and not an assortment of shipments of curtain wall parts imported at different points of time under multiple entries. As we explained, the only reasonable means of administering and enforcing the "finished goods kit" exclusion would be for CBP to focus on whether or not a "finished good" could be assembled and exist immediately upon importation.[125] Otherwise, the planned curtain wall, the "finished good," may, as a factual matter and for a variety of possible reasons, never be completed following numerous entries of its parts. Accordingly, the "finished goods kit" exclusion in the "terms of the antidumping and

[123] *Polites*, 755 F. Supp. 2d at 1357.
[124] *See* First Remand Redetermination at 16-18.
[125] *Id*.

countervailing duty orders" in this case does not extend to the merchandise imported in piecemeal fashion over multiple entries for a single product.[126]

Third, we also believe that the Court's holding, in general, that "{e}ven if such a product existed but was rarely imported, insisting upon such an interpretation would render the exclusion 'insignificant, if not wholly superfluous'" is problematic, because it appears to allow exporters and importers to avoid the application of a scope by alleging that they "rarely" import a given product. We do not believe such an exception to the application of the scope of antidumping duty or countervailing duty orders is grounded in any statutory or regulatory provision, and find that such an exception would be contrary to the express language of the scopes. Further, we are not certain how it could be enforced by CBP. Indeed, we can imagine importers or exporters might creatively modify their shipping and selling behavior for particularly big shipments, allege that they "rarely" import a product in that form, and therefore avoid the application of an antidumping or countervailing duty order – despite the fact that their product meets the physical description of in-scope merchandise. The Department applies the scopes of its orders as written, and we do not believe it is reasonable to require the Department to permit an exclusion for products that exist, but are rarely imported, when no such exclusion exists in the scope language.

Nonetheless, the Court held that Commerce's lack of consideration of whether a single-entry, unitized curtain wall is a real product, imported with any regularity rendered the Department's interpretation unreasonable.[127] Citing *Polites*, the Court stated that "{a}n 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 . . ."[128] It continued

[126] *Id*.
[127] *See Yuanda III* at 41-42.
[128] *Id*. at 42 – 43.

that, "{e}ven if such a product existed but was rarely imported, insisting upon such an interpretation would render the exclusion 'insignificant, if not wholly superfluous.'"[129] Because the administrative record does not reflect that curtain wall units are "regularly" imported under a single CBP 7501 Form in that manner, regardless of the size of the ultimate curtain wall, in accordance with the Court's Order and under protest, we are finding on remand that Yuanda's curtain wall units imported pursuant to a long-term contract are excluded from the scope of the *Orders*.

V. Interested Party Comments

Comment 1: Whether and the Extent to Which the Merchandise Under Consideration Requires Further Fabrication and Finishing to be Incorporated Into a Curtain Wall and Contains All Components Necessary For Installation as Imported

In support of its comments with respect to the Department's "subassemblies test" (discussed in comment 6, below), Permasteelisa argues that the curtain wall procedures referred to in the Department's analysis, above, are descriptive of installation and not preparation for assembly.[130] According to Permasteelisa, record evidence establishes that curtain wall units are sealed at the factory prior to importation, shipped with all attendant components, and shipped directly to a job site where they are installed onto a building or attached to other complete curtain wall units for installation onto a building and, thus, fully assembled products to be aligned and fixed with brackets on the building exterior; ready to be installed "as is."[131]

[129] *Id*. at 43.
[130] *See* Permasteelisa's Draft Results Comments at 9-10.
[131] *Id*. at 10, citing to Permasteelisa's May 31, 2013, Scope Inquiry Comments, Comments on Curtain Walls; November, 21, 2012 Submission from Overgaard; and Jangho's November 16, 2012, Comments in Opposition to the Amended Scope Request Regarding Curtain Wall Units and Other Parts of Curtain Wall System.

Yuanda argues that the record establishes that the imported curtain wall units and other parts of the curtain wall itself required no further fabrication, rather, that only assembly operations were needed to complete the curtain wall.[132]

Petitioner agrees with the Department's analysis that the record reflects that curtain wall units and other curtain wall parts require further fabrication and finishing to be incorporated into a curtain wall. However, in the alternative, Petitioner also cites to additional factual information demonstrating that curtain wall units require additional finishing before incorporation into a curtain wall.[133] Specifically, Petitioner asserts that the record demonstrates that curtain wall anchors are necessary to attach the curtain wall to the building and, because curtain wall anchors are typically not imported with curtain wall units, Yuanda's curtain wall units would thus not contain all of the parts necessary to assemble a final finished good upon importation.[134] Petitioner contends that, even if the curtain wall anchors were imported with Yuanda's curtain wall units, the anchors, which are a necessary part of the curtain wall system, require additional finishing as they must be drilled into the floor slab edge and such drilling is exactly the type of further finishing or fabrication that Petitioner intended would render a product ineligible as a finished goods kit.[135] Accordingly, Petitioner concludes, Yuanda's curtain wall units that are produced and imported pursuant to a contract must undergo further fabrication after importation and do not satisfy the requirements of the Department's subassemblies test (as discussed below).[136]

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[132] *See* Yuanda's Draft Results Comments at 3.

[133] *See* Petitioner's Draft Results Comments at 6, citing a 2004 publication by the Canadian Government's Public Works and Government Services, Canada Mortgage and Housing Corporation, entitled "Glass and Metal Curtain Walls: Best Practice Guide Building Technology" ("Curtain Wall Best Practices"), as provided in Petitioner's Factual Submission at Exhibit 1.

[134] *Id*.

[135] *Id*.

[136] *Id*.

According to the CWC, incorporation of curtain wall units into a curtain wall occurs unit-by-unit from the ground up, sometimes alongside the erection of the cement structure. In addition to the aluminum frame and glass panel, parts include splices, sealant, silicon, gaskets, anchors, and the field processing thereof, and units are then installed with fasteners and spacing bars, and weather stripping and fire insulation is applied before units are affixed to one another. Furthermore, as discussed *infra*, the CWC explains Yuanda's own contract included in its scope request in the instant proceeding reveals [

] are required to finalize the particular curtain wall subject to the contract provided.[137]

The CWC claims that aluminum extrusion profiles or trim is also fabricated, processed, and finished in the field to secure the curtain wall modules to the structure, which completes the curtain wall.[138]

Indeed, the CWC points out that Yuanda's initial request for scope review of unitized curtain walls in the investigations listed the curtain wall units and certain aluminum extrusion parts (*e.g.*, adjustment screw, starter sill, and brackets) as part of the complete curtain wall kit shipped in stages and the pictures in the scope request indicated that contrary to Yuanda's proposed finished goods kit, certain parts (such as aluminum brackets, aluminum profiles, lock panel, hanger, stainless steel bolts and screws, connectors, the starter sill or frame) that are necessary to build a finished curtain wall were not included in Yuanda's packaged shipment of

[137] *Id*. at 33, citing Yuanda's Scope Request at Exhibit 3.
[138] *Id*. at 25-26, citing to the CWC's Opposition Comments, at Exhibit C, Part 2 (Exhibit 3, thereof), with respect to the ASTM standards E238, E331, 501.1, and AAMA standards 501 required for certain curtain walls.

glazed curtain wall units.[139] The CWC points out that many other necessary components, aside from the curtain wall units themselves, are not imported by Yuanda with the unitized curtain wall and are incorporated into the project at a later date. Such components include silicone gaskets, sealant, and silicone sheets as illustrated by engineering drawings of curtain walls.[140] Without the silicone gasket, sealant and sheets, and splices the adjoined curtain wall units becomes penetrable by the elements (*e.g.*, rainwater), thus, defeating its purpose as an exterior wall for a building, according to the CWC. Furthermore, the CWC notes that Yuanda's own contract [

].[141]

The CWC submits that the record demonstrates that imported units and parts of the unitized curtain wall will undergo several finishing and fabrication processes after importation, specifically:

- Drilling, splicing, sealing, weatherproofing, and fireproofing and installing the curtain wall units to create the complete and final curtain wall, requiring significant time, engineering and careful calibration to fit.[142] Installation and fabrication instructions for curtain walls provide that drilling is required to create [
  ] and the anchor is composed of an embedded part which can be "drilled into the floor slab edge.[143] Yuanda's own contract for the unitized curtain wall,

[139] *See* CWC's Draft Results Comments at 5, citing Yuanda's letter to the Department in the underlying AD LTFV investigation, "Q&V Response of Shenyang Yuanda Aluminum Industry Engineering Co. Ltd.," dated May 6, 2010 ("Yuanda Q&V Response"), as provided in the CWC's Factual Submission at Attachment 4, and the Preliminary Scope Determination.

[140] *Id*. at 11-12, citing to Yuanda's Scope Request at Exhibit 3 and 4, CWC's Factual Submission at Exhibit 6, and the Peevey article.

[141] *Id*. at 12, citing to Yuanda's Scope Request at Exhibit 3 and 4.

[142] *Id*. at 9, citing the detailed shop drawings for specific curtain wall projects provided in the CWC's Factual Submission at Attachment 6.

[143] *Id*. citing CWC's Opposition Comments at Exhibit 20 and Curtain Wall Best Practices, as provided in Petitioner's Factual Submission at Exhibit 1.

which was included in its scope request, reveals fabrication is required, such that "[

]"[144]

- Installation and fabrication instructions for unitized curtain walls also stress the importance of sealing; *e.g.*, when [
  ].[145]
- The application of silicone gaskets, sealant and silicone sheets are necessary for assembly of the complete unitized curtain wall, as shown by drawings of shop drawings for unitized curtain walls being installed by other curtain wall producers.[146]
- Recently submitted shop drawings further demonstrate field processing and fabrication conducted to build a complete unitized curtain wall, including the following: [

  ].[147]

The CWC further refers to an article written by Anne Peevey, identified as an industry expert who has extensive knowledge of building envelope components, which explains that incorporating curtain wall units into a unitized curtain wall at a job site requires no small amount of finishing and fabrication work (such as the need to install silicone sheets) and expertise (such as the involvement of an architect) in order to avoid common problems such as structural failures and water infiltration issues.[148]

Department's Position:

In order to address parties' arguments, we begin with the background that in the Yuanda Scope Ruling and *First Remand Determination* the Department did not address whether

[144] *Id.* citing Yuanda's Scope Request at Exhibit 4.
[145] *Id.* citing CWC's Opposition Comments at Exhibit 20.
[146] *Id.*, citing to Organized Labor Publication, Vol. 115, No. 4, April 2015 and Transbay Joint Powers Authority Request for Proposals No. 15-01 Sponsorship Opportunities, dated February 19, 2015, each later provided at Attachments 1 and 2 of the Department's April 18, 2016, New Factual Memorandum.
[147] *Id.*, citing the detailed shop drawings for specific curtain wall projects provided in the CWC's Factual Submission at Attachment 6.
[148] *Id.*, at 10-11, citing an October 2011 article from the Symposium on Building Envelope Technology, "Common Installation Problems For Aluminum Framed Curtain Wall System," by Amy M Peevey ("Curtain Wall System Installation Article"), as provided in the CWC's Factual Submission at Attachment 5.

Yuanda's merchandise at issue required "no further finishing or fabrication, such as cutting or punching, and is assembled 'as is' into a finished product"—as required by the scope language to meet the requirements of the finished goods kit exclusion. Consistent with the CIT's and CAFC's decisions in *Yuanda I* and *Yuanda II*, the Department found that curtain wall units are not a finished good under the scope of the *Orders* and, accordingly, the "finished goods kit" exclusion could not apply to the curtain wall units themselves. Specifically, because the scope language requires that a finished goods kit "contain{}, at the time of importation, all of the necessary parts to fully assemble a final finished good" and, at the time of importation, Yuanda only imports curtain wall units and not a finished good in pieces – that is, all of the parts to fully assemble an unassembled unitized curtain wall, the finished good kit exclusion didn't apply.

However, in light of the Court's holding in *Yuanda III*, in the Draft Remand and above the Department analyzed Yuanda's merchandise in accordance with the Department's subassembly test. As explained above, to assure that our analysis is fulsome, we determined on remand to address not only the requirements that the product be a "final finished good" and that all the pieces to assemble the good be present "at the time of importation," but also the requirement that "no further finishing or fabrication, such as cutting or punching" is necessary and that the imported product can be "assembled 'as is' into a finished product."

In conducting such an analysis, we emphasize that a unitized curtain wall is composed entirely of curtain wall units and other curtain wall parts. In other words, absent curtain wall units, there is no curtain wall. Accordingly, in analyzing whether or not curtain wall units imported pursuant to a long-term contract contain "at the time of importation, all of the necessary parts to fully assemble a final finished good and require(s) no further finishing or fabrication, such as cutting or punching, and is assembled 'as is' into a finished product," we have analyzed

whether or not the curtain wall units and other curtain wall parts require no further finishing or fabrication "to be incorporated into" an ultimate curtain wall.

As noted above, Permasteelisa and Jangho argue that curtain wall units are finished at the factory and are shipped directly to the job site of a curtain wall project where they arrive ready to be incorporated into the project. They argue that the curtain wall units are simply unpackaged and placed into the building project with no further processing or manufacturing required.[149] Yuanda argues that the record establishes that the imported curtain wall units and other parts of the curtain wall itself require no further fabrication; rather, that only assembly/installation operations are needed to complete the curtain wall, with no preparation for assembly necessary.[150] The evidence on the administrative record does not support such a simplistic claim of the formation of a curtain wall and incorporation of Yuanda's curtain wall units into a curtain wall.

Pursuant to the express requirements of the finished goods kits exclusion, if a further fabrication step is performed on the curtain wall unit or curtain wall itself, other than simple attachment and assembly of the units together to form the wall and affix it to the wall of the building, then the product fails to meet the "finished goods kit" exclusion. As discussed below, the evidence on the record supports a determination that the construction of a curtain wall, in general, requires further fabrication and finishing, such as cutting or punching, to imported curtain wall units when incorporating those curtain wall units into the curtain wall. Furthermore, with respect to Yuanda's merchandise specifically, the record shows that the manufacture of curtain walls requires more components, fabrication and finishing, than Yuanda claims in its response to the Draft Results.

[149] *See* Permasteelisa's Draft Results Comments at 9-10 and Jangho Rebuttal Comments at 9.
[150] *See* Yuanda's Draft Results Comments at 3. *See also* Permasteelisa's Draft Results Comments at 9-10.

Yuanda's Scope Request states that each of its curtain wall units enter the United States finished with all parts for installation without any further processing or fabrication of any sort after importation.[151] Furthermore, Yuanda provided the invoice and entry forms for a standard entry of the product subject to the request and a standard curtain wall contract, as direct support for the description of the products subject to Yuanda's request.[152] Yuanda's Response to the CWC's Opposition further detailed the process of incorporating Yuanda's curtain wall units into a larger curtain wall, providing diagram's specific to Yuanda's curtain wall systems.[153]

Exhibit 3 to Yuanda's Scope Request contains entry forms, packing lists, and commercial invoices for shipments of curtain wall units and related parts. This information demonstrates that the following items are shipped along with, and in addition to, the curtain wall units themselves:

[

].[154]

The specific installation procedures of finished curtain wall units, as described and diagramed, demonstrate that the curtain wall units, as shipped, are: 1) incorporated into the building, in designated spots; 2) hung by their anchor brackets (consisting of brackets shipped with but not attached to the units and hangers shipped separately, necessarily attached onto the unit after importation using screws and/or other fasteners) onto pre-installed anchor plates (consisting of brackets and shims); 3) are attached to steel embeds pre-bored into the concrete superstructure of the building; and 4) the anchor bracket and plates are secured by a lock panel.[155]

[151] Yuanda Scope Request at 8.
[152] *Id*. at Exhibits 3 and 4.
[153] *See* Yuanda's Response to CWC Comments at Exhibit 11 (D'Amario Letter and Technical Drawings).
[154] *See* the Packing Lists and Commercial Invoices provided in Yuanda Scope Request at Exhibit 3.
[155] *See* Yuanda's Response to CWC Comments at Exhibit 11 (D'Amario Letter and Technical Drawings).

Thus, the process as shown on the record does not reflect a system in which curtain wall units and necessary parts, as imported, may be incorporated "as is" into a curtain wall. Notably, Yuanda's technical drawings show hangers, lock panels, shims and embeds which do not appear on the invoice or entry forms for the shipments in question and are indeed shown to ship separately from the imports of curtain wall units and other component parts.[156] Even accepting Yuanda's assertions that the embeds and attached shims and brackets on the building side are part of the superstructure and not part of the curtain wall, we note that the hangers and lock panels appear to be parts required for the installation of the curtain wall units, but not included with the units, as imported.[157]

Furthermore, the existence on Yuanda's invoice of the following additional components: [

]

[158] demonstrates that the assembly and installation process of a curtain wall is more complex than the simple "hanging" of curtain walls as argued by Yuanda, particularly as these parts are not clearly identified by the narrative or schematics of the installation process.[159]

[156] *Id*.
[157] *Id*.
[158] *See* the Packing Lists and Commercial Invoices provided in Yuanda Scope Request at Exhibit 3.
[159] *See* Technical Drawings provided in Yuanda's Response to CWC Comments at Exhibit 11. Yuanda's Response to CWC Comments at Exhibit 11 (D'Amario Letter and Technical Drawings) at 11 ("the embedments and anchors are the hooks nailed into the wall so that a picture frame can be hung on the hook. The nail and hook are not parts of the finished picture frame any more than the embedments and anchors are parts of the curtain wall"). We disagree that this narrative comparison to a picture hanging on a wall is supported by the evidence specific to Yuanda's own curtain wall fabrication experience. As stated in Yuanda's curtain wall contract at Exhibit 4 to the scope request, "{Yuanda} must submit anchor data and procedures for Architect/Engineer approval. The maximum depth of any anchor installed into the top or bottom of the PT deck is three quarters of an inch. All drills and tools boring into the decks must have depth stops to restrict the depth of the penetration. {Yuanda} is responsible for ensuring that its employees are trained in the proper drilling and anchoring procedures." As such, hanging curtain wall components on the anchorages and embeds is analogous to hanging a picture frame on an existing nail only to the extent that the purchase of a picture involves an employee of the picture frame company coming to one's house months in advance of delivery of the frame to properly place into the structure of the house the nail specifically designed for, and required by, that frame and without which the frame could not be hung.

We believe this information contradicts Yuanda's assertion that the curtain wall units are ready for incorporation into a curtain wall "as is" upon importation.

We understand that Jangho, Permasteelisa, and Yuanda argue that to the extent that the [ ] are included on Yuanda's invoice and entry documentation,[160] those components only compliment the curtain wall units with which they are shipped, and in fact the incorporation of those components into the curtain wall along with the curtain wall units does not constitute further finishing or fabrication.[161] For the reasons we explained in the Draft Results and above at pages 29-31, we disagree with that argument.

Further, we believe it is important to note that there are also [ ] included in Yuanda's reported shipments, but not otherwise discussed in the Yuanda Scope Request. Specifically, in the Yuanda Scope Request, Yuanda defined its curtain wall units as "aluminum frames in-filled with glass and sealed," which are ready to be incorporated in the curtain wall as imported, and the commercial invoice and customs documentation accompanying the request is clear that the units are pre-assembled with the aluminum frame as shipped.[162] Yet, in addition to the curtain wall units "[ ]" and "[ ]" are also identified in the commercial invoice and customs documentation accompanying the request.[163] It is unclear whether these components serve in the incorporation of the curtain wall unit into the curtain wall, or as a component of the curtain wall as a whole (*e.g.*, if they are added to the project in finishing, weatherizing, and patching the curtain wall itself).

[160] See Yuanda Scope Request at Exhibit 3.
[161] *See* Permasteelisa's Draft Results Comments at 9-10, Yuanda's Draft Results Comments at 3, and Jangho's Rebuttal Comments at 11.
[162] *See* Yuanda Scope Request at 11.
[163] *See* the Packing Lists and Commercial Invoices provided in Yuanda Scope Request at Exhibit 3.

In addition, the contract for a finished curtain wall itself, as provided in Yuanda's scope request[164] does not support a claim that the components listed in Yuanda's invoice and customs documentation reflect all parts necessary to incorporate the individual curtain wall units "as is" into Yuanda's curtain walls. Key parts of Yuanda's proprietary curtain wall contract are laid out below (emphasis added):

> Specifically, the terms of the contract require the subcontractor (*i.e.*, Yuanda) to:
> "[
>
>]":
>
> [

[164] *See* Yuanda Curtain Wall Contract at 1-2, provided at Exhibit 4 to Yuanda's Scope Request.

g.

]"[165]

Thus, in addition to the curtain wall units and component parts thereof listed in the invoice and shipping documentation, a unitized curtain wall system includes, *e.g.*, [

] Moreover, the contract further provides that Yuanda will [

],"noting that Yuanda will furnish "[

]" to complete the system.[166] In other words, Yuanda's own contract does not reflect that the curtain wall units it imports, alone, "complete" the "curtain wall system" nor that simple "hanging" of curtain wall units is the only fabrication step needed to assemble the unitized curtain wall. Furthermore, Yuanda is directed to provide the following, *e.g.*,:

- [

  ]
- [ ]
- [

  ]
- [

  ]
- [

  ] [167]

[165] *Id*. at 2.
[166] *Id*. at 1-2.
[167] *Id*. at 3-5.

Accordingly, Yuanda's contract demonstrates that in addition to the curtain wall units themselves and the non-curtain wall unit components listed in the import documentation provided in the Yuanda Scope Request, the fabrication of a finished curtain wall explicitly further requires, at least, that Yuanda supply additional [

]. These materials [ ] provided by Yuanda, yet for the "kit" to be composed of all the parts for a finished good to be assembled "as is" into a finished good at the time of importation without any further finishing or fabrication processes, the contract appears to indicate those materials would necessarily need to be included.

The curtain wall units imported by Yuanda, therefore, as a matter of fact, cannot be incorporated "as is" into the finished good, the curtain wall, without further components, fabrication and finishing, because the curtain wall contract itself requires much more than the narrative argued by Yuanda, Jangho and Permasteelisa.

In addition, other information regarding the composition of curtain walls generally, suggests that additional components and processes are necessary and common in the installation of unitized curtain walls. For example, Yuanda's Scope Request also provides that unitized curtain wall systems in general contain "few field joints"… sometimes require "detailing and installation of leave out units" and the units installed later in the process to cover openings left in the wall to facilitate the handling of construction materials, "usually require special joint details and installation procedures."[168] In the underlying request, Yuanda notes that "the material facts regarding the design, production, shipment and on-site installation of the unitized curtain wall

[168] Yuanda Scope Request at Exhibit 2 at page 5.

units produced by Shenyang Yuanda and imported by Yuanda USA were fully described to the Department during the {CWC Scope Ruling}."[169] As such, though not specific to Yuanda's curtain walls, we find the materials discussed in that request relevant to the instant proceeding. Specifically, the record in the CWC Scope Ruling indicates that in addition to the curtain wall units and "hanging" thereof, a complete curtain wall requires:

- Aluminum extrusion overlays or trim that are finished (cut-to-length, punched, machined, drilled, bent, stretched, etc.) on site to cover the gaps between the curtain wall units and the interior structure.[170]
- Embeds, anchors, and anchorage devices[171] Installation instructions for curtain walls provide that drilling is required to create [ ] and the anchor is composed of an embedded part which can be "drilled into the floor slab edge.[172]
- Waterproofing as units they are interlocked, including gaskets, splices, and other sealants. The top of the frames may be adjoined with a dynamic silicone and finishing work may be performed to fill or overlays the gap between the units and the building structure (*i.e.*, the aluminum extrusion overlays are cut to fit, punched, and processed in the field at the jobsite).[173]

[169] *See* Yuanda Scope Request at 9.

[170] *See* CWC Amended Scope Request at 20-22, at Exhibits 16 (pictures of installing sample curtain wall units), 17 (list of materials and material finishes at 108), 20 (installation manual) provided at Exhibit B of CWC's Opposition Comments; *see also* CWC Further Comments at 13-21 and Exhibit 2 (chart of installation steps for curtain wall units) provided at Exhibit C of the CWC's Opposition Comments.

[171] *See* CWC Further Comments at 19 and Exhibit 2 and Amended Scope Request at 21-22. We acknowledge that the Petition described an unassembled unitized curtain wall as a product which, if imported in parts, but could be assembled at the time of importation without further fabrication or finishing, could meet the "finished goods kit" exclusion. *See* Exhibit I-5 to the scope section of the Petition. By their nature, embeds and the concrete slabs might not be imported with a curtain wall, and we do not mean to infer as such. However, as we have described above, there are several other curtain wall parts which would need to be imported with an unassembled unitized curtain wall besides just a curtain wall unit or units to satisfy the requirements of the "finished goods kit" exclusion.

[172] *See* CWC's Opposition Comments at Exhibit 20. The CWC provided further support for this in Curtain Wall Best Practices, as provided in Petitioner's Factual Submission at Exhibit 1.

[173] *See* CWC's Opposition Comments at Exhibits 16 and 20. The CWC also provides further support for this in Peevey article, the shop drawings provided at Exhibit 6 of its factual submission, and the Organized Labor Publication and Transbay RFP. While we accept these as further support for the contention that curtain walls require weatherization and waterproofing generally, we note that the Organized Labor, Transbay, and shop drawings each concern projects for other curtain wall producers and importers and, as such, are not directly relevant to the requested product.

- Other parts and components, including sealants, fittings, elastomeric lineal gaskets, splices, clips, fasteners.[174]

Finally, regarding Jangho's rebuttal to the Curtain Wall System Installation Article by Anne Peevey, we note that unlike the other information for which Jangho provided appropriate rebuttal to information placed on the record by the Department, the Curtain Wall System Installation Article by Anne Peevey was already placed on the record by the CWC in a timely fashion. Jangho never addressed that article when it had the opportunity in its Draft Results Comments. Thus, Jangho's arguments on the Peevey article in its Rebuttal Comments were, in fact, placed on the record despite being outside of the scope of comments which the Department had permitted (*i.e.*, allowing comments on the information placed on the record in the New Factual Memorandum). Nonetheless, although we recognize that Jangho has now placed sur-rebuttal arguments on the record which the Department did not invite or indicate it would allow, the Department has exercised its discretion and determined to accept Jangho's arguments in the interest of time and completeness.

With respect to Jangho's arguments on the Peevey article, we do not agree with Jangho that the involvement of experts and testing on-site is irrelevant because these facts do not speak to further fabrication of curtain wall units. In fact, the necessity of these experts and tests supports the complexity involved in the assembly of a curtain wall (including the further fabrication thereof, as discussed above). Further, it is notable that Jangho ignores one very important fact contained within that article: the need to properly install silicone sheets between units and ensure that units are properly installed and the seal between units in the wall is

[174] *See e.g.*, CWC Further Comments at Exhibit 2, CWC Amended Scope Request at Exhibits 16-21, and the detailed shop drawings for specific curtain wall projects provided in the CWC's Factual Submission at Attachment 6.

weathertight.[175] As such, the Peevey article indeed supports the CWC's argument that further materials and fabrication, in excess of the simple assembly process of hanging a curtain wall unit to the side of a building as described by Yuanda, Jangho and Permasteelisa, are necessary in the assembly and installation of unitized curtain walls post-importation.

Comment 2: The Differences and Similarities Between Curtain Walls and Window Walls

Yuanda and Jangho allege that, based on a nearly identical fact pattern as the instant proceeding, in the Window Walls Kits Scope Ruling the Department excluded from the scope of the *Orders* window walls under the finished goods kit exclusions and noted no such requirement that the kit must be imported under a single entry. Indeed, according to Jangho, such kits were imported in multiple-entry segments pursuant to a contract to import window walls.[176] However, in using the term "window walls" in this context, Yuanda and Jangho describe window walls as a different product from that described in the window walls scope rulings and the Draft Results. According to the "Description of Merchandise Subject to Scope Request" section of both the NR Windows and Ventana Window Walls Kits scope rulings, a finished window wall is a structure made from non-weight bearing extruded aluminum framing, glass panes, and other components used as a fully assembled window, custom designed to fit in openings between floors (*e.g.* floor slabs) in large commercial structures, which does not require any further processing, addition of supplementary materials, or incorporation into other structures (*e.g.*, other window walls) or with other components for use, and is fully complete and finished as imported, after assembly by the consumer at the job site, using only the materials included in the imported cartons, which cannot

[175] *See* Curtain Wall System Installation Article at 12, 20 and 21.
[176] *See* Yuanda's Draft Results Comments at 3 and Jangho's Draft Results Comments at 3-4. *See also* Jangho's Rebuttal Comments at 3.

be modified, expanded, combined, or altered in any way after importation.[177] The Department explicitly held that a window wall, as it defined that term, was the wall for a room, not an entire building, or even the side of a building.[178] As explained above, when the Department found that the exclusion applied to window walls, it applied to self-contained window walls which are imported into the United States as a kit and can be fully assembled upon importation into the structure of the building. Yuanda and Jangho refer to "window walls," but then incorrectly claim our scope rulings applied to products which are better described for our purposes as window wall building projects (*i.e.*, a collection of window walls, floor slabs, and other parts of the side of a building's structure), when in fact, our window wall scope rulings applied only to window walls as described above.

Permasteelisa asserts that the Department should take into account record evidence establishing that window walls and curtain walls are substantially similar products, in accordance with Yuanda *III*.[179] According to Permasteelisa, the Court considered the distinctions between the two products discussed in the Draft Results but did not find these differences to be differences meaningful to counter evidence of similarities between the two products, and the Department should find window walls and curtain walls to be substantially similar products, in accordance with the Court's directive and in consideration of existing record evidence, including factual information submitted subsequent to the Draft Results.[180]

Jangho also argues that the North American Fenestration Standard ("NAFS") states that "window walls … can be fabricated from windows or curtain wall" and that both window walls

[177] *See* Ventana Window Walls Kits Scope Ruling at 5 and Ventana Window Walls Kits Scope Ruling at 5.
[178] *Id*.
[179] *See* Permasteelisa's Draft Results Comments at 10-11.
[180] *Id*., citing to Jangho's Factual Submission and Yuanda's February 18, 2015, Comments on the Draft Results of the First Redetermination at 11-12.

and curtain walls are installed on a "floor-by-floor" basis.[181] Jangho argues that "window wall units" and "curtain wall units" are installed in essentially the same fashion, and when the "floor slab edges" between window wall units are "covered on the exterior with aluminum slab covers, the resulting appearance is that of a curtain wall."[182]

Petitioner notes its agreement with the Department's analysis that Yuanda's curtain wall units are distinguishable from the window walls that the agency found were excluded from the *Orders* and states that the Department's decision is reasonable given that curtain wall units and window walls have different physical characteristics.[183]

In further support to the Department's statement that certain rulings exclude otherwise physically similar products from in-scope merchandise, while other scope findings have even excluded physically identical products, but from different areas of the investigated country, Petitioner notes that the Department has analyzed flag pole sets in three separate scope rulings but excluded only one type of flag pole sets and analyzed five separate aluminum fence scope rulings and found that each product was covered by the scope of the *Orders*.[184]

As such, Petitioner asserts that because the curtain wall units and window walls scope rulings were based on the same analysis and the products have distinguishing physical characteristics, the CIT should find that the Department's determination that curtain wall units

[181] Jangho's Rebuttal Comments at 12-13.
[182] *Id*.
[183] *See* Petitioner's Draft Results Comments at 7.
[184] *Id*. at 8, citing to: the Department's memorandum, "Scope Ruling on 5 Diamond Promotions, Inc.'s Individually Packaged Advertising Flag Pole Kits," dated February 5, 2015; the Department's memorandum, "Final Scope Ruling on Cameo Manufacturing, Inc. 20-foot Telescoping Flagpoles," dated January 8, 2015; the Department's memorandum, "Aluminum Extrusions from the People's Republic of China: Final Scope Ruling on Flag Pole Sets," dated April 19, 2013; the Department's memorandum, "Final Scope Ruling on Dynasty's Complete Fence Kits," dated July 16, 2014 ("Finished Fence Kits Scope Ruling"); the Department's memorandum, "Final Scope Ruling on Kitted Fences" dated August 15, 2012; the Department's memorandum, "Final Scope Ruling on Fence Panels, Posts and Gates," dated December 13, 2011; the Department's memorandum, "Aluminum Extrusions from the People's Republic of China: Final Scope Ruling on Fence and Post Parts," dated December 13, 2011; the Department's memorandum, "Final Scope Ruling on Fence Sections, Posts and Gates," dated December 2, 2011.

imported pursuant to a contract are covered by the scope of the orders. To the extent that the CIT continues to fault the Department for treating similarly situated products *(i.e.*, curtain wall units and window walls) differently, Petitioner notes that *the CIT's decision itself* essentially instructs the Department to treat the same or identical products differently, as the curtain wall units that the Federal Circuit confirmed are expressly covered by the scope of the *Orders* are the same curtain wall units at issue in this case.[185] Petitioner contends that the fact that curtain wall units subject to this case are imported pursuant to a contract does not change the physical characteristics of the curtain wall units. Petitioner argues that there is an inconsistency between the Department's (and the CIT's and the Federal Circuit's) determination that curtain wall units that are "parts of" curtain walls and are covered by the scope, and a finding that curtain wall units that are imported pursuant to a contract are excluded.[186]

The CWC argues that the Department has applied the finished goods kit exclusion appropriately to both window walls kits and curtain walls kits, and the difference in outcomes is clearly related to the factual distinctions between the two products and not an arbitrary and capricious application of the standard.[187] The CWC notes that Department has consistently found that, to be consistent with other scope rulings, a finished good kit must be imported in the same entry.[188] This was not established in the case of Yuanda's curtain wall units and, according

[185] *Id*. at 9, citing to *Yuanda II* and *Yuanda III*.
[186] *Id*.
[187] *See* the CWC's Draft Results Comments at 27-28, citing to the Ventana Window Wall Kits Scope Ruling, as provided in the Jangho's Factual Submission at Exhibit 2, stating "the Department has concluded in past determinations that window walls and curtain wall units share some physical characteristics, but window walls, once assembled, compose a finished product, while curtain wall units do not, but instead remain parts of curtain walls, which are expressly included in the scope of the Orders. Unlike curtain walls, which are composed of interlocking curtain wall unit parts, window walls do not envelop the side of the building, but instead each window wall is placed directly into the structure of the wall of the building – unattached to other window walls. As the Department explained in the {prior} Window Wall Kits Scope Ruling {that} "when inserted into the opening of a building, window walls leave significant areas of the building façade uncovered."
[188] *Id*. at 28, citing to, *e.g.*, *Kam Kiu*, as provided in both the CWC's Factual Submission at Attachment 2 and Permasteelisa's Factual Submission at Attachment 2.

to the CWC, the Department thus reasonably concluded that Yuanda had failed to establish that its imports constituted a curtain wall "kit." By requiring all window wall kits and all curtain wall kits to be included on one entry to meet the exclusion, the Department has treated window walls and curtain walls consistently, not differently, within the context of the scope of the *Order*, the CWC argues, and requiring all window wall parts to be on one entry while permitting curtain wall kits to be on multiple entries pursuant to the Court's order, the Department would be arbitrarily treating imports of curtain wall kits differently than window wall kits.[189]

The CWC argues that the Department properly found that window walls and curtain walls are different and distinct products which warrant different results regarding the finished goods kit exclusion, and that a comparison of window walls and curtain walls, as discussed in the scope requests of Window Walls Kits and the curtain walls cases, demonstrates the differences in these products.[190] Specifically, the CWC notes that the Window Walls Kits scope request states that a "critical difference between and window wall and a curtain wall, . . . is that window walls imported by NR Windows are both not a free-hanging or not-weight bearing framing system which encircles a building, <u>but rather it is a proscribed kit with all components included at the time of importation</u>."[191] Accordingly, the CWC states that a window wall kit includes all the necessary parts at the time of importation to make a finished window wall, is similar to a window in that it fits within a building's discrete aperture; and is imported in a single entry.[192]

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[189] *Id*.

[190] *Id*. at 21-22.

[191] *Id*. (<u>emphasis in original</u>), citing N.R. Windows Inc.'s letter to the Department in the Window Walls Kits Scope Ruling segment, "Aluminum Extrusions from China: Request of N.R. Windows Inc. for a Scope Ruling Confirming the Exclusion of Window Walls from the AD and CVD Orders," dated November 5, 2013 ("Window Walls Kits scope request") at 4, as provided in the Jangho's Factual Submission at Exhibit 3. The CWC also provides a comparison of photographs of window walls from the Window Walls Kits scope request and of curtain walls, as provided to the underlying record of the instant scope proceeding in Yuanda's scope request and CWC Opposition Comments.

[192] *Id*. at 22.

In addition, the CWC points to statements provided as supporting information to NR Windows' scope ruling request which listed several distinctions between window walls and curtain walls which highlight that there is "a big distinction between window walls and curtain walls in reviewing handling and processing."[193] Moreover, according to the CWC, it is telling that NR Windows separately listed these two products on two different pages of its website, whereas Yuanda, Jangho and Permasteelisa do not list window walls as primary or particular products (in contrast with the window wall kits requestors, which list them as key products), and further noteworthy that the CWC, Yuanda, Jangho and Permasteelisa all did not participate in either of the window wall kits scope proceedings: an indication that both the industry and market perceives them as two different products.[194]

Jangho and Yuanda rebut that, just because curtain walls may be listed separately from window walls as an advertisement for services, does not render the products dissimilar and the fact that the terms are used interchangeably in certain contexts does not support CWC's claim in this regard.[195]

CWC then notes several experiential observations identifying ways in which window walls are unique, and distinct from curtain walls. First, window walls fill a hole in a wall or structure, and have physical differences between the window and the existing building structure (*i.e.*, the load of the window wall is carried by the floor slabs of the building). Moreover, examples of window wall application/end-use show that a window wall is considered complete

[193] *Id*. at 23, citing NR Windows' Window Walls Kits scope request at Exhibit 7, as provided in the Jangho's Factual Submission at Exhibit 3.

[194] *Id*. at 23-24, citing to various product websites of NR Windows and Ventana (*i.e.*, requestors in the prior window walls scope rulings), and Yuanda and Jangho (*i.e.*, curtain wall producers and interested parties to the instant ruling), as provided on the record in the Department's New Factual Memorandum at Attachments III-VII.

[195] *See* Yuanda's Rebuttal Comments at 3-5, Jangho's Rebuttal Comments at 11-13 at Attachments 1 and 3. Jangho further notes that window walls and curtain walls are both installed on a floor by floor basis, which the Department further takes under consideration. *See* Rebuttal Comments at 12-13 and Attachment 2.

or finished after it is installed into a discrete opening in a structure. By contrast: 1) curtain walls cover an entire side of a building from top to ground level, not merely an aperture; 2) curtain wall units act as exterior wall cladding and require the transfer of dead and live loads back to the floor structure, unlike a window wall system which is modular and self-contained between slabs of the building; and 3) the curtain wall represents the entire façade of the building, which requires a more sophisticated extrusion profile, more complicated installation, as well as additional parts.[196]

Specifically, according to the CWC, the installation of a curtain wall occurs unit-by-unit from the ground up, sometimes alongside the erection of the cement structure. In addition to the aluminum frame and glass panel, parts include splices, sealant, silicon, gaskets, anchors, and the field processing thereof, and units are then installed with fasteners and spacing bars, and weather stripping and fire insulation is applied before units are affixed to one another, and must adhere to strict performance guidelines and unique standards, which do not all always apply to window walls. The CWC claims that aluminum extrusion profiles or trim is also fabricated, processed, and finished in the field to secure the curtain wall modules to the structure, which completes the curtain wall. According to the CWC, window walls also have different end uses, less stringent performance standards, and lower prices than curtain walls.[197]

Finally, the CWC points out that Yuanda and Jangho argued the opposite position regarding the distinction between curtain walls and window walls in the antidumping and

[196] The CWC's Draft Results Comments at 24-25.

[197] *Id*. at 25-26 citing to the CWC's Opposition Comments, at Exhibit C, Part 2 (Exhibit 3, thereof), with respect to the ASTM standards E238, E331, 501.1, and AAMA standards 501 required for certain curtain walls.

countervailing duty case before Canadian authorities involving unitized wall modules.[198] In that case, which included both curtain walls and window walls in the scope (due to the narrow focus of the initial aluminum extrusions order, according to the CWC), Jangho and Yuanda argued that curtain wall units and window wall units have "physical difference notably that unitized window wall modules are installed between floor slabs, while unitized curtain wall modules are outer coverings, as well as differences in price and end uses," are "marketed as separate products and cannot be substituted without changing the building design", and made to different specifications and standards.[199] According to the CWC, that these parties made opposite arguments about curtain wall units and window wall units depending on the jurisdiction calls into question the accuracy and reliability of their arguments about window walls in this proceeding.

Yuanda challenges the CWC's arguments in this regard, noting that the Canadian ruling was issued prior to the Department's window walls ruling, and, in fact, Yuanda first argued in that case that "window walls"[200] and unitized curtain walls were so similar as to be afforded similar treatment.[201] In any case, Yuanda claims that the CWC's reference is inapposite considering that in the Canadian ruling, all parties agreed that, prior to construction, "window walls" and curtain walls are indeed substitutable.[202] Further, Jangho argues that this is a foreign ruling based on different facts and different laws, which should have no bearing on the Department's remand pursuant to the Court's Order and that, to the extent that is may be considered, the Department should note that the Canadian authority ultimately determined, as

[198] *Id*. at 23-24, citing to Unitized Wall Modules of Large Buildings (Canadian International Trade Tribunal Nov. 27, 2013) ("Canadian Wall Module Ruling"), as provided on the record in the Department's New Factual Memorandum at Attachment VIII.

[199] *Id*., citing to Canadian Wall Module Ruling at para. 36, and 42-44.

[200] In this context, the "window wall" was not a "window wall" as determined by the Department in its scope rulings, but an entire window wall building project covering a side of a building, constructed in part of multiple window walls, interspersed by floor slabs and other structural materials.

[201] *See* Yuanda's Rebuttal Comments at 6-7.

[202] *Id*.

argued by Jangho and Yuanda here, that the two products warrant treatment as a single class of goods.[203]

Department's Position:

The Department agrees with Permasteelisa that window walls and curtain wall units share some physical characteristics. For example, both window walls and curtain wall units are window-like products and are framed in aluminum, as the Court stated in *Yuanda III*.[204] However, we disagree with Permasteelisa that the CIT directed the Department to find the products substantially similar, and have taken into consideration both those similarities and differences in our analysis on remand.

The window wall kits thus far analyzed by the Department include all the necessary parts at the time of importation to make a finished window wall, which is a modular stand-alone unit that fits within a building's discrete aperture, similar to a window, and is imported in a single entry.[205] As CWC explains, window walls fill a hole in a wall or structure, generally are placed between floor slabs, have physical differences between the window and the existing building structure (*i.e.*, the load of the window wall is carried by the floor slabs of the building), and are considered complete or finished after they are installed into a discrete opening in a structure.[206]

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[203] *See* Jangho's Rebuttal Comments at 13-14.

[204] *Yuanda III* at 47.

[205] Jangho refers in its submissions to these products as "window wall units" in its description, while refers to the entire project as a "window wall," but as explained above, that is not a correct description of the product as analyzed and described by the Department in its scope rulings.

[206] *See, e.g.*, Ventana Window Wall Kits Scope Ruling at 5, as provided in the Jangho's Factual Submission at Exhibit 2 ({Window Walls} are not free-hanging or non-weight bearing framing systems which encircles a building. Rather a window wall is a glass installation with framing of aluminum that is installed between two load bearing concrete slabs and comprise a prescribed kit with all components included at the time of importation meeting a particular project specification that must be installed within the masonry and framing of an existing load-bearing wall). *See also* Yuanda Scope Request at Exhibit 2 (Curtain Wall Design Manual at page 2 and Figure 1 "Window Wall – Schematic of a Typical Version) showing window walls are installed between floors or between floor and roof. *See also* the CWC's November 21, 2012, Comments in the CWC Scope Ruling provided to the record in the CWC's Scope Opposition Comments at Exhibit C ("Even large window walls, for example, fit into the building structure").

Furthermore, window walls may be secured without consideration of interlocking or installation of other components, and the CWC provided evidence that window walls, generally, have different end uses, less stringent performance standards, and lower prices than curtain walls.[207] In addition, the CWC provided documentation that another "big distinction between window walls and curtain walls is … handling and processing."[208]

Curtain walls, on the other hand, as the CWC also describes, cover an entire side of a building (or more) from top to ground level, not merely an aperture, act as exterior wall cladding and require the transfer of dead and live loads back to the floor structure, unlike a window wall system which is modular and self-contained between slabs of the building; and represent the entire façade of the building, which requires a more sophisticated extrusion profile, more complicated installation, as well as additional parts.

The physical differences in these products are significant in the context of the plain language of the scope of the *Orders* in finding that imports of curtain wall units and components as a kit for a curtain wall, short of all merchandise needed to completely assemble and finish a curtain wall, are explicitly covered. Furthermore, to the extent that the curtain wall units are substantially similar to windows, the Federal Circuit held in *Yuanda II* that curtain wall units, and not windows, are expressly covered by the scope of the *Orders*.[209]

Furthermore, we disagree with Yuanda's and Jangho's description of the "nearly identical fact pattern" of the Department's Window Walls Kits Scope Ruling and the Yuanda Scope

[207] *See* CWC Draft Results Comments at 26 (noting that window walls frequently include doors, windows, and balconies, and are used for store fronts, "whereas curtain walls are not").

[208] *See* Window Walls Kits Scope Request at Exhibit 7, which further notes that, in comparison to curtain walls, window walls: 1) are dimensionally smaller and restricted to floor height, 2) are easier to handle, 3) are easier to install in a pre-finished system because of a more defined and finite opening, 4) involve easier wall anchorage, which is easier to install. *See also* the CWC's Opposition Comments, at Exhibit C, Part 2 (Exhibit 3, thereof), with respect to the ASTM standards E238, E331, 501.1, and AAMA standards 501 required for certain curtain walls.

[209] *Yuanda II*, 776 F.3d at 1359.

Ruling. The Department has analyzed window walls in its past scope rulings, as explained above, and they do not cover an entire building façade or even the side of a building. Yuanda's and Jangho's description of "window walls" as "nearly identical" ignores the Department's description of the products subject to its window walls scope rulings, and offer inapt comparisons of the Department's prior window walls scope rulings with the items examined in the underlying Yuanda scope ruling and subsequent remands. Those cases are in not "nearly identical."

For purposes of addressing parties' comments, the Department will refer to an overall building project incorporating multiple window walls and other products, the project actually described by Yuanda and Jangho, as a "window wall building project."[210] Whereas Yuanda's curtain walls enter into the United States in segments of curtain wall units and other parts, the window walls thus far analyzed by Commerce, on the other hand, enter into the United States at one time, under one CBP 7501 Form, and with all of the necessary parts to fully assemble a window wall "as is" upon entry. That is a significant difference between those cases and fact patterns.

We also agree with the CWC and Petitioner that even though window walls share many physical similarities with curtain wall units, that fact alone is not necessarily determinative. As explained above, the Department's antidumping and countervailing duty scopes sometimes exclude otherwise physically similar products from in-scope merchandise, or even *physically*

[210] The plain language of the Window Walls Kits Scope Ruling makes clear that Yuanda and Jangho are using the term "window wall" to describe a different product from that the Department analyzed and addressed in its prior scope rulings. Specifically, "Information from NR Windows (*e.g.*, CBP 7501 Form) indicates that the kits are sold in multiple containers and cartons that enter under a single entry." *See* NR Windows' Window Walls Kits Scope Ruling at 9. *See also* Ventana Window Walls Kits Scope Ruling at 9. The Department did not find that the exclusion for window walls applied to a kitted finished good imported over multiple entries but, rather, multiple parts imported together in multiple containers making up the kits entered under a single entry and on one CBP 7501 Form.

identical products from different areas of the investigated country, and – as noted by Petitioner – the Department has indeed analyzed nearly identical products under the scope of these *Orders*, *i.e.*, flag pole sets, in three separate scope rulings but excluded only one type of flag pole set based on the facts before the Department.[211] Indeed, even when products may appear physically similar, we must look at the specific details of the items before us and analyze them based on the relevant scope language and other relevant factors. Moreover, we agree with Petitioner that, to the extent that the Court is concerned that the Department's analysis treats similar products differently under the scope of the *Orders*, reversing the Yuanda Scope Ruling in this case does not remedy this issue, as the granting of an exclusion to unitized curtain walls produced and imported pursuant to a long-term contract to supply a complete curtain wall would then treat individual entries of identical merchandise differently solely dependent on the terms of a contract.

With respect to the CWC's assertions that the manner in which both products are marketed further illuminate the physical differences between products (*i.e.*, that the websites of window walls producers and the requestors in the window walls segments and curtain walls producers and/or plaintiffs in the instant segment list the other type of product separately and not as a primary product, and that neither the requestors in window walls or Yuanda, Jangho and Permasteelisa in the instant case were an interested party to the others scope segment), we do not find that argument persuasive .[212] We agree with Jangho and Yuanda that just because curtain

[211] *See* the Department's memorandum, "Scope Ruling on 5 Diamond Promotions, Inc.'s Individually Packaged Advertising Flag Pole Kits," dated February 5, 2015; the Department's memorandum, "Final Scope Ruling on Cameo Manufacturing, Inc. 20-foot Telescoping Flagpoles," dated January 8, 2015; the Department's memorandum, "Aluminum Extrusions from the People's Republic of China: Final Scope Ruling on Flag Pole Sets," dated April 19, 2013.

[212] *See* the CWC's Draft Results Comments at 23-24, citing to various product websites of NR Windows and Ventana (*i.e.*, requestors in the prior window walls scope rulings), and Yuanda and Jangho (*i.e.*, curtain wall

walls may be listed separately from window walls as an advertisement for services, does not render the products dissimilar and the fact that the terms are used interchangeably in certain contexts does not support CWC's claim in this regard.[213]

Furthermore, with respect to the CWC's argument that Yuanda and Jangho argued the opposite position before Canadian authorities in that country's antidumping and countervailing investigations, that curtain walls and window walls are, in fact, physically different and distinctive products, and not substitutable,[214] we also find this information to be of little relevance and not persuasive. The "window wall" at issue in those submissions refers to a different product than the "window wall" which the Department has concluded is subject to exclusion in its window wall scope rulings. Specifically, the "window wall" at issue would be what we would call a window wall building project. Accordingly, that information is not relevant to our comparison of window walls and Yuanda's curtain wall units exported pursuant to a long-term contract.

Comment 3: A Single Entry May Contain Multiple Shipments Entered Into the United States Over Multiple Days

Yuanda argues that the Department's interpretation in the First Remand Redetermination of the language of the petition is incorrect, as an "unassembled unitized curtain wall" was expressly excluded according to the petition from the scope of the *Orders* under the finished goods kit exclusion. [215] Yuanda argues that despite that language in the petition, the Department

producers and interested parties to the instant ruling), as provided on the record in the Department's New Factual Memorandum at Attachments III-VII.

[213] *See* Yuanda's Rebuttal Comments at 3-5, Jangho's Rebuttal Comments at 11-13 at Attachments 1 and 3 (making arguments about building-length "window walls" and referring to the individually-installed window walls as "window wall units").

[214] *See* Unitized Wall Modules of Large Buildings (Canadian International Trade Tribunal Nov. 27, 2013) ("Canadian Wall Module Ruling"), as provided on the record in the Department's New Factual Memorandum at Attachment VIII.

[215] *See* Yuanda's Draft Results Comments at 3-4.

incorrectly required that "all of the units for a given project arrive on the port on the same vessel" – a description of a product it claimed was "never examined in the original investigations by either the Department" or the ITC.[216]

Jangho claims that the Department's requirement that all merchandise be in a single entry is unrealistic and inconsistent with the Department's analysis in the Window Walls Kits Scope Ruling and in the Department's Fan Blades Scope Ruling,[217] in which it claims that the Department did not require window wall "segments" or "all fan blades needed for a cooling tower fan on one entry summary to be excluded" from the scope of the *Orders*.[218]

The CWC points out that the Department has consistently interpreted the finished goods kit exclusion's requirement that all parts necessary to assemble the final finished good be present "at the time of importation" to mean that all of the parts must be included on one entry, on one CBP 7501 Form.[219] According to the CWC, this is not an unreasonably restrictive interpretation of the phrase "at the time of importation" that renders the exclusion insignificant or superfluous, as held by the CIT, particularly when, for example, one CBP entry summary can include many shipments imported over the course of 10 days.[220]

Department's Position:

> As the Department explained in the First Remand Redetermination:
>
> the fact that an unassembled unitized curtain wall may be so large when it enters the United States that it must be shipped in separate containers does not, in of itself, prohibit the merchandise from being excluded from the scope of the *Orders* as a finished goods kit. In the Window Kits Scope Ruling, for example, the finished product at issue entered the United States in pieces in multiple

[216] *Id*.

[217] *See* Jangho's Draft Results Comments at 3-4 citing the Department's memorandum, "Final Scope Ruling on Fan Blade Assemblies," dated July 25, 2014 ("Fan Blades Scope Ruling") at 19, as provided in the Jangho's Factual Submission at Exhibit 4.

[218] *Id*. at 4.

[219] *See* the CWC's Draft Results Comments at 17-18.

[220] *Id*. at 18, citing to 19 CFR 141.57(b)(3).

> containers, but was listed on a single CBP 7501 form. The means of shipment, whether or not shipped in multiple containers, did not prohibit the Department from determining that the merchandise at issue was a finished goods kit and therefore excluded from the scope of the *Orders*. What distinguished that merchandise from Yuanda's products is that the separate parts of the finished goods kit were all imported as part of the same entry, and at the time of importation, the kit contained all of the necessary parts to assemble a final, finished good.[221]

Again, Commerce then repeated this interpretation in the First Remand Redetermination, citing to both its Window Walls Kits Scope Ruling and Sunshades Kits Scope Ruling for its understanding that products may enter the United States under multiple shipments/conveyances and in multiple containers, as long as they all are reported under one CBP 7501 Form.[222]

Thus, Yuanda's statement that the Department's practice is that entire product must "arrive on the port on the same vessel" is incorrect. The Department has no such practice. As described above, the Department does not have a numerical limitation on the number of shipments/conveyances or containers in which a product may be shipped under the finished goods kit requirement of "at the time of importation." Further, Jangho's reliance on the Window Walls Kits Scope Ruling and Fan Blades Scope Rulings misconstrues the facts of those cases. In the Window Walls Kits Scope Ruling, as explained above, the window walls at issue were determined to be self-contained window walls which were shipped in multiple containers, but entered into the United States as one entry.[223] From its submissions, as noted above, it appears Jangho does not recognize that the Department found in that case that the window wall was essentially a wall composed of a window between floor slabs within the structure of the building – a wall for a room – and not an entire window wall building project, which would include numerous window walls, floor slabs, and other building materials.

[221] First Remand Redetermination at 16.
[222] *Id*.
[223] *See* Fan Blades Scope Ruling as provided in the Jangho's Factual Submission at Exhibit 4.

In addition, in the Fan Blades Scope Ruling, the Department concluded that the "finished good" was the fan blade itself, a subassembly that could be incorporated into the ultimate downstream product (the fan).[224] Because the finished good/subassembly was the fan blade and thus subject to the "finished merchandise" exclusion, there was no requirement in that case that additional fan blades or other fan parts be imported with the fan blade, nor that any of the other requirements of the "finished goods kits exclusion" at issue in this case apply. [225]

CWC points out that CBP permits carriers to "split" sizeable "shipments" which are still reported "under a single entry."[226] Furthermore, under certain circumstances, CBP permits importers to "process as a single entry" "an unassembled or disassembled entity arriving on multiple conveyances" over several days.[227] These CBP regulations reflect that certain imports might enter the United States in different shipments/conveyances or over several days and still be considered a single entry. Accordingly, there is no merit to Yuanda's and Jangho's claims that the Department's literal interpretation of the term "at the time of importation" to mean merchandise entering the United States as a single entry is unrealistic or overly restrictive. Such an interpretation could, in fact, potentially cover multiple days-worth of shipments/conveyances and cargo, while the alternative would be inconsistent with the Department's practice in the previous scope rulings in which this issue was addressed. Furthermore, it is unclear what the alternative interpretation of that language would be – it seems Yuanda and Jangho appear to advocate that the Department ignore the "at the time of importation language" altogether for at least some products, including curtain wall units exported pursuant to a long-term contract.

[224] *Id*.
[225] *Id*.
[226] 19 CFR 141.57(b)(3).
[227] 19 CFR 141.58(a)and (b)

Comment 4: The Validity of the Department's Concerns Regarding the Administrability of the Exclusion

According to Yuanda, there is no practical reason to insist that curtain wall units must be covered by the orders unless all of the units for a given project be entered under a single CBP 7501 Form, and, contrary to the Department's concerns with respect to enforcement, the Department and CBP are administering the exclusion regarding "window wall" kits "without any reported difficulty."[228] Similarly, Permasteelisa asserts that such concerns are speculative and unsupported by record evidence and points out that the Court found this reasoning to be an "invalid" basis for scope rulings.[229]

Petitioner agrees with the Department's concerns regarding the administration of a scope exclusion that would require CBP to focus on the terms of a sales contract, and not the physical product before it, and notes additional concerns regarding the importation of complete curtain wall systems over multiple entries and, potentially, multiple review periods, where the sale of a single product could be potentially subject to varying duties. Additionally, Petitioner notes that Yuanda could manipulate its dumping margin by producing certain portions of the curtain wall in China and other portions at different production facilities. As addressed above, Petitioner points out that importing curtain wall units in a piecemeal fashion over multiple entries for a single product is also contrary to the plain language of the finished goods kit exclusion because all portions of the merchandise may not even be produced at the time of the contract (*i.e.*, one

[228] *See* Yuanda's Draft Results Comments at 4. As noted previously, it appears that Yuanda is relying on a description of "window wall" different from that relied on by the Department in its window wall scope rulings. Yuanda's use of the term "window wall" is not referring to the single story window wall specifically analyzed and excluded from the scope of the *Orders* by the Department in its former scope rulings, but instead to a window wall building project, which is composed, in part, of multiple window walls, floor slabs and other structural components in the walls of the building itself.

[229] *See* Permasteelisa's Draft Results Comments at 6, citing *Yuanda III* at 43, footnote 147 (regarding the potential difficulty of administration, "As Commerce states elsewhere, ease or difficulty of administration is not a valid basis for scope rulings." "It is not a question of policy, as Defendant suggests…but rather a list of factors prescribed by regulation, *see* 19 CFR 351.225(k) – and *expressio unius est exclusio alterius*.").

portion of the planned curtain wall could enter the United States while another portion may not have even entered production and, thus, a "finished" product would be entered into the United States with certain portions of said product still not even in production).[230]

Finally, Petitioner notes respectful disagreement with the CIT's holding that even if such a product existed but was rarely imported, insisting upon such an interpretation would render the exclusion insignificant, if not wholly superfluous. Petitioner echoes the Department's concerns that the CIT's holding creates a roadmap for circumventing an order by allowing parties to claim that a product is "rarely imported" and would lead to unreasonable results.[231]

The CWC argues that if phased shipments were allowed, it would only be a matter of time before importers would circumvent the Orders by simply claiming that that any necessary components missing from its "kit" at the time of importation will inevitably be imported at a later stage.[232]

Department Position:

We disagree with Permasteelisa that the CIT held that the ability of the Executive Branch to administer and enforce its antidumping and countervailing duty orders, which includes the determinations and enforcement of which merchandise is included and excluded from the scope of those orders, is "invalid." In the section of the CIT's decision cited by Permasteelisa, the Court held that enforcement concerns cannot trump the factors listed in 19 CFR 351.225(k).[233] We do not disagree. However, when interpreting the language of the scope of the *Orders* and analyzing the factors listed under 19 CFR 351.225(k), the Department can also discuss the implications of certain interpretations as relate to the Government's ability to enforce and

[230] Petitioner's Draft Results Comments at 12-14.
[231] *Id*. at 14-15.
[232] *See* the CWC's Draft Results Comments at 11-12.
[233] *See Yuanda III* at 43, n. 147.

administer possible scope exclusions. If the Court had held that such considerations were "invalid," such a holding would have ignored Federal Circuit and Supreme Court precedent that Courts, including the CIT, may not "usurp" the Department's "ability to administer the statute entrusted to it."[234] Congress entrusted the administration and enforcement of the antidumping and countervailing duty laws to the Department and CBP by statute, and therefore we do not interpret the CIT's holding in the manner alleged by Permasteelisa.

The Court expressed in *Yuanda III* concerns that the importation realities of a single product might render "hollow" an exclusion to the scope of the *Orders*. We have explained above why our interpretation of the term of the term "at the time of importation" would render that exclusion "hollow," particularly because the exclusion is designed to cover a variety of products and has already been successfully applied to a large number of products.[235] Furthermore, we have serious concerns that an interpretation of the scope to exclude multiple entries which, alone, do not meet the requirements of the "finished goods kit" exclusion could incentivize exporters to draft a contract in a manner to allow for containers full of unequivocally "in-scope" merchandise (*e.g.*, sheets of extruded aluminum) to enter unfettered, so long as a contract stipulated that such entries were a part of the first stages of a "kit" for a finished good that could not reasonably be imported in a single entry. Such an interpretation is at odds with the text of the scope exclusion (which requires that said kit must contain all parts necessary for the finished good at the time of importation), as well as the (k)(1) factors (in which prior scope determinations have confirmed this language to mean that all of the parts must be included on one entry, on one CBP 7501 Form), as explained above. It is permissible and within the

[234] *See PSC VSMPO-AVISMA Corporation v. United States*, 688 F.3d 751, 761 (Fed. Cir. 2012). *See also United States v. Eurodif*, 555 U.S. 305, 321 (2009) (explaining the importance of the ability of the agency to "preserve the effectiveness of antidumping duties").

[235] *See* the Department's Draft Results analysis, as provided at section C of the "Analysis" section, above.

statutory authority of the Department to be concerned about administrability and the potential for evasion which might arise from such an interpretation of the scope of the *Orders*.

With respect to Yuanda's claim that the Government has been able to administer and enforce the exclusion covering window wall kits "without any reported difficulty," we agree with Yuanda that we have been able to administer and enforce an exclusion covering the merchandise specifically covered by the Department's window wall kit scope rulings, which is different than the item Yuanda calls a window wall. As we have explained above[236] and in the *First Remand Redetermination*, the Department considers a window wall to be a structure used as a fully assembled window, custom designed to fit in openings between floors in large commercial structures.[237] A window wall serves the function of a wall to a room; frequently a wall to a single-story room between two building structural floor slabs; it does not envelop the whole or a side of a multi-story building, as does a unitized curtain walls. At the time of importation, for the products reviewed by the Department in its window wall kits scope rulings, all of the necessary parts to fully assemble a window wall were present. That is why the Department and CBP are able to administer and enforce the exclusion. That is not the case, as explained, for Yuanda's imports of curtain wall units shipped pursuant to a long-term contract, which, by the nature of the request, do not contain all of the necessary parts to fully assemble the finished good, the curtain wall, at the time of importation.[238]

Finally, we agree with the further examples and concerns cited by Petitioner and the CWC above. In particular, we agree that an interpretation of the scope exclusion which allows exporters to make multiple entries over multiple review periods pursuant to a single long-term

[236] *See* Comment 2 and Draft Results analysis ("Analysis", above, at B).
[237] *First Remand Redetermination* at 27.
[238] *See* Yuanda's Scope Request at Exhibits 3 and 4, and discussion at Comment 1, above.

contract under the "finished goods kit" exclusion could allow exporters and importers to evade the scope of the *Orders*, or, at minimum, limit the applicability of the scope of the *Orders*.

Comment 5: The Department's Consideration of the Subassemblies Test

Permasteelisa contends that the Draft Results are flawed by continuing to characterize the curtain wall, in effect, as parts (or subassemblies imported as part of a finished goods kit) and not finished good subassemblies for complete curtain wall.[239]

According to Permasteelisa, the Department's reasoning in the Draft Results is flawed as it fails to consider the description and nature of the merchandise at issue, the unitized curtain wall, *i.e.*, a complete curtain wall, unitized and imported in phases pursuant to a sales contract, as instructed by the Court. Permasteelisa claims that the Department maintains that the subassemblies test need not be considered as a result of *Yuanda I* decision and the scope language identifying curtain wall parts as subject to the *Order*. However, Permasteelisa argues that the Court in *Yuanda III* rejected this reasoning, claiming that the prior rulings affirmatively answered the threshold question as to whether a curtain wall unit was a "subassembly," and that the determination that parts for curtain walls are within the scope does not prevent Yuanda's unitized curtain wall from being excluded as a subassembly finished goods kit.[240] Permasteelisa claims that the Department's conclusion that an individual curtain wall unit does not satisfy the subassembly test because it is not a finished good like the complete curtain wall does not consider the specific product at issue in the scope ruling. Rather, Permasteelisa states that the

[239] *See* Permasteelisa's Draft Results Comments at 6-7, asserting that the final redetermination must consistently apply the subassembly finished goods kit exclusion to the merchandise at issue here.

[240] *Id*. at 7-8.

issue the Court directed the Department to address on remand is the merchandise subject to this scope proceeding; a complete curtain wall, unitized and imported pursuant to a sales contract.[241]

Permasteelisa claims that the Department's first error is that its rationale both starts and stops with the conclusion that an individual curtain wall unit is apparently not a "subassembly" because it is not a finished good as is the complete curtain wall.[242] This, however, is the issue the Court directed the Department to address on remand in the specific context of the merchandise subject to this scope proceeding; a complete curtain wall, unitized and imported pursuant to a sales contract. Permasteelisa states unequivocally that "curtain wall units are a final product at the time of entry" and the fact that finished curtain wall units are part of a larger structure or system (a building or curtain wall) is not relevant since they meet the specific exclusion to the *Orders*. For this reason, Permasteelisa claims the Court in *Yuanda III* determined that just because curtain wall units, as imported, are parts of finished curtain wall systems does not mean that they cannot be subject to subassembly test.[243]

Permasteelisa then argues that the Department's reliance on the Metal Bushings Scope Ruling concerning the applicability of the "subassemblies test" is in error.[244] According to Permasteelisa, the subject merchandise of the Metal Bushing Scope Ruling are subparts to form elastomeric metal bushings after importation and the completed bushings then are installed in automotive suspension systems, also after importation (*i.e.*, work was performed on the subparts post-importation to be made into a metal bushing for installation). As such, the subparts were determined to be incomplete and unfinished, more analogous to standard extrusions in the instant case than curtain wall units. Furthermore, Permasteelisa claims that the curtain wall procedures

[241] *Id*.
[242] *Id*. at 7-8.
[243] *Id*. at 8-9.
[244] *Id*. at 9-10.

referred to in the Department's analysis are descriptive of installation procedures, and not preparation for assembly.[245] In contrast, and as discussed above, Permasteelisa argues that record evidence establishes that curtain wall units are finished goods, sealed at the factory prior to importation, shipped with all attendant components, and shipped directly to a job site where they are installed onto a building or attached to other complete curtain wall units for installation onto a building; fully assembled products to be aligned and fixed with brackets on the building exterior and ready to be installed "as is."[246]

According to Yuanda, the Department ignores the Court's holding in *Yuanda III* by focusing on the number of shipments of curtain wall units, but in fact the issue is not the number of curtain wall units needed to cover a multistory high-rise building but the degree to which those units are "finished and ready for installation on arrival.[247] As noted in Comment 1, above, Yuanda argues that the record established that the imported curtain wall units and other parts of the curtain wall itself required no further fabrication; rather, that only assembly operations were needed to complete the curtain wall.[248]

On the other hand, Petitioner contends that the Draft Results correctly acknowledged that Yuanda's curtain wall units do not qualify as a finished goods kit under the Department's application of the subassemblies test, as they fail all the prongs of this test (*i.e.*, a curtain wall unit is not a finished product in parts, all of the components necessary to assemble the finished goods are not imported under the same entry, and further finishing or fabrication, such as cutting

[245] *Id*. at 9-10.
[246] *Id*. at 10, citing to Permasteelisa's May 31, 2013, Scope Inquiry Comments, Comments on Curtain Walls; November, 21, 2012 Submission from Overgaard; and Jangho's November 16, 2012, Comments in Opposition to the Amended Scope Request Regarding Curtain Wall Units and Other Parts of Curtain Wall System.
[247] *See* Yuanda's Draft Results Comments at 3.
[248] *Id*.

or punching is necessary and/or the finished subassembly cannot be assembled "as is" into a finished product).[249]

As further support for the latter finding, Petitioner cites to additional factual information, as discussed above in Comment 1, concluding that Yuanda's curtain wall units that are produced and imported pursuant to a contract must undergo further fabrication after importation and do not satisfy the requirements of the Department's subassemblies test.[250]

The CWC notes that the plain language of the scope of the *Orders* makes clear that there are only two categories of "finished goods" exclusions, for finished goods and finished goods kits, and that there is no separate exclusion for "subassemblies," but rather a manner in which the Department may assess a particular product to assess whether it meets the exclusion. In other words, the Department adopted its current subassemblies test to avoid absurd results in foreclosing on whether a product could be eligible for exclusion at the outset because it was part of a larger assembly, and allows for consideration of such subassemblies; but the exclusion analysis does not end once a product is defined as a subassembly.[251] Rather, for a good to be eligible for exclusion as a finished good kit subassembly it must enter as a finished good or finished goods kit containing all the necessary hardware and components for assembly of a final finished good, at the time of entry, and must be ready for installation, as is, into a final finished good, pursuant to the explicit language of the *Orders* and SMVCs Scope Ruling.

Therefore, according to the CWC, the requested product (*i.e.*, Yuanda's unitized curtain wall, produced and imported pursuant to a long-term contract) fails a necessary prong of the subassembly test because it indeed requires further finishing and fabrication after importation, as

[249] *See* Petitioner's Draft Results Comments at 4.
[250] *Id.* at 6, citing Curtain Wall Best Practices, as provided in Petitioner's Factual Submission at Exhibit 1
[251] *See* the CWC's Draft Results Comments at 7.

discussed at length in the Draft Results and above. According to the CWC, based on its analysis as summarized in Comment 1, it is clear that the unitized curtain wall undergoes multiple instances of further finishing and fabrication at the job site before it becomes a complete and finished curtain wall, although only one finding of further finishing or fabrication is needed to disqualify Yuanda's unitized curtain wall from the exclusion.[252]

The CWC next asserts that its analysis, also summarized in Comment 1, shows that unitized curtain wall units exported pursuant to a long-term contract also fail another part of the subassembly test, as they do not contain all the necessary parts, hardware, and components for assembly of a finished good at the time of importation.[253] The CWC points out that Yuanda regularly concedes this fact, in stating that not all the components necessary for assembly are present at the time of importation, but instead, must be brought in separately and in phases. The CWC notes that, like the automotive bushings in *Kam Kiu* that were missing the essential rubber filler component at the time of importation, Yuanda's merchandise, imported pursuant to a long-term contract, similarly fails the second part of the test because many other necessary components, aside from the curtain wall units themselves, are not imported by Yuanda with the unitized curtain wall and are installed at the job site at a later date and must not undergo further finishing or fabrication.[254] Thus, CWC argues that because further fabrication and further component parts are needed at the time of entry, the curtain wall "kit" cannot be installed "as is."[255]

[252] *Id*., citing the Metal Bushings Scope Ruling and *Kam Kiu*.
[253] *Id*., at 11, citing to Yuanda's Q&V submission.
[254] *Id*., citing to Yuanda's Scope Request at Exhibit 3 and 4, CWC's Factual Submission at Exhibit 6, and the Peevey article. *See* Comment 1, above.
[255] *Id*., at 13.

The CWC concludes that each shipment containing the units (parts) of Yuanda's unitized curtain wall requires the addition of another shipment of curtain wall units and of other necessary components such as those proprietary products listed in Comment 1 above in order to assemble it into a final finished good.[256] Due to the inherent nature of a "unitized" curtain wall being imported as separate units that must be joined together with other parts requiring further finishing and fabrication, the CWC asserts that Yuanda's merchandise enters essentially as unassembled and incomplete "parts," thus, disqualifying it as finished merchandise that is fully and permanently assembled and completed at the time of entry.[257] Furthermore, according to the CWC, the Federal Circuit ruled in *Yuanda II* that an importation of "parts of curtain walls," i.e., the incomplete shipment of curtain wall units, "did not satisfy the 'finished merchandise' exclusion," yet neither Yuanda, nor the Court, have made any attempt to argue that the physical properties of Yuanda's curtain wall units differ from those before the CIT in *Yuanda I* or considered by the Federal Circuit in *Yuanda II*.[258]

Finally, the CWC also seeks to clarify that the Department need not undergo a separate "finished merchandise" or "finished good" analysis in connection with the "subassemblies test," as the two tests are mutually exclusive under a plain reading of the scope, according to the Court's recent opinion.[259] As such, the CWC agrees with the Department's finding that Yuanda's unitized curtain wall fails to satisfy the finished merchandise exclusion because its

[256] *Id*., at 15.
[257] *Id*., at 15-16, citing to the Metal Bushings Scope Ruling, *Kam Kiu*, and Auto Trim Kits Scope Ruling.
[258] *Id*., at 16-17, citing to *Yuanda II* at 1358.
[259] *Id*., at 16-17, citing to *Aluminum Extrusion Fair Trade Committee v. United States*, Slip Op. 16-31 (CIT March 31, 2016) ("*AEFTC Opinion*") ("In setting forth the subassemblies provision, the scope language mentions the finished goods kit exclusion without making a parallel reference to the finished merchandise exclusion, which suggests that the subassemblies provision and the finished merchandise exclusion were intended to be mutually exclusive").

merchandise is entered unassembled and requires later installation; thus, it is not finished merchandise that is fully and permanently assembled and completed at the time of entry.

Department's Position:

As a preliminary matter, we fundamentally disagree with Permasteelisa's claim that "finished curtain wall units are a final product at the time of entry." As explained extensively above, such a statement is in direct conflict with the holdings of the CIT in *Yuanda I* and the Federal Circuit in *Yuanda II*.[260] The Federal Circuit's holding in *Yuanda II* that curtain wall units are not finished merchandise, but are parts of curtain walls subject to the *Orders*, is binding precedent.[261]

Second, Permasteelisa's allegation that the Department found in the Draft Remand that curtain wall units are "not subassemblies," is factually incorrect. In fact, as shown on page 26 above, and as the Department found in the Draft Remand, curtain wall units are subassemblies under the scope of the *Orders* because they are "partially assembled merchandise."[262] This is what both the CIT and the Federal Circuit recognized in *Yuanda I* and *Yuanda II* in stating that curtain wall units are both parts of curtain walls and subassemblies.[263] What Permasteelisa fails to recognize is that subassemblies are explicitly covered by the scope of the *Orders*, unless they meet the criteria of the finished goods kit exclusion. To be clear, the Department did not, as alleged by Permasteelisa, determine that Yuanda's curtain wall units failed to meet the criteria of the subassembly test because they were not subassemblies. The Department determined that

[260] *See* "Background", above.

[261] In this way, we note that the curtain walls units are indeed distinguishable from the products at issue in the Metal Bushings Scope Ruling, as the latter might be considered a finished good, but for the need of further fabrication and finishing, whereas the former are included from the scope regardless of further fabrication. For the reasons described above and in the Draft Results, we believe these cases are similar in that both products require further fabrication and finishing before being installed or incorporated into the ultimate product. *See also* Comment 1 above.

[262] *See* page 26 above.

[263] *See Yuanda* I, 961 F. Supp. 2d at 1298 and *Yuanda II*, 776 F.3d at 1358.

Yuanda's curtain wall units did not meet the requirements of the subassemblies test because they are not: 1) a packaged combination of parts that contain at the time of importation; 2) all of the necessary parts to fully assemble a finished good; and 3) require no further finishing or fabrication, such as cutting or punching to be assembled 'as is' into a finished product. Instead, they can be "described as the time of importation as parts for final finished products that are assembled after importation including, but not limited to … curtain walls," which the scope of the *Orders* explicitly states are "subject aluminum extrusions."

As demonstrated above, curtain wall units imported pursuant to a long-term contract as a unitized curtain wall "kit," whether or not analyzed as a subassembly, would fail to meet the requirements of the "finished goods kit exclusion" for multiple reasons. Among the factors behind such a determination: 1) not all of the alleged kitted materials are contained in one entry; 2) the finished good is a curtain wall, not the individual units; and 3),although the request identifies only the curtain wall units and attendant materials as the components of the "kits," evidence demonstrates that further parts, fabrication, and finishing are necessary for the composition of the curtain wall. In other words, the collection of the curtain wall units identified could not be assembled simply 'as is' into a finished product without the further materials and/or further fabrication discussed in Comment 1.

Comment 6: Whether The Court's Order Applies to Jangho and Permasteelisa's Exports of Like Curtain Walls

Jangho and Permasteelisa claim that the language of the Draft Results incorrectly suggests that the scope exclusion pursuant to *Yuanda III* applies only to Yuanda. They argue that, the Department's final results of redetermination and subsequent liquidation instructions should include Jangho and Permasteelisa, which exported the same or like unitized curtain wall

that was imported into the United States in phases pursuant to a sales contract and participated in underlying proceedings and litigation.[264]

Petitioner asserts that, should the Department not change the outcome of its Draft Results, it should make clear that its final Remand Determination covers only Yuanda's curtain walls, not Jangho or Permasteelisa, as scope ruling requests made by an importer are specific to the importer that makes the request and neither Jangho nor Permasteelisa requested the scope ruling at issue in this litigation, nor have they ever requested a scope ruling for their own curtain walls or curtain wall units.[265]

Petitioner notes that, while Jangho and Permasteelisa may have submitted comments in the underlying proceeding, nothing in the Department's regulations or practice suggest that Jangho's or Permasteelisa's products would be subject to the Department's scope ruling on Yuanda's curtain wall units. According to Petitioner, the Department made its scope ruling determination by analyzing Yuanda's product description, contemporary business documents provided by Yuanda, and the method of importation for Yuanda's curtain walls and, as such, the resolution of the Yuanda litigation determines whether Yuanda's curtain walls are covered by the scope of the *Orders* and has no effect on Jangho's on Permasteelisa's curtain walls subject to this litigation.[266]

Finally, the CWC does not provide an argument on the applicability of the Yuanda Scope Ruling to Jangho and Permasteelisa, but does notably argue that the Department must consider

[264] *See* Jangho's Draft Results Comments at 3 and Permasteelisa Draft Results Comments at 5.
[265] *See* Petitioner's Draft Results Comments at 15-16, citing *Aluminum Extrusions From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 78784 (December 31, 2014) and accompanying IDM at 31.
[266] Petitioner's Draft Results Comments at 16.

Yuanda's proprietary, company-specific information pertaining to the fabrication of Yuanda's curtain walls in reaching any determination on remand.[267]

Department's Position:

The Department has consistently stated that the Yuanda Scope Ruling applies only to Yuanda's merchandise. On March 26, 2013, the Department received a "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" from Shenyang Yuanda and Yuanda USA, producer and importer of complete, finished unitized curtain walls. Pursuant to 19 CFR 351.225(c)(1)(i), Yuanda provided a detailed description of the merchandise requested in "Part C. Descriptions of the Merchandise" on page 7 of its request. The opening paragraph of this description specified:

> The material facts regarding the design, production, shipment and on-site installation of the unitized curtain wall units produced by Shenyang Yuanda and imported by Yuanda USA were fully described to the Department during the Parts of Curtain Wall Units Scope Ruling request. Nevertheless, because this is a new scope ruling request squarely addressing "complete curtain wall units" that form a curtain wall when installed on a building, Shenyang Yuanda and Yuanda USA provide a detailed description of complete curtain wall units sold under a contract for a complete curtain wall system in accord with 19 CFR 351.225(c)(l)(i).[268]

On May 10, 2013, the Department initiated a formal scope inquiry, stating in the initial paragraph:

> The United States Department of Commerce (the Department) has received a request from Yuanda USA ("Yuanda") asking that the Department determine that certain complete and finished unitized curtain wall units which Yuanda imports from the People's Republic of China (PRC) are not within the scope of the antidumping and countervailing duty orders on aluminum extrusions from the PRC.[269]

[267] The CWC Draft Results Comments at 12.
[268] *See* Scope Request at 7 (emphasis added).
[269] *See* Initiation Letter at 1 (emphasis added).

Then, upon receipt of comments from all interested parties, the Department recommended in the final, actionable, paragraph of the resulting Yuanda Scope Ruling:

> For the reasons discussed above, and in accordance with 19 CPR 351.225(k)(l), we recommend finding that Yuanda's curtain wall units that are produced and imported pursuant to a contract to supply a curtain wall are within the scope of the Orders.[270]

As a result, the Department's instructions to CBP stated:

> On 03/27/2014, in response to a request by Shenyang Yuanda Aluminum Industry Engineering Co., Ltd., (Yuanda), Commerce issued a final scope determination that Yuanda's curtain wall units that are produced and imported pursuant to a contract to supply a curtain wall are within the scope of the AD duty order on aluminum extrusions from the PRC (A-570-967). Because the language of the scope of the order specifically provides that subject aluminum extrusions may be described at the time of importation as parts for final products (including curtain walls) that are assembled after importation, Commerce found that Yuanda's curtain wall units that are produced and imported pursuant to a contract to supply a curtain wall are within the scope of the order. Curtain wall units that are produced and imported pursuant to a contract to supply a curtain wall fall short of the final finished curtain wall that envelops an entire building. Further, as provided in the language of the scope of the order, the scope does not include the non aluminum extrusion components.[271]

As such, the underlying record is clear and unambiguous that the products requested, initiated, and ruled upon were specific to Yuanda, in accordance with the Department's standard practice when receiving a request on a particular product from a producer/exporter/importer.

As explained above, in the CWC Scope Ruling, the scope request was made by the domestic manufacturer, CWC, of curtain wall units, who indicated that it was concerned about curtain wall units imported and exported by multiple parties, including Yuanda and Jangho, and the request, and ultimate scope ruling, applied generally to all curtain wall units exported from China and imported into the United States.[272] On the other hand, in this case, the scope request

[270] *See* Yuanda Scope Ruling at 27 (emphasis added).

[271] *See* CBP Message 4100304, dated April 10, 2014 (emphasis added). *See also* CBP Message 4101301, dated April 10, 2014 (the equivalent instructions for purposes of the countervailing duty order). Both sets of Customs instructions can be found at Tab 23 of the Appendix to Permasteelisa's Rule 56.2 Motion for Judgment on the Agency Record, dated September 19, 2014.

[272] *See* Background section, above.

was specifically for merchandise which only Shenyang Yuanda produces and Yuanda USA imports, and the Department's analysis was focused solely on Yuanda's merchandise and commercial experience.

As shown by the Department's analysis of Yuanda's contract and the proprietary information contained in the information supplied by Yuanda in Comment 1 above, the Department continues to conduct its analysis solely on Yuanda's merchandise. We have analyzed Yuanda's "long-term contract" and import information, and not that of other importers. Had Jangho and Permasteelisa filed similar scope requests, pursuant to 19 CFR 351.225(c), the Department could have analyzed those companies' contracts and project-specific import information as well. Jangho and Permasteelisa did not make such requests, did not provide the necessary information to make such a scope determination, and at no time did the Department state that its scope ruling in this case applied equally to Jangho and Permasteelisa.

To the extent that there was any ambiguity on the record as to this issue, the sole source of possible confusion was in paragraph three of the CBP instructions, which the Department issued to CBP following the Yuanda Scope Ruling.[273] Although, as noted above, the preceding paragraphs stated that the Department's analysis applied solely to Yuanda's merchandise, the third paragraph stated that "CBP should suspend liquidation of entries of curtain wall units that are produced and imported pursuant to a contract to supply a curtain wall effective 05/10/2013, which is the date of initiation of the scope inquiry."[274] The omission of Yuanda's name in this specific paragraph was unintentional on behalf of the Department. Had this omission been brought to the Department's attention before this litigation, the Department could have corrected

[273] Jangho and Permasteelisa alleged during the Yuanda Scope Ruling proceedings that we should apply results of that scope ruling to their merchandise as well, but the Department declined to do so, and the Yuanda Scope Ruling was clear in stating that it only applied to Yuanda's merchandise.

[274] *Id*.

those instructions. Unfortunately, no party brought this omission to the Department's attention until after this litigation commenced and Jangho and Permasteelisa requested injunctions to prevent their merchandise from being liquidated.

Nevertheless, we believe that the preceding two paragraphs of the CBP instructions make clear that the Department intended to instruct CBP to suspend liquidation only for entries of the products subject to the request, (*i.e.*, Yuanda's curtain wall units that are produced and imported pursuant to a contract to supply a curtain wall).

As a final point, it is important to recognize that by their nature, contracts, building projects, and imports are unique. The Yuanda Scope Ruling applies only to the merchandise identified in Yuanda's Scope Request, and to the extent that Jangho and Permasteelisa wish the Department to issue a scope ruling covering their merchandise, the Department's regulations specifically provide for such a procedure.

Comment 7: Whether the Department Should Consider New Factual Information Contained in the CWC's Draft Results Comments

On April 4, 2016, the Department released its Draft Results, in which we included supplementary information relied upon (*i.e.*, Petitioner's Scope Amendment Letter and the Metal Bushings Scope Ruling). Accordingly, the Department indicated in the Draft Results that it would permit interested parties an opportunity to submit rebuttal factual information to rebut, clarify, or correct factual information placed on the record by the Department, due April 8, 2016; noting that any such information must only respond to the information provided onto the record by the Department in the Draft Results, and that there would be no opportunity to provide sur-rebuttal information.[275] The Department also requested parties provide comment in response to the Draft Results, due April 13, 2016; noting that parties may not submit new factual information

[275] *See* Draft Results at 37-38.

in these comments and that – due to time constraints – there would be no opportunity for rebuttal comments.[276] Interested parties timely submitted both rebuttal new factual information and comments on the Draft Results.[277]

As the deadline for rebuttal factual information was due on April 8, 2016, and the deadline for comment on the draft results was April 13, 2016, all parties were afforded the opportunity to rely upon any rebuttal new factual information submitted by themselves or address the rebuttal factual information submitted by any other interested party on April 8, 2016, in providing comments on the Draft Results. Whereas all parties generally complied with this request, the CWC's Draft Results Comments further cited to websites containing certain new factual information that were not provided to the record in its (or any other party's) April 8, 2016, submission of rebuttal factual information, and which were not filed on the record previously.

In response, the Department explained that websites are new factual information and under normal procedures in investigations and reviews, the Department would reject the submission and request that it be refiled without the new information.[278] However, the Department determined the following:

> {A}s these are remand proceedings, there was a quick turnaround in requesting new factual information and comment on the draft results pursuant to the Court's deadline,

[276] *Id*.

[277] The CWC contacted Department officials prior to the 5 p.m. Eastern Time ("ET") deadline for this April 8, 2016, submission noting technical difficulties preventing the Department's "ACCESS" electronic filing system from accepting the filing, which was ultimately accepted at 5:13 p.m. As such, the CWC filed a *post hoc* request for extension of 15 minutes to explain the filing errors and request the response be accepted to the record. *See* the CWC's April 8, 2016, request "Request for an Extension for Submission of Factual Information" ("CWC Extension Request"). The Department granted this request and allowed the submission on the record the next business day. *See* the Department's letter, "Remand Redetermination Regarding Curtain Wall Units Produced and Imported Pursuant to a Contract to Supply a Curtain Wall; Response to Request to Accept Information on the Record," dated April 11, 2016. All other submissions by all other IPs, including the CWC, have been timely filed prior to the 5 p.m. deadline on the due date.

[278] *See* New Factual Memorandum.

> and we acknowledge there was a possibility of confusion with respect to the citation to publicly-available documents on websites for the purposes of the administrative record, we have determined not to reject CWC's submission, but instead, pursuant to 19 CFR 351.301(c)(4), we are placing the information derived from those websites on the record. That information is submitted as attachments to this memorandum. Furthermore, in accordance with 19 CFR 351.301(c)(4), we are providing all parties, except CWC, an opportunity to submit factual information to rebut, clarify, or correct this information.[279]

Further, because no other party was afforded the opportunity to rely upon or address this information for the purposes of briefing the Department's Draft Results, we allowed all parties, except CWC, the opportunity to file comments on the factual information contained in the websites and the CWC's specific comments reliant on this information.[280]

Later the same day, on April 18, 2016, Jangho filed a request for extension to the Department's deadline for submitting responsive comments and sur-rebuttal facts.[281]

On April 19, 2016, the Department granted Jangho's request, in part; extending the deadline for submitting rebuttal factual information and comment on the websites relied upon in the CWC's Draft Results Comments for all interested parties until the close of business, April 22, 2016.[282] In partially granting this request, the Department noted that it was compelled to address certain claims forwarded in Jangho's extension request. Specifically, in placing the information on the record, the Department found that the CWC's website sites did not provide inappropriate sur-rebuttal, but – to the extent that the CWC's reliance on the information could have provided any advantage – the Department was remedying that inequity by allowing all parties other than the CWC to provide rebuttal comment and information. [283]

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[279] *Id*.
[280] *Id*.
[281] *See* Jangho's letter to the Department, "Extension Request – New Factual Information Rebuttal," dated April 18, 2016 ("Jangho's Extension Request").
[282] *See* the Department's memorandum to Jangho, "Response to Jangho's Extension Request for Rebuttal Comment," dated April 19, 2016 ("Memorandum Granting Extension").
[283] *Id*.

On April 22, 2016, Yuanda, Jangho, and Permasteelisa, timely filed comments on new factual information.[284] Yuanda's Rebuttal Comments objected to the information submitted and provided rebuttal comment on the websites, noting that the information contained therein did not provide any basis to challenge the Court's conclusion in *Yuanda III* and was either irrelevant or further supported the distinction between window walls and curtain walls.[285] Permasteelisa articulated similar concerns, then argued that the website information itself merely attempted to support arguments regarding the distinction between window walls and curtain walls that had allegedly already been found arbitrary and capricious by the Court and was therefore inconsequential to the instant remand proceeding.[286]

Jangho's Rebuttal Comments challenged CWC's use of its website citations not previously provided on the record and the Department's determination to provide those website printouts on the record and argued that the Department had inappropriately provided the CWC two opportunities to ignore deadlines on the record.[287] Specifically, Jangho asserted that the Draft Results were clear on the 5 p.m. ET on April 8, 2016, deadline for submission of factual information yet the Department "twice" granted the CWC the ability to file untimely information – first in the April 8, 2016, submission and then second by placing new factual information contained in the CWC's April 13, 2016, Draft Results Comments on the record for further comment and rebuttal.[288]

Further, Jangho argued that, in acquiescing to CWC's April 13 filing, the Department deprived Jangho of due process and abused its discretion by accepting new factual information

[284] *See* Yuanda's Rebuttal Comments, Permasteelisa's Rebuttal Comments, and Jangho's Rebuttal Comments.
[285] *See* Yuanda's Rebuttal Comments.
[286] *See* Permasteelisa's Rebuttal Comments.
[287] *See* Jangho's Rebuttal Comments.
[288] *Id*.

that was untimely filed on the record. Jangho disagreed with the Department's position that this information did not represent sur-rebuttal information, asserting that the website citations provided by CWC and references to a Canadian case were "bootstrapped" to CWC's submission as sur-rebuttal argument to distinguish curtain wall from window wall.[289]

Jangho concluded by rebutting the website information in similar fashion as Jangho and Permasteelisa, noting that the distinction between window walls and curtain walls that has been found arbitrary and capricious by the Court and is inconsequential to the instant remand proceeding, and providing additional information to demonstrate that the distinction is minimal.[290] Notably, in rebutting the website information the Department placed on the record and arguing that it is clear that website information is new factual information which should have been printed out and placed in a timely fashion on the administrative record by the CWC, Jangho cited itself to websites which it did not print out and place on the administrative record as exhibits.[291]

Department's Position:

As a preliminary matter, with respect to Jangho's arguments on CWC's filing on April 8, 2016, Jangho appears to misunderstand the sequence of events which took place that day. To be clear, on April 8, 2016, the CWC's counsel contacted the Department regarding technical issues preventing the acceptance of the new factual information filing due at 5 p.m. ET that day.[292] CWC's counsel was in communication with Department personnel prior to the deadline, and

[289] *Id*.
[290] *Id*., at 8-15 and Attachments I-III.
[291] *Id*., at 12, n. 21, 14, n. 24.
[292] *See* CWC Extension Request.

worked with Department personnel to ensure successful filing by 5:13 p.m., at which point counsel immediately filed a request for extension/acceptance of the late filing.[293]

As the Department explained in granting an extension to Jangho to submit rebuttal arguments and new factual information in response to the website information cited by CWC:[294]

> {W}e also disagree with Jangho's characterization of the Department granting an extension for the CWC to untimely refile their rebuttal factual information on April 11, 2016, three days after everyone else. On Monday, April 11, 2016, the Department issued a *post hoc* letter granting an extension requested by the CWC the prior Friday (*i.e.*, the due date for rebuttal information submission) for a 15 minute extension of the filing deadline due to confirmed technical difficulties with the ACCESS system. The CWC was in contact with Department personnel regarding such difficulties prior to the deadline and was able to submit their response in full by 5:13 pm on the due date. As such, the "advantage" purported by Jangho was not three days but, at most, 15 minutes, and we do not see efforts to fix a problem with an electronic system for one party as providing any unfair advantage to other parties.

This is consistent with the guidance provided to interested parties by the Department if technical difficulties arise in filing documents in ACCESS electronically, the parties should reach out to the Department before the deadline for filing has passed. In such instances, the Department can work with the party to successfully file the document, including under the appropriate circumstances, granting an extension of the necessary amount of time to file the document.[295]

With respect to Jangho's, Yuanda's and Permasteelisa's claims that the Department should not have placed CWC's website information on the record, we determine that in allowing the parties to submit responsive new factual information and argument, the Department satisfied its obligation to consider the facts and arguments provided by all parties in this dispute. Section

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[293] *Id.*

[294] *See* Memorandum Granting Extension at footnote 2.

[295] *See cf Extension of Time Limits*, 78 FR 57790, 57793 (Sept. 20, 2013) ("The IA ACCESS Handbook states that 'any electronic submissions that are postponed due to a technical failure of the IA ACCESS system may not be made without having first obtained an extension of the due date from the applicable AD/CVD Office.').

19 CFR 351.301(c)(4) permits the Department to "place factual information on the record of the proceeding at any time" and allows parties one opportunity to submit new factual information in rebuttal to information provided on the record by the Department. The Department explained the reasons it believed it was appropriate to place CWC's website information on the record and allow parties to provide rebuttal factual information and argument in the New Factual Memorandum:[296]

> However, as these are remand proceedings, there was a quick turnaround in requesting new factual information and comment on the draft results pursuant to the Court's deadline, and we acknowledge there was a possibility of confusion with respect to the citation to publicly-available documents on websites for the purposes of the administrative record, we have determined not to reject CWC's submission, but instead, pursuant to 19 CFR 351.301(c)(4), we are placing the information derived from those websites on the record. That information is submitted as attachments to this memorandum. Furthermore, in accordance with 19 CFR 351.301(c)(4), we are providing all parties, except CWC, an opportunity to submit factual information to rebut, clarify, or correct this information.

Furthermore, in response to Jangho's challenge to the Department's decision to act in accordance with its regulatory discretion and place the information on the record, the Department explained further its views in the Memorandum Granting Extension:[297]

> With respect to Jangho's assertion that there was no ambiguity or possibility of confusion in the Department's request for new factual information in the defined request, we recognize Jangho's concerns, but respectfully disagree. While there indeed may have been no confusion that new factual information was to be submitted by April 8, we recognize the *possibility* of confusion by CWC in its failure to recognize citation to websites as constituting new factual information. Accordingly, for this reason we have placed the information on the record and allowed for rebuttal information and comments with respect to that data…
>
> To the extent that the other parties to this proceeding did not have the opportunity to file comments in response to that information, the Department is remedying any such inequity at present. Indeed, pursuant to the Department's April 18, 2016, memorandum, non-CWC parties now have the opportunity both to provide further rebuttal information and comment specifically on the arguments forwarded by the CWC in its Draft Results

[296] *See* New Factual Memorandum.
[297] *See* Memorandum Granting Extension.

> Comments, an opportunity that would not have been fully afforded had the CWC provided the website information on the record on April 8, 2016. Thus, if anything, it is only non-CWC parties who are afforded the opportunity for surrebuttal in this case. We believe this approach is fair, in that it allows for a robust record, allows CWC to make its arguments, and allows parties to respond with facts and comments on those arguments. We will consider all comments and facts placed on the record in response to those websites in our final results of redetermination on remand.

Thus, the Department acted consistently with its regulations and procedures in placing the CWC website information on the record, and allowing the other parties to submit new factual information and argument on the record in response to that.

In addition, in response to Jangho's claim that the websites and Canadian trade case relied upon by CWC's arguments were the equivalent of sur-rebuttal, we disagree with that assessment of the record. The distinction between curtain walls and window walls (to which the Canadian case and product websites were addressed) is a primary issue in this remand, and not one which was introduced by the April 8, 2016, factual submissions. On the other hand, as we noted above, among Jangho's Rebuttal Comments was an argument addressing the Curtain Wall System Installation Article by Anne Peevey, which was, in fact, placed on the record by CWC in a timely fashion,[298] and Jangho elected not to comment on in its Draft Results Comments. [299] Its arguments on this point in its Rebuttal Comments were therefore outside the scope of the new information which the Department placed on the record and allowed parties to comment on. Thus, it is Jangho's arguments responding to this information, and not the CWC's arguments, which are the equivalent of sur-rebuttal. Nonetheless, as we have explained above, because it is within the Department's discretion to accept and consider this claim, in the interest of providing a fulsome record and discussion of all comments provided, we have accepted and considered this argument (*see* Comment 1).

[298] CWC Factual Submission, dated April 8, 2016, at Attachment 5.
[299] *See* Jangho Draft Results Comments.

Comment 8: Whether the Department Is Required to Exclude Yuanda's Merchandise Under the Court's Interpretation and Application of *Polites*

The CWC argues that by reviewing the description of the products subject to Yuanda's underlying scope ruling and the three prior scope rulings concerning imports for curtain walls, it is clear that all involved the same products – curtain wall units and parts for a curtain wall, short of a complete or finished curtain wall.

The CWC notes that Yuanda's scope request specified two products, curtain wall units purported to be eligible for exclusion pursuant to the "finished goods" exclusion, and complete and finished curtain wall units that are produced and imported pursuant to a contract to supply a complete curtain wall purported to be eligible for exclusion because each shipment is a part of a kit for a larger finished good (*i.e.*, the complete curtain wall), but that the in-scope status of the former request was settled and conceded by Yuanda in the *Yuanda I* and *II* rulings.[300]

The CWC argues that the Court has not established the difference between the alleged curtain wall kit or part of a curtain wall kit and the products addressed in prior scope determinations (*i.e.*, the Department's determination in the underlying investigation and CWC Scope Ruling).

Specifically, the CWC notes that Yuanda's present request "finished good kit" comprised of "curtain wall units and parts for a curtain wall product" are the same as Yuanda's scope ruling request during the investigation, wherein Yuanda asked the Department to examine whether its curtain wall units with glass and its various aluminum component parts of a curtain wall imported in stages and in accordance with a contracted construction schedule were excluded as a kit for a finished curtain wall, and for which the Department determined did not satisfy the finished goods or finished goods kits exclusion and that, specifically, "unitized curtain wall and

[300] *See* CWC's Draft Results Comments at 29-30.

assorted aluminum extrusions" failed to meet the kit exclusion because Yuanda failed to demonstrate that all the necessary parts to fully assemble a final finished curtain wall were imported in the alleged kit.[301]

The CWC further notes that, whereas Yuanda's initial request in the investigation listed the curtain wall units and certain aluminum extrusion parts (*e.g.*, adjustment screw, starter sill, and brackets) as part of the complete curtain wall kit shipped in stages, the pictures in the request indicated that contrary to Yuanda's proposed kit, certain parts (such as aluminum brackets, aluminum profiles, lock panel, hanger, stainless steel bolts and screws, connectors, the starter sill or frame) that are necessary to build a finished curtain wall were not included in Yuanda's packaged shipment of glazed curtain wall units.[302] Indeed, the CWC requests that the Department consider revising its description of Yuanda's scope request during the investigation from the Draft Results (as included at page 9, above) to even more accurately reflect that during the investigation Yuanda asked the Department to find that its curtain wall units were excluded as a finished good kit and its request identified parts that were shipped separately and necessitated post-entry finishing and fabrication.[303]

Furthermore, as discussed above, the CWC explains Yuanda's own contract reveals that the curtain wall units and parts under consideration are the same or nearly identical to the Department's prior scope ruling regarding Yuanda's unitized curtain wall units and parts for a finished curtain wall during the investigation.

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[301] *See* CWC's Draft Results Comments at 31-32, citing Yuanda's letter to the Department in the underlying AD LTFV investigation, "Q&V Response of Shenyang Yuanda Aluminum Industry Engineering Co. Ltd.," dated May 6, 2010 ("Yuanda Q&V Response"), as provided in the CWC's Factual Submission at Attachment 4, and the Preliminary Scope Determination.

[302] *Id*. at 32.

[303] *Id*. at 5.

Contrary to the Court's presumption in *Yuanda III* that the prior CWC Scope Ruling did not concern Yuanda's products, the CWC argues that the Department is required to consider prior scope determinations pursuant to 19 CFR 351.225(k)(1), in which case, the CWC contends, a prior scope ruling concerning imports of similar products is indeed relevant and, in the case of the CWC ruling, particularly relevant and controlling since the prior ruling considered the exact same product as requested in the instant scope proceeding (*i.e.*, entries of curtain wall units short of the units necessary to construct an entire curtain wall, principally entered by Jangho and Yuanda). Indeed, the discussion of the contractual and piecemeal nature of such curtain transactions was discussed in that ruling and not a new or unique feature of Yuanda's instant scope request.[304]

The CWC notes that, during the course of the CWC scope proceeding, Yuanda began to call its products "completed or finished curtain wall units," but Yuanda never explained or proved what, if any, differences existed between "completed or finished curtain wall units" and curtain wall units with glass, which were the subject of the CWC's request, nor proffered any distinctions other than a change in nomenclature. According to the CWC, much of the same information presented by Yuanda in the CWC's scope proceeding was also presented during in the instant scope request. According to the CWC, this case presents nothing substantively new and Yuanda's underlying request is nothing more than a thinly veiled attempt by Yuanda to reverse the Department's prior scope rulings concerning curtain wall units and other parts of curtain walls.[305] The CWC argues that, even assuming *arguendo* that Yuanda's scope request

[304] *Id.*, at 33, citing the CWC Scope request at 3-5 and Exhibit 13A-H.

[305] *Id*. Specifically, the CWC asserts that Exhibit 1 of Yuanda's Scope Request is the same as Exhibit 5 of Yuanda's September 25, 2012, Opposition Comments to the CWC Scope Request; Exhibit 2 of Yuanda's Scope Request is identical to Exhibit 4 of Yuanda's CWC Opposition Comments; and Exhibit 4 of Yuanda's Scope Request is identical to another document filed in the *Yuanda I* and *Yuanda II* litigation.

that the curtain wall units and parts for curtain walls that were subject to the Department's prior scope rulings are not the exact same product, they nevertheless are imports of nearly the exact same product and for curtain walls. The curtain wall is the finished product excluded from the scope of the *Orders*, and the focus of Yuanda's scope request (*i.e.*, a finished goods kit for a curtain wall). As such, the CWC requests that the Department reject the baseless conclusion in *Yuanda III* that the products subject to the different requests are "different" and, at very least, the Department and the Court must consider these scope rulings involving the same or nearly identical imports, in accordance with the regulations to consider the 19 CFR 351.225(k)(1) factors, which include prior scope rulings.[306]

Indeed, the CWC notes that in *Yuanda II* the Federal Circuit upheld that curtain wall units are parts that fall short of the finished good, and thus covered by the explicit language of the scope of the *Orders* which includes parts for curtain walls. [307] The CWC contends that in such a circumstance where the Department considered successive scope requests for the same merchandise with the Federal Circuit upholding the Department's finding in one and the CIT remanding the identical finding in the other, the Department may not be free, even under protest, to exclude merchandise that the Federal Circuit has found to be covered by the scope. Even under protest, the Department is making the non-credible claim that the existence of a contract somehow removes otherwise subject merchandise from the scope of the *Orders*. The Supreme Court, however, has previously determined that a contract cannot result in expressly covered goods becoming excluded from the scope of an order simply by the operation of the contract

[306] *Id*., at 35-36.
[307] *Id*., at 36-38.

terms.[308] The CWC further highlights the Supreme Court's decision that "form should be regarded for substance and the emphasis should be on economic reality."[309] For this reason, the CWC supports the Department's determination in the *First Remand Redetermination* that "a contract alone would not satisfy the requirements of the exclusion language."[310]

The CWC notes that in rendering this conclusion, the Court had to ignore the finished goods kit exclusion's explicit requirement that all parts necessary for the finished good be present "at the time of importation" and erroneously and inaccurately declared that the Department, in employing its "subassemblies test", no longer requires all parts to be present at the time of importation.[311]

Rather, the CWC points out that the Department is not free to disregard the explicit language of the scope and is bound by the requirement that all of the parts, all of the curtain wall units, to be present at the time of importation. The CWC agrees with the Department's assessment in the Draft Results that, in *Polites* the Department interpreted an exclusion for a specific product in such a way that no importer could benefit from the exclusion whereas here the Department has interpreted the *Orders*' finished goods kit exclusion in such a way as to benefit importers in excluding a variety of products and, as such, the exclusion is not "hollow." The CWC contends that the Department is under no obligation to interpret the finished goods kit exclusion in such a way as to benefit every requestor or industry and particularly here, where the

[308] *Id*., at 39, citing *United States v. Eurodif S.A.*, 555 U.S. 305, 318 (2009) ("*Eurodif*") that private parties cannot utilize contracts to exclude subject imports from the scope of trade remedy orders.

[309] *Id*., citing *Eurodif* at 317-18.

[310] *Id*., citing the *First Remand Redetermination* at 18. The CWC further asserts that the Court's holding in *Yuanda III* that the Federal Circuit's decision held merely that the importation of a single curtain wall unit is subject to the scope of the *Orders*, is incorrect in consideration of the repeated references in the Federal Circuit's decision to "curtain wall units" and the Federal Circuit's declaration that "'absolutely no one purchases for consumption a single curtain wall piece or unit," and particularly vexing given the CIT's focus on the commercial realities of importation in the instant remand, citing *Yuanda II* at 1298.

[311] *Id*., at 18-19, citing to *Yuanda III* at 40-43.

Federal Circuit has found that curtain wall units are "parts… of curtain walls," and the scope explicitly covers "parts… of curtain walls."[312] The CWC shares the Department's concern that the Court's interpretation of *Polites* would encourage importers to structure their shipments so as to take advantage of the finished goods kit exclusion and the scope's explicit coverage of imported parts containing aluminum extrusions would be largely rendered meaningless, and notes that the Department is under no obligation to abandon this interpretation that "at the time of importation" equates to a single customs entry in circumstances where it is difficult for a requestor to import all parts for the finished good on a single entry, which would contravene the clear language of the scope.[313]

Petitioner agrees with the Department's interpretation of the term "at the time of importation" and disagrees with the Court's analysis in its application of the *Polities* finding and holding that the Department did not consider whether a single-entry, unitized curtain wall is a real product. Petitioners point out that, in *Polites*, the CIT determined that it would be unreasonable for the Department to interpret the term used in an exclusion for a single product to speak to a product that does not exist (*i.e.*, finished scaffolding), rendering the exclusion hollow. Petitioner requests that the Department make clear that there is no exclusion for unitized curtain walls in the scope of the *Orders*, unlike in *Polites*, where the scope exclusion covered a single product (*i.e.*, finished scaffolding). Rather, the scope exclusion at issue here is not for unitized curtain walls, but a finished goods kit, and which requires that the kit contain all of the necessary parts to fully assemble a final finished good at the time of importation. As such, Petitioner agrees with the Department's Draft Results that the finished goods kit exclusion covers a broad category of products (shown to exist in numerous scope findings), not a single product as in

[312] *Id*.
[313] *Id*., at 19-20.

Polites and, thus, the final finished goods exclusion has not been rendered "hollow" in the same manner.[314]

Further, according to Petitioner, a specific industry's practice should not have an effect on whether certain extruded products qualify for the finished goods kit exclusion, but the CIT has essentially created an industry specific finished goods kit scope exclusion by requiring the Department to analyze whether a single-entry unitized curtain wall is a "real product" despite the fact that the Department has consistently applied the "at the time of importation" language to other industries that do not structure their transactions in a manner where all the components necessary to assemble a final finished good are imported in a single entry (*e.g.*, fences). Additionally, Petitioner agrees with the Court's holding that the terms of an antidumping and countervailing duty order are triggered when merchandise is imported into the United States, noting that the plain language of the "finished goods kits" exclusion require all components necessary to assemble a final finished "at the time of importation." Thus, Petitioner agrees with the Department's concerns regarding the administration of such an exclusion (as discussed in Comment 4, above). Furthermore, Petitioner points out that importing curtain wall units in a piecemeal fashion over multiple entries for a single product is also contrary to the plain language of the finished goods kit exclusion because all portions of the merchandise may not even be produced at the time of the contract (*i.e.*, one portion of the planned curtain wall could enter the United States while another portion may not have even entered production and, thus, a "finished" product would be entered into the United States with certain portions of said product still not even in production).[315]

[314] *See* Petitioner's Draft Results Comments at 10-12, citing *Polites*.
[315] *Id.*, at 12-14.

Permasteelisa contends that he manner in which curtain walls are transacted, packaged, shipped, and/or imported does not align with the manner in which other finished goods kits found to be excluded are traded, and therefore the Department should not foreclose on the subassembly finished goods kit exclusion as it applies specifically to the curtain wall industry. [316] According to Permasteelisa, the Department does not reconcile its interpretation of the scope exclusion with the petition which expressly lists the "unassembled unitized curtain walls" as excluded merchandise under the "finished goods kit" exclusion in consideration of the fact that Petitioner's acknowledgement that it is simply not possible for a complete curtain wall to enter all at once as a 'kit' (*i.e.*, an interpretation of "unassembled unitized curtain walls" to mean a complete curtain wall system imported in a single entry, necessarily accepts that Petitioner's presented an example of a product they knew did not exist). [317]

As the Court finds that Petitioner "could not" have intended to use a non-existent product as an example of non-subject merchandise, Permasteelisa argues that the Department's interpretation of the term "unassembled unitized curtain walls" is equally impermissible. Accordingly, Permasteelisa argues that the Department's conclusions are inherently inconsistent with the lack of record evidence that a complete curtain wall is an actual imported product and, pursuant to *Yuanda III*, the Department cannot support an exclusion of merchandise from a scope determination to encompass merchandise where there is no record evidence it is or may be imported. [318]

[316] *See* Permasteelisa's Draft Results Comments at 5-6.
[317] *Id*., citing *Yuanda III* and the CWC Scope Ruling.
[318] *See* Permasteelisa's Draft Results Comments at 6-7.

Department's Position:

At issue on remand is the exclusion to the scope of the *Orders* which states that "finished goods containing aluminum extrusions that are entered unassembled in a 'finished goods kit'" are excluded, which is "understood to mean 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."

As discussed throughout this remand, the language of the scope, as well as the holdings of the CIT and the CAFC in *Yuanda I* and *Yuanda II*, all support one basic fact – curtain wall units are "parts of curtain walls," and therefore are not "final finished goods."[319] The final finished good is a curtain wall under the scope of the *Orders*. As such, a curtain wall unit could enter as merchandise not subject to the *Orders* only to the extent that it is part of a finished goods kit and that kit, as a whole, complies with all of the requirements of the exclusion.

In addition, the Department's consistent practice has been to interpret the term "at the time of importation" according to its literal terms, and to find that the "time of importation" means at the time of entry, as reported in the CBP 7501 Form.[320] Moreover, the Department has notable concerns regarding the ability to administer a finished goods kit exclusion that allows for multiple entries of subject merchandise over an extended period of time.[321]

Furthermore, the Department has concluded on the basis of the extensive information on the administrative record that curtain wall units require further finishing and fabrication to be

[319] As explained above in Comment 5, curtain wall units are also subassemblies, but they are not subassemblies that meet the finished good or finished goods kit exclusion such that they are excluded from the *Orders*.

[320] *See* Comment 3 above.

[321] *See* Comment 4 above.

incorporated into a curtain wall, and are not assembled "as is" at the time of importation into a curtain wall.[322]

Thus, we agree with the CWC and the Petitioner that under the Department's consistent interpretation of the scope of the *Orders*, Yuanda's merchandise would not meet the requirements of the "finished goods kits" exclusion to the scope of the *Orders*, that the individual entries of curtain wall units under consideration are the same as those found to be explicitly covered by the scope of the *Orders* in the CWC Scope Ruling, and that the ultimate product requested upon (*i.e.*, the unitized curtain wall imported as a "kit" in stages), was considered and found to be insufficient to satisfy the criteria for exclusion in the Preliminary Scope Determination in the investigation.

Accordingly, absent the Court's opinion in *Yuanda III* we would determine under the text of the scope of the *Orders* and the criteria listed in 19 CFR 351.225(k)(1) that Yuanda's merchandise, *i.e.*, curtain wall units imported pursuant to a long-term contract for purposes of constructing a unitized curtain wall, as described in the Yuanda Scope Request, is subject to the scope of the *Orders*.

However, as noted above, the petition suggested that unassembled unitized curtain walls could be excluded under the finished goods kit exclusion if all of the criteria described in that exclusion were present. For an unassembled unitized curtain wall to meet the requirements of the exclusion, all of the parts for the curtain wall would have to be imported in a single entry, as reported on the CBP 7501 Form, contain all of the necessary parts to fully assemble the curtain wall at that time, require no further finishing or fabrication, such as cutting or punching, and be able to be assembled 'as is' into a finished product. Yuanda does not structure its shipments or

[322] See Comments 1 and 5 above.

projects in this manner, and there is no evidence on the record that other curtain wall importers or exporters do this either.

As discussed above, the Court held that Commerce's lack of consideration of whether a single-entry, unitized curtain wall is a real product, imported with any regularity rendered the Department's interpretation unreasonable.[323] Citing *Polites*, the Court stated that "{a}n 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 . . ."[324] It continued that, "{e}ven if such a product existed but was rarely imported, insisting upon such an interpretation would render the exclusion 'insignificant, if not wholly superfluous.'"[325] As we have explained, we respectfully disagree with the Court's finding in this regard, and have provided the reasons in this remand redetermination behind our disagreement.

However, we are also obligated to make a conclusion on remand that is consistent with that holding. As Permasteelisa argues, it appears the Court's holding is clear that if the only way a particular product in a particular industry, in this case the curtain wall industry, can benefit from the "finished goods kit" exclusion, as interpreted by the Department, is to fulfill criteria which the evidence on the record does not suggest anyone in that industry currently fulfills, then the Department's interpretation is flawed and unreasonable, even if other industries currently fulfill those criteria and benefit from the exclusion.[326]

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[323] *See Yuanda III* at 41-42.
[324] *Id*. at 42 – 43.
[325] *Id*. at 43.
[326] There may be an alternative interpretation of the Court's holding on this point. In its analysis, the Court was addressing both the Yuanda Scope Ruling, as well as *Department's First Remand Redetermination*. As explained above, in neither decision did the Department analyze whether or not Yuanda's merchandise required further finishing or fabrication, such as cutting or punching, and the Court expressly held that it was not reaching this question in its holding. Furthermore, in providing its *Polites* analysis, the Court was primarily addressing the Department's literal application of the term "at the time of importation" in the *First Remand Redetermination*. Thus, one interpretation of the Court's holding might be that the Court was only requiring that the Department provide

Accordingly, we disagree with the CWC and Petitioner that the Department has an option on remand to determine that Yuanda's curtain wall units imported pursuant to a long-term contract are included in the scope of the *Orders*. We find that based on the Court's analysis and statements in *Yuanda III*, the Department must determine that Yuanda's merchandise is excluded from scope of the *Order*, absent evidence that any exporter or importer in the curtain wall industry ships its curtain wall units in a manner that would permit parties to benefit from the "finished goods kit" exclusion to the antidumping and countervailing duty orders covering aluminum extrusions from the PRC. No such evidence is present on the record.

Final Results of Redetermination

For the forgoing reasons and pursuant to *Yuanda III*, we are finding on remand, under protest, that Yuanda's curtain wall units imported pursuant to a long-term contract are excluded from the scope of the *Orders*.

Paul Piquado
Assistant Secretary
for Enforcement and Compliance

12 MAY 2016
Date

evidence of the existence of an unassembled unitized curtain wall that met the requirements set forth by the Department in the *First Remand Redetermination absent evidence as to the necessity of further finishing and fabrication*. Now that the Department has conducted that analysis, one might argue that the Court's holding in this regard no longer applies.

However, the problem with that interpretation is that the Court did not tie its *Polites*-related analysis and conclusion solely to the Department's literal interpretation of the term "at the time of importation," and did not suggest that if the Department conducted an analysis of the necessity of further finishing and fabrication of Yuanda's merchandise that its holding should be interpreted any differently. Accordingly, we do not believe that this is the correct interpretation of the CIT's holding in *Yuanda III*.