U.S. Court of International Trade

Slip Op. 15–114

BEIJING TIANHAI INDUSTRY CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and NORRIS CYLINDER COMPANY, Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 12–00203

[The Department of Commerce's Final Results of Redetermination are remanded.]

Dated: October 14, 2015

Mark E. Pardo, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, argued for plaintiff. With him on the brief was *Andrew T. Schutz*.

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Edward M. Lebow, Haynes and Boone, LLP, of Washington, DC, argued for defendant-intervenor.

OPINION AND ORDER

EATON, Judge:

Before the court is plaintiff Beijing Tianhai Industry Co., Ltd.'s ("Tianhai" or "plaintiff") motion for judgment on the agency record, pursuant to USCIT Rule 56.2. *See* Resp't's Mot. for J. on the Agency R. Pursuant to Rule 56.2 (ECF Dkt. No. 32). In *Beijing Tianhai Industry Co. v. United States*, 38 CIT __, 7 F. Supp. 3d 1318 (2014) ("*BTIC I*"), the court remanded to the United States Department of Commerce ("Commerce" or the "Department") its final determination in the antidumping duty investigation of high pressure steel cylinders From the People's Republic of China ("PRC"). *See High Pressure Steel Cylinders from the PRC*, 77 Fed. Reg. 26,739 (Dep't of Commerce May 7, 2012) (final determination of sales at less than fair value), and accompanying Issues and Decision Memorandum ("Issues & Dec. Mem.") (collectively, "Final Determination"); *see also High Pressure Steel Cylinders From the PRC*, 77 Fed. Reg. 37,377 (Dep't of Commerce June 21, 2012) (antidumping duty order). On remand, Com-

merce was directed to further explain the use of the average-to-transaction ("A-T") methodology[1] for determining the presence of targeted dumping and for calculating plaintiff's dumping margin. *See BTIC I*, 38 CIT at __, 7 F. Supp. 3d at 1337–38. Commerce supplemented its explanation in its Final Results of Redetermination Pursuant to Court Remand dated September 9, 2014. *See* Final Results of Redetermination Pursuant to Ct. Remand (ECF Dkt. No. 85) ("Remand Results"). Jurisdiction lies pursuant to 28 U.S.C. § 1581(c) (2012) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2012). For the reasons discussed below, the Remand Results are remanded.

BACKGROUND

In 2011, responding to a petition filed by defendant-intervenor Norris Cylinder Company ("Norris" or "defendant-intervenor") alleging targeted dumping, the Department initiated an antidumping duty investigation of high pressure steel cylinders from the PRC ("subject merchandise") and selected plaintiff, a producer and exporter of subject merchandise from the PRC, as a mandatory respondent. *See High Pressure Steel Cylinders from the PRC*, 76 Fed. Reg. 33,213, 33,213 (Dep't of Commerce June 8, 2011) (initiation of antidumping duty investigation); Final Determination, 77 Fed. Reg. at 26,739. The period of investigation was October 1, 2010 through March 31, 2011 ("POI"). Final Determination, 77 Fed. Reg. at 26,739.

During its investigation, Commerce found that the statute permitted the use of an alternative methodology (i.e., A-T) to determine if targeted dumping had occurred, and to calculate plaintiff's dumping margin. *See* Issues & Dec. Mem. at cmt. IV. The Department issued its Preliminary Determination of sales at less than fair value on December 15, 2011. *See High Pressure Steel Cylinders From the PRC*, 76 Fed. Reg. 77,964 (Dep't of Commerce Dec. 15, 2011) (preliminary determination of sales at less than fair value) ("Preliminary Determination"). In its preliminary investigation, Commerce used the targeted dumping test that has come to be known as the *Nails* test.[2] After applying the test, the Department determined that there was "a

[1] The A-T methodology "compar[es] the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions" when making a lessthan-fair-value determination. *See* 19 U.S.C. § 1677f-1(d)(1)(B) (2006).

[2] "The *Nails* test derives its name from the cases in which it was first used." *Timken Co. v. United States*, 38 CIT __, __ n.3, 968 F. Supp. 2d 1279, 1283 n.3 (2014) (citing *Certain Steel Nails from the PRC*, 73 Fed. Reg. 33,977 (Dep't of Commerce June 16, 2008) (final determination of sales at less than fair value and partial affirmative determination of critical circumstances); *Certain Steel Nails from the United Arab Emirates*, 73 Fed. Reg. 33,985 (Dep't of Commerce June 16, 2008) (notice of final determination of sales at not less than fair value)), *aff'd*, 589 F. App'x 995 (Fed. Cir. 2015). Although not relevant to this case, the Department now applies the "Cohen's *d* test" and the "ratio test," rather than the *Nails* test

pattern of prices for comparable merchandise that differ[ed] significantly by time period." Preliminary Determination, 76 Fed. Reg. at 77,968.

To preliminarily determine the presence of dumping and to calculate plaintiff's antidumping duty rate, the Department used the A-T methodology because it found that its normally used average-to-average ("A-A") methodology[3] could not properly account for the differing pattern of sales prices. *Id.* When making its dumping determination, the Department applied the A-T methodology, with zeroing,[4] to all of plaintiff's U.S. sales during the POI. *See id.*

In the Final Determination, the Department continued to use the *Nails* test and continued to find that there was a pattern of sales that differed significantly by time period.[5] Issues & Dec. Mem. at cmt. IV. Commerce again used the A-T methodology to determine if dumping had in fact occurred and to calculate the antidumping rate. *See id.* The Department also continued to apply its zeroing methodology to all of plaintiff's U.S. sales. *See id.* In the Final Determination, the Department calculated a weighted-average dumping margin of 6.62% for Tianhai during the POI. Final Determination, 77 Fed. Reg. at 26,742.

Following issuance of the Final Determination, plaintiff moved for judgment on the agency record pursuant to USCIT Rule 56.2. In *BTIC I*, the court held that two of plaintiff's claims were wanting. First, the court found that "plaintiff failed to exhaust its administrative remedy with respect to its 'pattern' argument,"[6] and, thus, declined to consider it. *BTIC I*, 38 CIT at __, 7 F. Supp. 3d at 1331. Next, with regard to the application of 19 C.F.R. § 351.414(f) (2007), which

to determine whether targeted dumping has occurred. *See Steel Wire Garment Hangers From the PRC*, 80 Fed. Reg. 41,480 (Dep't of Commerce July 15, 2015) (preliminary results of antidumping duty administrative review; 2013–2014), and accompanying Issues and Decision Memorandum at 13–14.

[3] The A-A methodology "compar[es] the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise." 19 U.S.C. § 1677f-1(d)(1)(A)(i).

[4] "Zeroing is a methodology used for calculating an exporter's weighted average dumping margin 'where negative dumping margins (i.e., margins of sales of merchandise sold at nondumped prices) are given a value of zero and only positive dumping margins (i.e., margins for sales of merchandise sold at dumped prices) are aggregated.'" *BTIC I*, 38 CIT at __ n.1, 7 F. Supp. 3d at 1323 n.1 (quoting *Union Steel v. United States*, 713 F.3d 1101, 1104 (Fed. Cir. 2013)).

[5] The Department made one adjustment to the dates of the sales within the allegedly targeted period. *See* Final Determination, 77 Fed. Reg. at 26,740. That change is not challenged here.

[6] Plaintiff's "pattern" argument was "that the legislative history and purpose of 19 U.S.C. § 1677f-1(d)(1)(B) show that the Department's application of the *Nails* test in this case was improper because the test can identify a pattern of targeted dumping based on non-dumped sales." *BTIC I*, 38 CIT at __, 7 F. Supp. 3d at 1328–29.

limited the application of the A-T method to targeted sales, and which plaintiff argued was improperly withdrawn, the court found that, even if Commerce erred in withdrawing the regulation, "that error [was] harmless as it applies to plaintiff, and the Department is not bound by the withdrawn regulation here." *Id.* at __, 7 F. Supp. 3d at 1333.

The court also found insufficient Commerce's explanation for why the observed pricing pattern between the targeted and non-targeted time periods could not be accounted for using either of the general methodologies prescribed by statute, i.e., A-A or transaction-to-transaction ("T-T"), and thus, that the A-T methodology, an exception to the general methodologies, should be employed. *See id.* at __, 7 F. Supp. 3d at 1331–32; *see also* 19 U.S.C. § 1677f-1(d)(1). Because "[t]he Department's failure to provide an explanation sufficient to satisfy 19 U.S.C. § 1677f-1(d)(1)(B)(ii) was an error of law," the court found that "a remand for the Department to provide such explanation [was] required." *Id.* at __, 7 F. Supp. 3d at 1332. The court therefore granted plaintiff's USCIT Rule 56.2 motion, in part, and in remanding the case to the Department, (1) directed Commerce to further explain its selected methodology for calculating Tianhai's dumping margin and (2) reserved decision on the other issues that might be rendered moot if Commerce changed its methodology on remand. *See id.* at __, 7 F. Supp. 3d at 1337–38.

STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *Yantai Xinke Steel Structure Co. v. United States*, 38 CIT __, __, Slip Op. 14–38, at 4 (2014) (citation omitted) (internal quotation marks omitted).

DISCUSSION

I. LEGAL FRAMEWORK

A. Statutory Framework

"[I]n 'situations where comparable merchandise differ[s] significantly among purchasers, regions, or periods of time,'" Commerce may determine if dumping has occurred by using the A T methodology. *See JBF RAK LLC v. United States*, 790 F.3d 1358, 1361 (Fed. Cir. 2015) (alteration in original) (quoting *U.S. Steel Corp. v. United*

States, 621 F.3d 1351, 1359 (Fed. Cir. 2010)); *See* 19 U.S.C. § 1677f-1(d)(1). During an antidumping investigation, the Department ordinarily determines whether dumping has occurred by using one of the two methodologies (i.e., A-A or T-T) identified in 19 U.S.C. § 1677f-1(d)(1)(A). The general rule under the A-A methodology is that, when determining an exporter's dumping margin, the Department will "compar[e] the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise" during the period of investigation. *See* 19 U.S.C. § 1677f-1(d)(1)(A)(i). If the difference between the weighted average normal values of an exporter's merchandise and the weighted average of the export prices is a positive number, then dumping has occurred. *See BTIC I*, 38 CIT at __, 7 F. Supp. 3d at 1325. Thus, 19 U.S.C. § 1677f-1(d)(1)(A)(i) provides for an A-A comparison to determine whether dumping has occurred.

The Department is also permitted to determine whether dumping has occurred, and to set an exporter's margin, by using the T-T methodology, by which it may "compar[e] the normal values of individual transactions to the export prices . . . of individual transactions for comparable merchandise." 19 U.S.C. § 1677f-1(d)(1)(A)(ii). By regulation, however, this methodology is permitted only in special circumstances. *See* 19 C.F.R. § 351.414(c)(1) ("The Secretary [of Commerce] will use the [T-T] method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made.").

In addition to the A-A and T-T methodologies, the statute provides for an exception to the general methodologies, the A-T methodology, to be used to "determine whether the subject merchandise is being sold in the United States at less than fair value," and, if so, to calculate a dumping margin. *See* 19 U.S.C. § 1677f-1(d)(1)(B). When applying the A-T methodology, Commerce "compar[es] the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise." *Id.* In providing for the use of this alternate methodology, Congress recognized that there might be situations where the usual "methodolog[ies] cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping may be occurring." Uruguay Round Agreements Act, Statement of Administrative Action ("SAA"), H.R. Doc. No.

103–316, at 843 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4178. Congress anticipated that the patterns of sales might be identifiable on the basis of "purchasers, regions, or time periods."[7] SAA, H.R. Doc. No. 103–316, at 843, *reprinted in* 1994 U.S.C.C.A.N. at 4178. Thus, the statute provides that the Department

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

19 U.S.C. § 1677f-1(d)(1)(B); *see also* SAA, H.R. Doc. No. 103–316, at 843, *reprinted in* 1994 U.S.C.C.A.N. at 4178 ("Before relying on this methodology, however, Commerce must establish and provide an explanation why it cannot account for such differences through the use of [A-A] or [T-T]."). In other words, before it may employ the A-T methodology, the statute requires the Department to (1) identify a pattern of pricing that differs significantly among purchasers, and then also (2) explain what about that particular pattern makes the use of A-A or T-T inappropriate. Once the Department finds that it has satisfied 19 U.S.C. § 1677f-1(d)(1)(B)(i) and (ii), it may compare the weighted average of the normal values to each individual export (or constructed export) price to determine an exporter's margin. Thus, if both requirements of § 1677f-1(d)(1)(B) are met, the Department may use A-T to find that dumping has taken place and determine the producer's or exporter's dumping margin.

B. The *Nails* Test

Here, before Commerce could take advantage of the exception provided in the statute and employ the A-T methodology it first had to conclude that there was a pattern of sales prices that differed significantly over time. *See* 19 U.S.C. § 1677f-l(d)(1)(B)(i). In this case, in order to meet the requirements of 19 U.S.C. § 1677f-1(d)(1)(B)(i), the Department engaged in a two-step analysis referred to as the *Nails*

[7] In this case, Norris alleged targeting on the basis of time period. *See* Preliminary Determination, 76 Fed. Reg. at 77,968.

test.[8] The *Nails* test proceeds in two steps, each performed on a product-specific basis by control number or "CONNUM."[9] The first step is referred to as the "standard-deviation test." *JBF RAK*, 790 F.3d at 1367 n.5. In this step, if 33% or more of the alleged targeted group's (i.e., customer, region, or time period) "sales of subject merchandise (by sales volume) . . . are at prices more than one standard deviation below the weighted-average price of all sales under review," then those sales pass the standard deviation test and are considered in step two: the "gap test." *Id.* (citation omitted) (internal quotation marks omitted). When performing the gap test, Commerce considers whether the "gap" "between the weighted-average price of sales for [the] allegedly targeted group and the next highe[st] weighted-average price of sales to the non-targeted groups exceeds the average price gap (weighted by sales volume) for the non-targeted groups." *Id.* (citation omitted) (internal quotation marks omitted). In other words, if the gap between the targeted group and the next-highest non-targeted group is greater than the average gap, those sales pass the gap test. "If more than 5% of total sales of the subject merchandise to the alleged target pass both tests, Commerce determines that targeting has occurred." *Timken*, 38 CIT at __, 968 F. Supp. 2d at 1283. This Court in *BTIC I* found the two steps of the *Nails* test to be a reasonable method for determining whether the requirements of 19 U.S.C. § 1677f-1(d)(1)(B)(i) have been met. *See BTIC I*, 38 CIT at __, 7 F. Supp. 3d at 1328.

II. REMAND RESULTS

Although Commerce adequately identified a pattern of sales that differed over time using the *Nails* test, in *BTIC I*, the court remanded the issue of the Department's selection of the A-T method for determining whether dumping was present and for calculating Tianhai's weighted-average dumping margin. *See BTIC I*, 38 CIT at __, 7 F. Supp. 3d at 1337–38. In doing so, the court found that Commerce had not explained adequately why the A-T methodology was appropriate because Commerce did not "mention . . . how the Department reached [its] conclusion" or "reference[] any record evidence supporting [its]

[8] The first stage of the two-step test is directed to the pattern requirement of 19 U.S.C. § 1677f-1(d)(1)(B)(i), while the second stage concerns the significant-difference requirement of that statutory provision. *See* 19 U.S.C. § 1677f-1(d)(1)(B)(i); *see also JBF RAK*, 790 F.3d at 1367 n.5.

[9] "Control numbers, or CONNUMs are used by Commerce to designate merchandise that is deemed identical based on the Department's model matching criteria. . . . CONNUMs are used as the basis for product identification in most cases." *Shandong Huarong Mach. Co. v. United States*, 30 CIT 1269, 1284 n.12, 435 F. Supp. 2d 1261, 1275 n.12 (2006) (quoting *Koenig & Bauer-Albert AG v. United States*, 24 CIT 157, 161 n.6, 90 F. Supp. 2d 1284, 1288 n.6 (2000)) (internal quotation marks omitted).

conclusion." *Id.* at __, 7 F. Supp. 3d at 1331. Because the statute states that Commerce must "'explain[] why such differences cannot be taken into account' using A-A or T-T," the court directed Commerce to explain, on remand, why the A-A and T-T methodologies were inappropriate. *Id.* at __, 7 F. Supp. 3d at 1326 (quoting 19 U.S.C. § 1677f-1(d)(1)(B)(ii)).

The court, in *BTIC I*, further observed that:

> In creating an explanation requirement in 19 U.S.C. § 1677f1(d)(1)(B)(ii), Congress anticipated that "pattern[s] of prices that differ significantly among purchasers, regions, or time periods," could sometimes be accounted for without resorting to A-T. Accordingly, Congress required the Department to explain why A-A and T-T cannot account for a pattern of disparate prices before using A-T. Thus, if no explanation other than the bare-bones invocation of the differing natures of the [A-A] and [A-T] methodologies would suffice to satisfy 19 U.S.C. § 1677f-1(d)(1)(B)(ii), as defendant and defendant-intervenor would have it, that statutory provision would be superfluous.

Id. at __, 7 F. Supp. 3d at 1332 (quoting SAA, H.R. Doc. No. 103–316, at 843, *reprinted in* 1994 U.S.C.C.A.N. at 4178 ("Before relying on this methodology, however, Commerce must establish and provide an explanation why it cannot account for such differences through the use of an average-to-average or transaction-to-transaction comparison.")).

Here, in the Remand Results, Commerce stated that it could not use the T-T method because this determination involved a less-than-fair-value investigation in a nonmarket economy country[10] "in which the Department used a factors of production method to determine normal value," and normal value was "thus based . . . on the valuation of [Tianhai's] factors of production using surrogate values rather than on home market or third country transactions." Remand Results at 4–5. In other words, Commerce elaborated, "there simply is no corresponding home market or third country sales database that would allow [the Department] to compare [Tianhai's] individual home mar-

[10] A "nonmarket economy country" is a "foreign country that the [Department] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Because the Department deems the PRC 'to be a nonmarket economy country, Commerce generally considers information on sales in [the PRC] and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise.'" *Jacobi Carbons AB v. United States*, 38 CIT __, __ n.11, 992 F. Supp. 2d 1360, 1365 n.11 (2014) (alteration in original) (quoting *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 481, 318 F. Supp. 2d 1339, 1341 (2004)), *aff'd*, Appeal No. 2014–1752 (Fed. Cir. Aug. 3, 2015).

ket or third country transactions to its individual U.S. sales transactions." Remand Results at 5. Thus, no T-T comparison was possible. Because, as Commerce points out, there were no usable transactions in the PRC to compare to domestic U.S. transactions, the court finds the Department's explanation with respect to the T-T methodology to be reasonable, and its explanation for not using T-T adequate. *See* 19 U.S.C. § 1677f1(d)(1)(B)(ii).

Next, Commerce found that the price differences, for purposes of the first step of the *Nails* test, could not be determined using the A-A methodology. *See* Remand Results at 5–6. When making this finding, Commerce stated:

> To satisfy the second part of the statutory test, *i.e.*, to explain why the differences cannot be taken into account using the [A-A] method, in the underlying investigation, we calculated the estimated weighted-average dumping margins using both the [A-A] method and the [A-T] method. In this specific case, we find that the price differences cannot be taken into account using the [A-A] method, as evidenced by the fact that [Tianhai's] estimated weighted-average dumping margin crossed the *de minimis* threshold specified in [19 U.S.C. § 1673b(b)(3)[11]](*i.e.*, two percent *ad valorem*) when we applied the [A-T] method instead of the [A-A] method. In other words, [Tianhai's] estimated weighted-average dumping margin calculated using the [A-A] method was below the *de minimis* threshold, and [Tianhai's] estimated weighted-average dumping margin calculated using the [A-T] method was 6.62 percent. In light of [the] fact that the estimated weighted-average dumping margin crosses the *de minimis* threshold specified in [§ 1673b(b)(3)] when the [A-T], rather than the [A-A], comparison method is applied, the Department finds that the [A-A] method cannot account for the price differences.

Remand Results at 5–6 (footnotes omitted). Put another way, using the *Nails* test, Commerce first found a difference in price pattern between the targeted and non-targeted time periods that indicated that dumping had occurred during the targeted period. Next, Commerce applied the A-A methodology, but that methodology did not

[11] Pursuant to 19 U.S.C. § 1673b(b)(3):

> In making a determination under this subsection, the [Department] shall disregard any weighted average dumping margin that is de minimis. For purposes of the preceding sentence, a weighted average dumping margin is de minimis if [Commerce] determines that it is less than 2 percent ad valorem or the equivalent specific rate for the subject merchandise.

19 U.S.C. § 1673b(b)(3).

yield a dumping margin that was sufficient in magnitude to result in an antidumping order. When it applied the A-T methodology, however, a larger margin was found. Because this larger margin exceeded the two-percent threshold, provided by statute as necessary for the imposition of an antidumping order when a margin is determined using A-A, Commerce concluded that the observed differences in price pattern did indeed indicate that targeted dumping had occurred, but was concealed using the A-A methodology.

With respect to this explanation, it is important to keep in mind how the *Nails* test fits into the analysis required by 19 U.S.C. § 1677f-1(d)(1)(B)(i). The *Nails* test does not demonstrate that targeted dumping has taken place. Rather, the test merely identifies "a pattern of [sales] prices that differ significantly among . . . time periods, *i.e.*, where targeted dumping may be occurring." *See* SAA, H.R. Doc. No. 103–316, at 843, *reprinted in* 1994 U.S.C.C.A.N. at 4178. Dumping in targeted dumping cases, as in all dumping cases, is determined by a comparison of normal value to export price. The question is which methodology (i.e., A-A, T-T, or A-T) is appropriate under the facts of each investigation. Should Commerce choose to use the A-T methodology, the statute requires the Department to explain why the two general methodologies could not be used. *See* 19 U.S.C. § 1677f-1(d)(1)(B)(ii) ("The [Department] may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if . . . [Commerce] *explains* why such differences cannot be taken into account using [the A-A or T-T methods]." (emphasis added)).

On remand, Commerce has supplied what it claims is an adequate explanation for why A-T should be used here. Its reasoning, however, relies on a form of confirmation bias: Commerce's explanation is that, because substantial dumping was not found using A-A, but substantial dumping was found using A-T, it was permissible for the Department to use the alternative A-T methodology. *See* Remand Results at 5–6; *see also* Issues & Dec. Mem. at cmt. IV. This statement, however, is simply inadequate. The statute requires that the Department explain why A-A (or T-T) cannot take into account the pattern of pricing differences "among purchasers, regions, or periods of time" before it may proceed to using the A-T methodology. *See* 19 U.S.C. § 1677f-1(d)(1)(B). Here, Commerce states a fact when it says that it finds substantial dumping using A-T and not when using A-A, but that fact

alone does not explain why A-A cannot account for the differences.[12] Rather, if this is an explanation at all, it explains that Commerce chose to use the A-T methodology because it showed, not dumping, but a greater level of dumping. Merely because the A-A methodology did not result in a significant dumping margin and the A-T methodology did, however, it does not necessarily follow that the statute permits the application of A-T to determine plaintiff's dumping margin.

It is plain from its structure, that the statute requires more than a finding of greater dumping before the use of the A-T methodology is permitted. If, as the Department would have the court believe, Congress intended that the only requirement before the A-T methodology could be used was a finding of greater dumping using A-T itself, 19 U.S.C. § 1677f1(d)(1)(B)(ii)'s explanation requirement would be rendered effectively a nullity. Indeed, under that reading, in every case where the Department wished to use the A-T methodology and was able to identify dumping above the de minimis level using that exception methodology, it would be permitted to do so regardless of whether the general A-A or T-T methodologies were more appropriate, and without any further explanation as to why those methodologies were inadequate.

Here, the Department has chosen a narrative rather than an explanation. Because Commerce has failed to satisfy the requirements of the statute, this issue must be remanded for Commerce to supply the explanation required by 19 U.S.C. § 1677f-1(d)(1)(B)(ii).

III. DEFERRED ISSUES

As previously explained, in *BTIC I*, the court remanded the issue of the methodology used by the Department to determine whether dumping had occurred, and if so, to establish a dumping margin, but refrained from addressing plaintiff's three other arguments. Because the Federal Circuit has addressed one of the three arguments, and because the two others can be disposed of easily, they will be considered here.

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[12] It is worth noting that Commerce comes close to providing an explanation in its reasons for the use of zeroing when employing the A-T methodology:

This is so because record evidence shows that for [Tianhai], the [A-A] methodology masks differences in the patterns of prices between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group. . . . As such, we find that the petitioner is correct that the intent of [19 U.S.C. § 1677f-1(d)(1)] is not effectuated if offsets are used under the alternative [A-T] methodology. Issues & Dec. Mem. at cmt. IV.

A. Commerce Is Not Required to Consider Whether the Pattern Was Caused by a Valid Commercial Reason

Before the court, plaintiff argues that Commerce was required to consider whether there were alternate explanations for the alleged targeted dumping. *See* Pl.'s Mem. of Law in Supp. of Mot. for J. on the Agency R. Pursuant to Rule 56.2 26–29(ECF Dkt. No. 32) ("Pl.'s Br."). Plaintiff contends that (1) if the "pattern" of price differences was caused by a valid commercial reason (i.e., not dumping), then the A-T exception does not apply, and (2) in Tianhai's case, the pattern was, in fact, caused by a valid commercial reason, and not dumping. Pl.'s Br 29.

The Federal Circuit has recently addressed the issue of whether Commerce is required to consider alternate explanations for "a pattern of export prices . . . that differs significantly among . . . time periods," and has found that it is not. *See JBF RAK*, 790 F.3d at 1368 ("Section 1677f1(d)(1)(B) does not require Commerce to determine the reasons why there is a pattern of export prices for comparable merchandise that differs significantly among purchasers, regions, or time periods, nor does it mandate which comparison methods Commerce must use in administrative reviews. . . . [R]equiring Commerce to determine the intent of a targeted dumping respondent 'would create a tremendous burden on Commerce that is not required or suggested by the statute.'" (quoting *JBF RAK LLC v. United States*, 38 CIT __, __, 991 F. Supp. 2d 1343, 1355 (2014))); *see also Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 608 F. App'x 948, 949–50 (Fed. Cir. 2015) ("In light of our decision in *JBF RAK*, and because Borusan has merely challenged Commerce's failure to consider Borusan's alternate explanation for the observed pricing patterns, we affirm the Court of International Trade's judgment sustaining Commerce's calculation of a 3.55% dumping margin using the average-to-transaction comparison methodology."). Thus, because the Federal Circuit has found that Commerce is not required to consider alternate explanations for an observed pricing pattern, plaintiff's argument, that, here, the "pattern" of price differences was caused by a valid commercial reason (i.e., not dumping), necessarily fails.

B. Commerce's Application of Zeroing Was Reasonable

Plaintiff also argues that, even if the use of the A-T methodology were appropriate, the Department was not permitted to employ its zeroing methodology. *See* Pl.'s Br. 29–35. According to plaintiff: (1) "the statute is ambiguous with respect to the application of the zeroing methodology"; (2) Commerce has an "established policy . . . that it

will *not* apply zeroing in antidumping duty investigations"; and (3) because (1) and (2) are true, "Commerce must provide an independent justification for the application of its zeroing methodology." *See* Pl.'s Br. 30–31. Plaintiff thus maintains that Commerce cannot justify the application of zeroing simply because the Department has selected the "exception" methodology (i.e., the A-T methodology). Pl.'s Br. 31.

In *Union Steel v. United States*, the Federal Circuit affirmed Commerce's abandonment of zeroing when using the A-A methodology with respect to investigations, but permitted the use of zeroing in reviews employing the A-T methodology, holding that:

> The [World Trade Organization's ("WTO")[13]] decision was limited; it found that Commerce's use of zeroing methodology with respect to [A-A] comparisons in antidumping duty *investigations* was inconsistent with the United States' international obligations. The Executive Branch responded by discontinuing its zeroing practice in new and pending investigations using [A-A] comparison methodology. Commerce, did not, however, alter its practice with respect to the use of zeroing methodology in anything other than investigations using [A-A] comparisons. . . . Commerce's modification was limited to changes that were necessary to comply with the WTO decision.

Union Steel v. United States, 713 F.3d 1101, 1110 (Fed. Cir. 2013) (citations omitted). In other words, the Department did not abandon zeroing in A-A investigations after concluding that zeroing led to an unfair result, or provided an inaccurate result, but rather, because it was obliged to do so by our trading partners. *See id.*

The *Union Steel* Court also found that

> Commerce's decision to use or not use the zeroing methodology reasonably reflects unique goals in differing comparison methodologies. In average-to-average comparisons, as used in investigations, Commerce examines average export prices; zeroing is not necessary because high prices offset low prices within each averaging group. When examining individual export transactions, using the average-to-transaction comparison methodology, prices are not averaged and zeroing reveals masked dumping. This ensures the amount of antidumping duties assessed better reflect the results of each average-to-transaction comparison. Commerce's differing interpretation is reasonable because

[13] The WTO found that zeroing in antidumping investigations was a violation of trade agreements entered into by the United States. *See Union Steel v. United States*, 713 F.3d 1101, 1105 (Fed. Cir. 2013) (citation omitted).

> the comparison methodologies compute dumping margins in different ways and are used for different reasons.

Id. at 1109 (footnote omitted). Therefore, the Federal Circuit has found zeroing to be reasonable in at least some A-T situations. Plaintiff acknowledges these findings of the Federal Circuit in *Union Steel*, yet maintains that the case did not establish that Commerce was entitled to use zeroing whenever the A-T method is employed. *See* Pl.'s Reply Br. 14 (ECF Dkt. No. 50) ("Pl.'s Reply Br."). Rather, plaintiff maintains that "the proper focus of the inquiry into whether zeroing is appropriate should be the type of proceeding and purpose it serves as opposed to the sales comparison method being employed." Pl.'s Reply Br. 14. Put another way, for plaintiff, the *Union Steel* Court did not necessarily hold that zeroing could be used in A-T comparisons in targeted dumping investigations as well as in reviews.

The court cannot agree. As the court noted in *BTIC I*, "the Federal Circuit has 'repeatedly addressed zeroing and has held 19 U.S.C. § 1677(35)(A) ambiguous and deferred to Commerce's reasonable interpretation of that statute.'" *BTIC I*, 38 CIT at __ n.9, 7 F. Supp. 3d at 1337 n.9 (quoting *Union Steel*, 713 F.3d at 1104). Indeed, before the WTO intervened, the Federal Circuit found the use of zeroing lawful in both investigations and reviews. *See Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005).

In the Final Determination, Commerce provided the following explanation for its application of zeroing here:

> Our interpretation [that 19 U.S.C. § 1677(35)] permits zeroing in the [A-T] methodology, as in this investigation, and permits offsetting in the [A-A] methodology reasonably accounts for differences inherent in the distinct comparison methodologies.
>
> . . .
>
> . . . As such, we find that the petitioner is correct that the intent of [19 U.S.C. § 1677f-1(d)(1)] is not effectuated if offsets are used under the alternative [A-T] methodology. This is so because record evidence shows that for [Tianhai], the [A-A] methodology masks differences in the patterns of prices between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group.

Issues & Dec. Mem. at cmt. IV. This explanation comports with the Federal Circuit's holding in *Union Steel*. *See Union Steel*, 713 F.3d at 1107 ("Commerce's decision to modify its zeroing practice has previ-

ously been sustained by this court. In *U.S. Steel*, the court sustained Commerce's decision to cease zeroing when making average-to-average comparisons in antidumping duty investigations while recognizing Commerce intended to continue zeroing in other circumstances. The court relied upon the differences among various types of comparison methodologies, recognizing that 19 U.S.C. § 1677f-1(d)(1) allows Commerce to use average-totransaction comparisons in investigations where certain patterns of significant price differences exist." (citing *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1355 n.2, 1362–63 (Fed. Cir. 2010))). The Federal Circuit has observed that "[n]o rule of law precludes Commerce from interpreting 19 U.S.C. § 1677(35) differently in different circumstances as long as it provides an adequate explanation." *Id.* at 1110.

> In [A-A] comparisons, as used in investigations, Commerce examines average export prices; zeroing is not necessary because high prices offset low prices within each averaging group. When examining individual export transactions, using the [A-T] comparison methodology, prices are not averaged and zeroing reveals masked dumping. This ensures the amount of antidumping duties assessed better reflect the results of each [A-T] comparison.

Id. at 1109. This explanation also fits to the facts of this case.

Therefore, for the foregoing reasons, plaintiff's arguments regarding zeroing are unconvincing and the court finds that Commerce's application of zeroing was reasonable in this case.

C. Commerce's Application of the A-T Methodology Was Reasonable Despite the Small Number of Tianhai's Targeted Sales

Last, Tianhai asks the court to consider the issue of "whether it was reasonable for Commerce to apply its targeted dumping remedy to 100%[14] of [Tianhai's] reported sales database when only 5.04% of [Tianhai's] sales were identified as being targeted." *See* Comments on Final Remand Redetermination 2 (ECF Dkt. No. 87); Pl.'s Br. 18–26. Specifically, plaintiff argues that the Department should have considered whether the number of dumped sales was too small to justify application of the targeted dumping margin to all of its sales. Accord-

[14] As to whether Commerce was justified in applying the targeted dumping remedy to *all* of Tianhai's sales, rather than only to its "dumped" sales, this was also addressed, in part, in *BTIC I*. There, the court found that, even if Commerce erred in withdrawing a regulation that limited the application of the A-T method to targeted sales, "that error [was] harmless as it applies to plaintiff, and the Department is not bound by the withdrawn regulation here." *BTIC I*, 38 CIT at __, 7 F. Supp. 3d at 1333.

ing to plaintiff, "[i]t is illogical and arbitrary for Commerce to attempt to satisfy the statutory requirements for use of the targeted dumping exception by reference to a small subset of [Tianhai's] sales data and then claim that it is justified in applying the targeted dumping methodology to 100% of [Tianhai's] sales database." Pl.'s Reply Br. 6. For plaintiff, because "only . . . 10 transactions . . . passed both prongs of Commerce's targeted dumping test, and these transactions comprise only 5.04% of [Tianhai's] sales database by quantity (of which only three transaction[s] comprising just 1.23% of the database were sales below fair value)," it was unreasonable for Commerce to apply its targeted dumping remedy to all of Tianhai's reported sales. *See* Pl.'s Reply Br. 6.

The *Chevron* line of cases provides guidance to courts when a statute is silent or ambiguous. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). "[A]gencies are entitled to formulate policy and make rules 'to fill any gap left, implicitly or explicitly, by Congress.'" *SKF USA Inc. v. United States*, 254 F.3d 1022, 1030 (Fed. Cir. 2001) (quoting *Chevron*, 467 U.S. at 843). Relying on these cases, and because of the gap in the targeted dumping provision left by Congress, this Court has held that the Department's policies filling that gap are entitled to deference so long as they are reasonable. *See Timken Co. v. United States*, 38 CIT __, __ n.7, 968 F. Supp. 2d 1279, 1286 n.7 (2014), *aff'd*, 589 F. App'x 995 (Fed. Cir. 2015).

Here, although plaintiff's "fairness" argument may have some surface appeal, it cannot be said that Commerce's determination was unreasonable. Both the statute and the legislative history of 19 U.S.C. § 1677f-1 are "silent as to the body of sales to which Commerce will apply the exception methodology." *Chang Chun Petrochemical Co. v. United States*, 37 CIT __, __, 906 F. Supp. 2d 1369, 1375 (2013). That is, the statute gives no indication as to whether the margin determined by the exception A-T methodology should be applied to all of a respondent's subject merchandise following an investigation, or only to part. *See* 19 U.S.C. § 1677f1(d)(1)(B). With respect to margins determined by the other methodologies in investigations where a producer or exporter is found to have dumped subject merchandise, the degree of dumping found in the dumping margin becomes the antidumping duty rate, which in turn becomes the cash deposit rate for all of the merchandise entered during the period of investigation. *See* 19 C.F.R. § 351.212. At no point in § 1677f-1(d)(1)(B) is there any indication that, unlike margins determined by these other methodologies, a margin determined by A-T should be restricted only to the merchandise entered during the time period of targeted dumping.

Therefore, because the statute is silent as to whether a margin determined by the A-T methodology should be employed in a manner different from one determined in accordance with § 1677f-1(d)(1)(A), there is nothing to indicate that it is unreasonable to apply the resulting margin to all of defendant's sales.

Because Commerce is entitled to deference with respect to its interpretation of how broadly the margin will be applied, the Department may apply the rate to all of plaintiff's sales if it is reasonable to do so. *See Chevron*, 467 U.S. at 843–44. Plaintiff cites to nothing in the statute indicating that Congress intended a different result when the A-T methodology is used to determine a dumping margin, rather than when A-A or T-T comparisons are used; that is, that the resulting margin should be applied to all sales. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979). Accordingly, plaintiff has not shown that the application of the resulting rate to all of its sales was unreasonable. *See Chevron*, 467 U.S. at 843–44. It is worth noting, however, that if Commerce chose to do so, it might well be able to provide a reasonable justification for applying margins resulting from the use of the A-T methodology to only a portion of a respondent's sales following an investigation.

Thus, although it remains to be seen if Commerce can provide an adequate explanation for using the A-T methodology in this case, should it do so, its authority to apply the resulting margin to all of plaintiff's sales is not in doubt.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that Commerce's Final Results of Redetermination are remanded; it is further

ORDERED that, on remand, Commerce shall issue a redetermination that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

ORDERED that, on remand, should the Department continue to find the application of the A-T methodology to be appropriate, it must provide an adequate explanation, in accordance with 19 U.S.C. § 1677f-1(d)(1)(B)(ii), as to why the general methodologies (i.e., the A-A and T-T methodologies) cannot account for the pattern identified under § 1677f-1(d)(1)(B)(i); it is further

ORDERED that the Department may, in its discretion, reopen the record to solicit any additional information it deems necessary to make its determinations; and it is further

ORDERED that the remand results shall be due on December 14, 2015; comments to the remand results shall be due thirty (30) days following filing of the remand results; and replies to such comments shall be due fifteen (15) days following filing of the comments.

Dated: October 14, 2015
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 15–115

CÁMARA NACIONAL DE LAS INDUSTRIAS AZUCARERA Y ALCOHOLERA, Plaintiff, AMERICAN SUGAR COALITION, Plaintiff-Intervenor, v. UNITED STATES, Defendant, IMPERIAL SUGAR COMPANY, Defendant-Intervenor.

Before: Mark A. Barnett, Judge
Court No. 15–00123

[The court finds that Plaintiff failed to establish constitutional standing. Accordingly, the court grants Defendant's motion to dismiss.]

Dated: October 16, 2015

Philippe M. Bruno, *Irwin P. Altschuler*, and *Rosa S. Jeong*, Greenberg Traurig, LLP, of Washington, D.C., for Plaintiff Cámara Nacional de las Industrias Azucarera y Alcoholera.

Karl S. von Schrilt z and *Courtney S. McNamara*, Attorney-Advisors, Office of General Counsel, U.S. International Trade Commission, of Washington, D.C., for Defendant United States. With them on the briefs was *Andrea C. Casson*, Assistant General Counsel for Litigation.

OPINION

Barnett, Judge:

Before the court is Defendant United States' ("Defendant") Motion to Dismiss pursuant to United States Court of International Trade ("CIT") Rule 12(b)(1). *See* Def.'s Mot. to Dismiss ("MTD"), ECF No. 26. Plaintiff Cámara Nacional de las Industrias Azucarera y Alcoholera ("Plaintiff" or "Mexican Sugar Chamber") opposes the motion. *See* Pl.'s Opp'n to Mot. to Dismiss ("Pl.'s Opp'n"), ECF No. 32.[1] Plaintiff brings this action for judicial review of the United States International Trade Commission's ("ITC" or "Commission") decision that domestic sugar producers Imperial Sugar Company ("Imperial") and

[1] Plaintiff-Intervenor American Sugar Coalition (ECF No. 25) and Defendant-Intervenor Imperial Sugar Company (ECF No. 17) did not submit any briefs in this motion.

AmCane Sugar LLC ("AmCane") had standing to request review of suspension agreements pursuant to 19 U.S.C. §§ 1671c(h), 1673c(h). *See generally* Compl., ECF No. 9. Defendant moves to dismiss the Complaint, arguing that "the Court must dismiss the action for lack of jurisdiction" because Plaintiff failed to "identify or allege any injury-in-fact that a favorable decision from this Court could redress." MTD at 6.

BACKGROUND AND PROCEDURAL HISTORY

The Mexican Sugar Chamber is an association with a majority of its members consisting of Mexican sugar producers. *See* Compl. ¶ 3. The Mexican Sugar Chamber was a party to the ITC proceeding, which is the subject of this action. *See generally* Compl. On April 17, 2014, the United States Department of Commerce ("Commerce") initiated antidumping and countervailing duty ("AD" and "CVD," respectively) investigations of sugar imported from Mexico. *See Sugar from Mexico*, 79 Fed. Reg. 22,795 (Dep't of Commerce Apr. 24, 2014) (initiation of antidumping duty investigation); *Sugar from Mexico,* 79 Fed. Reg. 22,790 (Dep't of Commerce Apr. 24, 2014) (initiation of countervailing duty investigation).

On May 12, 2014, the ITC found a "reasonable indication" of material injury to the sugar industry in the United States by reason of subject imports. *See Sugar from Mexico*, 79 Fed. Reg. 28,550 (USITC May 16, 2014). Commerce issued an affirmative preliminary determination in the CVD investigation on August 25, 2014. *See Sugar from Mexico,* 79 Fed. Reg. 51,956 (Dep't of Commerce Sept. 2, 2014) (preliminary affirmative countervailing determination and alignment of final countervailing duty determination with final antidumping duty determination). Commerce also issued an affirmative preliminary determination in the AD investigation on October 24, 2014. *See Sugar from Mexico*, 79 Fed. Reg. 65,189 (Dep't of Commerce Nov. 3, 2014) (preliminary determination of sales at less-than-fair-value and postponement of final determination).

Shortly thereafter, on October 27, 2014, the United States, the Mexican government, and the Mexican sugar industry initialed proposed agreements suspending the AD and CVD investigations. *See* Compl. ¶ 9. Commerce then invited interested parties to comment on the proposed agreements. *See id*. ¶ 10. Imperial and AmCane entered appearances before Commerce and submitted comments. *See id*.The final Suspension Agreements were signed on December 19, 2014, and Commerce suspended the AD and CVD investigations accordingly.

See id. ¶ 11. Before entering appearances to comment on the proposed suspension agreements, Imperial and AmCane submitted responses to the Commission's questionnaires but did not otherwise participate "actively" in the Commission's investigations. *Id.*¶ 12. Imperial first entered an appearance on December 9, 2014, during the final phase of the ITC's investigations, and AmCane first entered an appearance on January 2, 2015, during the final phase of the ITC's investigations and after the signing of the suspension agreements. *See id.*

On January 8, 2015, Imperial and AmCane petitioned the ITC to review the suspension agreements pursuant to 19 U.S.C. §§ 1671c(h) and 1673c(h). *See id*. ¶ 13. The ITC subsequently initiated the requested review. *Id*. The notice of institution stated that the ITC determined that Imperial and AmCane were "interested parties who were parties to the underlying investigations at the time the petitions were filed, and consequently are appropriate petitioning parties." *Id*. ¶ 14. The Mexican Sugar Chamber participated in the reviews and opposed Imperial and AmCane's petitions, arguing that the suspension agreements eliminated the injurious effect of subject imports and should remain in place. *See Sugar from Mexico*, Inv. Nos. 704-TA-1, 734TA-1 (Review), USITC Pub. 4523 at 5 (Apr. 2015), A.R. 148, ECF No. 31; 80 Fed. Reg. 16426 (Mar. 27, 2015).

The Mexican Sugar Chamber challenged Imperial and AmCane's standing to petition the ITC for the review of the suspension agreements via a letter dated January 13, 2015. *See* Views of the Commission ("Views") at 4–5 n.13, A.R. 148, ECF No. 31. Specifically, the Mexican Sugar Chamber requested that the Commission reject the petitions for review because neither Imperial nor AmCane qualified as "an interested party which is a party to the investigation" pursuant to 19 U.S.C. §§ 1671c(h) and 1673c(h). *Id.* The ITC "rejected these arguments" and affirmed that Imperial and AmCane were proper petitioning parties because they were interested parties and parties to the investigations pursuant to 19 U.S.C. §§ 1671c(h) and 1673c(h). *See id*. The ITC agreed with the Mexican Sugar Chamber's position, however, on the effect of the suspension agreements, finding that the agreements "eliminate completely the injurious effect of subject imports." *Sugar from Mexico*, USITC Pub. 4523 at 1. Accordingly, the suspension agreements remained in effect.

Thereafter, Imperial and AmCane independently filed summonses with this court, challenging the ITC's injurious effects determination regarding the suspension agreements. *See Imperial Sugar Co. v. United States*, Court No. 15–00118, *AmCane Sugar LLC v. United States*, Court No. 15–00122. The Mexican Sugar Chamber intervened as of right as a defendant-intervenor in both actions. *See* Court No.

1500118, ECF Nos. 12, 13; *see also* Court No. 15–00122, ECF Nos. 12,13.

On April 27, 2015, the Mexican Sugar Chamber filed this action (ECF No. 1, Summons) and filed its complaint on May 26, 2015 (ECF No. 9). The Mexican Sugar Chamber subsequently sought the consent of Imperial, AmCane, and the ITC to consolidate its case with *Imperial Sugar Company*, Court Number 15–00118, and *AmCane Sugar LLC*, Court Number 15–00122, under the lead caption *Imperial Sugar Co. v. United States*. *See generally* Mot. Consol., ECF No. 12. Imperial and AmCane gave their consent, but the ITC opposed consolidation. *See* Mot. Consol. at 2. The court consolidated Imperial and AmCane's actions on June 19, 2015, but held in abeyance a ruling on consolidation of this case, pending resolution of the Commission's motion to dismiss. *See* Consol. Order, ECF No. 28.

The Mexican Sugar Chamber's Complaint challenges the ITC's determination that Imperial and AmCane have standing to request a review of agreements suspending AD and CVD investigations pursuant to 19 U.S.C. §§ 1671c(h) and 1673c(h). *See* Compl. ¶¶ 18–19. Specifically, the Mexican Sugar Chamber contends that the determination was unsupported by substantial evidence and otherwise not in accordance with law because, it alleges, Imperial and AmCane were not "parties to the investigations" and thus were not "proper petitioning parties" within the meaning of those statutory sections. *Id*.

Defendant moves to dismiss for lack of subject-matter jurisdiction, pursuant to CIT Rule 12(b)(1). *See* MTD at 1. The Commission contends that the Mexican Sugar Chamber failed to demonstrate any injury-in-fact sufficient to establish constitutional standing to bring this claim. *See id*. at 5–7. The Commission avers that, because the Mexican Sugar Chamber prevailed on the merits of the review of the suspension agreements, the subsidiary finding that Imperial and AmCane had standing to petition for the review is insufficient to provide the injury-in-fact necessary to establish standing. *See id*. at 7–8.

STANDARD OF REVIEW

To adjudicate a case, a court must have subject-matter jurisdiction over the claims presented. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). "[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

A plaintiff bears the burden of establishing subject-matter jurisdiction. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). When subject-matter jurisdiction is challenged at the motion to dismiss stage, courts must presume that the factual allegations in the complaint are true and make reasonable inferences in the plaintiff's favor. *See Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988). The allegations, however, "must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The showing must include "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

DISCUSSION

"The Constitution 'limits the judicial power of the United States to the resolution of 'Cases' and 'Controversies.'" *Hein v. Freedom Religion Found., Inc.*, 551 U.S. 587, 597 (2007) (quoting U.S. CONST. art. III, § 2, cl. 1). A key component of a case or controversy is standing. *See* U.S. CONST. art. III, § 2, cl. 1; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."). As the Supreme Court explained, "the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560–61 (citations omitted). In addition, the plaintiff must demonstrate that the injury is "fairly traceable to the challenged action" and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (quotation marks and brackets omitted).

The Court of Appeals for the Federal Circuit ("Federal Circuit") has noted, "[a]s a general rule, the prevailing party in a proceeding may not appeal the proceeding just because he disagrees with some of the findings or reasoning." *Freeport Minerals Co. v. United States*, 758 F.2d 629, 634 (Fed. Cir. 1985). The parties in *Freeport* disputed what constitutes a reviewable determination by an aggrieved party. In that case, domestic producer Freeport challenged a court affirmed remand determination because "it wasn't until [Commerce's] 1983 [remand] notice [("1983 notice")] revoking the order [as to Chevron] that Freeport believed it was aggrieved." *Id.* at 633.

In contrast, Commerce and defendant intervenor, Chevron, countered that Freeport's action was untimely because Freeport should have challenged the original determination in 1982 [("1982 notice")], despite the fact that the order remained in place as to Chevron, and Freeport, therefore, was not aggrieved. *See id*. According to Commerce and Chevron, the 1982 notice "constituted the final administrative review of the antidumping finding for the period under review." *Id*.

The CIT had agreed with Commerce and Chevron and dismissed Freeport's case as untimely. *See Freeport Minerals Co. v. United States*, 7 CIT 65, 583 F. Supp. 586 (1984). On appeal, the Federal Circuit reversed on the grounds that "since the end result of the [original] notice was favorable to Freeport, there was no point in its challenging [Commerce] then" and stated that "under the [CIT's] remand, [Commerce] made a new determination under section 1675 based on the same finding." *Freeport Minerals*, 758 F.2d at 634. The appellate court viewed "the publication of the 1983 [remand] notice as a publication of that determination as required under section 1675(a)." *Id*. The Federal Circuit further found that the other two issues in Freeport— the doctrines of collateral estoppel and laches— "[founder] on the same rock of confusion" as the standing issue raised by Commerce and Chevron. *Id*. at 636. Thus, these doctrines did not bar Freeport from challenging the 1983 notice. *See id.*

Based upon *Freeport* and its progeny, this court has repeatedly held that a party lacks standing to challenge a subsidiary finding in an administrative determination in which it prevailed on the merits. *See, e.g.*, *Zhanjiang Guolian Aquatic Prods. Co. v. United States*, 38 CIT __, 991 F. Supp. 2d 1339 (2014); *Royal Thai Gov't v. United States*, 38 CIT at __, 978 F. Supp. 2d 1330 (2014); *Rose Bearings Ltd. v. United States*, 14 CIT 801, 751 F. Supp. 1545 (1990). Consequently, "[i]t is well-settled in this court that when a [party] challenges an administrative proceeding in which it has prevailed there is no case or controversy, and thus no jurisdiction lies." *Zhanjiang Guolian*, 991 F. Supp. 2d at 1342 (internal quotations and citations omitted).

Notwithstanding this court's well-settled law, the Mexican Sugar Chamber asserts that it may nonetheless seek recourse on the original determination and either cannot or should not wait for any possible remand determination reversing the ITC's original determination. Plaintiff argues that the ITC's determination as to Imperial and AmCane's standing is the type "from which legal consequences flow, having a substantial impact on the rights of the parties," as required for Article III standing. Pl.'s Opp'n at 6–7 (citing *Internor Trade, Inc. v. United States*, 10 CIT 826, 830, 651 F. Supp. 1456, 1460 (1986)).

The Mexican Sugar Chamber contends that, in *Internor*, the CIT held that a plaintiff had a stake in the outcome of an action to review an affirmative less-than-fair-value determination by Commerce, although no antidumping duty order was issued, due to a negative injury determination by the ITC. *See* Pl.'s Opp'n at 6–7 (citation omitted). The Mexican Sugar Chamber urges that it is similar to the *Internor* plaintiff in that a dumping finding by Commerce would be to its detriment if a future investigation resulted in an adverse determination. *See* Pl.'s Opp'n at 7 (citation omitted). The Mexican Sugar Chamber thus analogizes its appeal of the ITC's standing determination as akin to "a protective cross-appeal filed by a defendant that has prevailed on the issue of damages but has lost on liability." *Id*. (citing *Internor*, 10 CIT at 830, 651 F. Supp. at 1460).

The court's decision in *Internor* is readily distinguishable, however. First, in *Internor*, the plaintiff's right to appeal Commerce's affirmative less-than-fair-value determination, despite a separate negative injury determination by the ITC, was expressly provided for by statute.[2] *See Internor*, 10 CIT at 828–29, 651 F. Supp. at 1458–59 (citation omitted). There is no similar statutory right to appeal a subsidiary standing determination by the ITC within a broader decision otherwise favorable to plaintiff. Further, the remaining challenges to the plaintiff's cause of action in *Internor* related to whether legal consequences flowed from the agency decision, which is the test for assessing whether a case is ripe for review. As the *Internor* court explained,

> [t]he purpose of the ripeness doctrine is to prevent courts through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative poli-

[2] As the *Internor* court stated,

> Section 1516a(a)(2) of Title 19, U.S.C. has provided for commencement of actions in this Court of International Trade within 30 days of publication in the Federal Register of antidumping-duty orders to review final affirmative ITA determinations underlying such orders. In 1984, Congress enacted the Trade and Tariff Act, section 623 of which was entitled "Elimination of Interlocutory Appeals." Subparagraph (a)(4) of this section stated:
>
> > Redesignate paragraph (3) [of 19 U.S.C. § 1516a(a) (1979)] as paragraph (4) and after paragraph (2) insert the following:
> >
> > (3) EXCEPTION.—Notwithstanding the limitation imposed by paragraph (2)(A)(ii) of this subsection, a final affirmative determination by the administering authority under section 705 or 735 of this Act may be contested by commencing an action, in accordance with the provisions of paragraph (2)(A), within thirty days after the date of publication in the Federal Register of a final negative determination by the Commission under section 705 or 735 of this Act.

10 CIT at 828–29, 651 F. Supp. at 1458–59. The court concluded that it must permit the claim to proceed because "[t]he text of the provision at issue is not ambiguous, and this court is not at liberty to interpret that language as if it were otherwise." *Id.* (citations omitted).

> cies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

10 CIT at 830, 651 F. Supp. at 1460 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967) (internal quotations omitted)). Here, the parties do not dispute that the agency decision is final, and thus there is no question as to ripeness. The pertinent question before this court is whether the Mexican Sugar Chamber has suffered an injury given that it prevailed on the merits of the underlying review. The court discerns no basis in the *Internor* decision to depart from the significant precedent that holds a party cannot establish injury-in-fact under such circumstances.

Plaintiff contends, however, that it suffered an injury-in-fact because of the "uncertainty" surrounding the validity of the suspension agreements created by the review and pending appeal. Pl.'s Opp'n at 7–8. Such uncertainty does not establish injury-in-fact for standing purposes. Injury-in-fact requires a showing of "actual and imminent" harm. *Lujan*, 504 U.S. at 560–61; *see also Zhanjiang Guolian*, 991 F. Supp. 2d at 1342 ("the fact that no CVD order has been issued means that Plaintiff is not suffering any injury due to the errors it alleges the ITC committed"). The Mexican Sugar Chamber's Complaint fails to allege that it is currently suffering any harm and cannot make an imminent harm allegation in good faith because the suspension agreements remain in effect. *See Royal Thai*, 978 F. Supp. 2d at 1333 (dismissing case where plaintiff "is currently not suffering any actual or imminent injury in fact"). Moreover, this court has rejected the contention that the existence of an appeal establishes an injury-in-fact because it requires the court to adjudicate a hypothetical negative outcome.[3] The court therefore concludes that the Mexican Sugar Chamber has not established an injury-in-fact for Article III standing purposes.

Finally, the Mexican Sugar Chamber appeals to the court's notions of fairness. It urges that it may have no opportunity to be heard on the standing issue if the court does not hear the issue now. It contends that it may not be able to raise the issue on remand, should Imperial and AmCane prevail in their appeals, because the issue will be out-

[3] The court will not speculate about future administrative reversals. *See Zhanjiang Guolian,* 991 F. Supp. 2d at 1342 ("Speculation of an administrative reversal is hypothetical, and hypothetical harm cannot provide jurisdiction."); *see also Rose Bearings*, 14 CIT at 802–03, 751 F. Supp. at 1546 ("Rose's not-so-rosy scenario, that the court *may* remand the case and that the ITA *may* reverse its finding as to spherical plain bearings, is precisely the type of situation which calls for an advisory opinion, and the court is barred explicitly from issuing such a ruling.").

side the scope of the remand order. In addition, the Mexican Sugar Chamber argues that it may be unable to raise its claim about Imperial and AmCane's standing in the parallel proceedings because a cross-claim will be subject to the same constitutional standing requirements as its claim in this action. Moreover, it notes that such a cross-claim may be untimely at this stage of the litigation.

These arguments do not change the fundamental problem that the Mexican Sugar Chamber has failed to demonstrate an injury-in-fact sufficient for standing. Case law is unequivocal that a plaintiff may not challenge subsidiary determinations where it has prevailed in the overall proceeding, and, as discussed above, *Freeport* makes it clear that, should the parallel proceeding result in a remand determination adverse to the Mexican Sugar Chamber, it would then have the opportunity to obtain judicial review of this claim, assuming that it meets any relevant procedural requirements. Because it has suffered no injury, the Mexican Sugar Chamber lacks standing to pursue this action. Therefore, the court lacks jurisdiction, and accordingly, grants Defendant's motion to dismiss.

CONCLUSION

For the foregoing reasons, the court grants Defendant's motion to dismiss (ECF No. 26) and denies the Mexican Sugar Chamber's motion to consolidate as moot (ECF No. 12). Judgment will follow.

Dated: October 16, 2015
New York, New York

/*s*/ *Mark A. Barnett*
MARK A. BARNETT, JUDGE

Slip Op. 15–116

DIAMOND SAWBLADES MANUFACTURERS COALITION, Plaintiff, v. UNITED STATES, Defendant, and BEIJING GANG YAN DIAMOND PRODUCTS COMPANY, GANG YAN DIAMOND PRODUCTS, INC., CLIFF INTERNATIONAL LTD., HUSQVARNA CONSTRUCTION PRODUCTS NORTH AMERICA, INC., HEBEI HUSQVARNA-JIKAI DIAMOND TOOLS CO., LTD., WEIHAI XIANGGUANG MECHANICAL INDUSTRIAL CO., LTD., BOSUN TOOLS CO., LTD., AND BOSUN TOOLS INC., DEFENDANT-INTERVENORS.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00241

[Sustaining second administrative review of antidumping duty order on diamond sawblades and parts thereof from the People's Republic of China.]

Dated: October 21, 2015

Daniel B. Pickard and *Maureen E. Thorson*, Wiley, Rein & Fielding, LLP, of Washington, DC, for plaintiff.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White*, *Jr.*, Assistant Director. Of Counsel on the brief was *Aman Kakar*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Jeffrey S. Neeley and *Michael S. Holton*, Hush Blackwell, LLP, of Washington, DC, for defendant-intervenors Beijing Gang Yan Diamond Products Company, Gang Yan Diamond Products, Inc., and Cliff International Ltd.

John D. Greenwald, *Robert C. Cassidy*, *Jr.*, and *Thomas M. Beline,* Cassidy Levy Kent (USA) LLP, of Washington, DC, for defendant-intervenors Husqvarna Construction Products North America and Hebei Husqvarna-Jikai Diamond Tools Co., Ltd.

Max F. Shutzman, *Bruce M. Nitchell*, *Dharmendra N. Choudhary*, and *Kavita Mohan*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, of Washington, DC, for defendant-intervenor Weihai Xiangguang Mechanical Industrial Co., Ltd.

Gregory S. Menegaz and *J. Kevin Horgan*, deKeiffer & Horgan, of Washington, DC, for defendant-intervenors Bosun Tools, Co., Ltd. and Bosun Tools Inc.

OPINION

Musgrave, Senior Judge:

The prior opinion on this matter remanded the plaintiff's challenge to the second administrative review of *Diamond Sawblades from the People's Republic of China* ("PRC) covering the 2010–2011 period.[1] *See* 38 CIT ___, Slip Op. 14–112 (Sep. 23, 2014). The final results of remand ("*Final Remand Redetermination*" or "RR"), dated May 18, 2015, from the defendant International Trade Administration, U.S. Department of Commerce ("Commerce") are now before the court, and the issues have been reduced to (1) the appropriateness of the country-wide rate of antidumping duty (reduced to 82.12% via remand) on subject merchandise, and (2) the administrative decision not to analyze the petitioners' targeted dumping allegation against one of the respondents, as restated on remand.

By way of brief background, the matter was remanded in part, at Commerce's request, for reconsideration of the determination to grant a separate rate to the "ATM entity,"[2] an issue on which the court also requested evaluation of whether the China Iron and Steel

[1] *Diamond Sawblades and Parts Thereof From the PRC*, 78 Fed. Reg. 36166 (Jun. 17, 2013) ("*AR 2 Final*"), PDoc 471, *amended* 78 Fed. Reg. 42930 (Jul. 18, 2013) ("*Amended AR2 Final*"), PDoc 487, and accompanying issues and decision memorandum ("*IDM*") (July 11, 2014), PDoc 455.

[2] The "ATM entity" is a "collapsed" respondent in the underlying administrative review including the defendant-intervenors Beijing Gang Yan Diamond Products Co. and Gang Yan Diamond Products, Inc. (hereinafter "ATM"). *See* 19 C.F.R. §351.401(f). For purposes of the administrative review, the ATM entity was determined to consist of the three affiliates in the underlying investigation: ATM, Advanced Technology & Materials Co., Ltd., and

Research Institute ("CISRI") should be considered part of the collapsed ATM entity. Additionally, the matter was remanded for explanation of the methodology for valuing the steel sawblade cores of defendant-intervenor Weihai Xiangguang Mechanical Industrial Co., Ltd. ("Weihai"). The third issue remanded concerned the plaintiff Diamond Sawblades Manufacturers' Coalition's ("DSMC") challenge to Commerce's rejection of their allegation that Weihai had engaged in "targeted dumping." The DSMC's argument was that the agency had failed to explain why the allegation was untimely filed given the absence of any statutory, regulatory, or other deadlines requiring that such arguments be presented prior to the case briefs. *See* Pl.'s 56.2 Mot. at 34–38. The matter was remanded, however, for threshold explanation of the authority for requiring a targeted dumping allegation as a prerequisite to determining "if . . . there is a pattern" of export prices or constructed export prices that differ significantly among purchasers, regions, or periods of time. Slip Op. 14 112. *See* 19 U.S.C. §1677f-1(d)(1)(B); *see also I&D Memo* at 14–15.

The papers here persuade that sustaining the results of remand is appropriate.

Discussion

Regarding the agency's redetermination on remand, on the record presented, of the ATM entity's non-entitlement to a separate rate, and consistent with such redetermination in *Advanced Technology & Materials Co. v. United States*, Court No. 09–00511 ("*Advanced Tech*"), *remand results sustained*, 37 CIT ___, 938 F. Supp. 2d 1342 (2013), *aff'd*, 581 Fed. Appx. 900 (Fed. Cir. 2014), Commerce found that the ATM entity failed to rebut the presumption of state control and demonstrate entitlement to a separate rate; therefore, Commerce also found that the issue of whether CISRI should also be collapsed is moot. ATM does not contest the redetermination of ineligibility for a separate rate, but instead focuses on the PRC-wide rate to which the ATM entity is subject. That subject was considered in the recent opinion concerning the prior (first) administrative review. *Diamond Sawblades Manufacturers Coalition v. United States*, 39 CIT ___, Slip Op. 15–105 (Sep. 23, 2015). Perceiving no reason to depart therefrom, the court defers to that opinion and hereby sustains the determination that the ATM entity is subject to the PRC-wide antidumping duty

Yichang HXF Circular Saw Industrial Co., Ltd.), combined with the additional affiliates AT&M International Trading Co., Ltd., and Cliff International Ltd. RR at 1 n.1, referencing Memorandum *re Diamond Sawblades and Parts Thereof from the PRC: Determination to Include Additional Companies in the ATM Single Entity* (Nov. 30, 2011), CDoc 103, PDoc 118; *see also IDM* at 2.

rate. Further, regarding the readjustment of the PRC-wide rate, the parties' arguments thereon appear to be identical in substance to those considered in that opinion, *see id.*, to which the court will also, therefore, defer. Incorporating the reasoning thereof herein, the readjustment of the PRC-wide rate is hereby sustained.

Regarding the valuation of Weihai's steel cores, Commerce on remand explained that the build-up multiplier methodology used in the final remand results "follows more closely . . . the statutory guidance to use surrogate data from market economy countries at a level of economic development comparable to that of the [non-market economy ("NME")] country to value [factors of production] in an NME antidumping proceeding" and results in "greater accuracy in the margin calculations" than the methodology used in the original results of *AR2 Final*. RR at 15–16. Although the DSMC raised several concerns regarding Commerce's explanation, they do not contest the results of remand with respect to this issue. *See* DSMC Cmts. at 3 n.3. Commerce calculated a margin of zero percent for Weihai, and based on that margin assigned a zero margin rate to the separate rate respondents. RR at 42. The validity of that determination is dependant upon the discussion of the following issue.

Regarding Commerce's rejection of the DSMC's argument that Weihai had engaged in targeted dumping[3] during the period of review, the matter was remanded for explanation of the non-ministerial discretion not to determine whether a record evinces targeted dumping. *See* Slip Op. 14–112 at 7–8. The remand results explain that the targeted dumping provision applies by its express terms to investigations, that Commerce determined, pursuant to the *Final Modification*, to apply the "alternative comparison method" of that provision perforce to administrative reviews, that its practice has consistently required a timely-filed allegation by the petitioner, and that at the time of the underlying review an allegation of targeted dumping had to be made at a reasonable time prior to the issuance of the prelimi-

[3] "Targeted dumping" means "a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time" as compared with normal values. 19 U.S.C. §1677f-1(d)(1)(B). Prior to 2012, for administrative reviews, Commerce compared U.S. prices and normal values by comparing monthly average-totransaction ("A-T") data. As such, targeted dumping, which a comparison of average-to-average ("A-A") monthly data potentially masks, was not a methodological problem. Early in 2012, however, Commerce announced that the default methodology for calculating dumping margins in administrative reviews would be based on A-A monthly data, and that it would resort to alternative methodology "when deemed appropriate in a particular case" (*e.g.*, A-T in a case of targeted dumping). *See generally Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*, 77 Fed. Reg. 8101, 8103–07 (Feb. 14, 2012) (final rule; final modification) ("*Final Modification*").

nary determination "so we could allow parties an opportunity to evaluate the allegation and provide comments on the results of the targeted dumping analysis." RR at 11. *See also* Weihai Cmts at 3–5; Husqvarna Cmts at 5–11.

The DSMC briefly argue that Commerce's explanation is not responsive to the court's request for explanation of the agency's treatment of the targeted dumping statute. Although the court still has concerns regarding Congress' intent as expressed in the targeted dumping statute,[4] further argument thereon has not been advanced, and the court will therefore focus on the remaining arguments on the record.

Generally speaking, the DSMC contend that in most of the limited number of reviews subject to the *Final Modification* that have involved targeted dumping allegations, the allegations pre-dated the preliminary results of the reviews and the agency postponed consideration of the allegations until the final phase. *See*, *e.g.*, *Certain Pasta from Turkey*, 77 Fed. Reg. 46694 (Aug. 6, 2012) (prelim. results of the 2010–2011 antidumping duty admin. rev.); *Polyethylene Terephthalate Film, Sheet, and Strip From India*, 77 Fed. Reg. 46687 (Aug. 6, 2012) (prelim. results of antidumpingduty admin. rev.). The DSMC acknowledge that such cases do not, by themselves, shed any light on the amount of time realistically required to analyze a targeted dump-

[4] In particular, while the terms of the targeted dumping provision apply to investigations, the fact that Commerce interprets those terms as providing "guidance" does not mean those terms are ambiguous; further, while parties bear a burden of creating an adequate record, Commerce still has a duty to correctly interpret that record. Defendant-intervenors Husqvarna Construction Products North America and Hebei Husqvarna-Jikai Diamond Tools Co., Ltd. ("Husqvarna") point out that Commerce's targeted dumping practice is not the only instance where the statute governing the analysis does not use "allege" or some derivation thereof: Commerce's interpretation of the salesbelow-cost provision, 19 U.S.C. § 1677b(b), requires parties to timely file an allegation that there are home market sales at prices below the producer's cost of production, and Commerce's interpretation of the major input rule, 19 U.S.C. §1677b(f)(3), requires an allegation that major inputs into the production process are purchased at prices below an affiliate's cost of production. "These allegations are required even though the statutory provisions impose a duty upon Commerce to disregard home market sales or disregard purchase prices of inputs into the cost of production if the statutory requirements are satisfied. Where the statute does not expressly preclude Commerce from requiring an allegation, Commerce's interpretation and practice requiring an allegation cannot be invalidated under *Chevron* step one." Husqvarna Cmts. at 7. That does not, however, lead to the conclusion that the absence of an allegation relieves or precludes the agency from a duty to correctly interpret the record, which would seem to include determining "if . . . there is a pattern", an issue that does not concern the submission of new or separate factual matter. *Cf. JBF RAK LLC v. United States*, 790 F.3d 1358, 1365 (Fed. Cir. 2015) ("the facts that served as the basis" for the targeted dumping "claim already were on the record", quoting Commerce). For example, Commerce's requirement of an allegation of the "market viability" for a product pursuant to 19 C.F.R. §351.404(d) does not, apparently, compel reliance upon the alleged market in the absence of an allegation that the market is not viable. *See, e.g.*, *Preliminary Determination of Sales at Less Than Fair Value: Ball Bearings and Parts Thereof From Singapore*, 53 Fed. Reg. 45339 (Nov. 9, 1988).

ing allegation, but they argue the cases tend to show that the agency is inclined to use as much time as is available to it, as is its right. In particular, the DSMC point out, in an antidumping duty review of seamless refined copper pipe and tube from Mexico the petitioners filed their targeted dumping allegation just 12 days prior to the due date for the preliminary results. DSMC Cmts at 19 n.11, referencing issues and decision memorandum accompanying *Seamless Refined Copper Pipe and Tube From Mexico*, 77 Fed. Reg. 73422 (Dec. 10, 2012) (prelim. results of antidumping duty admin. rev.) at 2–3 ("*Seamless Tube Memo*"). The next day, the DSMC further point out, Commerce postponed the preliminary results by four months, and within that period of time Commerce solicited responses on the allegations from the respondents, received additional comments from the parties, and was able to fully analyze the targeted dumping allegations. *Id*. referencing, *inter alia*, *Seamless Tube Memo* at 2–3. The DSMC contend this suggests that a time period of approximately four months is sufficient to analyze a targeted dumping allegation and that, in anyevent, Commerce does not appear to have even enforced its own "deadline" concerning the submission of targeted dumping allegations.

However, in the final analysis the DSMC do not persuade that Commerce's rejection of their targeted dumping allegation as untimely should be deemed arbitrary, capricious, or abusive. The DSMC acknowledge notice of the *Final Modification*, which explicitly announced that Commerce would apply the new targeted dumping methodology in reviews in which "*preliminary* determinations" were not due for at least 60 days from the date of its publication of the *Final Modification*, 77 Fed. Reg. at 8101 (italics added), and the preliminary results of the review at bar were issued 10 months after the *Final Modification*'s publication. Although there were no established or articulated deadlines for the filing of targeted dumping allegations for administrative reviews, the DSMC were not, apparently, unaware of Commerce's apparent targeted dumping practice, in particular with respect to investigations, which requires an allegation thereof prior to the preliminary determination.

In addition, Weihai points out that the claim of targeted dumping was filed for the first time in the DSMC's administrative case brief on February 19, 2013, notwithstanding that the original Weihai sales database was of record since April 18, 2012, and Commerce's preliminary determination was issued December 3, 2012, or 78 days before the allegation was made. In contrast to that time frame, Commerce's explanation as to why it requires a targeted dumping allegation prior

to filing an administrative case brief on the preliminary results, *i.e.*, so as to provide interested parties an opportunity to comment on the results of a targeted dumping analysis, is not inherently unreasonable, and as Weihai and Husqvarna further argue, the timing of a targeted dumping allegation must be considered in light of the time remaining for completion of the review at the time of the allegation, not in hindsight. The fact that Weihai did in fact substantively respond to the allegation is unsurprising and of little moment: if Commerce had determined to accept and consider the allegation, Weihai would have run the risk of a failure to exhaust administrative remedies had it not done so. Lastly, although Commerce did conduct a further post-preliminary inquiry and analysis into another issue involving Weihai, for which Commerce solicited and obtained post-briefing comments by the parties, indications are that Commerce did so as a result of changing its core valuation calculation methodology after the preliminary determination, and appropriately solicited comments as a result. It is unclear whether the DSMC might have used the opportunity at that time, once it became clear that the final determination would be delayed, to request again that Commerce conduct a targeted dumping inquiry, but that question is now moot, and in any event the foregoing considerations do not persuade that the separate inquiry into the change in core valuation methodology, and the resultant delay in making a final determination, renders Commerce's rejection of the targeted dumping allegation arbitrary, capricious, or an abuse of discretion.

Conclusion

After considering the parties' arguments, Commerce's *Final Remand Redetermination* will be sustained and separate judgment to that effect entered in accordance with this opinion.

Dated: October 21, 2015
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 15–117

AMERICAN FIBER & FINISHING, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Donald C. Pogue, Senior Judge
Court No. 12–00138

[Defendant's motion for partial summary judgment denied; Plaintiff's cross-motion for partial summary judgment granted in part and denied in part]

Dated: October 21, 2015

Arthur K. Purcell, Sandler, Travis & Rosenberg, P.A., of New York, NY, for the Plaintiff.

Jason M. Kenner, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for the Defendant. Also on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Amy M. Rubin*, Assistant Director. Of counsel was *Beth Brotman*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

OPINION AND ORDER

Pogue, Senior Judge:

In this action, Plaintiff, American Fiber & Finishing, Inc. ("AFF"), challenges the denial of its protests made pursuant to § 514 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514 (2012),[1] and 19 C.F.R. § 174.11 (2012), by the Bureau of Customs and Border Protection ("CBP" or "Customs"). In those protests, and now before the court, Plaintiff claims that Customs incorrectly assessed the rate and amount of duties chargeable in liquidating[2] sixteen of Plaintiff's imports of cotton gauze fabric. Summons, ECF No. 1, at Form 1–3 (listing the sixteen entries); 2d Am. Compl., ECF No. 11–1, at ¶ 1. Plaintiff asserts that Customs violated 19 U.S.C. § 1625(c)(2) by making an interpretive ruling or decision modifying or revoking a previously accorded treatment of AFF's goods, reclassifying and rate-advancing them, without the statutorily required notice and comment. 2d Am. Compl., ECF No. 11–1, at ¶¶ 17–32. The court has jurisdiction over Plaintiff's claim pursuant to 28 U.S.C. § 1581(a).[3]

Defendant and Plaintiff now cross-move for partial summary judgment.[4] Because Plaintiff has alleged an appropriate interpretive ruling or decision within the meaning of 19 U.S.C. § 1625(c) and claim of treatment, as discussed below, Defendant's motion is denied, while Plaintiff's cross-motion is granted in part and denied in part.

BACKGROUND

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

[2] Liquidation is "the final computation or ascertainment of duties on entries for consumption or drawback entries." 19 C.F.R. § 159.1.

[3] 28 U.S.C. § 1581(a) provides that this Court "shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. §1515]."

[4] Def.'s Partial Mot. for Summ. J. or, in the Alt., for a Determination of the Date of Pl.'s Claim of Treatment, ECF No. 36 ("Def.'s Mot."); Pl.'s Partial Cross-Mot. for Summ. J., ECF No. 39 ("Pl.'s Mot.").

Plaintiff claims that it has, for some time, imported cotton gauze fabric under subheading 5803.00.10, Harmonized Tariff Schedule of the United States ("HTSUS"), a duty free provision.[5] 2d Am. Compl., ECF No. 11–1, at ¶¶ 9–13. Among these importations was an entry made on July 11, 2009. Following laboratory testing,[6] on January 14, 2010, Customs issued a CF-29 notice of action[7] to Plaintiff indicating that this entry and all such entries "scheduled to liquidate" should be reclassified under subheading 5208.21.4090, HTSUS,[8] at a duty rate of 10.2 percent *ad valorem*. Notice of Action (Jan. 14, 2010), *reproduced in* Pl.'s Br., ECF No. 39–1 at Ex. A ("Jan. 2010 Notice of Action"); 2d Am. Compl., ECF No. 11–1, at ¶ 14.[9] Subsequently, in September through November 2010, Customs issued a series of similar notices of action reclassifying and rate advancing a number of Plaintiff's entries that had been made between September 2009 and April 2010.[10]

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[5] 5803.00.10, HTSUS, covers "Gauze, other than narrow fabrics of heading 5806: Of cotton."

[6] *See* Laboratory Report, *reproduced in* Pl.'s Br. in Supp. of Partial Cross-Mot. for Summ. J. & in Opp'n to Def.'s Mot. for Summ. J., ECF No. 39–1 ("Pl.'s Br.") at Ex. B.

[7] A CF-29 notice of action is issued pursuant to 19 C.F.R.§ 152.2 (providing that "[i]f the port director believes that the entered rate or value of any merchandise is too low, or if he finds that the quantity imported exceeds the entered quantity, and the estimated aggregate of the increase in duties on that entry exceeds $15, he shall promptly notify the importer on Customs Form 29, specifying the nature of the difference on the notice").

[8] 5208.21.4090, HTSUS, covers "Woven fabrics of cotton, containing 85 percent or more by weight of cotton, weighing not more than 200 g/m2: Bleached: Plain weave, weighing not more than 100 g/m2: Of Numbers 43 to 68: Cheesecloth."

[9] Customs instructed Plaintiff to "provide to CBP a list of entries scheduled to liquidate under the 314 day liquidation cycle that were not entered as referenced above. Submit voluntary tenders where applicable." Jan. 2010 Notice of Action, ECF No. 39–1 at Ex. A.

[10] *See* Notice of Action (Sept. 29, 2010), *reproduced in* Pl.'s Br., ECF No. 39–1 at Ex. C, at 5 (following laboratory testing, reclassifying and rate advancing eight of Plaintiff's entries of "100 [percent] cotton leno weave gauze" from 5803.00.1000, HTSUS, duty-free to 5208.21.6090, HTSUS, 11.5 percent *ad valorem*); Notice of Action (Sept. 29, 2010), *reproduced in* Pl.'s Br., ECF No. 39–1 at Ex. C, at 6 (following lab report, rate advancing three of Plaintiff's entries of "100 [percent] cotton leno weave gauze roll" from 5803.00.1000, HTSUS, duty-free to 5208.21.6090, HTSUS, 11.5 percent *ad valorem*); Notice of Action (Oct. 1, 2010), *reproduced in* Pl.'s Br., ECF No. 39–1 at Ex. C, at 2 (reclassifying and rate advancing Plaintiff's entry of "leno weave gauze," "as well as any previous/subsequent entries invoiced with this commodity," as listed, to 5208.21.6090, HTSUS, at a duty rate of 11.5 percent *ad valorem*); Notice of Action (Oct. 4, 2010), *reproduced in* Pl.'s Br., ECF No. 39–1 at Ex. C, at 1 (rate advancing Plaintiff's entry, made on Sept. 4,2009, of "gauze in roll"); Notice of Action (Nov. 18, 2010), *reproduced in* Pl.'s Br., ECF No. 39–1 at Ex. C, at 7 (rate advancing one of Plaintiff's entries of "gauze roll" to 5208.21.6090, HTSUS, 11.5 percent *ad valorem*). Plaintiff protested the liquidation of some of these entries, had the protests denied, and then challenged those denials pursuant to 19 U.S.C. § 1515. These denials are currently the subject of a related case on this Court's Reserve Calendar. *See* Summons, Ct. No. 12–00139, ECF No. 1; Pl.'s Br., ECF No. 39–1, at 3 n.2.

As instructed by these notices of action, from October 2010 through January 2011, Plaintiff made sixteen entries of cotton gauze fabric under one of two HTSUS provisions — either subheading 5208.11.40, HTSUS,[11] at a duty rate of 9 percent *ad valorem*, or subheading 5208.21.40, HTSUS,[12] at a duty rate of 10.2 percent *ad valorem* – rather than the duty-free 5803, HTSUS provision Plaintiff had previously used. Summons, ECF No. 1, at Form 1–3; 2d Am. Compl., ECF No. 11–1, at ¶¶ 8–9. Customs then liquidated the merchandise as entered through "bypass" procedures.[13] Decl. of Stephanie Allen, Senior Import Specialist, CBP, *reproduced in* Attach. to Def.'s Mem. in Supp. of its Partial Mot. for Summ. J. ("Attach. to Def.'s Br."), ECF No. 36–1 at Ex. 1 ("Allen Decl."), at ¶ 3. On March 8 and 12, 2012, Plaintiff timely filed protests of these liquidations. 2d Am. Compl., ECF No. 11–1, at ¶ 15. Customs denied the protests. *Id.* Plaintiff now contests Customs' denials, *id.*, at ¶ 5, claiming, as it did in its protests, that Customs violated 19 U.S.C. § 1625(c) when it liquidated the sixteen entries, because Customs made an "interpretive ruling or decision" that modified or revoked a "treatment previously accorded" Plaintiff's "substantially identical transactions" without the statutorily prescribed notice and comment. 19 U.S.C. § 1625(c)(2); 2d Am. Compl., ECF No. 11–1, at ¶¶ 17–32.[14]

Currently before the court is Defendant's motion for partial summary judgment, Def.'s Mot., ECF No. 36, and Plaintiff's cross-motion for partial summary judgment, Pl.'s Mot., ECF No. 39. In their mo-

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[11] 5208.11.40, HTSUS, covers "Woven fabrics of cotton, containing 85 percent or more by weight of cotton, weighing not more than 200 g/m2: Unbleached: Plain weave, weighing not more than 100g/m2: of Numbers 43 to 68."

[12] 5208.21.40, HTSUS, covers "Woven fabrics of cotton, containing 85 percent or more by weight of cotton, weighing not more than 200 g/m2: Bleached: Plain weave, weighing not more than 100 g/m2: Of Numbers 43 to 68."

[13] Under the bypass procedures "importers declare a value and tariff classification for their goods when they import them; Customs port directors may liquidate the goods as declared, without inspecting the goods or otherwise independently determining the proper duty to be paid." *Motorola, Inc. v. United States*, 436 F.3d 1357, 1362 (Fed. Cir. 2006); *see Customs Service: 19 C.F.R. Part 177*, 67 Fed. Reg. 53,483, 53,491 (Dep't Treasury Aug. 16, 2002) ("Customs must deal with a very large number of import transactions each year and must at the same time facilitate international trade. It is simply impossible for Customs to facilitate trade and at the same time review all import transactions. Accordingly, Customs has adopted procedures, such as selectivity and bypass, which are intended to strike a workable balance between these two competing goals. As a result, the vast majority of import transactions do not receive Customs review.").

[14] *See* Attach. to Protest 1512–12–100039 (Mar. 8, 2012) *reproduced in* Pl.'s Br., ECF No. 39–1 at Ex. D, at 1 ("Attach. to Protest") (claiming that "the imported merchandise . . . is correctly classified in subheading 5803.00.1000, [HTSUS], for which the duty rate is Free, rather than in subheading 5208.21.4090, HTSUS, the tariff provision under which the fabrics were liquidated," and that "the fabrics are classifiable in Heading 5803 due to an established treatment of classification of [AFF's] merchandise . . . under 19 U.S.C. §1625").

tions, Defendant and Plaintiff raise two issues: First, they argue whether Plaintiff's claim fails as a matter of law because it cannot identify an "interpretive ruling or decision" through which Customs revoked or modified the alleged treatment, for the purposes of 19 U.S.C. § 1625(c).[15] Second, if Plaintiff's claim does not fail as a matter of law, the parties seek a ruling on an issue of regulatory interpretation. Specifically, in order to establish the existence of a "treatment previously accorded" by Customs under 19 U.S.C. § 1625(c), Plaintiff must provide, *inter alia*, evidence of that treatment "[o]ver a 2-year period immediately preceding the claim of treatment." 19 C.F.R. § 177.12(c)(1)(i)(C). The parties dispute the meaning of "claim of treatment" to determine the relevant 2-year evidentiary period.[16]

STANDARD OF REVIEW

Because the court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(a), questions of both fact and law presented here are reviewed *de novo*. 28 U.S.C. § 2640(a)(1).[17]

The court will grant summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT Rule 56(a). A dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party"; a fact is material when it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[T]he plain language of [the rule] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where, as here, parties cross-move for summary judgment, "each party carries the burden on its own motion to show entitlement to judgment as a matter of law after demonstrating the absence of any genuine disputes over material facts." *Massey v. Del Labs., Inc*., 118 F.3d 1568, 1573 (Fed. Cir. 1997).

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[15] Def.'s Mem. in Supp. of its Partial Mot. for Summ. J., ECF No. 36 ("Def.'s Br."), at 4–6; Mem. in Opp'n to [Pl.'s Mot.], ECF No. 47 ("Def.'s Resp."), at 4–12; Pl.'s Br., ECF No. 39–1, at 612; Pl.'s Reply to [Def.'s Resp.], ECF No. 50 ("Pl.'s Reply"), at 2–9.

[16] Def.'s Br., ECF No. 36, at 7–9; Def.'s Resp., ECF No. 47, at 12–17; Pl.'s Br., ECF No. 39–1, at 12–21; Pl.'s Reply, ECF No. 50, ECF No. 50, at 9–14.

[17] Under 28 U.S.C. § 2640(a)(1), the court "make[s] its determination [] upon the basis of the record made before the court," in "[c]ivil actions contesting the denial of a protest under [19 U.S.C. § 1515]. *See also Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 924 (Fed. Cir. 2003) ("The Court of International Trade is required to decide, on a de novo basis, civil actions that contest the denial of a protest to a Customs classification ruling.").

DISCUSSION

I. Whether Plaintiff can identify an "interpretive ruling or decision" for the purposes of 19 U.S.C. § 1625(c)

Under 19 U.S.C. § 1625(c)(2), Customs must follow notice and comment procedures before it issues an "interpretive ruling or decision which would . . . have the effect of modifying [a] treatment previously accorded by [Customs] to substantially identical transactions."[18] Defendant argues that Plaintiff's claim fails as a matter of law because Plaintiff has not identified "a proposed interpretive ruling or decision" within the meaning of 19 U.S.C. § 1625(c). Def.'s Br., ECF No. 36, at 4–6; Def.'s Resp., ECF No. 47, at 4–12. Plaintiff counters, arguing that Customs' January 2010 Notice of Action, *see* Jan. 2010 Notice of Action, ECF No. 39–1 at Ex. A, may constitute an "interpretive ruling or decision" within the meaning of 19 U.S.C. § 1625(c). Pl.'s Br., ECF No. 39–1, at 6–12; Pl.'s Reply, ECF No. 50, at 2–9; *see also* 2d Am. Compl., ECF No. 11–1, at ¶ 14. Plaintiff also cross-moves for an affirmative finding that the January 2010 notice of action is an interpretive ruling or decision within the meaning of 19 U.S.C. § 1625(c). Pl.'s Mot., ECF No. 39; Pl.'s Br., ECF No. 39–1, at 7–9; Pl.'s Reply, ECF No. 50, at 5.

While 19 U.S.C. § 1625 does not define an "interpretive ruling or decision", it does provide examples.[19] An interpretive ruling "include[s] any ruling letter, or internal advice memorandum," 19 U.S.C. § 1625(a), and a "decision" may be, but is not limited to, a protest review decision.[20] Whether a determination falls within the ambit of 19 U.S.C. § 1625(c) depends on its substance, not its form. *Int'l Custom Products*, 748 F.3d at 1187–88. If a determination is the result of considered deliberations,[21] if it "interprets and applies the

[18] *See Sea-Land Serv., Inc. v. United States*, 239 F.3d 1366, 1372 (Fed. Cir. 2001) ("Section 1625(c) mandates that Customs provide notice and comment under specific circumstances. First, 1625(c) only applies to a proposed interpretive ruling or decision by Customs. Second, the proposed interpretive ruling or decision must either modify or revoke a prior ruling or decision or have the effect of modifying Customs[']' previous treatment of substantially identical transactions.") (citations omitted).

[19] *See Int'l Custom Prods., Inc. v. United States*, 748 F.3d 1182,1188 (Fed. Cir. 2014) (describing the statutory language as "exemplary, not exhaustive").

[20] *California Indus. Prods., Inc. v. United States*, 436 F.3d 1341, 1351 (Fed. Cir. 2006) ("In short, 'decision' in the phrase 'ruling or decision' in 19 U.S.C. § 1625(c), includes a 'protest review decision.'"); *Kahrs Int'l, Inc. v. United States*, 33 CIT 1316, 1353, 645 F. Supp. 2d 1251, 1285 (2009) ("Thus, based on Congress' use of the word 'includes' in the statutory language of § 1625(c), a 'protest review decision' is to be included among the larger category of otherwise generic Customs' 'decision[s].'") (alteration in original).

[21] *See Int'l Custom Prods.*, 748 F.3d at 1188.

provisions of the Customs and related laws to a specific set of facts,"[22] if it has the effect of "unilaterally chang[ing] the rules" upon which importers have come to rely,[23] if it is otherwise "the functional equivalent of interpretive rulings or decisions,"[24] then it may be an interpretive ruling or decision and thereby may trigger 19 U.S.C. § 1625 notice and comment requirements.[25] Therefore, as the Federal Circuit has recently held, a notice of action may be an interpretive ruling or decision within the meaning of 19 U.S.C. § 1625(c), depending on the substance of the determination contained therein. *Int'l Custom Products*, 748 F.3d at 1188 ("The [Court of International Trade] did not err in holding that the Notice of Action in this case amounts to an interpretive ruling or decision subject to § 1625(c)'s notice and comment procedures.").

Accordingly, because a notice of action may be an interpretive ruling or decision, by offering the January 2010 notice of action as a possible interpretive ruling or decision, Plaintiff has "establish[ed] a genuine issue of material fact" through evidence, a document, in the record, sufficient to survive summary judgment on this issue. *See* USCIT Rule 56(c)(1)(A) ("A party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including . . . documents[.]").[26] However, Plaintiff has not offered evidence sufficient to establish that this notice of action is, substantively, an interpretive ruling or decision, as Plaintiff has yet to prove that the notice of action was the result of considered deliberation and effectively revoked a treatment.[27]

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[22] 19 C.F.R. § 177.1(d)(1)(Customs' regulation providing the definition of a "ruling," promulgated pursuant to Commerce's authority under 19 U.S.C. § 1624).

[23] S. Rep. No. 103–189, at 64 (1993) (discussing the purpose of 19 U.S.C. § 1625); *see also* H.R. Rep. No. 103–361(I), at 124(1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2674 (indicating that 19 U.S.C. § 1625 was meant to "provide assurances of transparency concerning Customs rulings and policy directives").

[24] *Kahrs Int'l*, 33 CIT at 1353, 645 F. Supp. 2d at 1285 ("Accordingly, this Court finds for purposes of deciding this case, the text of [19 U.S.C.] § 1625 covers interpretive rulings, ruling letters, internal advice memoranda, protest review decisions, or decisions that are the functional equivalent of interpretive rulings or decisions.").

[25] See Int'l Custom Prods., 748 F.3d at 1185–89 (considering the contents and effect of a notice of action, as well as its deliberative nature and plaintiff's reliance on the previous ruling, to determine whether it was an interpretive ruling within the meaning of 19 U.S.C. § 1625(c)).

[26] *See also Long Island Sav. Bank, FSB v. United States*, 503 F.3d 1234, 1244 (Fed. Cir. 2007) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248); *Netscape Commc'ns Corp. v. Konrad*, 295 F.3d 1315, 1319 (Fed. Cir. 2002) ("When ruling on a motion for summary judgment, all of the nonmovant's evidence is to be credited, and all justifiable inferences are to be drawn in the nonmovant's favor.") (citation omitted).

[27] Plaintiff argues that "the 2010 Notice of Action meets all the core requirements . . . necessary to constitute a communication subject to notice and comment under [19 U.S.C. §

Accordingly, there still remains a genuine dispute of material fact, such that both motions, on this issue, must be denied. *See Marriott Int'l Resorts*, 586 F.3d at 969 ("To the extent there is a genuine issue of material fact, both motions must be denied.") (citation omitted).[28]

II. Plaintiff's "claim of treatment"

While 19 U.S.C. § 1625 leaves the term "treatment" ambiguous,[29] Customs has provided[30] a reasonable and permissible construction in 19 C.F.R. § 177.12(c), where it defines what is necessary to prove a "treatment [was] previously accorded [by Customs] to substantially identical transactions." *Motorola*, 436 F.3d at 1365–66. In order to establish a previously accorded treatment, a party must show, *inter alia*, that "there was an actual determination by a Customs officer regarding the facts and issues involved in the claimed treatment," and that "[o]ver a 2-year period immediately preceding the claim of treatment, Customs consistently applied that determination [. . .]." 19 C.F.R. §§ 177.12(c)(1)(i)(A), (C). Plaintiff and Defendant seek a

1625(c)],"because "[i]t identifies the product, expresses disagreement with the importer's classification, and directs under pain of penalty that future imports be classified differently than had been the case prior." Pl.'s Resp., ECF No. 50, at 5; *see also* Pl.'s Br., ECF No. 39–1, at 7–9. However, this only suggests that the notice of action "interprets and applies the provisions of the Customs and related laws to a specific set of facts," 19 C.F.R. § 177.1(d)(1). It does not establish that the notice of action was the result of considered deliberation and effectively revoked a treatment. *Cf. Int'l Custom Prods.*, 748 F.3d. at 1188–89 (finding that a notice of action was the result of "considered deliberations" after Plaintiff provided evidence of a "months-long deliberative process" by Custom's Office of Regulations and Rulings (which is responsible for reviewing and issuing ruling letters) and "effectively revoked" a previous ruling letter made by that same office).

[28] Plaintiff also argues that Customs' liquidation of the entries at issue here may be considered an interpretive ruling or decision because, while the merchandise was liquidated as entered, the liquidation "subsumed and put into effect the agency's prior tariff change decision, namely the January 2010 Notice of Action." Pl.'s Br., ECF No 39–1, at 11–12. However, the entries at issue here were liquidated as entered, through bypass procedures, "meaning that they were designated as entries that could be liquidated without scrutiny by Customs officials." Ellen Decl., ECF No. 36–1 at Ex. 1, at ¶ 3. They "were processed without any review or examination by the commodity team charged with classifying the merchandise." *Id.* "[T]he mere liquidation of merchandise at the declared bypass rate" is not an "interpretive ruling or decision" under 19 U.S.C. § 1625(c). *Kahrs Int'l*, 33 CIT at 1353, 645 F. Supp. 2d at 1285–86 (quoting *California Indus. Prods.*, 436 F.3d at 1351 ("Section 1625(c)only applies when Customs issues an 'interpretive ruling or decision.'")).

[29] *Motorola*, 436 F.3d at 1365 (holding that the term "treatment" is ambiguous in 19 U.S.C. § 1625(c)(2) because "[t]he question of what degree of [agency] action (as opposed to acquiescence)is sufficient to [create a treatment]" is left open).

[30] *See* 19 U.S.C. § 1624 (Customs is "authorized to make such rules and regulations as may be necessary to carry out the provisions of [Chapter 19]."); *Customs Service: 19 CFR Part 177*, 67 Fed. Reg. at 53,484 (providing that 19 C.F.R. § 177.12 was promulgated, pursuant to notice and comment rule making, to implement "the terms of 19 U.S.C. § 1625(c) through appropriate regulatory standards").

ruling [31] on the meaning of "claim of treatment," in order to establish when the "2-year period immediately preceding claim of treatment" occurred, to provide a framework for the "remaining discovery in this case." *See* Def.'s Br., ECF No. 36, at 7–8.

Defendant argues that, based on the dictionary definition of the word "claim," the phrase "claim of treatment" means a written application or mechanism through which Plaintiff "first asked or called for a finding that [a] treatment existed," and dated to the time of filing. Def.'s Br., ECF No. 36, at 8. According to the Defendant, Plaintiff's claim of treatment was its March 8, 2012 protest, making the relevant "two year [evidentiary] 'look back' period . . . approximately March 8, 2010 — March 8, 2012." *Id.* at 8. Plaintiff argues that "claim of treatment" is not defined in regulation or statute, Pl.'s Reply, ECF No. 50, at 12, such that a "claim of treatment" should be considered the statement, made in whatever filing procedurally was available, and dated according to the facts contained therein, Pl.'s Br., ECF No. 39–1, at 15–16. According to the Plaintiff, its claim of treatment was properly made in its March 8, 2012 protest, but the effective date of its claim is "the date of the earliest entry [at issue]," Pl.'s Mot., ECF No. 39, at 1, making the two-year "look-back" period approximately October 2008 through October 2010. Pl.'s Br., ECF No. 39–1, at 15–16; *see* Summons, ECF No. 1 (dating earliest entry at issue here to October 24, 2010).

A. Defining a "claim of treatment"

"When construing a regulation," the "same interpretative rules" apply as when "analyzing the language of a statute." *Mass. Mut. Life Ins. Co. v. United States*, 782 F.3d 1354, 1365 (Fed. Cir. 2015) (citation omitted). This means that, under the *de novo* standard of review applicable here, our analysis begins with "the regulatory language itself," *Roberto v. Dep't of Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006) (citation omitted), to ascertain its "plain meaning," Lengerich v. Dep't *of Interior*, 454 F.3d 1367, 1370 (Fed. Cir. 2006) (citations omitted).[32] Because meaning is a function of context, "[i]n interpreting a regulatory provision, we examine the text of the regulation as a whole,

[31] Because this presents solely an issue of regulatory interpretation – the facts on this narrow issue are undisputed, Def.'s Br., ECF No. 36, at 7; Pl.'s Br., ECF No. 39–1, at 13–14 – pursuant to USCIT Rule 56(a), it is a question ripe for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 247–48; *see also Puerto Rico Towing & Barge Co. v. United States*, 33 CIT 1131, 1133, 637 F. Supp. 2d 1266, 1267 (2009).

[32] While, under *Auer v. Robbins*, the court will defer to an agency's interpretation of its own ambiguous regulation, such deference is unwarranted where the interpretation is "plainly erroneous," "inconsistent with the regulation" itself, or "does not reflect the agency's fair and considered judgment on the matter in question." 519 U.S. 452, 461–462 (1997) (internal quotation marks and citations omitted).

reconciling the section in question with sections related to it," *id.*, including "its object and policy," *Warner–Lambert Co. v. Apotex Corp.*, 316 F.3d 1348, 1355 (Fed. Cir. 2003) (quoting *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993)). "The plain meaning that we seek to discern is the plain meaning of the whole [regulation], not of isolated sentences." *Beecham v. United States*, 511 U.S. 368, 372 (1994) (citations omitted).[33]

19 C.F.R. § 177.12 does not provide a definition for the phrase "claim of treatment," or even of the term "claim." Where a term or

Although Defendant advances an interpretation of 19 C.F.R.§ 177.12(c)(1)(i)(C), *see* Def.'s Br., ECF No. 36, at 7–9; Def.'s Resp., ECF No. 47, at 12–17, deference is unwarranted here because the interpretation appears to be "nothing more than a convenient litigating position, or a *post hoc* rationalization advanced" by counsel in order "to defend past agency action against attack." *See Christopher v. Smith Kline Beecham Corp.*, 132 S. Ct. 2156, 2166–67 (2012) (internal citations, quotation marks, and alteration marks omitted). "To merit deference" an agency's interpretation "must have been actually applied in the present agency action." *Lengerich*, 454 F.3d at 1372. It was not so applied here. Rather, the interpretation appears in Defendant's briefings alone, without any reference to any decision or interpretation made by Customs at the administrative level, whether in this case or otherwise. *See* Def.'s Br., ECF No. 36, at 7–9; Def.'s Resp., ECF No. 47, at 12–17. This is likely because there was no agency interpretation or application of the regulation at the administrative level. *See* Protest 151212–100039 (Mar. 8, 2012) *reproduced in* Pl.'s Br., ECF No. 39–1 at Ex. D (denying protest in accordance with the disposition Protest, 1512–10–100149, without discussion of Plaintiff's 19 U.S.C. § 1625(c) claim); *see* HQ H158256 (Nov. 16, 2011), *available at* 2011 WL 8200988 (deciding Protest 1512–10–100149 without discussion of 19 U.S.C. § 1625(c) or 19 C.F.R.§ 177.12). Moreover, outside of this action, Customs' understanding of the "2–year period immediately preceding the claim of treatment," 19 C.F.R. § 177.12(c)(1)(i)(C), has been inconsistent, being variously defined as "the two year period immediately preceding the [entry of the] merchandise subject to the claim of treatment," HQ H076723 (Nov. 24, 2010), *available at* 2010 WL 5810910 at *11, the "two years prior to the date of the last liquidated entry subject to the claim," HQ 966756 (Aug. 19, 2004), *available at* 2004 WL 2904423, at *4 (also asserting that this requirement is "codified at 19 C.F.R. § 177.12"), and the two years prior to the filing date of the document the claim comes in, *see, e.g.*, HQ H025849 (Nov. 17, 2010), *available at* 2010 WL 5810900 (in context of a protest determination, finding that the claim of treatment was made in protestant's initial request for internal advice pursuant to 19 C.F.R. § 177.11 and the two years prior to that request were the relevant evidentiary period). It follows that, because there is no indication that Defendant's interpretation represents "the agency's considered position and not merely the views of litigating counsel," it is afforded no deference under *Auer*. *See Mass. Mut. Life Ins.*, 782 F.3d at 1370 (quoting *Abbott Labs. v. United States*, 573 F.3d 1327, 1333 (Fed. Cir. 2009)).

Further, this lack of deference is in better keeping with the plain language of the applicable, statutorily prescribed standard of review, as "civil actions [that] contest[] the denial of a protest" are reviewed "upon the basis of the record made before the court," 28 U.S.C. § 2640(a)(1), that is "*de novo*," *Park B. Smith*, 347 F.3d at 924. *Cf. Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1211–13 (2015) (Scalia, J., concurring) (arguing that *Auer* deference is in direct conflict with the standards of review provided in the Administrative Procedure Act at 5 U.S.C. § 706).

[33] *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he cardinal rule that a [regulation] is to be read as a whole, since the meaning of [regulatory] language, plain or not, depends on context.") (citation omitted).

phrase is not expressly defined in a regulation, it is presumed to have its ordinary meaning.[34] For the ordinary meaning, we look to the dictionary.[35] At the time the 19 C.F.R. § 177.12 was adopted, "claim" was variously defined as: "[t]he aggregate of operative facts giving rise to a right enforceable by a court"; "[t]he assertion of an existing right; any right to payment or an equitable remedy, even if contingent or provisional"; "[a] demand for money or property to which one asserts a right"; and "[a]n interest or remedy recognized at law; the means by which a person can obtain a privilege, possession, or enjoyment of a right or thing; [cause of action]." BLACK'S LAW DICTIONARY 240 (7th ed. 1999).[36]

A "claim," then, may be either the assertion that a right exists or the means through which that assertion is made. Under the former meaning, Plaintiff's "claim" is the assertion made within its March 8, 2012 protest that the entries at issue here were "classifiable [under the duty-free provision, 5803, HTSUS,] due to an established treatment," absent appropriate notice and comment, pursuant to 19 U.S.C. § 1625(c). *See* Attach. to Protest, ECF No. 39–1 at Ex. D, at 1. Under the latter meaning, Plaintiff's "claim" is its March 8, 2012 protest itself. *See* Protest 1512–12–100039, ECF No. 39–1 at Ex. D.

Reading "claim of treatment" in the context of the regulation as a whole, "reconciling the section in question with sections related to it," *Lengerich*, 454 F.3d at 1370, clarifies which definition is appropriate here.[37] While the phrase "claim of treatment" appears at only one other time in the regulatory framework (and much to the same

[34] *See Mass. Mut. Life Ins.*, 782 F.3d at 1365 (considering the "plain language of the regulation and . . . the terms in accordance with their common meaning") (internal citations, quotation marks, and alteration marks omitted); *Warner-Lambert*, 316 F.3d at 1355 ("When a [regulation] does not define a given word or phrase, we presume that [the agency] intended the word or phrase to have its ordinary meaning.") (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)).

[35] *Massachusetts Mut. Life Ins.*, 782 F.3d at 1367 ("When terms are undefined, the court may consider the definitions of those terms in order to determine their meaning.") (citations omitted); *Am. Express Co. v. United States*, 262 F.3d 1376, 1381 n.5 (Fed. Cir. 2001) ("It is appropriate to consult dictionaries to discern the ordinary meaning of a term not explicitly definedby statute or regulation.").

[36] "Claim" is also defined therein as a "right to payment or to an equitable remedy for breach of performance if the breach gave rise to a right of payment," and, in patent law, a "formal statement describing the novel features of an invention and defining the scope of the patent's protection." *Id.* at 241.

[37] *See NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.) ("Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used[. . .].").

effect),[38] "claim" and "treatment" appear in various iterations in relation to each other throughout. Specifically, 19 C.F.R. § 177.12 provides detailed guidance on what evidence is relevant and necessary to assert a treatment claim.[39] In contrast, the regulation does not provide or require a specific mechanism through which that assertion, a treatment claim, must be made.[40] Indeed, in practice, Customs accepts treatment claims in a variety of forms, including, as here, protests pursuant to 19 U.S.C. § 1514.[41] It follows then, from the text of 19 C.F.R. § 177.12, that a "claim of treatment" is the assertion that

[38] Stating that there is no treatment if the importer fails to establish the treatment "over the 2–year period immediately preceding the claim of treatment." 19 C.F.R.§ 177.12(c)(1)(iii)(A).

[39] In making a claim of treatment, the "evidentiary burden as regards the existence of the previous treatment is on the person claiming that treatment." 19 C.F.R. § 177.12(c)(1)(iv). That person must provide, *inter alia*, evidence to establish that "[t]here was an actual determination by a Customs officer regarding the facts and issues involved in the claimed treatment," *id.* at § 177.12(c)(1)(i)(A), and should provide, if known, "the name and location of the Customs officer who made the determination on which the claimed treatment is based," *id.* at § 177.12(c)(1)(iv). "[T]he person claiming a previous treatment must be prepared to submit to Customs written or other appropriate evidence of the earlier actual determination of a Customs officer that the person relied on in preparing the entry and that is consistent with the liquidation of the entry." *Id.* If it is found that this person "made a material false statement or material omission in connection with a Customs transaction or in connection with the review of a Customs transaction and that statement or omission affected the determination on which the treatment claim is based," then Customs will find no treatment. *Id.* at § 177.12(c)(1)(iii)(C).

[40] 19 C.F.R. § 177.12(c)(2)(ii) provides that a person may make a "written application" to Customs "claiming that the interpretive ruling has the effect of modifying or revoking the treatment previously accorded by Customs to his substantially identical transactions," such that Customs will "consider delaying the effective date of the interpretive ruling with respect to that person, and continue the treatment previously accorded the substantially identical transactions," pending notice and comment. This may be the non-protest mechanism that Defendant alludes to, without citation. Def.'s Resp., ECF No. 47, at 14. However, the regulation does not equate "written application" with "claim of treatment," nor does it define "written application" in such a way that precludes use of existing administrative mechanisms that require written application, *e.g.*, protests, *see* 19 U.S.C. § 1514(c)(1) ("A protest . . .shall be filed in writing, or transmitted electronically pursuant to an electronic data interchange system [. . .].").

[41] See HQ H209836 (Apr. 23, 2015), 2015 WL 4385860 at *7 ("The claim of treatment [was] made in conjunction with the protested entries"); HQ H241622 (Apr. 24, 2015), *available at* 2015 WL4385863 (claim of treatment made in a protest); HQ H076723 (Nov. 24, 2010), *available at* 2010 WL 5810910 (same); HQ H074375 (Nov. 22, 2010), *available at* 2010 WL 5819067 (same); HQ H022287 (Dec. 30, 2010), *available at* 2010 WL 6524009 (same); HQ 967289 (Jan. 4, 2005), *available at* 2005 WL 934029 at *3 (noting that "[t]he claim of treatment [was] made in [the] protest"); HQ 966794 (Sept. 7, 2004), *available at* 2004 WL 3049068 (claim of treatment made in a protest); *see also* HQ H025849 (Nov. 17,2010), available at 2010 WL 5810900 (claim of treatment made in request for internal advice pursuant to 19 C.F.R. § 177.11); HQW968251 (Oct. 3, 2007), *available at* 2007 WL 4792308 (claim of treatment made in letter to Customs); HQ 965956 (Jan. 22, 2003), *available at* 2003 WL 1386611 (same).

a right to a treatment exists, not the administrative mechanism or filing through which such a claim is made.

Accordingly, Plaintiff's claim of treatment was the assertion in its March 8, 2012 protest that its entries were "classifiable [under the duty-free provision, 5803, HTSUS,] due to an established treatment," absent appropriate notice and comment, pursuant to 19 U.S.C. § 1625(c). Attach. to Protest, ECF No. 39–1 at Ex. D, at 1.[42] It was not the protest itself.

B. Dating a "claim of treatment"

Given that a "claim of treatment" is distinct from the filing in which it is made, the "2-year period immediately preceding [that] claim of treatment" is also, while not necessarily different, distinct. A claim is not the same as the filing in which it comes, and is dated by its facts not its filing. *Cf. Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (dating a claim to when it arises, not to when the complaint is filed). Inasmuch as a "claim of treatment" is an assertion of a right, made up of its operative facts, so too is the 2-year period immediately preceding it defined by that assertion and those facts. Reading 19 C.F.R. § 177.12 in its statutory and regulatory context, "reconciling the section in question with sections related to it," *Lengerich*, 454 F.3d at 1370, with an eye to its object and policy, *Warner–Lambert*, 316 F.3d at 1355, confirms this understanding.

Regarding context, Customs can be presumed to be "knowledgeable about existing law pertinent to [regulations it promulgates]." *See VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1581 (Fed. Cir. 1990) (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988)). Treatment claims, lacking a specific administrative mechanism, are often made through protests.[43] This prevalence is likely because, if an importer wishes to contest an interpretive ruling or decision that results in the liquidation of its entries, *e.g.*, a notice of action, it must make its claim of treatment through a protest to ensure this Court's jurisdiction over any appeal of that ruling or decision.[44] However, protests may only be filed after liquidation of the entries at issue. 19 U.S.C. § 1514(c)(3)(A). Under statute, Customs

[42] *See also id.* at 2–3 ("In late 2009/ early 2010, CBP at the port of Los Angeles changed the classification for Heading 5803 to classification as a cotton fabric in Heading 5208.").

[43] *See supra*, footnote 41.

[44] *See* 19 U.S.C. § 1514(a)(2) (providing that "decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to . . . the classification and rate and amount of duties chargeable . . . shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in

has one year to liquidate an entry before it is deemed liquidated by operation of law. 19 U.S.C. § 1504(a). Typically, Customs liquidates an entry within 314 days. *See* 314-Day Liquidation Cycle-Trade Notice, CSMS 97–000727 (Aug. 3, 1997). Importers have up to 180 days from liquidation to file their protest. 19 U.S.C. § 1514(c)(3); 19 C.F.R. § 174.12(e). This means that the most common mechanism for making a claim of treatment, a protest, may not be filed until 494 days after a treatment has changed.[45] It would be contrary to Customs' presumed knowledge to read 19 C.F.R. § 177.12 and its two-year evidentiary requirement in such a way that would, because of procedural requirements laid out in other regulations and statutes, consistently and inevitably guide the agency or court to consider an evidentiary period that is, because it is after the liquidation, largely irrelevant (*i.e.*, when the alleged treatment has already been modified or revoked for more than a year).

Regarding object and policy, a regulation must be interpreted "in [a] manner which effectuates rather than frustrates [its] major purpose." *Shapiro v. United States*, 335 U.S. 1, 31 (1948). Customs chose the two years immediately "preceding the claim of treatment" as the requisite evidentiary period because the agency consider it the most relevant for "protecting the treatment rights of a person." *See Customs Service: 19 C.F.R. Part 177*, 67 Fed. Reg. at 53,494. This purpose evinces a context-based approach meant to ensure that "the interested public has notice of a proposed change in Customs' policy" and can "modify any current practices that were based in reliance on Customs' earlier policy." *Sea-Land Serv., Inc. v. United States*, 239 F.3d 1366, 1373 (Fed. Cir. 2001) (summarizing the purpose of enabling statute 19 U.S.C. § 1625).

part, is commenced in the United States Court of International Trade [. . .]."); *see also Volkswagen of Am., Inc. v. United States*, 532 F.3d 1365, 1370(Fed. Cir. 2008) ("As this court and its predecessor have confirmed, the language of [19 U.S.C.] § 1514 establishes liquidation as a final challengeable event in Customs' appraisal process. Findings related to liquidation—including valuation —merge with the liquidation. If an importer wishes to challenge the appraised value of merchandise, the importer must protest the liquidation.") (citations omitted); *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1326–28 (Fed. Cir. 2006) (holding that this Court did not have 28 U.S.C. § 1581(i) jurisdiction over plaintiff's 19 U.S.C. § 1625(c) challenge to a notice of action because jurisdiction under 28 U.S.C. § 1581(a)would not have been manifestly inadequate; remanding to this Court with instructions to dismiss for lack of jurisdiction because the plaintiff had not protested the liquidation of the entries subject to the challenged notice of action as required for 19 U.S.C. § 1581(a) jurisdiction).

[45] *Cf. Xerox Corp. v. United States*, 28 CIT 1667, 1670 (2004) aff'd, 423 F.3d 1356 (Fed. Cir. 2005) ("[W]hen Customs replaced its 90 day liquidation cycle with a 314 day liquidation cycle" it meant "that the typical time for filing a protest would extend beyond a year from the date of entry.")

Here, Plaintiff's "claim of treatment" was the assertion, made in its March 8, 2012 protest, of its right to a treatment pursuant to 19 U.S.C. § 1625(c). Attach. to Protest, ECF No. 39–1 at Ex. D, at 1, 2–3. The defining, operative facts that gave rise to Plaintiff's claim are that Plaintiff made an entry on July 11, 2009, and, on January 14, 2010, through a CF-29 notice of action, Customs reclassified this entry and all similar pending entries from a duty-free to a dutiable provision. *See* Jan. 2010 Notice of Action, ECF No. 39–1 at Ex. A; Attach. to Protest, ECF No. 39–1 at Ex. D, at 2 ("In late 2009/early 2010, CBP at the port of Los Angeles changed the classification [of Plaintiff's entries]"); *see also* 2d. Am. Compl., ECF No. 11–1, at ¶ 14. This entry is the first subject to Plaintiff's claim of treatment and, as such, the inflection point when Plaintiff's claimed treatment changed, *i.e.*, when the "pattern of actions taken by Customs on [Plaintiff's] import transactions, on which [Plaintiff claims it] has reasonably relied," putatively changed without notice or comment. *See* Customs Service: 19 C.F.R. Part 177, 67 Fed. Reg. at 53,489 (providing Customs' explanation of the purpose behind enacting 19 U.S.C. § 1625(c) and 19 C.F.R. § 177.12). The "relevant" 2-year evidentiary period "for purposes of protecting the treatment rights" of the Plaintiff, then, are two years prior to that point, immediately prior to when the claim arose. *See id.* at 53,494. Accordingly, the two years immediately preceding Plaintiff's claim of treatment are the two years immediately preceding its earliest affected entry (*i.e.*, the first entry that does not receive the anticipated, relied upon treatment),[46] here July 11, 2007 through July 11, 2009.[47]

[46] *Cf.* Customs own interpretation in previous 19 U.S.C.§ 1625(c)(2) determinations, HQ H076723 (Nov. 24, 2010), *available at* 2010 WL 5810910 at *11 (finding the relevant evidentiary for a claim of treatment was "the two year period immediately preceding the claimed treatment tariff classification," *i.e.*, "the two year period immediately preceding the [entry of] merchandise subject to the claim of treatment").

[47] This entry, and subsequent January 2010 notice of action, are within the scope of relevant, and therefore admissible evidence.*See* Fed. Rule Evid. 402; *Int'l Custom Prods. v. United States*,__ CIT __, 774 F. Supp. 2d 1338, 1342 (2011) (denying defendant's motion to preclude evidence in a 19 U.S.C. § 1625(c) action brought under 28 U.S.C. § 1581(a) "to the extent that the evidence is otherwise admissible and [relevant]") (citing Fed. Rule Evid. 402). However, because this entry is not part of the underlying protest here (its liquidation does not appear to have been protested at all), because it is not listed on the summons in this action, this Court lacks jurisdiction to grant relief with regards to it. Summons, ECF No. 1; 28 U.S.C. § 1581(a); *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1319(Fed. Cir. 2006) (holding that this Court lacks jurisdiction over entries not listed on the summons); *Int'l Custom Prods., Inc. v. United States*, __ CIT __, 878 F. Supp. 2d 1329 (2012), *aff'd*, 748 F.3d 1182 (Fed. Cir. 2014) (finding that a CF-29 notice of action was an "interpretive ruling or decision" within the meaning of 19 U.S.C. 1625(c), while maintaining jurisdiction, under 28 U.S.C. 1581(a) via another, unrelated entry, protest, and denial).

While Defendant notes the peculiarity of Plaintiff's failure to protest the liquidation of the entry subject to the January 2010 notice of action, Def.'s Resp., ECF No. 47, at 15, it does

CONCLUSION

Therefore, upon consideration of Defendant's Partial IT IS SO ORDERED. Motion for Summary Judgment, and Plaintiff AFF's Cross-Motion for Summary Judgment, Defendant's motion is hereby DENIED and Plaintiff's cross-motion is hereby GRANTED in part and DENIED in part. The parties shall consult and, not later than November 20, 2015 propose a schedule for further proceedings in this matter.

Dated: October 21, 2015
New York, NY

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

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not challenge Plaintiff's failure to do so as creating unreasonable or prejudicial delay in commencing this action. *See* USCIT Rule 8(d)(1) (providing laches as an available affirmative defense); *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) (discussing the laches defense: "There must be conscience, good faith, and reasonable diligence, to call into action the powers of the court [. . .]. [The] court may dismiss a suit where the plaintiffs' lack of diligence is wholly unexcused; and both the nature of the claim and the situation of the parties was such asto call for diligence.") (internal quotation marks and citations omitted).