U.S. Court of International Trade

Slip Op. 15–145

TRADE ASSOCIATES GROUP, LTD., Plaintiff, v. UNITED STATES, Defendant, AND NATIONAL CANDLE ASSOCIATION, Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 11–00397

OPINION AND ORDER

[Issuing a second remand order in litigation concerning the scope of an antidumping duty order on certain petroleum wax candles from the People's Republic of China]

Dated: December 28, 2015

Thomas J. O'Donnell and *Jessica R. Rifkin*, Clark Hill PLC, of Chicago, IL, for plaintiff Trade Associates Group, Ltd.

Antonia R. Soares, Trial Attorney, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Melissa Brewer*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Karen A. McGee and *Teresa L. Jakubowski*, Barnes & Thornburg LLP, of Washington, DC, for defendant-intervenor National Candle Association.

Stanceu, Chief Judge:

In this litigation, plaintiff Trade Associates Group, Ltd. ("Trade Associates"), a U.S. importer of candles, contested a 2011 "Final Scope Ruling" of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), which interpreted the scope of an antidumping duty order (the "Order") on certain petroleum wax candles from the People's Republic of China ("China" or the "PRC"). *Final Scope Ruling: Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China* (Aug. 5, 2011), (Admin.R.Doc. No. 56) ("*Final Scope Ruling*"). In the Final Scope Ruling, Commerce rejected the position taken by Trade Associates in a 2009 request ("Scope Ruling Request") that Commerce should determine various specialty-shaped or holiday-themed candles to be outside the scope of the Order.

Before the court is the Department's decision on remand ("Remand Redetermination") issued in response to the court's opinion and order

in *Trade Assocs. Grp., Ltd. v. United States*, 38 CIT __, 961 F. Supp. 2d 1306 (2014) ("*Trade Associates I*"). *Results of Redetermination Pursuant to Trade Assocs. Grp., Ltd. v. United States* (June 16, 2014), ECF No. 66–1 ("*Remand Redetermination*"). The court orders a second remand, concluding that the Remand Redetermination is based on an unreasonable interpretation of the scope language of the Order.

I. BACKGROUND

The court's prior opinion in *Trade Associates I*, 38 CIT at __, 961 F. Supp. 2d at 1308–09, presents background information on this case, which is summarized briefly and supplemented herein with developments since the issuance of that opinion.

A. Administrative Proceedings Following Submission of the Scope Ruling Request

Trade Associates filed the Scope Ruling Request on June 11, 2009, in which it identified 261 Chinese-origin petroleum wax candles that Trade Associates described as having the shape of identifiable objects or as being associated with Christmas or other holidays. *Trade Assocs. Grp. Application for Scope Ruling on Antidumping Duty Order A-570–504 on Petroleum Wax Candles from the People's Republic of China* 2 (June 11, 2009) (Admin.R.Doc. No. 1) ("*Scope Ruling Request*"). After receiving the Scope Ruling Request, Commerce published, on August 21, 2009, a Federal Register notice seeking "comments from interested parties on the best method to consider whether novelty candles should or should not be included within the scope of the *Order* given the extremely large number of scope determinations requested by outside parties." *Petroleum Wax Candles from the People's Republic of China: Request for Comments on the Scope of the Antidumping Duty Order and the Impact on Scope Determinations*, 74 Fed. Reg. 42,230, 42,230 (Int'l Trade Admin. Aug. 21, 2009) ("*Request for Comments*"). In the notice, Commerce defined the term "novelty candles" as "candles in the shape of an identifiable object or with holiday-specific design both being discernable from multiple angles." *Id*. Commerce proposed two options. Under "Option A," only candles in shapes identified in the Order, which were "tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers" would be within the scope of the Order. *Id*., 74 Fed. Reg. at 42,231. For purposes of Option A, candles in the specified shapes would be considered to be within the scope "regardless of etchings, prints, moldings or other artistic or decorative enhancements including any holiday-related art." *Id*. Under "Option B," Commerce would consider all candle shapes, including novelty candles, to be within the scope of the Order. *Id*.

Approximately a year later, Commerce published preliminary results of its request for comments. *Petroleum Wax Candles From the People's Republic of China: Preliminary Results of Request for Comments on the Scope of the Petroleum Wax Candles from the People's Republic of China Antidumping Duty Order*, 75 Fed. Reg. 49,475 (Int'l Trade Admin. Aug. 13, 2010) ("*Preliminary Results*"). Approximately a year after that, on August 2, 2011, Commerce published the final results of its request for comments. *Petroleum Wax Candles From the People's Republic of China: Final Results of Request for Comments on the Scope of the Antidumping Duty Order*, 76 Fed. Reg. 46,277 (Int'l Trade Admin. Aug. 2, 2011) ("*Final Results*"). The Final Results incorporated by reference an "Issues and Decision Memorandum." *Issues & Decision Mem. for Final Results of Request for Comments on the Scope of the Petroleum Wax Candles from the People's Republic of China Antidumping Duty Order*, A-570–504, (July 26, 2011) (Admin.R.Doc. No. 54), *available at* http://enforcement.trade.gov/frn/summary/PRC/2011–19529–1.pdf (last visited Dec 18, 2015) ("*Final Results Decision Mem.*"). On August 5, 2011, Commerce issued a final determination on the scope request of Trade Associates ("Final Scope Ruling") in which it incorporated by reference the final results of the request for comments. *Final Scope Ruling* 3 & n.10 (citation omitted). In the Final Scope Ruling, Commerce concluded that, as a general matter, "the scope of the Order includes candles of any shape, with the exception of birthday candles, birthday numeral candles, utility candles, and figurine candles." *Final Scope Ruling* 3. Commerce described its figurine candle exception as applying to "a candle that is in the shape of a human, animal, or deity." *Id.* at 5.

B. Initiation of this Action and the Court's First Remand Opinion and Order

In late 2011, Trade Associates commenced this action contesting the Final Scope Ruling. Summons (Oct. 5, 2011), ECF No. 1; Compl. (Nov. 2, 2011), ECF No. 13. Upon judicial review of the Final Scope Ruling, the court concluded that "the Final Scope Ruling applied an impermissible interpretation of the scope language in the Order." *Trade Associates I*, 38 CIT at __, 961 F. Supp. 2d at 1322. The court ordered Commerce "to file a remand redetermination comprising a new scope ruling that complies with this Opinion and Order and addresses the products in the Scope Ruling Request submitted by Trade Associates." *Id*. at __, 961 F. Supp. 2d at 1323.

C. The Remand Redetermination

In response to the court's opinion and order in *Trade Associates I*, Commerce issued the Remand Redetermination on June 16, 2014. *Remand Redetermination* 1, 3. Commerce included an attachment to the Remand Redetermination in which it ruled individually on 269 candles, as identified by product number and including a photographic illustration. Attach. 1 to *Remand Redetermination* (June 16, 2014), ECF No. 66–1 ("*Department's Candle Chart*"). Of the 261 product numbers in the plaintiff's Scope Request, Commerce concluded that 120 are within the scope of the Order. *Remand Redetermination* 20.

Plaintiff and defendant-intervenor National Candle Association ("NCA"), the petitioner in the antidumping investigation resulting in issuance of the Order, submitted comments to the court on July 23, 2014. Pl.'s Comments on Results of Redetermination (July 23, 2014), ECF No. 69 ("Pl.'s Comments"); Def.-Int.'s Comments on Dep't of Commerce Redetermination (July 23, 2014), ECF. No. 68 ("Def.-Int.'s Comments"). Defendant filed a response to the comments on September 5, 2014. Def.'s Reply to Pl.'s & Def.-Int.'s Respective Comments on the Remand Results (Sept. 5, 2014), ECF No. 73 ("Def.'s Reply"). Both plaintiff and defendant-intervenor oppose aspects of the Remand Redetermination.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants jurisdiction over civil actions brought under section 516A of the Tariff Act of 1930 ("Tariff Act"). 19 U.S.C. § 1516a(a)(2)(B)(vi).[1] Section 516A provides for judicial review of a determination of "whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping . . . duty order." *Id*. In conducting this review, the court must set aside "any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id*. § 1516a(b)(1)(B).

B. The Department's Shifting Interpretations of the Order

Commerce issued the Order in 1986. *Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China*, 51 Fed.

[1] All statutory citations are to the 2006 edition of the United States Code.

Reg. 30,686 (Int'l Trade Admin. Aug. 28, 1986) ("*Order*"). The pertinent scope language of the Order consists of only two sentences, as follows:

> The products covered by this investigation are certain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks. They are sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers.

Order, 51 Fed. Reg. at 30,686.[2] The scope language at issue in this case has remained essentially unchanged since Commerce originally published the Order in 1986. *See Trade Associates I*, 38 CIT at __, 961 F. Supp. 2d at 1311. The same cannot be said for the Department's interpretation of that language, which has undergone significant shifts over the long history of the Order.

According to background information it provided in its August 2009 request for comments, Commerce had a practice prior to November 2001, and apparently dating back to the 1986 issuance of the Order, of interpreting the scope to include only candles in the shapes identified in the second sentence of the scope language. *See Request for Comments*, 74 Fed. Reg. at 42,230–31. The practice, which Commerce apparently followed for fifteen years, ended when Commerce issued a scope ruling, the "JC Penney" scope ruling. *Id*., 74 Fed. Reg. at 42,230 ("In November 2001, the Department changed its practice on the issue of candle shapes." (citing *Final Scope Ruling Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China (A-570–504); JC Penney Purchasing Corporation*, (November 9, 2001))). In the JC Penney scope ruling, Commerce concluded that the scope of the Order included, as a general matter, candles in any shape. *Id.*, 74 Fed. Reg. at 42,231.

In the JC Penney scope ruling, Commerce recognized an exclusion from the scope of the Order for certain types of candles that Commerce had identified as outside of the scope in instructions (the "CBP Notice") it provided in 1987 to the U.S. Customs Service, which was later renamed "Customs and Border Protection." *Id*. The exclusion applied to "certain novelty candles, such as Christmas novelty candles" and "candles having scenes or symbols of other occasions

[2] In its prior opinion, the court concluded that changes since the 1986 publication of the antidumping duty order at issue in this case did no more than conform the scope language to the 1989 adoption of the Harmonized Tariff Schedule of the United States ("HTSUS") and were not relevant to the issues raised by this case. *Trade Assocs. Grp., Ltd. v. United States*, 38 CIT __, __, 961 F. Supp. 2d 1306, 1311 (2014) ("*Trade Associates I*").

(*e.g.*, religious holidays or special events) depicted in their designs, figurine candles, and candles shaped in the form of identifiable objects (*e.g.*, animals or numerals)." *Id*., 74 Fed. Reg. at 42,230 (quoting CBP Notice). At the time it issued the CBP notice in July 1987, Customs apparently was adhering to an interpretation under which the scope included only candles in the specific shapes identified in the second sentence of the scope language.

In the request for comments, Commerce summarized its current practice, which began with the issuance of the JC Penney scope ruling, as follows: "Since 2001, the Department has determined that if the candle is made from petroleum wax and has a fiber or paper-cored wick it falls within the scope of the Order regardless of shape unless the candle possesses the characteristics set out in the CBP notice, in which case a candle falls within the Department's novelty candle exception and is not within the scope of the *Order*." *Id*., 74 Fed. Reg. at 42,231.

In the preliminary results of its request for comments, published in August 2010, Commerce reached several conclusions. First, Commerce concluded that the intent of the petitioners, as expressed in the petition and as shown in other documentary evidence, was that Commerce limit any antidumping duty investigation to petroleum wax candles that were in the shapes that later were specified in the second sentence of the scope language. *Preliminary Results*, 75 Fed. Reg. at 49,479. Second, Commerce concluded that, in promulgating the Order, it had sought to adhere to the original intent expressed by NCA as to the scope of the investigation. *Id*. Third, Commerce concluded that the scope language itself supports the interpretation that only candles of the shapes identified in the scope language are included within the scope. *Id*. Finally, Commerce concluded that it had erred when, upon issuing the JC Penney scope ruling in November 2001, it abandoned its practice of limiting the scope to the specified candle shapes in favor of a position that the scope of the Order included, as a general matter, candles of any shape. *Id*.

As to the first conclusion, Commerce stated in the preliminary results that "[a] thorough review of the record clearly illustrates that NCA did not intend for the scope of the candles *Order* to include all candles" and that "[a]t the time of the LTFV [less-than-fair-value] investigation and the concomitant setting of the scope, NCA advocated a scope where only the enumerated shapes would be covered." *Id*. The August 2010 publication analyzed, in particular, the petition by which the NCA sought an antidumping duty investigation (the "Petition"), concluding that "[t]he *Petition* illustrates that, contrary to its current assertions, NCA advocated for an exhaustive scope where

those candles not specifically enumerated in the scope language, as well as figurine candles, 'household,' 'utility,' or 'emergency' candles, were to be excluded from the investigation." *Id*., 75 Fed. Reg. at 49,476–77 (footnote omitted). Among the reasons Commerce cited for reaching this conclusion was that "the *Petition's* like product definition itself indicates exclusivity." *Id*., 75 Fed. Reg. at 49,477. The August 2010 issuance quoted text from the petition that was presented as a description of the imported merchandise. That text, as presented in the August 2010 issuance, reads as follows:

> The imported PRC candles are made from petroleum wax and contain fiber or paper-coated wicks. They *are* {emphasis added} sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers. These candles may be scented or unscented. While manufactured in the PRC, these candles are marketed in the United States and are generally used by retail customers in the home or yard for decorative or lighting purposes.

Id. (quoting *Petition* at 6–7 (emphasis in original)). In the August 2010 issuance, Commerce also described various scope clarifications Commerce issued to the U.S. Customs Service, both before and after the August 28, 1986 publication of the Order, concluding that communications with NCA indicating NCA's apparent concurrence with those clarifications "further indicate[s] that the scope was originally intended to include only those candle shapes described in the scope . . . ." *Id*., 75 Fed. Reg. at 49,479.

According to the August 2010 issuance, Commerce intended to promulgate scope language in the Order that reflected NCA's intent that the investigation include only candles in the specified shapes. As noted above, Commerce stated in the issuance that "[a]t the time of the LTFV investigation *and the concomitant setting of the scope*, NCA advocated a scope where only the enumerated shapes would be covered." *Id*. (emphasis added). Commerce added that "[f]or instance, NCA's agreement in the Memorandum Dated April 30, 1986, that 'figurine' candles were not within the scope of the *Order* indicates that candles in shapes other than those enumerated in the scope language were not included within the scope of the investigation." *Id*.

In addition to the petitioner's intent, the Department's August 2010 issuance relied on the scope language of the Order in defending the Department's previous, fifteen-year practice of confining the scope to the shapes mentioned therein. Quoting the two operative sentences of the scope language, Commerce concluded that "the language of the

scope is overt in its exclusivity." *Id*. ("For instance, the scope of the *Orders* covers '{c}ertain scented or unscented petroleum wax candles' that '*are* sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers' (emphasis added).")

The scope language in the Order and the intent of the petitioner, NCA, as shown in the record of the investigation were the bases for the Department's conclusion that the JC Penney ruling was incorrect. The August 2010 issuance concluded as follows:

> However, a close review of the investigation record shows that, although addressing a key enforcement concern, the *JC Penney* methodology did not fully take into account record evidence from the investigation. While *JC Penney* stated that the scope of the *Order* was inclusive, the language of the *Order* indicates that the scope is exclusive, whereby only those candles in the enumerated shapes are considered inside the scope.

Id. Based on the petitioner's original intent, as shown in "a close review of the investigation record," and its construction of the scope language to exclude candles in other than the specified shapes, Commerce concluded that it had erred in changing its practice in November 2001. *Id*. The August 2010 issuance proposed, for a second round of public comments, a scope interpretation that reversed the position taken in the JC Penney scope ruling in favor of one similar to the practice the Department had followed from the inception of the Order until that scope ruling was issued. Under this new interpretation, only candles of the specific shapes and types identified in the Order (which the August 2010 issuance defined in a series of footnotes) would be considered to be within the scope of the Order. *Id.*, 75 Fed. Reg. at 49,480 & nn.12–21. The proposal was basically the scope interpretation of "Option A" as set forth in the request for comments. Consistent with Option A, Commerce proposed that candles in the identified shapes and types would be considered to be within the scope "regardless of etchings, prints, texture, moldings or other artistic or decorative enhancements including any holiday-related art." *Id*., 75 Fed. Reg. at 49,480. Finally, the proposal was that two types of candles would be excluded: candles identified as "household," "emergency," or "utility" candles (which the issuance defined and grouped under the term "utility" candles), and "birthday" and "birthday numeral" candles (also defined and grouped under the term "birthday" candles). *Id*.

In the final results of the request for comments, which Commerce issued approximately a year later (on August 2, 2011), Commerce

abandoned its August 2010 proposal as to candle shapes and types and adopted essentially the position on candle shapes and types that it had taken in the November 2001 JC Penney scope ruling. Commerce stated its reasoning as follows: "[e]vidence on the record indicates that contrary to the Department's position in the *Preliminary Results*, the *Order* is not limited only to the enumerated shapes/types listed in the scope of the *Order*." *Final Results*, 76 Fed. Reg. at 46,278 (footnote omitted). "Rather," the final results continued, "the most reasonable interpretation pursuant to the factors established in 19 CFR 351.225(k)(1) is that the enumerated shapes/types serve as an illustrative, not exhaustive, list of candles included within the scope of the *Order*." *Id*. (citing *Final Results Decision Mem.* at Comment 1). Commerce recognized specific exclusions for the birthday and utility candles addressed in the preliminary results and, further, recognized an exception for "figurine" candles, stating that "the term 'figurine' is narrowly defined as a candle in the shape of a human, animal, or deity." *Id*. (citing *Final Results Decision Mem*. at Comment 3). The August 2011 final results of the request for comments announced, in conclusion, that "the Department hereby adopts an inclusive interpretation of the scope of the *Order*, whereby all candles are included within, with the exception of the three candle types that are excluded: Birthday, utility, and figurine (*i.e.*, human, animal, or deity shaped) candles." *Id.* The Final Scope Ruling adopted the position taken in the final results of the request for comments, concluding "that the scope of the *Order* includes candles of any shape, with the exception of birthday candles, birthday numeral candles, utility candles, and figurine candles." *Final Scope Ruling* 3.

C. The Court's Opinion and Order in Trade Associates I

Applying the principle established by the Court of Appeals for the Federal Circuit ("Court of Appeals") in *Duferco Steel, Inc. v. United States*, 296 F.3d 1087 (Fed. Cir. 2002) ("*Duferco*"), the court rejected the Department's conclusion that the scope of the Order included, as a general matter, candles of any shape, reasoning that "nothing in the scope language reasonably supports this interpretation." *Trade Associates I*, 38 CIT at __, 961 F. Supp. 2d at 1312. The first sentence of the relevant scope language, the court noted, could not reasonably be so interpreted because "it provides that not all, but only 'certain,' *i.e.*, unspecified, petroleum wax candles with fiber or paper-cored wicks are included in the scope." *Id*. Nor could the second sentence, the court reasoned, because it identifies candles in specific shapes, not candles in any shape. *Id*. at __, 961 F. Supp. 2d at 1313.

The court also found several faults with the Department's construction of the word "certain" in the first sentence of the scope language. Addressing the Department's explanation that Commerce had given effect to this word by excluding those types of candles for which there was evidence in the record of the investigation that the NCA had intended such exclusions, *id*. at __, 961 F. Supp. 2d at 1312–13, the court responded that "[b]ecause the relevant scope language consists of only the two sentences, any reasonable construction of the term 'certain . . . petroleum wax candles' as used in the first sentence must find meaning in the second sentence," which lists specific candle types and shapes. *Id*. at __, 961 F. Supp. 2d at 1313. Having noted the Department's construction of the second sentence as offering only an illustrative list of examples of common candle shapes rather than as limiting the scope, *id*. at __, 961 F. Supp. 2d at 1312, the court considered the Department's construction of the word "certain" in the first sentence to be "impermissible not only in failing to give effect to one of the two sentences that comprise the scope language but also in leaving only the first sentence to function as the entire operative scope language." *Id*. at __, 961 F. Supp. 2d at 1313. The first sentence, according to the court's reasoning, could not reasonably be so interpreted, because by such an interpretation "the Final Scope Ruling adopts an interpretation resulting in 'scope' language that makes no meaningful attempt to define the scope." *Id*. *Trade Associates I* also concluded that Commerce unreasonably construed the term "certain" to refer to matters entirely outside the scope language, i.e., the "'record evidence' from which Commerce concludes that the petitioner intended that certain candle types would be outside the scope of the investigation." *Id*. (citation omitted). The court viewed this not only as an unreasonable interpretation but also as an impermissible one in light of the statute, which charges Commerce, not the petitioner, with the responsibility for defining the scope of an antidumping duty order. *Id*. (citing 19 U.S.C. §§ 1673(1), 1673e(a)(2) and *Duferco*, 296 F.3d at 1096).

Due to the Department's unreasonable interpretation of the scope language of the Order as including, in general, candles of any shape, under which Commerce subjected to the Order candles in the shapes of various identifiable objects, *Trade Associates I* remanded the Final Scope Ruling to Commerce for reconsideration. *Id*. at __, 961 F. Supp. 2d at 1322–23.

D. In Applying the Term "Common Candle Shapes and Types," the Remand Redetermination Unlawfully Defines, Rather than Interprets, the Scope of the Order and Must Be Remanded

Commerce stated in the Remand Redetermination that it "respectfully disagrees with the Court's *Remand Opinion and Order* and is conducting this remand under protest." *Remand Redetermination* 3 (citing *Viraj Group Ltd. v. United States*, 343 F.3d 1371 (Fed. Cir. 2003)). In the Remand Redetermination, Commerce, under protest, took an approach to the scope of the Order that differs markedly from any it has followed previously.

To summarize briefly the past history, for the first fifteen years under the Order, Commerce followed a practice of interpreting the outer boundary of the scope as defined by the candle shapes and types listed in the second sentence of the scope language. Beginning with the JC Penney scope ruling in November 2001, Commerce abandoned that practice and interpreted the outer boundary as encompassing, in general, candles in any shape, subject to specific and limited exclusions not mentioned in the scope language of the Order itself. In the August 2010 preliminary response to comments, Commerce proposed returning to its prior, fifteen-year practice upon concluding that its analysis in the JC Penney scope ruling was inconsistent with the scope language itself and the investigative record. In the August 2011 final response to comments and the Final Scope Ruling contested in this litigation, Commerce reversed its preliminary position, reverted to an interpretation under which the outer boundary of the scope encompassed generally candles in any shape, and recognized specific exclusions for three categories of candles (nowhere mentioned in the scope language) that it identified as "birthday," "utility," and "figurine" candles.

In contrast to either of the two approaches to the general scope of the Order that Commerce took previously, the Remand Redetermination places the outer boundary of the scope of the Order in the term "common candle shapes or types." *See Remand Redetermination* 3–4. This is a term or concept that is not found anywhere within the scope language of the Order. Instead, the scope language Commerce actually chose when it formulated the Order refutes any contention that Commerce, in formulating the language of the scope in 1986, intended to base the decision as to whether a particular candle is within, or outside of, the scope of the Order on whether that candle is described by the term "common candle shape or type." The Remand Redetermination, however, would now make individual scope decisions according to that very inquiry. In this way, the Remand Rede-

termination *defines*, rather than interprets, the scope of an Order that Commerce formulated nearly three decades ago.

The Court of Appeals repeatedly has held that once Commerce has issued an antidumping or countervailing duty order, it may interpret the scope of the order but, absent resort to its anti-circumvention authority, may not modify it. *Duferco*, 296 F.3d at 1095; *see also Fedmet Resources Corp. v. United States* , 755 F.3d 912, 921–22 (Fed. Cir. 2014); *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382–83 (Fed. Cir. 2005). As the court stated in *Trade Associates I*, "[t]he logic of the rule in *Duferco* is straightforward: were Commerce empowered in a scope ruling to place merchandise within the scope of an order that cannot reasonably be interpreted to include that merchandise, Commerce would be altering the scope, not interpreting it." *Trade Associates I*, 38 CIT at __, 961 F. Supp. 2d at 1321 (citing *Duferco*, 296 F.3d at 1097). In this litigation, Commerce has attempted to use a remand proceeding as the mechanism for adopting a new definition of the scope of an existing antidumping duty order, even though the new definition bears no relationship to the scope language it used in promulgating the Order.

According to the Remand Redetermination, the scope of the Order includes a candle, "even if it is not one of the enumerated candle shapes or types in the second sentence," if "it is a common candle shape or type." *Remand Redetermination* 4. The Remand Redetermination explains that "[f]or example, if a candle is in the shape of a cone, we considered that to be a common candle shape or type." *Id*. It also states that "we find that the list of shapes and types in the second sentence of the scope of the *Order* is illustrative, because it does not specify that only those specifically enumerated are covered by the scope language." *Id.* In reaching that conclusion, the Remand Redetermination echoes the Final Results. *See Trade Associates I*, 38 CIT at __, 961 F. Supp. 2d at 1312 ("Regarding the second sentence, Commerce further reasoned that 'the shapes listed in the scope of the *Order*' do not constitute 'an exhaustive list of shapes, but simply an illustrative list of common candle shapes.'" (quoting *Final Results*, 76 Fed. Reg. at 46,278)).

As the court has discussed, the Final Results and the Final Scope Ruling interpreted the second sentence of the scope language as merely "illustrative," i.e., in such a way as to give it no effect. But the Remand Redetermination goes beyond the Final Scope Ruling in placing upon the second sentence the definition of the entire general scope of the Order. The language of the second sentence will not bear this construction. Instead of speaking of "common" candle shapes, the

second sentence speaks of *specific* candle shapes: "tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers." *Order*, 51 Fed. Reg. at 30,686. The sentence prefaces the list with an introductory clause: "*[t]hey* are sold in the following shapes." *Id*. (emphasis added). The subject of the second sentence, the pronoun "[t]hey," must be read to have as its antecedent the subject of the first sentence: "[t]he products covered by this investigation." The second sentence contains no language connoting an intent to provide a list of candle shapes that are "illustrative" of those candle shapes that are "common." Instead, the plain meaning of the second sentence is that the identified shapes are "shapes" in which the subject merchandise "is sold."

In summary, the Remand Redetermination adopts an unreasonable, and therefore impermissible, interpretation of the scope language. By placing the outer boundary of the scope according to a concept that Commerce describes using the term "common candle shapes and types," Commerce impermissibly attempts to use its redetermination upon remand to establish a new definition of the scope of the Order. This new definition lacks any foundation in the scope language that Commerce is charged to interpret.

E. Trade Associates I Did Not Hold that Commerce Permissibly Could Construe the Second Sentence of the Scope Language as Illustrative of "Common Candle Shapes or Types"

The Remand Redetermination bases the Department's decision, at least in part, on the premise that *Trade Associates I* held that the second sentence of the scope language permissibly may be interpreted as an illustrative list of common candle shapes that the Order includes. The court did not so hold. In part B.1 of the Opinion and Order, under the title "The Final Scope Ruling Unreasonably Interprets the Scope Language of the Order," the court held, instead, that the scope language of the Order may not reasonably be interpretedto include generally all petroleum wax candles without regard to shape. *See Trade Associates I*, 38 CIT at __, 961 F. Supp. 2d at 1311–13. As summarized earlier, the court gave several reasons for so holding.

Were the court to have ruled that an interpretation such as that adopted by the Remand Redetermination were permissible, it necessarily would have ruled that the scope language need not be interpreted to confine the scope to the candle shapes specified in the second sentence of the scope language. But in deciding *Trade Associates I*, the court declined to decide that question. *See id*. at __, 961 F. Supp. 2d at 1318 ("The court need not decide, and does not decide, whether the second sentence of the scope language at issue in this

case expressly limits the scope of the Order to the specified candle shapes and types."). It was not necessary for the court to decide that question in order to resolve the issue of whether the Final Scope Ruling was based on a reasonable interpretation of the scope language, for before the court was a decision under which Commerce had interpreted the Order to include, as a general matter, candles in any shape. That was the only general interpretation of the scope language that was before the court, and the court rejected it. *Trade Associates I* did not approve any alternate interpretation of the scope language, leaving it to Commerce to reconsider the Final Scope Ruling in the entirety and submit a new decision that, unlike the Final Scope Ruling, interprets the scope language reasonably.

The court's discussion in *Trade Associates I* of a "common candle shape" interpretation was in a hypothetical context. In short, the court posited that even if, *arguendo*, it were presumed that the second sentence of the scope language reasonably could be interpreted as an illustrative list of common candle shapes, the court still could not sustain the interpretation adopted by the Final Scope Ruling. *See Trade Associates I*, 38 CIT at __, 961 F. Supp. 2d at 1315–16. The discussion was in the context of the court's explaining why the Final Scope Ruling could not be sustained on the basis of ambiguity in the scope language. *Id*. at __, 961 F. Supp. 2d at 1315–17. Another reference to a hypothetical "common candle shape" interpretation was in the context of the court's explaining why certain arguments made by defendant and defendant-intervenor in favor of the Final Scope Ruling were not convincing to the court. *See id*. at __, 961 F. Supp. 2d at 1321.

F. Trade Associates I Did Not Apply the Scope Language to Any Specific Candle Identified in the Scope Ruling Request

In their comment submissions, plaintiff and defendant-intervenor disagree as to whether, and to what extent, the court ruled that specific candles identified in the Scope Ruling Request are outside the scope of the Order. Plaintiff, for example, contends that *Trade Associates I* ruled in such a way that Commerce must determine that *all* the candles identified in the Scope Ruling Request are outside the scope of the Order. Pl.'s Comments 2–7.

As discussed previously in this Opinion and Order, *Trade Associates I* held that the Final Scope Ruling was impermissible, and must be reconsidered upon remand, because it was based on an unreasonable interpretation of the scope language. The result of the application of that interpretation to the Scope Ruling Request, the court concluded, was the placement within the scope of "various candles made to

resemble identifiable objects." *Trade Associates I*, 38 CIT at __, 961 F. Supp. 2d at 1322. The court reached that conclusion based on its holding that the Department's interpretation of the scope language, under which Commerce considered candles of any shape to be, as a general matter, within the scope of the Order, was an impermissible one. It did not reach that conclusion based on any application by the court of the scope language of the Order to any individual candle. Rather than rule on any specific candle, the court in *Trade Associates I* left any individualized determinations as issues to be resolved by Commerce on remand. *See id*., 38 CIT at __, 961 F. Supp. 2d at 1323.

To avoid any confusion that its previous opinion may have caused, the court now clarifies that, upon remand, Commerce is directed to: (1) submit a new decision upon a second remand that is based on a reasonable interpretation of the scope language of the Order; and (2) consistent with a reasonable interpretation of the scope language, identify the individual candles in the Scope Ruling Request that Commerce considers to be within the scope of the Order and those that it considers to be outside the scope of the Order.[3] In doing so, Commerce should interpret *Trade Associates I* as holding that the scope language interpretation upon which Commerce based the Final Scope Ruling, i.e., that the scope of the Order includes, as a general matter, candles of any shape, is an impermissible one. Similarly, it must apply on remand the holding the court has put forth in this Opinion and Order, which is that the general interpretation of the scope language upon which the Remand Redetermination is based, as described herein, is also unreasonable and therefore impermissible. For purposes of the second remand proceeding, Commerce should not interpret the holding of *Trade Associates I* or of this Opinion and Order as an application of the scope language by the court to any specific candle identified in the Scope Ruling Request.

III. CONCLUSION AND ORDER

The Remand Redetermination applied to the candles at issue in this litigation an unreasonable, and therefore legally impermissible, interpretation of the scope language of the Order. Because the Remand Redetermination did so, Commerce must reconsider this decision in the entirety. The new decision must address the specific candles for

[3] Defendant-intervenor contends that the Remand Redetermination inadvertently omitted the Large Candy Corn candle, Product Number 610170. Def.-Int.'s Comments 20 n.35. Additionally, the parties differ in their description and physical portrayal of the Peppermint Candy candles, Product Number 710101. *Compare* Attach. 1 to *Remand Redetermination* 18 (June 16, 2014), ECF No. 66–1 ("*Department's Candle Chart*") (describing the candle as a "circle or oval") *with* Attach. 1 to Pl.'s Comments on Results of Redetermination (July 23, 2014), ECF No. 69–1. The court instructs Commerce, on remand, to resolve these issues.

which Trade Associates Group sought a determination. Therefore, upon consideration of the Remand Redetermination, the comments in response thereto, and all papers and proceedings had herein, it is hereby

ORDERED that the Remand Redetermination be, and hereby is, remanded to Commerce; it is further

ORDERED that Commerce, on remand, shall submit a second redetermination upon remand ("Second Remand Redetermination") that adopts a reasonable interpretation of the scope language of the Order in accordance with the above Opinion and applies a reasonable interpretation of the scope language to the candles at issue in this litigation; it is further

ORDERED that Commerce shall have ninety (90) days from the date of this Opinion and Order to file the Second Remand Redetermination; and it is further

ORDERED that plaintiff and defendant-intervenor shall have thirty (30) days from the date of the Department's filing of the Second Remand Redetermination in which to file comments on the Second Remand Redetermination; and defendant shall have fifteen (15) days after the filing of the last comment in which to file a reply to the comments of the other parties.

Dated: December 28, 2015
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU
Chief Judge

Slip Op. 15–146

THE JANKOVICH COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Court No. 15–00208

[Defendant's motion to dismiss is granted.]

Dated: December 30, 2015

Frank X. Dipolito, Swain & Dipolito LLP, of Long Beach, CA, for plaintiff.

Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief were *Andrew K. Lieberman* and *Marc Matthews*, Senior Attorneys, Office of Chief Counsel, Trade and Finance, U.S. Customs and Border Protection, of Washington, DC.

Restani, Judge:

This matter is before the court on defendant United States' ("the government") motion to dismiss the complaint filed by the Jankovich Company ("Jankovich"), for lack of subject-matter jurisdiction pursuant to U.S. Court of International Trade Rule 12(b)(1). Jankovich could have brought its claims under 28 U.S.C. § 1581(a), but failed to perfect jurisdiction under that section by filing a proper protest. Because jurisdiction was potentially available under § 1581(a), the court does not have jurisdiction under § 1581(i), and grants the government's motion.

BACKGROUND

Jankovich distributes bunker fuel between the ports of Los Angeles and San Diego. Compl. ¶¶ 3–4, ECF No. 4. The bunker fuel is used "for the propulsion and operation of vessels." *Id.* Jankovich has been paying Harbor Maintenance Fees ("HMFs") to U.S. Customs and Border Protection ("CBP") on a quarterly basis since 2008 based on the value of the bunker fuel. *Id.* ¶ 5, Ex. A. The HMF is a port use fee assessed at 0.125% of the value of commercial cargo shipped through certain identified ports. 19 C.F.R. § 24.24(a) (2015).

On November, 20, 2009, Jankovich sought a ruling from CBP that its bunker fuel shipments were not subject to the HMF. *See* HQ H086062 (Mar. 12, 2010), *available at* 2010 WL 1267976. On March 12, 2010, CBP determined that the shipments were subject to the HMF. *Id.* On January 24, 2014, Jankovich submitted a request for reconsideration. HQ H250175 (May 19, 2014), *available at* 2014 WL 2683944. On May 19, 2014, CBP denied the request for reconsideration and affirmed HQ H086062. *Id.* On October 14, 2014, Jankovich again requested reconsideration, which CBP denied on November 18, 2014, based on 19 U.S.C. § 1625. Decl. of Frank X. Dipolito Re: Def.'s Mot. to Dismiss Ex. D ("Dipolito Decl."). On July 31, 2015, Jankovich filed a two-count complaint seeking refund of HMF payments, plus interest, and a declaration that its bunker fuel is not subject to the HMF. Compl. ¶¶ 13–21. Jankovich claims, under the plain meaning of 26 U.S.C. §§ 4461, 4462 and 19 C.F.R. §§ 24.24(a), (c), that its bunker fuel is not "commercial cargo" and is specifically exempted from the HMF. *Id.* ¶¶ 6–12. The complaint asserts jurisdiction under 28 U.S.C. § 1581(i). *Id.* ¶ 1.

In moving to dismiss the complaint, the government argues that the court does not have jurisdiction. The government asserts that the court lacks jurisdiction under 28 U.S.C. § 1581(i) because relief was available under § 1581(a), and lacks jurisdiction under 29 U.S.C. § 1581(a) because Jankovich failed to perfect jurisdiction by filing a

protest. Def.'s Mot. to Dismiss & Mem. in Supp. of its Mot. to Dismiss 4, ECF No. 9 ("Gov. Br."). The government also argues that even assuming the court could exercise subject-matter jurisdiction under § 1581(i), Jankovich's refund claims for payments made before July 31, 2013, are time-barred by § 1581(i)'s two-year statute of limitations. *Id.* at 5–6.

Jankovich responds that as a challenge to a CBP "prospective" ruling, its complaint falls properly within § 1581(i) jurisdiction. Jankovich Co.'s Opp'n to Def.'s Mot. to Dismiss 4, ECF No. 15 ("Jankovich Resp."). Alternatively, Jankovich argues that if the court lacks jurisdiction under § 1581(i), its request for reconsideration operated as a *de facto* protest, satisfying the procedural requirements of § 1581(a). *Id.* at 6. Jankovich also argues that if jurisdiction lies under § 1581(a), the court should apply equitable tolling to afford it a two-year period to request judicial review of the "prospective" ruling "based on the express representations in CBP's Rulings Program that a complaint to contest a prospective ruling must be filed within two years of the issuance of the ruling." *Id.* at 6–7.[1] Finally, Jankovich requests leave to file an amended complaint should the court hold that the Complaint's jurisdictional facts are deficient. *Id.* at 8–9.

DISCUSSION

I. Jurisdiction Under 28 U.S.C. § 1581(i)

Generally, jurisdiction under 28 U.S.C. § 1581(i) "may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). The court has also recognized the "general rule that litigants must exhaust their administrative remedies under other subsections of § 1581 before properly invoking § 1581(i) jurisdiction." *NuFarm America's, Inc. v. United States*, 29 CIT 1317, 1328, 398 F. Supp. 2d 1338, 1348 (2002). Where the remedy under another

[1] First, it is not clear that the ruling is "prospective" as fees may have already been paid when the binding ruling was made. It seems clear that fees had been exacted by the time of reconsideration. Second, CBP's "Rulings Program" is an informal publication "provided for general information purposes only" and suggests that parties obtain advice of counsel. Decl. of Frank X. Dipolito Re: Def.'s Mot. to Dismiss Ex. E at 3. The publication is written in a shorthand manner such that the two years within which a complaint must be filed challenging a prospective ruling assumes the court has jurisdiction over the claim. The publication cites to the general two-year statute of limitations for aggrieved parties to seek relief in 28 U.S.C. § 2636(i). *Id.* at 26–27. The two-year statute of limitations for challenging prospective rulings is subject to jurisdictional limits not discussed, such as for prospective rulings regarding imports, the party must demonstrate irreparable injury. 28 U.S.C. § 1581(h). Similarly, under 28 U.S.C. § 1581(i), the other jurisdictional subsections must be manifestly inadequate. *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1292 (Fed. Cir. 2008).

subsection of § 1581 would be manifestly inadequate, however, the court does not require exhaustion and exercises jurisdiction under § 1581(i). *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1292 (Fed. Cir. 2008). Thus, if Jankovich's claims could have been brought under § 1581(a) and the remedy would not be manifestly inadequate, the court does not have jurisdiction under § 1581(i).

In *West Travel, Inc. v. United States*, the court analyzed this issue and stated: "in *Swisher Int[ernationa]l, Inc. v. United States*, 205 F.3d 1358, 1365 (Fed. Cir. 2000), the court recognized an administrative refund procedure [for HMF payments] under 19 C.F.R. § 24.24(e), the results of which could be protested, leading to § 1581(a) jurisdiction." 30 CIT 594, 595 (2006). The court also acknowledged that Supreme Court precedent allowed a constitutional challenge to the HMF statute to proceed under § 1581(i) jurisdiction because the administrative remedy was futile for constitutional challenges to statutory provisions. *Id.* (citing *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 365–66 (1998) (holding HMF on exports unconstitutional). The court then determined that plaintiff's statutory claim was "not in the same class of futile claims," held that "jurisdiction to hear [plaintiff's claims] does not exist under § 1581(i) because a 28 U.S.C. § 1581(a) remedy was legally and practicably available" by the time of the suit, and dismissed the action. *Id.* at 595–96. The same is true here. Jankovich could have requested refunds through CBP's administrative procedure, protested any adverse decision, and sought review under § 1581(a). Review of the refund determination under § 1581(a) also would have made the separate declaratory relief sought in Jankovich's second cause of action unnecessary. *See* 28 U.S.C. § 2643(c)(1) ("[T]he Court of International Trade may . . . order any other form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition."). Because 19 C.F.R. § 24.24(e) creates a reasonable administrative remedy for pursuing refunds of HMF payments and ultimately for obtaining a judicial determination of the law pursuant to the court's § 1581(a) protest denial jurisdiction, the remedy afforded by § 1581(a) is not manifestly inadequate. As a sufficient remedy was available under § 1581(a), the court does not have jurisdiction under § 1581(i).

II. Jurisdiction Under 28 U.S.C. § 1581(a)

Jankovich recognizes it did not meet the time limit to file suit of 180 days from the denial of its last request for reconsideration, which it

asserts is a protest.[2] It claims an extended period based on representations of CBP. *See supra* note 1. The court, however, would not have jurisdiction under 28 U.S.C. § 1581(a) in any case because a request for reconsideration of a ruling is not a protest. Section 1581(a) grants the court jurisdiction to review "the denial of a protest" under the Tariff Act of 1930. 28 U.S.C. § 1581(a). The relevant portion of the Tariff Act of 1930 provides that certain decisions made by CBP "shall be final and conclusive . . . unless a protest is filed." 19 U.S.C. § 1514(a). Assuming *arguendo* that CBP's "prospective" ruling is a decision that may be protested on the facts of this case, Jankovich failed to properly protest the "prospective" ruling to perfect jurisdiction.

Jankovich concedes that it never requested refunds, or instituted a formal protest before CBP. *See* Jankovich Resp. at 5. Jankovich asks the court to treat its request for reconsideration of CBP's "prospective" ruling as a constructive protest and CBP's denial of that request as a denial of a protest. *See id.* at 6. Although courts have previously construed purported protests generously, noting the harsh consequences of failing to comply with this jurisdictional prerequisite, the requirements for a valid protest are mandatory. *See Puerto Rico Towing & Barge Co. v. United States*, Slip Op. 14–80, 2014 WL 3360779, *2–3 (CIT July 10, 2014); *see also Koike Aronson, Inc. v. United States*, 165 F.3d 906, 908–09 (Fed. Cir. 1999); *Mattel, Inc. v. United States*, 72 Cust. Ct. 257, 261–62, C.D. 4547, 377 F. Supp. 955, 960 (1974).

By statute, a protest must set forth distinctly and specifically the decision being protested, the category of merchandise affected by the decision, and the nature of the protesting party's objections. *See* 19 U.S.C. § 1514(c)(1). Section 1514(c)(1) also requires protests to comply with relevant regulations. *Id.* By regulation, a protest must be clearly labeled "Protest," identify the party protesting, and list the number and date of the entry, the date of liquidation of the entry or of the decision being protested, a description of the merchandise, and the justifications for the objections. 19 C.F.R. §§ 174.12(b), (c), 174.13(a). Also by regulation, to properly request refund of HMF payments, a party must file CBP Forms 349 and 350. 19 C.F.R. § 24.24(e)(4)(iii).

Whether a purported protest is a valid protest is evaluated by an objective standard, rather than the subjective understanding of the agency. *Power-One Inc. v. United States*, 23 CIT 959, 964, 83 F. Supp.

[2] Suit on a protest denial must be filed within 180 days after the mailing of the notice of denial of a protest or within 180 days of the denial of a protest by operation of law. 28 U.S.C. § 2636(a).

2d 1300, 1305 (1999); *Mattel*, 72 Cust. Ct. at 266, 377 F. Supp. at 963. The purported protestor's intent matters, if at all, only to the extent that the reviewing agency must be able to discern such intent and the relief sought. "[O]ne cardinal rule in construing a protest is that it must show fairly that the objection afterwards made at the trial was in the mind of the party at the time the protest was made . . . ." *Mattel*, 72 Cust. Ct. at 260, 377 F. Supp. at 959. Just as objections later made before a court must have been in the mind of the protestor at the time of the protest, *see Mattel*, 72 Cust. Ct. at 266, 377 F. Supp. 2d at 963, courts have indicated that the alleged protestor must have intended the submission to be a protest. *See Power-One Inc.*, 23 CIT at 964, 83 F. Supp. 2d at 1306 (holding that a letter containing the statement "[we have not] filed a protest"—a position reaffirmed by counsel at oral argument—was not a protest). *But see Sony Elecs., Inc. v. United States*, 26 CIT 286, 288 (2002) ("Plaintiff's subjective intent is no more at issue than is Customs' subjective understanding of the protests.").

Here, Jankovich both failed to comply with the regulations for filing a proper protest and did not intend for its request for reconsideration to be a protest. First, the request for reconsideration was not clearly labeled "Protest" and in fact, never mentioned the word protest. Courts have dismissed complaints for similar deficiencies. *See, e.g.*, *Ovan Int'l, Ltd. v. United States*, 49 F. Supp. 3d 1327, 1333 (CIT 2015); *Chrysal USA, Inc. v. United States*, 853 F. Supp. 2d 1314, 1324 (CIT 2012); *Ammex, Inc. v. United States*, 27 CIT 1677, 1685, 288 F. Supp. 2d 1375, 1382 (2003). Second, the request for reconsideration did not indicate that Jankovich was seeking refunds and did not comply with 19 C.F.R. § 24.24(e)(4)(iii). Jankovich expressly states it never protested CBP's ruling, Jankovich Resp. at 4–5 ("[Jankovich] is not contesting CBP's denial of a protest"); *id.* at 5 ("[a]t no time did [Jankovich] . . . submit a protest under section 515 of the Tariff Act"). Jankovich's request for reconsideration contained no request for refunds, Dipolito Decl. ¶ 6, yet Jankovich now asks the court to construe its request for reconsideration as a protest based on 19 C.F.R. § 24.24(e), which concerns refunds. Jankovich Resp. at 6. There was nothing in Jankovich's request that indicated it sought a refund and thus no way for CBP to know it was initiating a protest of a refund denial. *See Lykes Pasco, Inc. v. United States*, 22 CIT 614, 615–16, 14 F. Supp. 2d 748, 749–50 (1998) (dismissing complaint where purported protest would have required CBP to speculate as to the contents of the protest). Finally, if all that is protested is the adverse ruling, courts have indicated that the proper path seeking relief from a prospective ruling is to protest, *ex post*, an actual application of that

ruling, rather than the ruling letter itself. *See, e.g., General Mills, Inc. v. United States*, 32 F. Supp. 3d 1324, 1330 (CIT 2014) (denying jurisdiction where importer could have obtained relief by filing a protest upon importation, rather than challenging the prospective ruling). Indeed, although Jankovich missed its opportunity here to seek relief as to most of its past payments, by requesting a refund and protesting upon denial of the refund, such an option for seeking refund of fees remains available to Jankovich in the future. It needs to file a protest in proper form if its refund request is not granted, and file suit upon protest denial.[3] Accordingly, the court must deny Jankovich's request for leave to amend its complaint to assert jurisdiction under 28 U.S.C. § 1581(a) because the prerequisites to such suit have not been met.

CONCLUSION

As Jankovich's request for reconsideration was not a proper protest, the court does not have jurisdiction under § 1581(a), and because the court could have had jurisdiction under § 1581(a), the court does not have jurisdiction under § 1581(i). The complaint is dismissed.

Dated: December 30, 2015
New York, New York

Jane A. Restani
JANE A. RESTANI JUDGE

[3] The court does not imply that such suit would be successful. CBP's ruling that the exclusion of bunker fuel from the definition of "commercial cargo" subject to the HMF applies only to such fuel for the ship's own use is not without some appeal.

Slip Op. 15–147

SUNPOWER CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Donald C. Pogue, Senior Judge
Consol. Ct. No. 15–00067[1]

SUNPOWER CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Ct. No. 15–00090

OPINION AND ORDER

[motions to amend complaints granted; motions to amend preliminary injunctions granted; motion to amend preliminary injunction motion granted; motion for preliminary injunction granted; motions to dismiss denied]

Dated: December 30, 2015

Daniel J. Gerkin and *Jerome J. Zaucha*, K&L Gates, LLP of Washington, DC, for the Plaintiff.

Melissa M. Devine, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. With her on the briefs were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades*, Jr., Assistant Director. Of counsel were *Rebecca Cantu*, Senior Attorney, and *Shelby M. Anderson*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Timothy C. Brightbill, *Laura El-Sabaawi*, and *Usha Neelakantan*, Wiley Rein, LLP of Washington, DC, for Defendant-Intervenor SolarWorld Americas, Inc.

Pogue, Senior Judge:

In these cases, Plaintiff SunPower Corp. ("SunPower") contests aspects of the final affirmative determinations made by the U.S. Department of Commerce ("Commerce") in its antidumping and countervailing duty ("AD" and "CVD," respectively) investigations of solar cells and panels from the People's Republic of China.[2] The court has jurisdiction over these actions pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[3] and 28 U.S.C. § 1581(c) (2012).

---

[1] This action is consolidated with Court Nos. 15–00071, 15–00083, 15–00087, 15–00088, and 15–00089. Order, July, 1, 2015, ECF No. 31.

[2] Compl., Consol. Ct. No. 15–00067, ECF No. 16; Compl., Ct. No. 15–00090, ECF No. 9; *see Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China*, 79 Fed. Reg. 76,970 (Dep't Commerce Dec. 23, 2014) (final determination of sales at less than fair value) ("*AD Final Determination*"); *Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China*, 79 Fed. Reg. 76,962 (Dep't Commerce Dec. 23, 2014) (final affirmative countervailing duty determination) ("*CVD Final Determination*").

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

Currently before the court are ten motions, all of which concern the standing of SunPower and that of its wholly owned subsidiary, SunPower Corporation, Systems ("Systems") in these matters.[4]

As explained below, both SunPower and Systems were interested parties who participated in the underlying administrative proceedings at issue here, and therefore each has standing to challenge the administrative determinations in its own right. Accordingly, Plaintiff's motions to amend the complaints[5] and extend the preliminary injunctions to cover its wholly owned subsidiary are granted, while Defendant's and Defendant-Intervenor's motions to dismiss are denied.

BACKGROUND

The two cases currently under review are Consolidated Court Number 15–00067 ("15–67"), which concerns challenges to Commerce's antidumping duty investigation, and Court Number 15–00090 ("15–90"), which concerns challenges to the countervailing duty investigation.

Both cases arise from petitions filed by Defendant-Intervenor SolarWorld Americas Incorporated ("SolarWorld").[6] SunPower participated in both investigations.[7]

---

[4] [SunPower's] Mot. for Leave to Amend, Consol. Ct. No. 15–00067, ECF No. 34 ("Pl.'s Mot. to Amend"); [SunPower's] Mot. to Enlarge Scope of Prelim. Inj. to Include Entries Made by [Systems] [in Connection with Ct. No. 15–00083], Consol. Ct. No. 15–00067, ECF No. 35; [SunPower's] Mot. to Enlarge Prelim. Inj. to Include Entries Made by [Systems] [in Connection with Ct. No. 15–00088], Consol. Ct. No. 15–00067, ECF No. 36; Def.'s Mot. to Dismiss Count VI of Pl.'s Compl., Consol. Ct. No. 15–00067, ECF No. 37 ("Def.'s Mot. to Dismiss Count VI"); Def.-Intervenor's Mot. to Dismiss Count VI of Pl.'s Compl., Consol. Ct. No. 15–00067, ECF No. 39 ("Def.-Intervenor's Mot. to Dismiss Count VI"); [SunPower's] Mot. for Prelim. Inj., Ct. No. 15–00090, ECF No. 17; [SunPower's] Mot. for Leave to File Am. Compl., Ct. No. 15-00090, ECF No. 30 ("Pl.'s Mot. to Amend"); SunPower's Mot. to Amend Mot. for Prelim. Inj., Ct. No. 15–00090, ECF No. 31; Def.'s Mot. to Dismiss Pl.'s Compl., Ct. No. 15–00090, ECF Nos. 32 (conf.) & 33 (pub.); Def.-Intrvenor's Mot. to Dismiss, Ct. No. 15–00090, ECF No. 35.

[5] Since SunPower's amendments to its complaint relate back to its original filing, as explained below, *see infra* Section IIIA, Systems is not time-barred from entering this litigation.

[6] *See Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China and Taiwan*, 79 Fed. Reg. 4661, 4661 (Dep't Commerce Jan. 29, 2014) (initiation of antidumping duty investigations); *Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China*, 79 Fed. Reg. 4667,4668 (Dep't Commerce Jan. 29, 2014) (initiation of countervailing duty investigation).

[7] In 15–67, SunPower entered an appearance in Commerce's antidumping duty investigation, claiming interested party status pursuant to 19 U.S.C. §§ 1677(9)(A) and (9)(C) as an importer and United States producer of a domestic like product. *See* SunPower Corp.'s Entry of Appearance & Appl. for Admin. Protective Order, *Certain Crystalline Silicon Photovoltaic Products from China*, A-570–010, Investigation (Feb. 12, 2014), *reproduced in* Pl.'s Mot. to Amend, Ct. No. 15–00067, ECF No. 34 at Ex. 1 ("SunPower AD Entry of Appearance"), at 1. Thereafter, SunPower responded to Commerce's Quantity and Value

Plaintiff timely filed a summons and complaint in 15–67 seeking judicial review of Commerce's antidumping duty investigation.[8] Plaintiff then moved, in what are now two of the member cases in that consolidated action, Court Numbers 15–00083 and 15–00088,[9] to preliminarily enjoin Defendant from liquidating its subject merchandise.[10] Both motions were granted.[11] Plaintiff now seeks for both its complaint and its injunction to be expanded to cover Systems.[12] Defendant opposes both motions, arguing that Systems does not have

(Q&V) questionnaire on behalf of "SunPower Corporation . . . and its wholly owned U.S. subsidiaries, [including] SunPower Corporation Systems." Submission of [Q&V] Questionnaire for SunPower Corp. & Wholly Owned U.S. Subsidiaries, *Certain Crystalline Silicon Photovoltaic Products from China*, A-570–010, Investigation (Feb. 13, 2014) reproduced in Pl.'s Mot. to Amend, Consol. Ct. No. 1500067, ECF No. 34 at Ex. 2 ("SunPower Q&V Questionnaire"), at 1. In 15–90, SunPower entered an appearance in the countervailing duty investigation, likewise claiming both 19 U.S.C. §§1677(9)(A) and (9)(C) interested party status. SunPower Corp.'s Entry of Appearance & Appl. for Admin. Protective Order, *Certain Crystalline Silicon Photovoltaic Products from China*, C-570–011, Investigation (Feb. 12, 2014), *reproduced in* Pl.'s Mot. to Amend, Ct. No. 15–00090, ECF No. 30 at Ex. 1 ("SunPower CVD Entry of Appearance"), at 1; Suppl. to Sunpower Corp.'s Entry of Appearance, *Certain Crystalline Silicon Photovoltaic Products from China*, C-570–011, Investigation (Mar. 31, 2014), *reproduced in* Pl.'s Mot. to Amend, Ct. No. 15–00090, ECF No. 30 at Ex. 2 ("Suppl. to SunPower CVD Entry of Appearance").

[8] Summons, Consol. Ct. No. 15–00067, ECF No. 1; Compl., Consol. Ct. No. 15–00067, ECF No. 16.

[9] By order dated July 1, 2015, the court consolidated 15–00083 and 15–00088 under Consolodated Court Number 15–00067, along with Court Numbers 15–00071, 15–00087, and 15–00089; Court Number 15–00090 remains unconsolidated. *See* Order, July 1, 2015, Consol. Ct. No. 15–00067, ECF No. 31.

[10] [SunPower's] Mot. to Enlarge Scope of Prelim. Inj. to Include Entries Made by [Systems] [in Connection with Ct. No. 15–00083], Consol. Ct. No. 15–00067, ECF No. 35; [SunPower's] Mot. to Enlarge Prelim. Inj. to Include Entries Made by [Systems] [in Connection with Ct. No. 15–00088], Consol. Ct. No. 15–00067, ECF No. 36.

[11] Order, May 29, 2015, Ct. No. 15–00083, ECF No. 38 (granting in part SunPower's motion for preliminary injunction); Order, May 29, 2015, Ct. No. 15–00088, ECF No. 40 (same).

[12] Pl.'s Mot. to Amend, Consol. Ct. No. 15–00067, ECF No. 34; [SunPower's] Mot. to Enlarge Scope of Prelim. Inj. to Include Entries Made by [Systems] [in Connection with Ct. No. 15–00083], Consol. Ct. No. 15–00067, ECF No. 35; [SunPower's] Mot. to Enlarge Prelim. Inj. to Include Entries Made by [Systems] [in Connection with Ct. No. 15–00088], Consol. Ct. No. 15–00067, ECF No. 36. SunPower also moves to "remove Count VI" from the complaint, which is challenged but effectively uncontested. Pl.'s Mot. to Amend, Consol. Ct. No. 15–00067, ECF No. 34, at 1; *see also* Def.'s Mot. to Dismiss Count VI, Consol. Ct. No. 15-00067, ECF No. 37; Def.-Intervenor's Mot. to Dismiss Count VI of Pl.'s Compl., Consol. Ct. No. 39. This is discussed further below, *see infra* Discussion Section II. SunPower also moves to amend its complaint in 15–67 to correct an error. Pl.'s Mot. to Amend, Consol. Ct. No. 15–00067, ECF No. 34, at 1 (moving to "correct a prior inadvertent reference to the scope of the investigations as stated in the petition"). This is uncontested, *see* Def.'s Partial Opp'n to [Pl.'s Mot. to Amend], Consol. Ct. No. 15–00067, ECF Nos. 41 (conf.) & 43 (pub.); Def.-Intervenor's Resp. to Pl.'s Mot. for Leave to File Am. Compl., Consol. Ct. No. 15–00067, ECF No. 46, and therefore granted.

standing before this court and that SunPower is not empowered to expand the injunction on Systems' behalf.[13]

SunPower also timely filed a summons and complaint in 15–90.14.[14] Here, too, SunPower moves to amend their complaint to cover Systems,[15] and for a preliminary injunction to prevent liquidation of their entries and those of Systems.[16] The Government and SolarWorld move to dismiss 15–90,[17] and accordingly argue that the Court lacks jurisdiction to grant SunPower's motions to amend its complaint and preliminarily enjoin.[18]

---

[13] Def.'s Partial Opp'n to [Pl.'s Mot. to Amend], Consol. Ct. No. 15–00067, ECF Nos. 41 (conf.) & 43 (pub.), at 2; Def.'s Resp. in Opp'n to Pl.'s Mots. to Enlarge Prelim. Injs., Consol. Ct. No. 15–00067, ECF Nos. 44 (conf.) & 45 (pub.).

[14] Summons, Ct. No. 15–00090, ECF No. 8; Compl., Ct. No. 15-00090, ECF No. 9.

[15] Pl.'s Mot. to Amend, Ct. No. 15–00090, ECF No. 30. This motion also seeks to correct errors in the complaint. *Id*. at 1–2 (moving to "correct prior inadvertent references to the companion antidumping duty investigation and order" and "inadvertent reference . . . to the scope of the investigation stated in the petition"). These corrections are uncontested, *see* Def.'s Resp. in Opp'n to [Pl.'s Mot. to Amend], Ct. No. 15-00090, ECF No. 37; Def.-Intervenor's Resp. to Pl.'s Mot. for Leave to File Am. Compl., Ct. No. 15–00090, ECF No. 39, and therefore granted.

[16] In 15–90, Planitiff moved for a preliminary injunction, [SunPower's] Mot. for Prelim. Inj., Ct. No. 15–00090, ECF No. 17, which Defendant and Defendant-Intervenors opposed, Def.'s Resp. to Pl.'s Mot. for Prelim. Inj., Ct. No. 15–00090, ECF No. 20; Def.-Intervenor's Opp'n to Pl.'s Mot. for Prelim. Inj., Ct. No. 15–00090, ECF No. 19. On consent motion, time was extended for a series of teleconferences. Teleconference, June 17, 2015, ECF No. 22; Consent Mot. for Extension of Time, June 30, 2015, ECF No. 25 (requesting rescheduling of teleconference from July 1, 2015 to July 8, 2015); Order, July 1, 2015, ECF No. 26 (granting); Teleconference, July 1, 2015, ECF No. 27; Teleconference, July 8, 2015, ECF No. 29. Therefore, this motion for a preliminary injunction was still pending when Plaintiff first sought to add Systems as a party to 15–90 and extend the scope of its preliminary injunctions to cover Systems' entries. In consequence, Plaintiff has filed a motion for leave to file an amended motion for preliminary injunction. Pl.'s Mot. for Leave to File Am. Prelim. Inj. Mot. to Include Entries Made by [Systems], Ct. No. 15–00090, ECF No. 31. Defendant and Defendant-Intervenor each filed papers characterized as oppositions to the request for leave to file an amended motion for preliminary injunction, but Defendant argues the merits of Plaintiff's proposed amended filing without contending that the amendment itself should be disallowed, Def.'s Resp. in Opp'n to Pl.'s Mot. for Leave to Amend Prelim. Inj., Ct. No. 15–00090, ECF No. 38, and Defendant-Intervenor's filing adopts Defendant's arguments by reference without adding any further argument, Def.'s-Int.'s Resp. to Pl.'s Mot. for Leave to File Am. Prelim. Inj., Ct. No. 15–00090, ECF No. 40. Accordingly, the court shall grant as unopposed Plaintiff's motion for leave to file an amended motion, and will below resolve Plaintiff's amended motion and all oppositions to it, *see infra* Discussion Section V.

[17] Def.'s Mot. to Dissmis Pl.'s Compl., Ct. No. 15–00090, ECF No. 32 (conf.) & 33 (pub.); Def.-Intervenor's Mot. to Dismiss, Ct. No. 15–00090, ECF No. 35.

[18] Def.'s Resp. in Opp'n to [Pl.'s Mot. to Amend], Ct. No. 15- 00090, ECF No. 37; Def.'s Resp. in Opp'n to Pl.'s Mot. for Leave to Amend its Prelim. Inj. Mot., Ct. No. 15–00090, ECF No. 38; Def.-Intervenor's Resp. to Pl.'s Mot. for Leave to File Am. Compl., Ct. No. 15–00090, ECF No. 39; Def.-Intervenor's Resp. to Pl.'s Mot. for Leave to File Am. [Prelim. Inj. Mot.], Ct. No. 15–00090, ECF No. 40.

DISCUSSION

I. Motions to Dismiss in Ct. No 15–90

The arguments to dismiss in 15–90 boil down to a contention that SunPower itself lacks standing to bring this case.

SunPower's claim of standing is based on 28 U.S.C. § 2631(j)(1)(B), which provides that "in a civil action under [19 U.S.C. § 1516a] only an *interested party* who was a *party to the proceeding* in connection with which the matter arose may intervene . . . ." (emphasis added).

A. SunPower was an Interested Party

19 U.S.C. § 1677(9) defines an "interested party" as, *inter alia*, "a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise . . . ."[19] In the CVD investigation, SunPower asserted status as an importer, based on the entries made by Systems; in the alternative, SunPower claimed that it was a producer by virtue of its toll produced products.[20] The agency made no determination to the contrary.[21] Similarly, the Defendant's motion to dismiss does not claim that SunPower was not an interested party.[22] SunPower was therefore an interested party.

B. SunPower was a Party to the Proceeding.

While there is no statutory definition of "party to the proceeding," Commerce has defined the term as "any interested party that actively participates, through written submissions of factual information or written argument, in a segment of a proceeding."[23] This Court has previously adopted that definition, holding that a party is a "'party to

[19] 19 U.S.C. § 1677(9)(A).

[20] Suppl. to SunPower CVD Entry of Appearance, Ct. No. 15–00090, ECF No. 30 at Ex. 2 (claiming standing under both 19 U.S.C. § 1677(9)(A) and (9)(C)).

[21] *See CVD Final Determination*, 79 Fed. Reg. 76,962, and accompanying Issues & Decission Mem., C-570–011, Investigation (Dec. 15, 2014).

[22] Def.'s Mot. to Dismiss Pl.'s Compl., Ct. No. 15–00090, ECF Nos. 32 (conf.) & 33 (pub.), at 8–9 (contending only that "because SunPower was not a party to the proceeding, it does not have standing to bring this action . . ."). Although the Defendant, in a teleconference held on September 15, 2015, questioned whether SunPower can claim status as an importer based solely on its ownership of a subsidiary importing subject goods, *see* Teleconference, Sept. 15, 2015, Ct. No. 15–00090, ECF No. 43, this claim was not presented in its moving papers, *see* Def.'s Mot. to Dismiss Pl.'s Compl., Ct. No. 15–00090, ECF Nos. 32 & 33, and the agency made no such determination, *see CVD Final Determination*, 79 Fed. Reg. 76,962, and accompanying Issues & Decission Mem., C-570–011, Investigation (Dec. 15, 2014). Arguments omitted from a party's briefing are waived. *See United States v. Great American Ins. Co. of NY*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived." (citations omitted)).

[23] 19 C.F.R. § 351.102(b)(36).

the proceeding' only when that party provides factual information or promotes a legal position before Commerce."[24]

There is no requirement that a party provide both factual information and legal argument. Providing factual data on exports in response to a questionnaire from Commerce is sufficient to make a party a "party to the proceeding."[25] The addition of relevant information to an otherwise procedural filing changes the character of that filing to meaningful participation in the administrative proceeding.

Here, SunPower submitted factual data on exports and sales of goods imported by Systems in response to Commerce's request.[26] This makes SunPower a "party to the proceeding."

Accordingly, SunPower is an interested party who was a party to the proceeding, and on that basis, jurisdiction over SunPower's claim is proper. Defendant and Defendant- Intervenors' motions to dismiss 15–90 are therefore denied.

---

[24] *Legacy Classic Furniture, Inc. v. United States*, ___ CIT ___, 774 F. Supp. 2d 1293, 1295 (2011) (emphasis added).

[25] Defendant's position here is that the lack of an argument accompanying the data dooms SunPower's attempt at participation. Def's Mot. to Dismiss, Ct. No. 15–00090, ECF No. 32 p. 4–9. *Legacy* holds that a party is a party to the proceeding "only when that party provides factual information or promotes a legal position before Commerce." *Legacy Classic Furniture*, ___ CIT at ___, 774 F. Supp. 2d at 1294. In effect, Defendant argues that the 'or' in *Legacy* should be read as 'and.'

To support this proposition, Defendant cites *Specialty Merchandise Corp*, in which a plaintiff was found to have been a party to the proceeding because it had submitted both facts and argument. *Specialty Merchandise Corp. v. United States*, 31 CIT 364, 365–66, 477 F. Supp. 2d 1359, 1361 (2007); *see* Def's Mot. to Dismiss, Ct. No. 15–00090, ECF No. 32 p. 7–8. There, this Court affirmed Commerce's determination that Specialty Merchandise was a party to the proceeding because it made written submissions containing argument. Defendant now appears to argue that by agreeing that evidence backed by argument was one valid form of participation, this Court somehow conjured up a requirement that only evidence linked to argument counts as participation. Def's Mot. to Dismiss, Ct. No. 15–00090, ECF No. 32 p. 7. This is not the case. The fact-to-argument link is sufficient to establish participation, but it is not necessary. *See Union Steel v. United States*, 33 CIT 614, 618–19, 617 F. Supp. 2d 1373, 1378–79 (2009).

[26] Suppl. to SunPower CVD Entry of Appearance, Ct. No. 15–00090, ECF No. 30 at Ex. 2, at 2–3 (noting that Commerce "requested that [SunPower] provide customs entry documentation to substantiate [the] assertion that it is an importer of subject merchandise," and provide factual information that its "wholly owned subsidiary, [Systems]," did); *see* Ex. 1 to Suppl. to Sunpower Corp.'s Entry of Appearance, *Certain Crystalline Silicon Photovoltaic Products from China*, C-570–011, Investigation (Mar. 31, 2014), *reproduced in* Def.'s [Conf.] Mem. in Supp. of Mot. to Dismiss for Lack of Jurisdiction, Ct. No. 15–00090, ECF No. 32 at Attach. A, (providing entry summary (Customs and Boarder Protection ("CBP") Form 7501) and the associated commercial invoice used by Systems to make entry).

II. Motions to Dismiss Count VI in 15–67

Plaintiff moves to withdraw Count VI of its complaint in 15–67.[27] Defendant and Defendant-Intervenor move to dismiss Count VI as well.[28] Since there is no disagreement between the parties on this point, SunPower's motion to withdraw Count VI is granted and Defendant and Defendant-Intervenor's motions to dismiss Count VI are denied as moot.

III. Motions to Amend in Both 15–67 and 15–90

SunPower has moved to amend its complaints in both 15- 67 and 15–90 pursuant to USCIT Rules 7(b)(1), 15(a)(2), 15(c)(1), 20, and 21.[29] The chief purpose of these amendments is to add Systems as a party.[30] Defendant and Defendant-Intervenor oppose the addition of Systems, arguing that Systems was not a party to the underlying administrative proceedings, and further, that Systems should be time-barred because it seeks joinder more than thirty days after Commerce's final determinations.[31]

USCIT Rule 21 empowers this Court, "[o]n motion or on its own . . . [to] at any time, on just terms, add or drop a party." This equitable power is broad: "Rules 20 and 21, involving, inter alia, the addition of parties, are to be construed liberally in order to promote complete resolution of disputes, thereby preventing multiple lawsuits."[32]

Despite Defendant and Defendant-Intervenor's claims, Systems standing is not time-barred, since, as explained below, the filing date

[27] Pl.'s Mot. to Amend, Consol. Ct. No. 15–00067, ECF No 34, at 1–2 (seeking to amend its complaint to "remove Count VI," as it had not intended "to challenge any aspect of the [International Trade] Commissions determinations").

[28] Def.'s Mot. to Dismiss Count VI, Consol. Ct. No. 15–00067, ECF No. 37; Def.-Intervenor's Mot. to Dismiss Count VI of Pl.'s Compl., Consol. Ct. No. 39.

[29] Pl's Mot. to Amend, Consol. Ct. No. 15–00067, ECF No. 34; Pl's Mot. to Am., Ct. No. 15–00090, ECF No. 30.

[30] *See* Pl's Mot. to Amend, Consol. Ct. No. 15–00067, ECF No. 34, at 3–9; Pl's Mot. to Am., Ct. No. 15–00090, ECF No. 30, at 4–11.

[31] Def.'s Partial Opp'n to [Pl.'s Mot. to Amend], Consol. Ct. No. 15–00067, ECF Nos. 41 (conf.) & 43 (pub.), at 5–13; Def.'s Resp. in Opp'n to [Pl.'s Mot. to Amend], Ct. No. 15–00090, ECF No. 37, at 4–10; *see also* Def.-Intervenor's Resp. to Pl.'s Mot. for Leave to File Am. Compl., Consol. Ct. No. 15–00067, ECF No. 46 (concurring with and adopting Defendant's arguments); Def.- Intervenor's Resp. to Pl.'s Mot. for Leave to File Am. Compl., Ct. No. 15–00090, ECF No. 39 (same).

[32] *United States v. Gold Mountain Coffee, Ltd.*, 9 CIT 16, 18 (1985) (not reported in Federal Supplement) (citations omitted); s*ee also AD HOC Utilities Grp. v. United States*, 33 CIT 1284, 1296 n.20, 650 F. Supp. 2d 1318, 1330 n.20 (2009) ("[I]n applying [USCIT] Rule 21, the court is governed by the liberal amendment standards of Rule 15(a)." (quoting *Insituform Techs., Inc. v. CAT Contracting, Inc*., 385 F.3d 1360, 1372 (Fed. Cir. 2004)); cf. USCIT Rule 15(a)(2) ("The court should freely give leave [to amend] when justice so requires."); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966) ("Under the [Federal Rules of Civil

of the amended complaint relates back to the filing date of the original complaint. In addition, Systems has standing in its own right because: Systems has shown that it is an interested party, having imported subject goods during the period of investigation that Commerce knew or should have known about by virtue of Systems' filings on the administrative record. Systems has shown it was a party to the underlying proceedings because it provided Commerce with factual data regarding those entries in response to questionnaires from the agency.

A. Systems' Addition is Not Time-Barred, Because the Amended Complaint Relates Back to the Date of the Original Filing.

Systems is not barred by the requirement in 19 U.S.C. § 1516a that a case be filed within thirty days of Commerce's final determination. Here, the bar is avoided, since "[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out - or attempted to be set out - in the original pleading."[33] Because the original complaints described SunPower's

Procedure], the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.").

[33] USCIT Rule 15(c)(1)(B). "[W]here it is appropriate to relate back an amendment to a pleading under Rule 15, jurisdiction is assessed as if the amendment had taken place at the time the complaint was first filed." *E.R. Squibb & Sons, Inc. v. Lloyd's & Companies*, 241 F.3d 154, 163 (2d Cir. 2001). Leave to amend should be given freely absent "apparent or declared reason . . . such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Rural Fire Protection Co. v. Hepp*, 366 F.2d 355, 362 (9th Cir. 1966) ("The purpose of Rule 15(c) is to defeat the bar of statutes of limitations, and is liberally applied especially if no disadvantage will accrue to the opposing party."). Defendant has not shown bad faith, prejudice, futility, or any other meaningful potential disadvantage. Commerce's parade of horribles here is unpersuasive: SunPower is not attempting to parachute previously unsuspected time-barred corporations into this litigation years after the fact. The rules would prohibit this, and will continue to do so in the future. Rather, they are attempting, several months after filing their complaint and promptly after discovering a defect in their pleading, to correct that defect in order to preserve the ability to challenge liquidation of the same entries they had apparently intended to protect in the first place. *See* Compl., Consol. Ct. No. 15–00067, at 2–4 (original complaint describing SunPower's tolling arrangement with subsidiaries); Compl., Ct. No. 15-00090, ECF No. 9, at 3–4 (same); [SunPower's] Mot. for Prelim. Inj., Ct. No. 15–00083, ECF No. 24, at 1–2 (seeking to enjoin liquidation of subject merchandise "imported by SunPower or any wholly owned subsidiary of SunPower (collectively, 'SunPower')"); [SunPower's] Mot. for Prelim. Inj., Ct. No. 15-00088, ECF No. 30, at 1–2 (same); [SunPower's] Mot. for Prelim. Inj., Ct. No. 15–00090, ECF No. 17, at 1–2 (same).

tolling arrangements with its various wholly-owned subsidiaries,[34] and since SunPower's factual submission in the underlying administrative proceedings were submitted jointly with Systems and discussed entries made by Systems that SunPower now seeks to cover with its amended complaints and expanded preliminary injunctions,[35] as discussed below, it follows from these filings that Commerce had fair notice of Systems' status and that Systems' status may therefore relate back to the date of the original filing of the complaints.[36] The thirty-day time bar is therefore satisfied.

B. Systems Has Standing Because it was an Interested Party and a Party to the Proceedings in its Own Right.

SunPower may amend its complaints to add Systems as a party if Systems is an interested party who was a party to the underlying proceedings.[37] If not, Systems lacks standing.[38]

Systems is an interested party if it acted as the importer of record for subject merchandise during the period of investigation.[39] In 15–67, SunPower, with Systems, provided Commerce, in the underlying proceedings, with entry summary documents for three entries of subject merchandise with Systems as the importer of record.[40] In

[34] Compl., Consol. Ct. No. 15–00067, ECF No. 16 at ¶¶ 5–7; Compl., Ct. No. 15–00090, ECF No. 9 at ¶¶ 5–7.

[35] SunPower AD Entry of Appearance, Ct. No. 15–00067, ECF No. 34 at Ex. 1; SunPower Q &A Questionnaire, Consol. Ct. No. 15–00067, ECF No. 34 at Ex. 2; SunPower CVD Entry of Appearance, Ct. No. 15–00090, ECF No. 30 at Ex. 1, at 1; Suppl. to SunPower CVD Entry of Appearance, Ct. No. 15–00090, ECF No. 30 at Ex. 2.

[36] *See Foman*, 371 U.S. at 182.

[37] SunPower does not need to prove anything about its relationship with Systems. As explained below, Systems' submission of factual information is independently sufficient to establish its participation in the proceedings, *see infra* Discussion Section III, such that it is not necessary to address the nature of SunPower's corporate structure, or any related legal questions.

[38] *See* 19 U.S.C. § 1516a(a)(2)(A); *see also* 28 U.S.C. § 2631(j)(1)(B) ("[O]nly an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right.")

[39] 19 U.S.C. § 1677(9)(A) (defining "interested party" as a inter alia, "the United States importer[ ] of subject merchandise").

[40] Aff. By Michael Holland, Sr. Counsel for [SunPower], in Supp. of [Systems'] Status as Importer of R. During Period of Investigation, *reproduced in* Affs. in Supp. of [Systems'] Status as Importer of R. during Period of Investigation, Consol. Ct. No. 15–00067, ECF Nos. 67 (conf.) & 68 (pub.) at App. 1 ("Holland Aff."), at Ex. 3.1 (providing the CBP Form 7501 and commercial invoice for Entry Number 201–9399143–6, dated June 18, 2013); *id*. at Ex. 3.2 (providing the CBP Form 7501 and commercial invoice for Entry Number 201–9399165–9, dated July 19, 2013); *id*. at Ex. 3.3 (providing the CBP Form 7501 and commercial invoice for Entry Number 201–9399161–8, dated July 17, 2013); *see* Def.'s Partial Opp'n to [Pl.'s Mot. to Amend], Consol. Ct. No. 15–00067, ECF Nos. 41 (conf.) & 43, at 15 (describing these CBP Forms 7501 as "provided to Commerce in SunPower's separate rate application").

15–90, SunPower relies similarly on entry documents that describe subject merchandise entered during the period of review with Systems as the importer of record.[41] As Defendant points out, in 15–67 the summary forms erroneously list the importer of record as "SunPower Corporation USA" and not "SunPower Corporation, Systems"; "SunPower Corporation, Systems" is identified only as the consignee.[42] However, Commerce knew or had reason to know that these entries were in fact made by Systems because the address and importer number listed on the forms were those of Systems, and "SunPower Corporation USA," which does not actually exist.[43] Therefore, because Systems served as importer of record of subject merchandise during the periods of investigation for both the AD and CVD administrative proceedings, and Commerce knew or had reason to know of this, Systems is an interested party for the purposes of both 15–67 and 15–90.

Systems next must show that it was a party to the underlying administrative proceedings.[44] As explained above, the statute provides no definition of the term "party to the proceeding," but Commerce has defined the term as "any interested party that actively participates, through written submissions of factual information or written argument, in a segment of a proceeding."[45] Purely procedural filings, such as an "[administrative protective order] application and notice of appearance," unaccompanied by other participation before the administrative agency, are insufficient to create a party to the proceeding.[46] On the other hand, an interested party who responds to

[41] *See* Suppl. to SunPower CVD Entry of Appearance, Ct. No. 15- 00090, ECF No. 30 at Ex. 2 (noting that Exhibit 1 to the supplement is a CBP Form 7501, and its commercial invoice, for Entry Number 322–0768689–4, dated Sept. 9, 2012, for which Systems is the importer of record); *see also* Ex. 1 to Suppl. to Sunpower Corp.'s Entry of Appearance, *Certain Crystalline Silicon Photovoltaic Products from China*, C-570–011, Investigation (Mar. 31, 2014), *reproduced in* Def.'s [Conf.] Mem. in Supp. of Mot. to Dismiss for Lack of Jurisdiction, Ct. No. 15–00090, ECF No. 32 at Attach. B, (providing CBP Form 7501 and the associated commercial invoice for Entry Number 322–0768689- 4, dated Sept. 9, 2012, with Systems as the importer of record).

[42] Def.'s Partial Opp'n to Mot. for Leave to File an Am. Compl., Consol. Ct. No. 15–00067, ECF No. 41, at 15.

[43] *See* Holland Aff., ECF Nos. 67 (conf.) & 68 (pub.) at App. 1, at ¶ 6 (noting that Systems' importer number is provide in the CBP Forms 7501 for the importer of record); *id*. at ¶9 (noting that forms make clear that the consignee and the importer of record are the same entity because they have the same federal Tax Identification Number), ¶10 (providing that "SunPower Corporation USA" does not exist and the forms give the correct, unique, physical address of Systems).

[44] 28 U.S.C. § 2631(j)(1)(B).

[45] 19 C.F.R. § 351.102(b)(36).

[46] *Legacy Classic Furniture*, ___ CIT at ___, 774 F. Supp. 2d at 1294.

a questionnaire from the Department seeking information to use in selecting respondents is a party to the proceedings.[47]

The documents on which SunPower and Systems rely in each case contained factual data on imports to the United States and were submitted to Commerce as a part of the administrative review process.[48] Filings that contain factual data on imports of subject merchandise are enough to establish participation.[49] Further, in 15–67, System's status as a party to the proceeding is strengthened by the fact that it, in conjunction with SunPower, "responded to a questionnaire from the Department seeking information to use in selecting respondents"[50] – a response that Commerce noted in its preliminary determination[51]and its final determination.[52] Commerece, having "acknowledged implicitely [System's] participation in the proceeding by responding to [its] submission containing factual information," cannot now say that Systems is not a party to the proceeding.[53]

Like its parent, Systems provided factual information to Commerce in the underlying proceedings to both 15–67 and 15–90, and is therefore entitled to participate in both cases as a party to the underlying

[47] Union Steel, 33 CIT at 618–19, 617 F. Supp.2d at 1378–79 (2009).

[48] SunPower AD Entry of Appearance, Ct. No. 15–00067, ECF No. 34 at Ex. 1, at 1; SunPower Q&A Questionnaire, Consol. Ct. No. 15- 00067, ECF No. 34 at Ex. 2, at 1; SunPower CVD Entry of Appearance, Ct. No. 15–00090, ECF No. 30 at Ex. 1, at 1; Suppl. to SunPower CVD Entry of Appearance, Ct. No. 15–00090, ECF No. 30 at Ex. 2.

[49] *Union Steel v. United States*, 33 CIT 614, 618–19, 617 F. Supp. 2d 1373, 1378–79 (2009).

[50] *See Legacy Classic Furniture*, __ CIT at __, 774 F. Supp. 2d at 1294 (2011) (citing *Union Steel*, 33 CIT at 618, 617 F. Supp. 2d at 1378); SunPower Q&A Questionnaire, Consol. Ct. No. 15–00067, ECF No. 34 at Ex. 2 at 1 (noting that the questionnaire was submitted on behalf of SunPower and "its wholly owned U.S. subsidiaries," including Systems, "collectively, 'SunPower U.S.'"); *id*. at 2 ("modules incorporating crystalline silicon photovoltaic ('CSPV') cells that were exported to SunPower U.S."); Holland Aff., Consol. Ct. No. 15–00067, ECF Nos. 67 (conf.) & 68 (pub.) at App. 1, at Exs. 3.1, 3.2, & 3.3 (providing the CBP Forms 7501 and commercial invoice for three entries during the period of investigation with Systems as the importer of record, *see supra* notes 39 & 43 with associated text, which are described by Defendant as "entry summary forms submitted to CBP, and later provided to Commerce in SunPower's separate rate application," *see* Def.'s Partial Opp'n to [Pl.'s Mot. to Amend], Consol. Ct. No. 15–00067, ECF Nos. 41 (conf.) & 43, at 15).

[51] *Certain Crystalline Silicon Photovoltaic Proucts from the People's Republic of China*, Preliminary Issues & Decision Mem., A-570–010, Investigation (July 24, 2014) (adopted in 79 Fed. Reg. 44,399 (Dep't Commerce July 31, 2014) (affirmative preliminary determination of sales at less than fair value and postponement of final determination)) at 6 n.20 (listing "SunPower Corporation," and thereby Systems, *see supra* note 50, as among the companies that "filed timely Q&A questionnaire responses").

[52] *See AD Final Determination*, 79 Fed. Reg. at 76,973 ((listing SunPower, and thereby Systems, *see supra* note 50, as among the companys that participated but were not eligible for separate rate status).

[53] *See Union Steel*, 33 CIT at 619, 617 F. Supp. 2d at 1378–79.

proceedings in its own right. Plaintiff's motions to amend its complaints to add Systems as a co-plaintiff are accordingly granted.

IV. Systems is Entitled to the Protection of the Previously- Granted Preliminary Injunction in 15–67.

It is uncontested that, if Systems can be added to this litigation in its own right, and the litigation survives the motions to dismiss, it also has the right to expand the existing preliminary injunction in 15–67 to protect its entries from liquidation.[54] Parties spend much ink arguing about whether or not SunPower possesses independent authority to expand the scope of its previously-granted preliminary injunction to cover Systems' entries. However, this issue does not need to be addressed. Systems having standing, and having therefore properly been joined to this litigation for the reasons described above, Systems is therefore granted an expansion to the preliminary injunction to cover all entries of subject merchandise made during the period covered by the previously-granted preliminary injunctions. leave for Systems to expand the preliminary injunction to protect its entries during the time period covered by the previously-granted preliminary injunction is therefore granted.

V. SunPower and Systems are Entitled to a Preliminary Injunction in 15–90.

In opposing SunPower's motion for a preliminary injunction in 15–90, Defendant claims solely that "the Court should deny SunPower's [and Systems'] motion because SunPower lacks standing to bring this action and, thus, is not entitled to injunctive relief."[55] However, as explained in Sections I through III, *supra*, SunPower and Systems do both have standing.

For the same reasons supporting the grant of preliminary injunctions against liquidation of SunPower and System's subject entries in the cases consolidated into 15–67, SunPower and Systems are entitled to an injunction in 15–90. Their motion, as amended, is granted.

---

[54] Systems is entitled to a preliminary injunction in this case for the same reason that SunPower is, which is laid out in [SunPower's] Mot. for Prelim. Inj., Ct. No. 15–00083, ECF No. 24 (granted in part by Order, May 29, 2015, Ct. No. 15–00083, ECF No. 38); *see also* [SunPower's] Mot. for Prelim. Inj., Ct. No. 15–00088, ECF No. 30 (granted in part by Order, May 29, 2015, Ct. No. 15–00088, ECF No. 40).

[55] Def.'s Resp. in Opp'n to Pl.'s Mot. for Leave to Amend its Prelim. Inj. Mot., Ct. No. 15–00090, ECF No. 38, at 1.

CONCLUSION

SunPower has established that, by submitting factual data to Commerce, it participated in the underlying administrative proceedings; accordingly, this court has jurisdiction and the motions to dismiss 15–90 must be denied.[56] SunPower's motion to dismiss Count VI of 15–67 is granted as unopposed, and in consequence Defendant and Defendant- Intervenor's motions to dismiss Count VI are denied as moot.[57] SunPower has also established that its wholly-owned subsidiary, Systems, joined it on its factual submissions, thereby giving Commerce notice of Systems' separate status and as an interested party who was a party to the proceedings. SunPower may therefore amend its complaints in both actions to include Systems as a party because it has shown that Systems was an interested party and a party to the underlying administrative proceedings. Systems has accordingly established standing before this court in both cases,[58] entitlement to protection under the previously-granted preliminary injunction in 15–67,[59] and to protection under the newly granted preliminary injunction in 15–90.[60] The amended complaints relate back to the filing date of the original complaints, and therefore the thirty-day time bar is not implicated.

For the above-stated reasons, Defendant and SolarWorld's motions to dismiss are denied, Plaintiff's motions to amend are granted, Plaintiff's motion to expand the preliminary injunctions in 15–67 to cover co-plaintiff Systems is granted, and the motion for a preliminary injunction in 15–90 as to both SunPower and Systems is granted.

IT IS SO ORDERED.

Dated: December 30, 2015
New York, NY

/*s*/*Donald C. Pogue*
DONALD C. POGUE,
Senior Judge

---

[56] Def.'s Mot. to Dismiss Pl.'s Compl., Ct. No. 15–00090, ECF Nos. 32 (conf.) & 33 (pub.) (denied); Def.-Intrvenor's Mot. to Dismiss, Ct. No. 15–00090, ECF No. 35. (denied).

[57] Pl.'s Mot. to Amend, Consol. Ct. No. 15–00067, ECF No. 34 (motion to dismiss Count VI granted); Def.'s Mot. to Dismiss Count VI, Consol. Ct. No. 15–00067, ECF No. 37 (denied as moot); Def.-Intervenor's Mot. to Dismiss Count VI, Consol. Ct. No. 15- 00067, ECF No. 39 (denied as moot).

[58] Pl.'s Mot. to Amend, Consol. Ct. No. 15–00067, ECF No. 34 (granted); Pl.'s Mot. to Amend, Ct. No. 15–00090, ECF No. 30 (granted).

[59] [SunPower's] Mot. to Enlarge Scope of Prelim. Inj. to Include Entries Made by [Systems] [in Connection with Ct. No. 15–00083], Consol. Ct. No. 15–00067, ECF No. 35 (granted); [SunPower's] Mot. to Enlarge Prelim. Inj. to Include Entries Made by [Systems] [in Connection with Ct. No. 15–00088], Consol. Ct. No. 15–00067, ECF No. 36 (granted).

[60] SunPower's Mot. to Amend Mot. for Prelim. Inj., Ct. No. 15- 00090, ECF No. 31 (granted); [SunPower's] Mot. for Prelim. Inj., Ct. No. 15–00090, ECF No. 17 (granted as amended).

Slip Op. 15–148

NAN YA PLASTICS CORPORATION, LTD., PLAINTIFF v. UNITED STATES, Defendant, and DUPONT TEIJIN FILMS, MITSUBISHI POLYESTER FILM, INC., AND SKC, INC., Defendant-Intervenors.

Court No. 13–00097

[Denying Plaintiff's Motion for Judgment on the Agency Record]

Dated: December 31, 2015

Peter J. Koenig, Squire Patton Boggs LLP, of Washington, D.C., argued for Plaintiff

Jane C. Dempsey, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Melissa M. Devine*, Trial Attorney. Of counsel on the brief was *Michael T. Gagain*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

David M. Horn, *Ronald I. Meltzer*, *Patrick J. McLain*, and *Jeffrey I. Kessler*, Wilmer, Cutler, Pickering, Hale and Dorr, LLP, of Washington, D.C., for Defendant-Intervenors.

OPINION

RIDGWAY, Judge:

In this action, Plaintiff Nan Ya Plastics Corporation, Ltd. ("Nan Ya") – a Taiwanese producer and exporter of polyethylene terephthalate film, sheet, and strip ("PET film") – contests the final results of the U.S. Department of Commerce's 2010–2011 administrative review of the antidumping duty order covering PET film from Taiwan. *See* Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Final Results of Antidumping Duty Administrative Review; 2010–2011, 78 Fed. Reg. 9668 (Feb. 11, 2013) ("Final Results"), *amended by* Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Notice of Correction to the Final Results of the 2010–2011 Antidumping Duty Administrative Review, 78 Fed. Reg. 14,266 (March 5, 2013) (correcting wrong case number identified in Final Results); *see also* Issues and Decision Memorandum for the Final Results of the 2010–2011 Antidumping Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan (Feb. 4, 2013) ("Issues & Decision Memorandum").

Pending before the Court is Plaintiff's Motion for Judgment on the Agency Record, in which Nan Ya challenges Commerce's application of the "average-to-transaction" ("A-T") comparison methodology in its review of Nan Ya's U.S. sales, based on the agency's finding that Nan Ya engaged in "masked" or "targeted" dumping. *See generally* Brief of Nan Ya Plastics Corporation, Ltd. in Support of Its Motion for Judg-

ment Upon the Agency Record ("Pl.'s Brief"); Reply Brief of Plaintiff Nan Ya in Support of Its Motion for Judgment on the Agency Record ("Pl.'s Reply Brief").[1] Pointing to record evidence indicating that differences in the prices that Nan Ya charged for PET film during the period of review correlated with fluctuations in the cost of raw materials that the company used to produce its merchandise, the gravamen of Nan Ya's claim is that Commerce erred by failing to consider such evidence in its targeted dumping analysis. *See*, *e.g.*, Pl.'s Brief at 17 (asserting that Commerce improperly "refused to consider undisputed evidence that the price differences in this case simply reflect differences in raw material costs – and not selective pricing"); *see generally* Pl.'s Brief at 1, 2, 3–4, 14–25, 31; Pl.'s Reply Brief, *passim*.

The Government maintains that the relevant part of the statute requires only that Commerce determine "*if* there [was] a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time." Defendant's Opposition to Plaintiff's Motion for Judgment upon the Agency Record at 15 ("Def.'s Response Brief") (quoting 19 U.S.C. § 1677f-1(d)(1)(B)(i) (emphasis added)).[2] According to the Government, "Nan Ya's explanation for *why* there was a pattern of prices that differed significantly among time periods and customers was not relevant" to Commerce's targeted dumping inquiry. Def.'s Response Brief at 15 (emphasis added); *see generally id*. at 1, 4–5, 14–28, 47. The Defendant-Intervenors – DuPont Teijin Films, Mitsubishi Polyester Film, Inc., and SKC, Inc. ("Domestic Producers") – similarly defend Commerce's interpretation of the statute, as well as the agency's targeted dumping analysis and its use of the A-T comparison methodology in reviewing Nan Ya's U.S. sales. *See generally* Defendant-Intervenors' Memorandum in Opposition to Plaintiff's Rule 56.2 Motion for Judgment on the Agency Record at 1, 5–7, 10 ("Def-Ints.' Response Brief").

Jurisdiction lies under 28 U.S.C. § 1581(c). For the reasons set forth below, Nan Ya's Motion for Judgment on the Agency Record must be denied.

I. *Background*

At issue here are the Final Results of the 2010–2011 administrative review of the antidumping duty order covering PET film from Taiwan, in which Commerce calculated Nan Ya's dumping margin using the

[1] In the international trade community, the terms "masked" dumping and "targeted" dumping are used interchangeably.

[2] All citations to statutes herein are to the 2006 edition of the United States Code. The pertinent text remained the same at all times relevant herein.

agency's "average-to-transaction" ("A-T") comparison methodology, based on findings made by the agency in its targeted dumping analysis. *See generally* Issues & Decision Memorandum at 3–14 (comment 1); *see also* Final Results, 78 Fed. Reg. at 9668, 9669 (referring to targeted dumping analysis and application of A-T methodology).

"Dumping occurs when imported merchandise is sold for a lower price in the United States than it is sold in its home market." *Union Steel v. United States*, 713 F.3d 1101, 1103 (Fed. Cir. 2013). Under the antidumping statute, Commerce is required to impose antidumping duties on imported merchandise that "is being, or is likely to be, sold in the United States at less than its fair value" when the relevant domestic industry is materially injured or threatened with material injury. 19 U.S.C. § 1673. The purpose of imposing such antidumping duties is to offset the negative effects of dumping. *See generally Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046–47 (Fed. Cir. 2012) (explaining that "dumping presents unfair competition concerns because foreign companies selling goods below fair value can undercut domestic producers selling those same goods at market prices").

Under the statute, Commerce calculates a respondent's dumping margin – to establish the extent of the antidumping duties to be imposed – by determining the "amount by which the normal value [*i.e.*, home market price] exceeds the export price or constructed export price [*i.e.*, U.S. price] of the subject merchandise." 19 U.S.C. § 1677(35)(A). The statute and the regulations identify three methods for comparing normal value to export price or constructed export price: (1) the average-to-average ("A-A") comparison methodology, (2) the transaction-to-transaction ("T-T") comparison methodology, and (3) the average-to transaction ("A-T") comparison methodology, which was the methodology that Commerce applied in calculating Nan Ya's dumping margin in the administrative review at issue here. *See* 19 U.S.C. § 1677f-1(d)(1)[3]; 19 C.F.R. § 351.414(b)(1)-(3) (2012)[4]; *JBF RAK LLC v. United States*, 790 F.3d 1358, 1364 (Fed. Cir. 2015)

[3] Although 19 U.S.C. § 1677f-1(d)(1) is titled "Investigations," the comparison methodology that Commerce applies in administrative reviews parallels its methodology in investigations. *See* Issues & Decision Memorandum at 7–8 (comment 1-A). The Court of Appeals has held that Commerce's approach is reasonable. *See JBF RAK LLC v. United States,* 790 F.3d 1358, 1362–65 (Fed. Cir. 2015) (ruling that Commerce did not abuse its discretion in basing its practice in administrative reviews on its practice in investigations, including application of targeted dumping analysis and use of A-T comparison methodology where appropriate; holding, *inter alia*, that "Commerce's decision to apply its average-to transaction comparison methodology in the context of an administrative review is reasonable").

[4] Except as otherwise indicated, all citations to regulations herein are to the 2012 edition of the Code of Federal Regulations; and all such citations are to subsections of 19 C.F.R. §

(recognizing the three comparison methodologies, *i.e.*, A-A, T-T, and A-T).

In administrative reviews, Commerce typically uses the A-A methodology, comparing the weighted-average of the normal values to the weighted-average of the export prices or constructed export prices for comparable merchandise. *See* 19 U.S.C. § 1677f-1(d)(1)(A)(i); 19 C.F.R. § 351.414(b)(1); *see also* 19 C.F.R. § 351.414(c)(1) (providing that, in both investigations and administrative reviews, agency "will use the average-to-average method unless the [agency] determines another method is appropriate in a particular case"). In contrast, when using the A-T methodology, Commerce compares the weighted average of the normal values to the export prices or constructed export prices in individual transactions. 19 U.S.C. § 1677f-1(d)(1)(B); 19 C.F.R. § 351.414(b)(3).[5]

351.414. That regulation was significantly revised in 2012, with the revisions made applicable to all segments of antidumping duty proceedings in which preliminary determinations issued after April 16, 2012 (including the administrative review at issue in this action). *See generally* Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 Fed. Reg. 8101 (Feb. 14, 2012). The only revisions relevant here are those to 19 C.F.R. § 351.414(c)(1) and (c)(2). Immediately prior to revision, those subsections provided:

> (c) *Preferences*. (1) In an investigation, [Commerce] normally will use the average-to-average method. [Commerce] will use the transaction-to transaction 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.
>
> (2) In a review, [Commerce] normally will use the average-to-transaction method.

As revised, the subsections read:

> (c) *Choice of method*. (1) In an investigation or review, [Commerce] will use the average-to-average method unless [Commerce] determines another method is appropriate in a particular case.
>
> (2) [Commerce] will use the transaction-to-transaction 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.

For purposes of this case, there are two noteworthy changes. First, before revision, the default comparison methodology in administrative reviews was A-T, whereas, post-revision, the default in administrative reviews became A-A. And, second, post-revision, the regulation expressly provides for Commerce's use of a methodology other than A-A (such as the A-T methodology) in both investigations and administrative reviews, if Commerce determines that use of another methodology is "appropriate." For additional background on the 2012 revisions to 19 C.F.R. § 351.414, *see Timken Co. v. United States*, 38 CIT ____, ____, 968 F. Supp. 2d 1279, 1281–82 (2014).

[5] When using the T-T comparison methodology, Commerce compares the normal values for individual transactions to the export prices or constructed export prices for individual transactions involving comparable merchandise. 19 U.S.C. § 1677f-1(d)(1)(A)(ii); 19 C.F.R. § 351.414(b)(2). However, the T-T methodology is used "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." 19 C.F.R. § 351.414(c)(2); *see also* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No.

The statute authorizes Commerce to use the A-T comparison methodology as an exception to the other two methodologies. *See* 19 U.S.C. § 1677f-1(d)(1)(B). Specifically, Commerce may use the A-T methodology in cases involving "masked" or "targeted" dumping – that is, where a respondent sells its goods in the United States at dumped prices "to particular customers or regions [or at particular times], while selling at higher prices to other customers or regions [or at other times]." *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1 at 842–43, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4177–78. When a respondent's sales are structured in this fashion, use of the A-A methodology may understate actual dumping by measuring average dumping over the review period as a whole, while masking dumping from discrete, specific targeted sales. In contrast, use of the A-T methodology unmasks such dumping by, among other things, determining a dumping margin for each individual sale. *See*, *e.g.*, *Koyo Seiko Co. v. United States*, 20 F.3d 1156, 1159 (Fed. Cir. 1994) (explaining "masked dumping," and noting that, "[b]y using individual U.S. prices in calculating dumping margins, Commerce is able to identify a merchant who dumps [its] product intermittently – sometimes selling below the foreign market value and sometimes selling above it," which is pricing behavior generally not captured by Commerce's A-A methodology).[6]

Pursuant to the statute, Commerce may use the A-T methodology where (i) "there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and (ii) [Commerce] explains why such differences cannot be taken into account" using one of the other methodologies. 19 U.S.C. § 1677f-1(d)(1)(B)(i)-(ii). At the time of the administrative review at issue here, Commerce applied the so-

103–316, vol. 1 at 842–43, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4178 (similar); *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1358 n.3 (Fed. Cir. 2010) (similar).

[6] As the court explained in *Apex Frozen Food*:

> Congress enacted § 1677f-1(d)(1)(B) to combat a type of dumping that is difficult to remedy. When exporters target their sales, those sales may disproportionately affect U.S. producers who sell to particular customers or regions or in specific time periods. . . . Nonetheless, if exporters counterweight their targeting with above-fair-value sales, then A-A, which averages export prices and offsets negative margins, could yield an understated antidumping rate. *See Union Steel v. United States*, 713 F.3d 1101, 1108 (Fed. Cir. 2013) (holding A-A with offsets "masks individual transaction prices below normal value"). Yet A-T neither averages export prices nor offsets. This approach ensures that the final rate reflects every instance of dumping, even if an exporter balanced its targeting with above-fair-value sales.

Apex Frozen Food Private Ltd. v. United States, 38 CIT ____, ____, 37 F. Supp. 3d 1286, 1296 (2014).

called "*Nails* test" to determine whether the "pattern" and "significant difference" criteria of 19 U.S.C. § 1677f-1(d)(1)(B)(i) were satisfied. *See*, *e.g.*, Issues & Decision Memorandum at 9, 10.[7] The *Nails* test (which has since been supplanted by what is known as Commerce's "differential pricing analysis") consisted of two statistical analyses: the "standard deviation test" and the "price gap test." *See JBF RAK*, 790 F.3d at 1367–68 & n.5 (summarizing the *Nails* test's "two-step analysis"); Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment, 73 Fed. Reg. 26,371, 26,732 (May 9, 2008) (same).[8]

If Commerce identifies a pattern of export prices or constructed export prices that differ significantly among purchasers, regions, or

[7] The "*Nails* test" is named for the first proceedings in which it was employed. *See generally* Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value, 73 Fed. Reg. 33,985, 33,985–86 (June 16, 2008) and accompanying Issues & Decision Memorandum at 2–3, 11–22 (June 6, 2008) (comments 2–7) (explaining that, in review at issue, Commerce developed and implemented a new methodology, *i.e.*, the *Nails* test, to analyze allegations of targeted dumping); Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 Fed. Reg. 33,977, 33,977 (June 16, 2008) ("Nails from China") and accompanying Issues & Decision Memorandum at 4, 12–23 (June 6, 2008) (comments 2–7) (same).

For a more detailed explanation of the *Nails* test, *see*, *e.g.*, Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment, 73 Fed. Reg. 26,371, 26,731–32 (May 9, 2008); *see also JBF RAK,* 790 F.3d at 1367–68 & n.5 (discussing, with approval, the *Nails* test); *Mid Continent Nail Corp. v. United States*, 34 CIT 512, 518–21, 712 F. Supp. 2d 1370, 1376–79 (2010) (in action reviewing Commerce's determination in Nails from China (*supra*), rejecting attacks on the then-newly announced*Nails* test and holding application of the test in targeted dumping analysis to be "reasonable").

[8] The Government notes that the *Nails* test was modified in certain respects in Multilayered Wood Flooring from China, but that the modification is not relevant to this case. *See* Def.'s Response Brief at 15 & n.5 (citing Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 Fed. Reg. 64,318 (Oct. 18, 2011) and accompanying Issues & Decision Memorandum at 28–36 (Oct. 11, 2011) (comment 4)).

More recently, Commerce has replaced its "targeted dumping analysis" (including the two-step *Nails* test) with a new "differential pricing analysis." *See generally*, *e.g.*, Differential Pricing Analysis; Request for Comments, 79 Fed. Reg. 26,720, 26,722–23 (May 6, 2014); *Golden Dragon Precise Copper Tube Group v. United States*, 39 CIT ____, ____, 2015 WL 4927515 * 2–3, 7–8 (2014); Xantham Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 78 Fed. Reg. 33,351, 33,352 (June 4, 2013) (noting Commerce's use of "a differential pricing analysis to determine the comparison method [*i.e.*, A-A or A-T], rather than the targeted dumping test") and accompanying Issues & Decision Memorandum at 17–31 (May 28, 2013) (comment 3).

Instead of the *Nails* test (consisting of the "standard deviation test" and the "price gap test"), Commerce now uses the "Cohen's *d* test" and the "ratio test" to determine whether there is a pattern of prices that differ significantly. *See* Differential Pricing Analysis; Request for Comments, 79 Fed. Reg. at 26,722–23; *Golden Dragon*, 39 CIT at ____, 2015 WL 4927515 * 2. Further, in addition to revising how Commerce determines whether there

periods of time (whether through the *Nails* test or the newer differential pricing analysis), Commerce then considers whether the A-A comparison methodology can account for the observed price differences. *See* 19 U.S.C. § 1677f-1(d)(1)(B)(ii). In making that determination, Commerce evaluates whether there is a "meaningful difference" between the results of the application of the A-A methodology and the results of the application of the A-T methodology. *See generally* Issues & Decision Memorandum at 11; *Apex Frozen Food Private Ltd. v. United States*, 38 CIT ____, ____, ____, 37 F. Supp. 3d 1286, 1292, 1293–1301 (2014) (discussing "meaningful difference" analysis, and addressing claims contesting agency's "meaningful difference" analysis). If Commerce finds a "meaningful difference," the agency, in its discretion, may apply the A-T methodology in reviewing the U.S. sales of the respondent in question. *See* Issues & Decision Memorandum at 11.

After Commerce initiated the administrative review at issue here, but shortly before the Preliminary Results were released, several of the petitioners (including two of the Domestic Producers that have intervened in this action) filed allegations that Nan Ya had engaged in targeted dumping during the period of review. *See* Letter from Domestic Producers to Commerce (July 17, 2012) (Pub. Doc. No. 115).[9] Given the press of time, Commerce decided not to conduct a targeted dumping analysis in reaching its Preliminary Results, and calculated Nan Ya's preliminary dumping margin as 5.20% using the A-A comparison methodology. Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Preliminary Results of Antidumping Duty Administrative Review, 77 Fed. Reg. 46,704, 46,705, 46,711 (Aug. 6, 2012) ("Preliminary Results"). However, the Preliminary Results signaled Commerce's "inten[t] to continue to consider . . . whether [application of the A-T methodology] [would be] appropriate in [this] administrative review[]." *Id*., 77 Fed. Reg. at 46,705.

In a different context, Commerce acknowledged in the Preliminary Results that Nan Ya "experienced significant changes" in its cost of production due to volatility in the prices of certain primary inputs.

exists a pattern of prices that differ significantly (*see* 19 U.S.C. § 1677f-1(d)(1)(B)(i)), Commerce's new differential pricing analysis also modifies how the agency determines whether use of the A-A comparison methodology can account for observed price differences (*see* 19 U.S.C. § 1677f1(d)(1)(B)(ii)) – that is, whether use of the A-T methodology "yields a meaningful difference" relative to use of the A-A methodology. *See* Differential Pricing Analysis: Request for Comments, 79 Fed. Reg. at 26,723.

[9] The administrative record in this action includes confidential (*i.e.*, business proprietary) information. Accordingly, like the record itself, the index to the administrative record consists of two sections – one identifying the public documents and the other identifying the documents that include confidential information. Only documents in the public record are cited herein; and they are noted as "Pub. Doc. No. ____."

Preliminary Results, 77 Fed. Reg. at 46,708 (explaining agency's decision to use a "quarterly costing approach" – in lieu of the standard practice of calculating an annual weighted-average cost of production – in determining Nan Ya's cost of production for purposes of the Preliminary Results). Commerce further acknowledged that there appeared to be a "reasonable correlat[ion]" between the fluctuations in Nan Ya's production costs and changes in the prices charged by the company. *Id*.

After the Preliminary Results issued, Commerce conducted a Post-Preliminary Analysis to address the Domestic Producers' allegations of targeted dumping. *See* 2010–2011 Administrative Review of the Antidumping Duty Order on Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan: Post-Preliminary Analysis and Calculation Memorandum of Nan Ya Plastics Corporation, Ltd. and Shinkong Synthetic Fibers Corporation and its Subsidiary Shinkong Materials Technology Co. Ltd. (Dec. 21, 2012) (Pub. Doc. No. 143) ("Post-Preliminary Analysis Memorandum"); Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan – Post-Preliminary Results Analysis Memo for Nan Ya Plastics Corporation, Ltd. at 1 (Dec. 21, 2012) (Pub. Doc. No. 145) ("Post-Preliminary Results Memo for Nan Ya").

Applying the *Nails* test to Nan Ya's U.S. sales, Commerce found a pattern of prices that differed significantly by time period. *See* Issues & Decision Memorandum at 5 (noting that Post-Preliminary Analysis focused only on time period); Def.'s Response Brief at 3; Post-Preliminary Analysis Memorandum at 3. Commerce further found that there was "a meaningful difference in the weighted-average dumping margins when calculated using the average-to-average method [as compared to] the average-to-transaction method," and therefore concluded that use of the A-A comparison methodology could not account for Nan Ya's observed price differences. Post-Preliminary Analysis Memorandum at 3–4. Accordingly, Commerce applied the A-T comparison methodology and calculated a revised dumping margin of 9.15% for Nan Ya. Post-Preliminary Results Memo for Nan Ya at 1.

In its administrative case brief filed with the agency, Nan Ya disputed Commerce's finding of targeted dumping in its Post-Preliminary Analysis and the agency's use of the A-T comparison methodology in calculating Nan Ya's dumping margin. *See generally* Nan Ya Comments on Preliminary Decisions at 1, 3–13 (Jan. 10, 2013) (Pub. Doc. No. 162) ("Nan Ya's Administrative Case Brief"). Among other things, Nan Ya emphasized the existence of uncontroverted evidence on the administrative record indicating that changes

in Nan Ya's prices correlated with fluctuations in the cost of raw materials used to produce the company's merchandise, together with Commerce's own observations to the same effect in the Preliminary Results. *Id*. at 1, 3–5; *see also* Preliminary Results, 77 Fed. Reg. at 46,708 (concluding, *inter alia*, that "the quarterly cost and quarterly sales prices for . . . Nan Ya appear to be reasonably correlated").

Much like Commerce's Post-Preliminary Analysis Memorandum, the agency's Final Results reflected the application of the *Nails* test to Nan Ya's U.S. sales, finding a pattern of prices that differed significantly by time period and by purchaser. *See* Issues & Decision Memorandum at 6, 10–12. Similarly, Commerce again determined that use of the A-A comparison methodology could not account for the observed differences in Nan Ya's prices. *Id*. at 6, 11–12. Commerce therefore continued to apply its A-T comparison methodology in analyzing Nan Ya's U.S. sales for purposes of the Final Results. *Id*. at 6, 12.

Underscoring the language of the statute, Commerce made short work of Nan Ya's argument that the agency's targeted dumping findings were "undermined by the observation that [fluctuations] in the costs of raw material[s] account for differences in Nan Ya's pricing . . . over time." Issues & Decision Memorandum at 12. Commerce reasoned that the statute on its face requires only that the agency consider whether there is a pattern of prices for comparable merchandise that differs significantly among purchasers, regions, or time periods, and, if such a pattern exists, to explain why such differences cannot be taken into account using a methodology other than the A-T methodology. *Id*. (citing 19 U.S.C. § 1677f1(d)(1)(B)). As such, Commerce concluded that the statute "does not require [the agency] to discern *why* such [pricing] patterns arise," and that nothing obligated the agency "to consider whether changes in [Nan Ya's] raw material costs caused the pattern" that the agency observed. *Id*. (emphasis added).

The Final Results assigned Nan Ya a dumping margin of 8.99%. *See* Final Results, 78 Fed. Reg. at 9669. This action ensued.[10]

[10] Nan Ya's claims have changed significantly during the pendency of this action. The Complaint that Nan Ya filed in this matter challenged the Final Results only generally, objecting broadly to Commerce's "findings regarding targeted dumping and zeroing." *See* Complaint ¶ 9. Nan Ya later stated four more specific claims, including the claim that it presses here. *See* [Plaintiff's] Response to Motion for More Definitive Statement at ¶ 1 (asserting that Commerce improperly "ignore[d] cost trends" in finding "a pattern of export prices for comparable merchandise that differ significantly over time periods and purchasers" as part of the agency's targeted dumping analysis); *id*. ¶ 2 (contesting Commerce's "use of the average-to-transaction methodology even as to sales where no targeted dumping is found"); *id*. ¶ 3 (asserting that Commerce is not permitted to use its A-T comparison methodology in administrative reviews); *id*. ¶ 4 (protesting Commerce's use of invoice date – rather than purchase order date – to determine date of sale).

II. *Standard of Review*

In an action reviewing an antidumping determination by Commerce, the agency's determination must be upheld except to the extent that it is 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); *see also NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). Substantial evidence is "more than a mere scintilla"; rather, it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *see also Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1380 (Fed. Cir. 2008) (same).

Nan Ya's opening brief argued two claims in addition to the claim that remains at issue. In particular, Nan Ya's opening brief reiterated the company's claim that the statute permits Commerce to engage in targeted dumping analyses only in initial antidumping investigations, and not in administrative reviews such as the review at issue here. *See* Pl.'s Brief at 1, 2, 11–13. In addition, Nan Ya's opening brief argued that Commerce violated the Administrative Procedures Act by the agency's 2008 withdrawal of its "Limiting Rule" (then codified at 19 C.F.R. § 351.414(f)(2)), which provided, in relevant part, that – where Commerce found targeted dumping – it would "normally" "limit the application of the average-to-transaction method to those sales that constitute targeted dumping." *See* Pl.'s Brief at 1, 3, 4, 6–7, 25–30. Ultimately, however, Nan Ya abandoned both of those claims, leaving only the claim that is addressed here – that is, Nan Ya's claim that, in Commerce's targeted dumping analysis, the agency should have considered evidence indicating that differences in the prices that Nan Ya charged for PET film correlated with fluctuations in the cost of inputs that the company used to produce its merchandise, and thus (according to Nan Ya) did not constitute targeted dumping. *See* Pl.'s Reply Brief at 1 n.2 (abandoning claim "that targeted dumping cannot be done in administrative reviews," as well as claim "that the [Administrative Procedure Act] was violated" by Commerce's 2008 withdrawal of its Limiting Rule).

Nan Ya attempted to raise a number of new claims in its reply brief. For example, in its reply brief, Nan Ya – for the first time – challenged Commerce's determination that use of the agency's A-A comparison methodology could not account for the observed differences in Nan Ya's prices. *See*, *e.g.*, Pl.'s Reply Brief at 7–8 (arguing that "Commerce simply *assumes*, without more, that just because the A-T method yields a higher dumping margin than the A-A method, . . . the A-A method does not take into account pricing differences"); *see generally id*. at 7–8, 9, 13. As another example, Nan Ya's reply brief – for the first time – argued the issue of "zeroing" (*i.e.*, Commerce's practice of treating negative dumping margins as zero, rather than allowing them to offset positive dumping margins). Specifically, in its reply brief, Nan Ya sought to challenge Commerce's use of zeroing in applying the agency's A-T comparison methodology in analyzing the company's U.S. sales. *See* Pl.'s Reply Brief at 6, 9–11, 11–12, 13. However, it is "well established that arguments not raised in the opening brief are waived." *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319–20 (Fed. Cir. 2006); *see also Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002) (same); Audio Recording of Oral Argument at 51:25–1:01:50 (counsel for the Government arguing that claims raised for the first time in Nan Ya's reply brief are waived). The doctrine of waiver has even greater force where, as here, it is new claims (rather than new arguments) that are at issue.

Moreover, any determination as to the substantiality of the evidence "must take into account whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp.*, 340 U.S. at 487–88); *see also Mittal Steel*, 548 F.3d at 1380–81 (same). That said, the mere fact that it may be possible to draw two inconsistent conclusions from the record does not prevent Commerce's determination from being supported by substantial evidence. *American Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001); *see also Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

Commerce's statutory interpretations are evaluated under the familiar, two-step *Chevron* framework. The first step of the analysis examines "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If so, courts must "give effect to the unambiguously expressed intent of Congress." *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239 (2004) (citing *Chevron*, 467 U.S. at 842–43). If instead Congress has left a "gap" for Commerce to fill, the agency's interpretation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843–44; *see also Household Credit*, 541 U.S. at 239.

In step two of a *Chevron* analysis, "[a]ny reasonable construction of the statute is a permissible construction." *Timken v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (quoting *Torrington Co. v. United States*, 82 F.3d 1039, 1044 (Fed. Cir. 1996)) (internal quotation marks omitted). "To survive judicial scrutiny, [Commerce's] construction need not be the only reasonable interpretation or even the most reasonable interpretation . . . . Rather, a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *Timken*, 354 F.3d at 1342 (quoting *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978))) (internal quotation marks omitted). Indeed, the Court of Appeals has underscored that, "[i]n recognition of Commerce's expertise in the field of antidumping investigations," *Corus Staal BV v. U.S. Department of Commerce*, 395 F.3d 1343, 1346 (Fed. Cir. 2005), "[d]eference to [the] agency's statutory interpretation is at its peak in the case of a court's review of Commerce's interpretation of the antidumping laws." *Koyo Seiko*, 36 F.3d at 1570.

Lastly, while Commerce must explain the bases for its decisions, "its explanations do not have to be perfect." *NMB Singapore*, 557 F.3d at 1319–20. Nevertheless, "the path of Commerce's decision must be reasonably discernable" to support judicial review. *Id.* (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see generally* 19 U.S.C. § 1677f(i)(3)(A) (requiring Commerce to "include in a final determination . . . an explanation of the basis for its determination").

III. *Analysis*

Highlighting record evidence (as well as findings by Commerce itself) indicating that differences in the prices that Nan Ya charged for PET film correlated with fluctuations in the cost of inputs that Nan Ya used to produce its merchandise, Nan Ya contends, in sum and substance, that – based on an assertedly flawed interpretation of 19 U.S.C. § 1677f-1(d)(1)(B) – Commerce improperly failed to consider whether the differences in Nan Ya's prices were due to fluctuations in Nan Ya's cost of production, rather than targeted dumping. *See generally* Pl.'s Brief at 1, 2, 3–4, 14–25, 31; Pl.'s Reply Brief, *passim* ; *see also* Preliminary Results, 77 Fed. Reg. at 46,708 (finding, *inter alia*, that "the quarterly cost and quarterly sales prices for . . . Nan Ya appear to be reasonably correlated"); Def.'s Response Brief at 3 (acknowledging Commerce's finding in Preliminary Results as to relationship between Nan Ya's production costs and changes in its prices). Nan Ya characterizes its pattern of price adjustments as "rational commercial behavior" and argues that, in changing its prices, it was merely "doing what the U.S. trade laws intend a company to do in order to avoid dumping in the U.S. market – *i.e.*, adjust[ing] [the company's] prices so that [the company] sells its products in the United States at prices that are *above* [its] cost of production." Pl.'s Brief at 18; *see also id*. at 4 (similar); Pl.'s Reply Brief at 4–5 (similar). Nan Ya thus maintains that its pricing decisions did not constitute targeted dumping, and, indeed, were "the antithesis of dumping." Pl.'s Brief at 4, 24.

According to Nan Ya, even "assum[ing] arguendo that Commerce is not required as a matter of course, to investigate the reasons for observed price differences in all cases[,] . . . it . . . does not follow that Commerce is free to ignore undisputed evidence affirmatively demonstrating that the observed price differences *do not* reflect targeting behavior." Pl.'s Brief at 14–15. Nan Ya concludes that "Commerce's statutory interpretation, and its . . . failure to consider whether the observed price differences were the result of raw material cost differ-

ences, and not selective pricing, render[] its targeted dumping determination unsupported by substantial evidence and otherwise not in accordance with law." *Id*. at 15.[11]

The Government and the Domestic Producers point to the statute itself and the absence of any text requiring Commerce to take into consideration potential causes of pricing patterns other than targeted dumping, such as the increased raw material costs that Nan Ya alleges here. *See generally* Def.'s Response Brief at 5, 14–15, 17–20, 22, 27; Def.-Ints.' Response Brief at 5–6.

The Government emphasizes that Commerce parsed the plain language of the statute in reaching the Final Results and explained in the Issues & Decision Memorandum that the "only obligations imposed" on the agency by the statute are those set forth in 19 U.S.C. § 1677f-1(d)(1)(B). Def.'s Response Brief at 18 (citing Issues & Decision Memorandum at 12); *see also* Def.-Ints.' Response Brief at 5–6. As discussed above, that provision requires Commerce (i) to determine "if there is a pattern of export prices (or constructed export prices) . . . that differ significantly among purchasers, regions, or periods of time," and – if such a pattern exists – (ii) to determine whether such differences can be accounted for through the use of a comparison methodology other than A-T. 19 U.S.C. § 1677f-1(d)(1)(B)(i)-(ii).

The Government and the Domestic Producers assert that both of the statutory requirements set forth in § 1677f-1(d)(1)(B) were satisfied in this instance, and that Commerce therefore properly applied its A-T methodology in reviewing Nan Ya's U.S. sales. Def.'s Response Brief at 3–4, 14, 15–17; Def.-Ints.' Response Brief at 5–6. The Government and the Domestic Producers argue that, contrary to Nan Ya's claims, nothing in the statute or the legislative history requires Commerce to consider the *causation* of any pattern of prices that the agency may identify under § 1677f-1(d)(1)(B)(i), whatever the record evidence may show. Def.'s Response Brief at 17, 20; *see also id*. at 5, 15, 17–20, 27; Def.-Ints.' Response Brief at 5–6.[12]

---

[11] Nan Ya contends, among other things, that – to the extent that Commerce reads the statute not to require the agency to consider whether pricing patterns identified by the agency could be attributable to factors other than targeted dumping (such as the increased cost of raw materials at issue here) – Commerce's interpretation of the statute contravenes Congressional intent (*see* Pl.'s Brief at 4, 15–17; Pl.'s Reply Brief at 4–5, 13) and leads to absurd results. *See* Pl.'s Brief at 4, 18–19; Pl.'s Reply Brief at 4–5. Nan Ya similarly asserts that Commerce's statutory interpretation violates the agency's obligation to take into consideration evidence that "fairly detracts" from its decision (*see* Pl.'s Brief at 19–20; Pl.'s Reply Brief at 13) and cannot be reconciled with the requirement that the agency calculate dumping margins as accurately as possible. *See* Pl.'s Brief at 24–25.

[12] The Government explains that Nan Ya's emphasis on Preliminary Results' findings concerning the relationship between Nan Ya's production costs and its prices is misplaced. *See* Def.'s Response Brief at 25–26. According to the Government, the referenced findings in the Preliminary Results were made in the context of Commerce's "sales below cost test,"

Two recent decisions from the U.S. Court of Appeals for the Federal Circuit, handed down on the same day, confirm the correctness of Commerce's interpretation and application of 19 U.S.C. § 1677f-1(d)(1)(B). The two decisions deal directly with – and, indeed, are dispositive of – the arguments that Nan Ya raises.

In the first of the two cases, *JBF RAK*, the Court of Appeals addressed whether it was "arbitrary, capricious and an abuse of discretion [for Commerce] to refuse to consider evidence . . . that [a] pricing pattern [identified by the agency] was not due to targeted sales but, instead, was for *a valid business purpose*." *JBF RAK* , 790 F.3d at 1368 (emphasis added).[13] The Court of Appeals squarely held that 19 U.S.C. § 1677f-1(d)(1)(B) does not obligate 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." *Id*. (emphasis added). The Court of Appeals further held that "there is no intent requirement in the statute" and that "requiring 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.'" *Id*. (citation omitted).

The second case, *Borusan*, even more closely parallels the facts here. *See Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v.*

which is used to determine whether certain sales "were made at less than the cost of production" and whether "such sales may be disregarded in the determination of normal value." *Id*. at 25 (citing 19 U.S.C. § 1677b(b)). On the other hand, "[t]he purpose of 19 U.S.C. § 1677f-1(d)(1)(B) is to determine whether the average-to-average [A-A] method is a meaningful tool to measure whether, and if so to what extent, dumping is occurring." Def.'s Response Brief at 25.

Thus, as the Government puts it, "[t]hese are two distinct tests with different aims." Def.'s Response Brief at 25. "Commerce resorts to the average-to-transaction [A-T] method when the explicit requirements of section 1677f-1(d)(1)(B) are met because the average-to average [A-A] method is not a proper tool for measuring dumping. By contrast, Commerce uses the shorter cost period analysis to determine whether period average costs are the appropriate basis to determine whether comparison market sales were made at prices below the cost of production." *Id*. The Government sums up: "Nan Ya cannot point to any [statutory] language mandating that Commerce look to its sales below cost test in determining whether to resort to the average-to-transaction [A-T] method after finding the explicit requirements of 19 U.S.C. 1677f-1(d)(1)(B) are satisfied. The statute imposes no such requirement." *Id*.; *see also* Issues & Decision Memorandum at 12–13 (discussing implications of finding of correlation between Nan Ya's production costs and its prices for Commerce's targeted dumping analysis).

[13] *Compare JBF RAK*, 790 F.3d at 1368 (addressing JBF RAK's claim that its pricing pattern was for "a valid business purpose") *with* Pl.'s Brief at 17 (arguing that Nan Ya's "pricing based on rising raw material costs" is "legitimate, recognized commercial" behavior); *id*. at 18 (characterizing Nan Ya's adjustment of prices to cover changing costs as "rational commercial behavior"); *id*. at 19 (describing Nan Ya's "changing prices" as "the result of rational commercial behavior"); Pl.'s Reply Brief at 4 (asserting that Nan Ya's changing prices reflect "legitimate commercial behavior").

United States, 608 F. App'x 948 (Fed. Cir. 2015). In *Borusan*, the Court of Appeals considered, and flatly rejected, a claim that is virtually identical to that asserted by Nan Ya – that is, the claim that Commerce is required to evaluate whether a pattern of prices identified by the agency in a targeted dumping analysis is "due to *increases in raw material costs*, and not due to . . . any intentional targeted dumping scheme." *Borusan*, 608 F. App'x at 949 (emphasis added). Citing to *JBF RAK* and conducting a *Chevron* analysis of § 1677f-1(d)(1)(B), the *Borusan* court held that "[n]othing in the language of the statute requires Commerce to take the extra analytical step proposed by [the respondent there] – [*i.e.*,] consideration of [the respondent's] alternate explanations for the pricing patterns observed through use of the *Nails* test." *Borusan*, 608 F. App'x at 949.

Distilled to their essence, the Court of Appeals' holdings in *JBF RAK* and *Borusan* establish that Commerce is under no obligation to consider evidence that factors other than targeted dumping may account for price patterns that the agency identifies through targeted dumping analyses. The two Court of Appeals decisions thus render meritless Nan Ya's attempts to impose on Commerce mandates beyond the express dictates of the statute. Nan Ya's challenge to Commerce's determination here therefore must fail.

IV. *Conclusion*

For the reasons set forth above, Nan Ya's Motion for Judgment on the Agency Record must be denied, and Commerce's determination in Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Final Results of Antidumping Duty Administrative Review; 20102011, 78 Fed. Reg. 9668 (Feb. 11, 2013), *amended by* Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Notice of Correction to the Final Results of the 2010–2011 Antidumping Duty Administrative Review, 78 Fed. Reg. 14,266 (March 5, 2013), is sustained.

Judgment will enter accordingly.

Dated: December 31, 2015

/s/ Delissa A. Ridgway
DELISSA A. RIDGWAY
Judge