U.S. Customs and Border Protection

Slip Op. 11–105

ADVANCED TECHNOLOGY & MATERIALS CO., LTD., BEIJING GANG YAN DIAMOND PRODUCTS COMPANY, and GANG YAN DIAMOND PRODUCTS, INC., Plaintiffs, v. UNITED STATES, Defendant, and DIAMOND SAWBLADES MANUFACTURERS COALITION, Defendant-Intervenor.

Before: R. Kenton Musgrave, Senior Judge
Court No. 10–00012

[Plaintiff's Motion for Judgment on the Agency Record is denied.]

Dated: August 18, 2011

Barnes, Richardson & Colburn (*Jeffery S. Neeley*, *Michael S. Holton* and *Stephen W. Brophy*) for Plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Claudia Burke*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Hardeep K. Josan*), Of Counsel, for Defendant.

Wiley Rein, LLP (*Daniel B. Pickard* and *Maureen E. Thorson*) for Defendant-Intervenor.

OPINION

Musgrave, Senior Judge:

Introduction

Plaintiffs Advanced Technology & Materials Co. Ltd., Beijing Gang Yan Diamond Products Company, and Gang Yan Diamond Products, Inc., ("ATM") seek judicial review of a decision by Defendant International Trade Administration, United States Department of Commerce ("Commerce" or "the Department") rejecting its request for a changed circumstances review pursuant to 19 U.S.C. § 1675(b). ATM now moves for Judgment on the Agency Record under USCIT Rule 56.1, requesting that the court remand the matter to Commerce with orders to conduct the review. Defendant and Defendant-Intervenor Diamond Sawblades Manufacturers Coalition ("DSMC") contend that the matter should be dismissed for lack of jurisdiction or, alternatively, that ATM's motion should be denied on the merits. For the reasons set forth below, the court finds that it has subject matter jurisdiction over the claim but that ATM's motion must be denied.

This action ultimately concerns the Department's policy change with respect to "zeroing,"[1] which, in relation to this matter, became effective after the final determination (which ATM has challenged in a separate action) but before issuance of an antidumping duty order. The facts of this case are somewhat unusual however, because the antidumping duty order was issued only after the International Trade Commission's ("ITC's") decision was successfully challenged in this court, almost three years later.

Background

Zeroing has a long and illustrious history that need not be recounted here. What is relevant to this matter is that in 2005 the European Communities brought an action before the World Trade Organization's (WTO's) Dispute Settlement Body challenging the United States' practice of zeroing in antidumping investigations. In October 2005, the WTO issued a report finding that the United States' practice of zeroing was inconsistent with its obligations under the Uruguay Round Agreements Act ("URAA"). *See generally U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1354 (Fed. Cir. 2010).

The manner and extent to which the United States will respond to an adverse WTO report is set forth, in part, in Section 123 of the URAA, codified at 19 U.S.C. § 3533 ("Section 123"). In keeping with the agency requirements set forth in Section 123, the Department published in the Federal Register a notice proposing to discontinue the practice of zeroing and soliciting comments thereon. *See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11189 (March 6, 2006). On December 27, 2006, the Department published its final decision that it would no longer use zeroing to calculate dumping margins in antidumping investigations, and that the new policy would be applied to future investigations and to "all investigations pending before the Department" as of the January 16, 2007 effective date. *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation; Final Modification*, 71 Fed. Reg. 77722 (Dec. 27, 2006) ("*Section 123 Determination*").

[1] "Zeroing" is a methodology used in dumping margin calculations where Commerce uses only the sales margins of merchandise sold at less than fair value to calculate the final weighted-average dumping margin; merchandise sold at or above fair value are assigned a sales margin of zero. *See Corus Staal BV v. Dep't of Commerce,* 395 F.3d 1343, 1345–46 (Fed. Cir. 2005).

The Diamond Sawblades Investigation

The petition giving rise to the diamond sawblades investigation was filed by DSMC on May 3, 2005. On May 12, 2005 the Department announced the initiation of an antidumping duty investigation of diamond sawblades and parts thereof from the People's Republic of China. In December 2005 the Department preliminarily determined that the subject merchandise was being sold in the United States for less than fair value; in keeping with then-current practice, the Department used zeroing in its calculation of the weighted-average dumping margins. Commerce issued the final determination on May 22, 2006, again with the use of zeroing, again finding that subject merchandise was being sold in the United States for less than fair value. *Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Fed. Reg. 29303 (May 22, 2006), *amended by* 71 Fed. Reg. 35864 (June 22, 2006) ("*Final Determination*").

The Issues and Decision Memorandum for the *Final Determination* indicates that the Department's then recent proposal to end zeroing was a topic of some discussion. One importer (not a party in this matter) urged that, in light of the adverse WTO rulings and the proposed policy change, the Department should eliminate zeroing in the *Final Determination*. The Department declined to do so, noting:

> We recognize that the Department has initiated a process under section 123 of the URAA to address the potential implementation of the WTO panel's recommendation regarding the calculation of the weighted average dumping margin in antidumping investigations. To date, however, that implementation process has not run its course. As such, it is premature to determine precisely how the United States will implement the panel recommendation. With respect to the recent Appellate Body Report in the same dispute, the United States has not yet gone through the statutorily mandated process of determining whether to implement the report.
>
> As such, the WTO dispute settlement proceedings have no bearing on whether the Department's [use of zeroing] in this investigation is consistent with U.S. law. Accordingly, the Department will continue in this investigation to [use zeroing].

Issues and Decision Memorandum at 25, Court No. 09–00511 Admin. R. Pub. Doc. 610.

In July 2006, the ITC issued a final determination finding that the domestic industry was not materially injured or threatened with

material injury by reason of the subject imports. *Diamond Sawblades and Parts Thereof From China and Korea*, 71 Fed. Reg. 39128 (July11, 2006). As a consequence of the ITC's negative final determination, the diamond sawblades investigation terminated as a matter of law, and no antidumping order was issued. *See* 19 U.S.C. § 1673d(c)(2). Shortly thereafter, DSMC commenced two actions in this court, one seeking judicial review of the ITC's negative determination (Court No. 06–00247) and the other challenging various aspects of the Department's *Final Determination* (Court No. 06–00246).[2] While those matters were pending at this Court, the Department published the *Section 123 Determination* announcing its policy change on zeroing.

DSMC's challenge to the ITC determination proved to be successful, resulting in a reversal by the ITC on the question of threat-of-material-injury. The ITC issued a (now affirmative) remand determination on May 14, 2008, which the court sustained in its entirety. *Diamond Sawblades Mfrs. Coalition v. United States*, 33 CIT __, Slip Op. 09–5 (Jan. 13, 2009), *aff'd*, 612 F.3d 1348 (Fed. Cir. 2010). Although delayed by several legal challenges, Commerce published antidumping duty orders in conformance with the *Final Determination* on November 4, 2009. *See Diamond Sawblades and Parts Thereof From the People's Republic of China and the Republic of Korea*: *Antidumping Duty Orders*, 74 Fed. Reg. 57145 (Nov. 4, 2009).

Where publication of the antidumping duty orders triggered a second opportunity to seek judicial review of the *Final Determination*, 19 U.S.C. § 1516a(a)(2)(A)(i)(II), ATM accordingly commenced its own challenge to the that decision in January 2010. ATM's challenge has been consolidated with DSMC's action (Court No. 06–00246) and is currently pending before this court under the caption *Advanced Technology & Materials Co., Ltd., v. United States*, Consol. Court No. 09–00511.

In addition to the challenge commenced here, ATM filed with the Department a request to conduct a (19 U.S.C. § 1675(b)) changed-circumstances review of the *Final Determination*. ATM asserted that circumstances warranted a review because the Department was required to recalculate the dumping margins in accordance the policy change set forth in *Section 123 Determination*. Specifically, ATM asserted that the policy change should be applied because (1) the diamond sawblades investigation was not yet finalized when the

[2] DSMC's challenge to the Department's *Final Determination* was stayed pending the outcome of its challenge to the ITC's negative determination.

Section 123 Determination was published, and (2) even if the matter was not technically "pending" on the effective date, fairness required application of the new policy. R. Doc. 1.

In a letter dated December 14, 2009, Commerce denied ATM's request on the ground that the *Section 123 Determination* did not apply to the diamond sawblades investigation. *Decision Letter*, R. Doc. 2 at 1. It is that decision that ATM now seeks to challenge here, alleging jurisdiction under 28 U.S.C. § 1581(i). ATM's challenge to the *Decision Letter* is focused on the Department's conclusion that the policy change did not apply to the diamond sawblades investigation. ATM contends, *inter alia*, that the Department's failure to conduct a review in order to apply the *Section 123 Determination* was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," and/or inadequately explained. *See* Complaint at ¶¶ 35, 39, 40, 42.

Accordingly, ATM now has two actions on the Court's docket: one action seeking judicial review of the *Final Determination* and the other (this matter) seeking review of the Department's refusal to initiate a changed circumstances review. Because both actions request the same ultimate relief, the government and DSMC present jurisdictional challenges based upon *Trustees in Bankr. of N. Am. Rubber Thread Co., Inc., v. United States,* 593 F.3d 1346 (Fed. Cir. 2010) (hereinafter "*Rubber Thread*"). Alternatively, Defendant and Defendant-Intervenor contend that ATM's motion is meritless and should be denied.

The government asserts that § 1581(i) jurisdiction cannot properly be invoked in this matter because ATM is already challenging the use of zeroing in the *Final Determination* in Court No. 09–00511, which serves to demonstrate the availability of jurisdiction under § 1581(c). The government argues further that, "despite [ATM's] characterization of this action as a changed circumstances request, the true nature of the action is a challenge to Commerce's continued use of zeroing in the final determination of this investigation . . . . This becomes particularly apparent when viewed in terms of the relief sought." Def.'s Mot. in Opp'n at 12.

In response, ATM asserts that the facts here can be distinguished from the circumstances in *Rubber Thread*, because unlike that case, ATM's two court challenges are not identical. According to ATM, its challenge to the *Final Determination* turns on, *inter alia*, "whether Commerce was correct in publishing an order incorporating the previous approach to zeroing when Commerce had changed its methodology for zeroing between the time of the final determination and the issuance of the order"; whereas here it argues that "even if Commerce

were correct regarding implementing the *Final Determination*, it now was compelled to issue a changed circumstances determination because of its change in practice regarding zeroing." Pls.' Reply at 5.

Discussion

A.

Section 1581 of Title 28, United States Code, provides this Court with "exclusive jurisdiction" to review the various types of civil actions listed in § § 1581(a) thorough (h), including "any civil action commenced under section 516A of the Tariff Act of 1930" (subsection (c)). These separate provisions are followed by § 1581(i), often referred to as a "catchall" or "residual" provision, because it gives the court, in addition to the actions listed in subsections (a) through (h), exclusive jurisdiction of civil actions that arise from other provisions of law. 28 U.S.C. § 1581(i).

However, § 1581(i) jurisdiction is subject to an important caveat: the Court may not exercise jurisdiction under § 1581(i) where jurisdiction is or could have been available under another subsection of § 1581, "unless the other subsection provided no more than a manifestly inadequate remedy." *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003) (citing *Norcal/Crosetti Foods, Inc. v. United States,* 963 F.2d 356, 359 (Fed. Cir. 1992)). Put differently, jurisdiction under § 1581(i) is available only if (1) jurisdiction is not available under any other subsection of § 1581, or (2) jurisdiction is available under another subsection of § 1581, but the remedy provided therein is "manifestly inadequate."

The government contends that § 1581(i) cannot be invoked here because jurisdiction for ATM's challenge is available under §1581(c), and that ATM is, in fact, availing itself of the remedy provided under § 1581(c) via its challenge to the *Final Determination*. Section 1581(c) provides the Court with jurisdiction over actions brought under section 516A of the Tariff Act of 1930; Section 516A, in turn, provides for judicial review of certain antidumping proceedings for the purpose of "contesting any factual findings or legal conclusions upon which the determination is based." 19 U.S.C. §1516a(a)(2)(A). *See Norsk Hydro Canada, Inc., v. United States*, 472 F.3d 1347, 1354 (Fed. Cir. 2006).

Hence, the problem with the government's argument is that, in this matter, ATM is not challenging any factual finding or legal conclusion found in the *Final Determination*. Instead, ATM's challenge concerns the entirely separate legal conclusion, set forth for the first time in the *Decision Letter*, that the policy change announced in the *Section 123 Determination* does not apply to the diamond sawblades investigation. The *Final Determination* was issued more than six months

before the *Section 123 determination*, and could not possibly contain any factual findings or legal conclusions concerning its application. The fact that the *Final Determination* contains the Department's acknowledgment of the likely change in policy does not transform this action into a challenge to the *Final Determination*.

Nor is it possible to view the *Decision Letter* as conceptually part of the *Final Determination* in the manner of assessment rates or corrections of ministerial errors. *Cf. Am. Signature Inc., v. United States*, 598 F.3d 816, 825 (Fed. Cir. 2010) (holding that because assessment rates stem directly from the margins calculated in a final determination, those rates are considered part of that determination for purposes of review). This would seem particularly true where, as here, the Department expressly refused to consider the question on the ground that it was "premature to determine." *Issues and Decision Mem*. at 25.

The government's argument appears to be premised, at least in part, upon certain underlying viewpoints concerning the "true nature" of a claim. The government contends that, "when viewed in terms of the relief sought," it becomes apparent that the "true nature" of ATM's claim is a challenge to the Department's use of zeroing in the *Final Determination*. Def's. Mot. in Opp'n. at 13. Accordingly, the government concludes that "[b]ecause the relief available under 1581(c) is precisely the same as the relief sought under section 1581(i), jurisdiction under section 1581(i) is unavailable." *Id*.

This argument misstates the law. Section 1581 does not confer jurisdiction based on the relief a plaintiff seeks, but upon the type of administrative decision under challenge. *See Canadian Wheat Bd. v. United States*, 641 F.3d 1344, 1351 (Fed. Cir. 2011) (observing that section 1581 "gives the court 'exclusive jurisdiction' to review eight different types of 'civil action[s]' listed in subsections (a) thorough (h) . . ."). [3] Hence, the "true nature" of a claim is not a determination of the ultimate relief sought by a plaintiff, but a determination of the legal conclusion that is actually being challenged in the pleadings. *See Shinyei Corp. of America v. United States,* 355 F.3d 1297, 1309 (Fed. Cir. 2004) ("a challenge to Commerce instructions on the ground that they do not correctly implement the published, amended administrative review results, is not an action defined under [19 U.S.C. § 1516a]"); *Consol. Bearings,* 348 F.3d at 1002 ("an action challenging Commerce's liquidation instructions is not a challenge to the final results, but a challenge to the 'administration and enforcement' of

[3] *See also Ugine and Alz Belgium v. United States*, 551 F.3d 1339, 1347 (Fed. Cir. 2009) (listing the various decisions that may be challenged and the corresponding jurisdictional provision for each); *Shinyei*, 355 F.3d at 1304.

those final results"); *Canadian Wheat Bd. v. United States*, 32 CIT__, 580 F. Supp. 2d 1357, 1361 (2008) ("[t]he controversy here involves a legal conclusion found in the Notice of Revocation, but not contained in Commerce's final determination"); *Corus Staal v. United States*, 31 CIT 826, 835, 493 F. Supp. 2d 1276, 279 (2007) (finding that the true nature of a challenge was to Commerce decision because plaintiff did "not claim that the liquidation instructions are inconsistent" with the Department's review, but rather claimed "that the dumping margins should be different"); *Ceramica Regiomontana, S.A., v. United States*, 5 CIT 23, 26, 557 F. Supp. 596, 600 (1983) ("the crucial fact is that ITA's decision was *not* made during any proceeding that would culminate in a determination for which judicial review is provided under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c)").

Finally, the government argues the following:

> The court may hear a challenge under § 1581(i) only where the plaintiff neither has, nor could have had, adequate relief available to it pursuant to litigation under any other section of 28 U.S.C. § 1581. Here, however, [ATM] has launched a simultaneous case under [ ] § 1581(c), asking for relief that is substantively identical and, indeed, more direct than the relief available to it here. Under the holding of *N. Am. Rubber Thread*, because adequate relief is available to [ATM] in its [§ 1581(c)] challenge to the [*Final Determination*] this action must be dismissed.

Def's Mot. in Opp'n. at 9.

In the above quoted language, the government appears to contend that *Rubber Thread* changed the *Norcal/Crosetti* test to one where § 1581(i) jurisdiction is barred if a plaintiff is seeking (or could have sought) the same ultimate *relief*[4] "pursuant to *litigation* under any

[4] To the extent that arguments regarding the "availability of adequate relief" are premised on the second part of *Norcal/Crosetti* jurisdictional rule (whether "the remedy provided under that other [available] subsection would be manifestly inadequate"), those arguments are misguided. The terms "remedy" and "relief" are not necessarily interchangeable. "'Remedy'can mean either specific relief obtainable at the end of a process of seeking redress, or the process itself, the procedural avenue leading to some relief." *Booth v. Churner*, 532 U.S. 731, 738, (2001). A brief survey of relevant caselaw indicates that the "remedy" of the *Norcal/Crosetti* jurisdictional rule refers to the procedural avenue, not the ultimate relief. *See Norcal/Crosetti*, 963 F.2d at 360 ("[c]ongress has provided a specific, detailed framework for domestic parties to challenge Customs' actions . . . . these procedures are the proper remedies wherever available"); *Miller & Co. v. United States*, 824 F.2d 961, 964 (Fed. Cir. 1987) ("mere allegations of financial harm . . . do not make the remedy established by Congress manifestly inadequate") (citing *Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1550–51, (Fed. Cir. 1983)); *United States v. Uniroyal, Inc.*, 69 C.C.P.A. 179, 188, 687 F.2d 467, 475 (Cust. & Pat. App.1982) ("[u]nless inadequate as a matter of due process . . . appellee must utilize the exclusive remedies provided by

other section of 28 U.S.C. § 1581." Def's. Mot. in Opp'n. at 9 (emphasis added). This cannot be accepted. *Rubber Thread* involved a unique circumstance where the plaintiff was left with two court actions not just seeking the same relief, but also challenging the same legal conclusion. Nothing in *Rubber Thread* purports to abrogate the first question of the *Norcal / Crosetti* test, or to transform the second question of the test into one concerning the *relief* sought in other *litigation* as opposed to the *remedy* provided under another available subsection of § 1581. *See Rubber Thread*, 467 F.3d at 1327 (observing that "for Heveafil's claim here, jurisdiction under another subsection of § 1581 is available and the remedy provided under that subsection is not manifestly inadequate"). Arguments similar to these were thoroughly addressed and rejected by this Court in *Tembec Inc., v. United States*, 441 F. Supp. 2d 1302 (2006) (per curiam) and *Canadian Wheat Board*, 580 F. Supp. 2d at 1362. Notably, in affirming *Canadian Wheat Board*, the Federal Circuit agreed that "[i]t is most unlikely . . . that *Norcal / Crosetti* intended to bar jurisdiction under subsection (i) whenever a wholly different action seeking the same relief could have been brought under a different subsection of section 1581." *Canadian Wheat Bd.*, 641 F.3d at 1351.

B

Having found subject matter jurisdiction over the claim, the court will now proceed to the merits.

When the Court exercises jurisdiction under 28 U.S.C. § 1581(i), the cause of action is considered to arise under the Administrative Procedure Act. *See, e.g., Nat'l. Fisheries Inst. Inc., v. United States*, 33 CIT __, 637 F. Supp. 2d 1270, 1281 (2009). Accordingly, the court applies the standard of review set forth in 5 U.S.C. § 706, which provides that the court "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2)(A). An agency decision is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Ins. Co* , 463 U.S. 29, 43 (1983). The agency must offer an explanation of the decision

Congress."). *See also JCM, Ltd., v. United States*, 210 F.3d 1357, 1359 (Fed. Cir. 2000) ("JCM's claim ofentitlement to share in the relief afforded to others . . . is without merit, and its failure to pursue its protest via the remedial path laid by Congress, deprived the Court of International Trade of subject matter jurisdiction").

that is clear enough to enable judicial review, and the court will uphold "a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.*

In this instance, the Department found that circumstances did not warrant a changed circumstances review, stating:

> The Department's change in methodology in antidumping investigations with respect to the calculation of the weighted-average dumping margin does not apply to the investigation of diamond sawblades from the PRC. The Department was clear that the effective date of its change in methodology was January 16, 2007, and that the change would apply to "all investigations pending before the Department as of the effective date." The Department completed its final determination in the investigation of diamond sawblades from the PRC in 2006, prior to the effective date of the change in methodology (i.e., January 16, 2007). Because the investigation on diamond sawblades from the PRC was not "pending before the department" as of January 16, 2007, the department's change in methodology does not apply to the investigation. As such the department does not agree that it is appropriate to initiate a changed circumstances review based on this request.

Decision Letter at 2.

ATM contends that the above explanation is inadequate because the Department (1) "made no effort whatsoever to explain the standards applied or the definition of the term 'pending,'" and (2) failed to "explain how it could make a determination under the unusual facts in this case, whether the investigation was 'pending' without initiating a review and obtaining a full briefing and record with regard to that issue." Pl's. Mot. at 11.

These contentions are without merit. Although the *Decision Letter* did not contain a separate discussion on the proper definition of "pending" or "pending before the department," the meaning it attributed to that term is nonetheless easily discernable. To wit, the letter conveys that an investigation is no longer "pending before the department" once the Department issues a final determination on the matter.

Further, the court cannot agree that the Department was obligated to discuss or otherwise investigate ATM's legal theory that the diamond sawblades investigation (perhaps under some alternative definition of the term "pending") somehow could have been "pending before the department" in January 2007. Even under the heightened requirements of formal adjudication, an agency is obligated only to

discuss arguments of "cogent materiality," *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2d Cir. 1977), and the arguments ATM has presented are neither. First, despite the importance ATM attributes to this argument, it is essentially a bare allegation. ATM offered no alternative definition of "pending" to support its position, cited to no legal authority, and provided no explanation at all as to how the Department (or the court) could reach the conclusion it advocates. Second, the possibility of an alternative definition is ultimately immaterial: the question that Commerce needed to resolve here did not require a survey of the various alternative ways that an investigation *might* be termed "pending"; the task, rather, was to interpret the meaning of that term as it was used in the *Section 123 Determination*. More precisely, to determine which investigations the Department was describing when it referred to "all investigations pending before the Department."

In that respect, the legal conclusion set forth in the *Decision Letter* is not unreasonable. An examination of the *Section 123 Determination* shows that Commerce made several observations that clarify the meaning of "investigations pending before the Department." Commerce observed (1) that the "number of pending antidumping investigations is few (i.e. there are seven ongoing antidumping investigations)," and (2) that "[a]ll of the currently pending investigations were initiated as a result of petitions filed after the date of publication of the Department's proposed modification."[5] 71 Fed. Reg. at 77725. Even without access to the Department's records on then-current investigations, it is readily apparent (and without dispute) that the petition for the diamond sawblades investigation was filed almost one year *prior* to the publication of the proposed modification. Hence, the Department's conclusion that the diamond sawblades investigation was not "pending before the department as of January 16, 2007" and therefore did not qualify for the policy change is not arbitrary, capricious, an abuse of discretion, and is in accordance with law.

Similarly, the Department did not err in failing to discuss why the reasoning set forth in the *Section 123 Determination* does not compel its application to the diamond sawblades investigation. As noted above, the only relevant question for application of the new policy is whether that investigation was pending before the Department on January 16, 2007. The Department would have no legal authority to

[5] That discussion further indicates that the Department initially proposed a much later effective date for the new policy, *i.e.*, that it would be applied to "investigations initiated on the basis of petitions received on or after the first day of the month following the date of publication" of the Department's final decision in the matter." 71 Fed. Reg. at 77725.

apply the *Section 123 Determination* in a manner that ignores the express legal directive set forth therein, and instead based its decision on certain portions of the Department's reasoning.

Finally, to the extent that the "true nature" of this argument is actually a challenge to the *Section 123 Determination* itself, such a challenge (assuming that a *Section 123 Determination* is subject to judicial review at all) would also fall under § 1581(i) jurisdiction. However, given the perfunctory nature of the allegation, the court is unwilling to opine on whether such a challenge, if properly brought, would be time barred by the two-year statute of limitations period set forth in 28 U.S.C. § 2636(i). *See United States v. Commodities Export Co.*, 972 F.2d 1266, 1270 (Fed. Cir. 1992) (noting that a cause of action accrues only when "all events necessary to state the claim, or fix the alleged liability of the Government, have occurred").

The court has considered all of ATM's other arguments and finds them without merit.

Conclusion

In consideration of the foregoing, the Court finds that the Department's refusal to conduct a changed circumstances review was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Accordingly, the Department's action will sustained, and ATM's Motion for Judgment on the Agency Record will be denied.

Dated: August 18, 2011
New York, New York

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

Slip Op. 11–106

AD HOC SHRIMP TRADE ACTION COMMITTEE, Plaintiff, - v - UNITED STATES, Defendant, - and - HILLTOP INTERNATIONAL and OCEAN DUKE CORP., Defendant-Intervenors.

Before: Pogue, Chief Judge
Court No. 10–00275

[Remanding Department of Commerce's final results of administrative review of antidumping duty order]

Dated: August 24, 2011

Picard Kentz & Rowe LLP (*Andrew W. Kentz*, *Jordan C. Kahn*, *Nathaniel M. Rickard* and *Kevin M. O'Connor*) for the Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Joshua Kurland*) for the Defendant.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Mark E. Pardo*, *Andrew T. Schutz* and *Jeffrey O. Frank*) for the Defendant-Intervenors.

OPINION AND ORDER

Pogue, Chief Judge:

INTRODUCTION

This action seeks review of two determinations by the United States Department of Commerce ("Commerce" or the "Department") in the final results of the fourth administrative review of the antidumping duty order covering certain frozen warmwater shrimp from the People's Republic of China ("China").[1]

Specifically, Plaintiff Ad Hoc Shrimp Trade Action Committee ("AHSTAC") – the Petitioner in the administrative proceeding below – challenges (I) Commerce's exclusive reliance on Customs and Border Protection Form 7501 data, for entries designated by the importer as "Type 03" (consumption entries subject to antidumping/countervailing duty[2]) ("Type 03 CBP data"), when determining, under Section 777A(c)(2)(B) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677f-1(c)(2)(B) (2006),[3] the volume of entries of subject merchandise for this review; and (II) the Department's use of certain price data for merchandise exported from North Korea when calculating, under 19 U.S.C. § 1677b(c)(1), the normal value of subject merchandise.

The court has jurisdiction pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c).

As explained below, the court concludes that (I) because the Department improperly failed to take into account record evidence that fairly detracts from the weight of the evidence supporting its entry volume determinations, the Department's consequent determinations regarding which respondents account for the largest volumes of subject entries during this POR were not supported by a reasonable reading of the record, and are therefore remanded to the agency for

[1] *See Certain Frozen Warmwater Shrimp From the People's Republic of China*, 75 Fed. Reg. 49,460 (Dep't Commerce Aug. 13, 2010) (final results and partial rescission of antidumping duty administrative review) ("*Final Results*"); Issues & Decision Mem., A-570–893, ARP 08–09 (Aug. 9, 2010), Admin. R. Pub. Doc. 180 (adopted in *Final Results*, 75 Fed. Reg. at 49,460) ("*I & D Mem.*"). The period of review ("POR") was February 1, 2008, through January 31, 2009. *Final Results*, 75 Fed. Reg. at 49,460.

[2] *See* Dep't of Homeland Security, U.S. Customs and Border Protection, CBP Form 7501 Instructions (Mar. 17, 2011), *available at* www.cbp.gov (Forms) ("*CBP Form 7501 Instr.*") 1.

[3] All further citation to the Tariff Act of 1930, as amended, is to Title 19 of the U.S. Code, 2006 edition.

reconsideration; and (II) because the Department's application of its reasonable methodology comports with a reasonable reading of the administrative record, Commerce's treatment of North Korean data in this case is affirmed.

STANDARD OF REVIEW

When reviewing the Department's decisions in administrative reviews of antidumping duty orders, this Court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Ad Hoc Shrimp Trade Action Committee v. United States*, 618 F.3d 1316, 1321 (Fed. Cir. 2010) (same). Importantly, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Tudor v. Dep't of Treasury*, 639 F.3d 1362, 1366 (Fed. Cir. 2011) (same). The substantial evidence standard of review essentially asks whether, given the evidence on the record as a whole, the agency's conclusion was reasonable. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006).

An agency acts contrary to law when it acts arbitrarily or based on an impermissible construction of its statutory authority. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001).

DISCUSSION

I. Commerce's Exclusive Reliance on Type 03 CBP data for Respondent Selection

A. Background

In its *Notice of Initiation* for this administrative review, the Department announced its intention to rely on CBP data[4] to select respon-

[4] Specifically, the Department relies in such situations on CBP 7501 forms. *See* Selection of Respondents for Individual Review, A-570–893, ARP 08–09 (May 29, 2009), Admin. R. Con. Doc. 8 [Pub. Doc. 41] ("*Resp't Selection Mem.*") 6; *Pakfood Pub. Co. v. United States*, __ CIT __, 753 F. Supp. 2d 1334, 1344–45 (2011) ("*Pakfood*"). Block 2 on CBP Form 7501 asks importers to "[r]ecord the appropriate entry type code by selecting the two-digit code for the type of entry summary being filed." *CBP Form 7501 Instr.*, *supra* note 2, at 1 ("The first digit of the code identifies the general category of the entry (i.e., consumption = 0, informal = 1,

dents for individual examination, in the event that resources did not permit examination of all respondents for whom review was requested.[5]

Responding to the Department's request for "comments regarding the CBP data and respondent selection," *Notice of Initiation*, 74 Fed. Reg. at 13,178, AHSTAC argued that the CBP data released for comment – consisting entirely of Type 03 CBP data[6] – did not accurately reflect the actual volume of subject merchandise entered by each respondent during the POR.[7] Specifically, ASTAC claimed that the volume of entries subject to the antidumping duty order on frozen warmwater shrimp from China, as reported on CBP 7501 forms, was substantially inaccurate. In support of this challenge, AHSTAC attached to its submission, and thereby placed on the record, *inter alia*, two reports to Congress – from CBP and the U.S. Government Accountability Office, respectively – as well as Commerce's own verified findings from the immediately preceding administrative review of this antidumping duty order, detailing recent discoveries of such substantial inaccuracies.[8]

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warehouse = 2). The second digit further defines the specific processing type within the entry category. The following codes shall be used: Consumption Entries[:] Free and Dutiable [=] 01 . . . Antidumping/ Countervailing Duty (AD/CVD) [=] 03 . . . .").

[5] *Certain Frozen Warmwater Shrimp from the Social Respublic of Vietnam and the People's Republic of China*, 74 Fed. Reg. 13,178, 13,178 (Dep't Commerce Mar. 26, 2009) (notice of initiation of administrative reviews and requests for revocation in part of the antidumping duty orders) ("*Notice of Initiation*"). *See* 19 U.S.C. § 1677f-1(c)(2)(B) ("If it is not practicable to make individual weighted average dumping margin determinations [ ] because of the large number of exporters or producers involved in the investigation or review, [Commerce] may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to . . . exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.").

[6] *See* CBP Data for Resp't Selection, A-570–893, ARP 08–09 (Mar. 30, 2009), Admin. R. Con. Doc. 1 [Pub. Doc. 15].

[7] [AHSTAC's] Comments on Resp't Selection, A-570–893, ARP 08–09 (Apr. 9, 2009), Admin. R. Con. Doc. 3 [Pub. Doc. 18] ("*AHSTAC's Apr. 9, 2009 Comments*").

[8] *AHSTAC's Apr. 9, 2009 Comments*, Admin. R. Con. Doc. 3 [Pub. Doc. 18] Ex. 1 (U.S. Customs and Border Protection, *Report to Congress on (1) U.S. Customs and Border Protection's Plans to Increase AD/CVC Collections and (2) AD/CVD Enforcement Actions and Compliance Initiatives* 11 ("Based on an allegation from the domestic shrimp industry, CBP conducted a special operation . . . to determine whether imports of shrimp from China were being misdescribed . . . so that the shipments would fall outside of the scope of the [antidumping duty] order. CBP's operation confirmed the allegation." (describing enforcement of antidumping duties owed for financial year 2007))) & Ex. 2 (U.S. Gov't Accountability Office, GAO–09–258, *Seafood Fraud: FDA Program Changes and Better Collaboration Among Key Federal Agencies Could Improve Detection and Prevention* 20 (2009) ("CBP and [Immigration and Customs Enforcement]'s investigation found that foreign manufacturers and importers were . . . attempting to circumvent antidumping duties by sending

The Department refused to consider this evidence. *See Resp't Selection Mem.*, Admin. R. Con. Doc. 8 [Pub. Doc. 41] at 6 ("[AHSTAC]'s references to evidence that CBP data contained flaws in other segments of this proceeding . . . are not on the record of [this] administrative review. Thus, those issues will not be addressed in the context of the information available on the record of the instant administrative review with respect to respondent selection.").

After rejecting AHSTAC's arguments, Commerce, relying exclusively on Type 03 CBP data, selected Zhanjiang Regal Integrated Marine Resources Co. Ltd. ("Regal") and Hilltop International ("Hilltop") as respondents accounting for the largest volume of subject imports that could reasonably be examined,[9] concluding that Hilltop and Regal were the "largest exporters by volume during the POR." *Prelim. Results*, 75 Fed. Reg. at 11,855 (citing *Resp't Selection Mem.*, Admin. R. Con. Doc. 8 [Pub. Doc. 41]).

In its *Final Results*, the Department, over AHSTAC's reiterated objections,[10] continued to rely exclusively on Type 03 CBP data to select respondents accounting for the largest volume of exports of subject merchandise. *See* 75 Fed. Reg. at 49,460; *I & D Mem.* Cmt. 1. AHSTAC now challenges this determination.

Chinese shrimp to the United States through Malaysia . . . ."). *See also Certain Frozen Warmwater Shrimp from the People's Republic of China*, Issues & Decision Mem., A-570–893, ARP 07–08 (Aug. 28, 2009) (adopted in 74 Fed.Reg. 46,565, 46,566 (Dep't Commerce Sept. 10, 2009) (final results and partial rescission of antidumping duty administrative review)) ("*AR3 I & D Mem.*") Cmt. 7 at 23 ("[A]t verification the Department found that certain importers improperly classified subject entries as non-dutiable."); *AHSTAC's Apr. 9, 2009 Comments*, Admin. R. Con. Doc. 3 [Pub. Doc. 18] at 5 (discussing the inaccurate reporting of subject entry volume discovered in the third administrative review) & nn. 11–13 (noting that, according to the terms of the Administrative Protective Order issued in the third review, "[i]f business proprietary information that is submitted in [the third administrative review of this antidumping duty order] is relevant to an issue in two consecutive subsequent administrative reviews, an authorized applicant may place such information on the record of those reviews," and affirming that AHSTAC, "an authorized applicant, [was] placing business proprietary information from that segment of the proceeding on the record of this review").

[9] *Resp't Selection Mem.*, Admin. R. Con. Doc. 8 [Pub. Doc.41] at 8; *Certain Frozen Warmwater Shrimp From the People's Republic of China*, 75 Fed. Reg. 11,855, 11,855 (Dep't Commerce Mar. 12, 2010) (preliminary partial recision of antidumping duty administrative review and intent not to revoke, in part) ("*Prelim. Results*").

[10] *See* [AHSTAC's] Case Br., A-570–893, ARP 08–09 (Apr. 12, 2010), Admin. R. Pub. Doc. 151 ("*AHSTAC's Admin. Case Br.*") 8–9 ("[E]xclusive reliance on [Type 03] CBP Form 7501 data in spite of significant historic evidence of willful circumvention of the antidumping duty order fails to reasonably identify exporters and producers 'accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined' as significant volumes of subject merchandise are likely misclassified by U.S. importers." (quoting 19 U.S.C. § 1677f-1(c)(2))).

B. Commerce Improperly Refused to Consider AHSTAC's Evidence.

AHSTAC's evidence, as noted above, indicated that Type 03 CBP data, as reported by importers on CBP Form 7501, did not accurately reflect the actual volume of entries subject to this order.[11] As further explained below, because this evidence detracts from the weight of the data relied on, and because the Department did not account for this evidence in its determination that Regal and Hilltop were the largest POR exporters/producers by entry volume,[12] the Department's entry volume determinations, and hence its selection of mandatory respondents in this review, were unsupported by substantial evidence. *See Universal Camera*, 340 U.S. at 488.

As a threshold matter, because Customs officers have a duty to assure the accuracy of information submitted to that agency by penalizing negligent or fraudulent omissions and/or inaccurate submissions,[13] CBP data are presumptively reliable as evidence of respondent-specific POR entry volumes. *Pakfood*, __ CIT at __, 753 F. Supp. 2d at 1345–46.[14] The record of this review, however, contains evidence sufficient to call this presumptive reliability into question.[15]

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[11] *See supra* note 8.

[12] *See Resp't Selection Mem.*, Admin. R. Con. Doc. 8 [Pub. Doc. 41] at 6; *I & D Mem.* Cmt. 1 at 4.

[13] *See* 19 C.F.R. § 162.77(a) ("If the [appropriate Customs] Officer has reasonable cause to believe that a violation of [19 U.S.C. 1592 (prohibiting fraudulent and/or negligent submission and/or omission of material information to Customs)] has occurred . . . he shall issue to the person concerned a notice of his intent to issue a claim for a monetary penalty.").

[14] *See also id.* at 1345 ("In the absence of evidence in the record that the CBP data – for merchandise entered during the relevant POR and subject to the [antidumping] duty order at issue – are in some way inaccurate or distortive, the agency reasonably concluded that such data, collected in the regular course of business under penalty of law for fraud and/or negligence, presents reliably accurate information." (citing 19 U.S.C. § 1592(a)(1) ("[N]o person, by fraud, gross negligence, or negligence [ ] (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of [ ] (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or (ii) any omission which is material, or (B) may aid or abet any other person to violate subparagraph (A)."); *id.* at §§ 1592(b)(2) & (c) (providing for penalties for violation of § 1592(a)); 19 C.F.R. § 162.79 (same); *Seneca Grape Juice Corp. v. United States*, 71 Cust. Ct. 131, 142, 367 F. Supp.1396, 1404 (1973) (noting "the general presumption of regularity that attaches to all administrative action" ("In the absence of clear evidence to the contrary, the courts presume that public officers have properly discharged their duties . . . . This presumption, of course, also attaches to the official actions taken by customs officers.") (citing, *inter alia, United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926)) (additional citations omitted)).

[15] *Cf. A.C. Aukerman Co. v. R.L. Chaides Const. Co.,* 960 F.2d 1020, 1037 (Fed. Cir. 1992) ("[A] presumption . . . completely vanishes upon the introduction of evidence sufficient to

Specifically, evidence on the record of this review indicates that, notwithstanding Customs' duty to assure the accuracy of CBP data, the volume of subject merchandise produced/exported by respondents subject to this review and entered during the POR may have been inaccurately reported in CBP Form 7501 data.[16] The fact that, in the immediately preceding review, Commerce discovered significant inaccuracies, undetected by Customs, in the CBP entry volume data for subject merchandise from the very same respondents as those covered in this review[17] casts sufficient doubt on the presumption that Customs has assured the accuracy of such data for this POR. *See Aukerman*, 960 F.2d at 1037; *Pakfood*, __ CIT at __, 753 F. Supp. 2d at 1345–46. *Cf. Home Products Int'l, Inc. v. United States*, 633 F.3d 1369, 1380–81 (Fed. Cir. 2011) (determination of data inaccuracies in a separate review of the same producer/exporter, subject to the same antidumping duty order, casts doubt on similar data regarding such producer/exporter in an adjacent review).[18] Accordingly, AHSTAC's evidence must be taken into account when the Department makes its determinations regarding POR subject entry volumes, prior to respondent selection under 19 U.S.C. 1677f-1(c)(2). *See Universal Camera*, 340 U.S. at 488.

Because Commerce failed to take into account record evidence that fairly detracts from the weight of the evidence supporting its POR subject entry volume determinations, these determinations are not

support a finding of the nonexistence of the presumed fact. In other words, the evidence must be sufficient to put the existence of a presumed fact into genuine dispute." (citations omitted)).

[16] See *supra* note 8; AHSTAC's Admin. Case Br., Admin. R. Pub. Doc. 151 at 5–6 ("The Department has failed to point to any evidence on the record of this review – or, indeed, provide any logical explanation – for why evasion of the antidumping duty order by misclassification would not have continued during [this POR]."); *I & D Mem.* Cmt. 1 at 4 (stating, without further explanation, that evidence of entry misclassification, undetected by Customs, in the immediately preceding review of this antidumping duty order "ha[s] no bearing on the instant administrative review"). *Compare with Resp't Selection Mem.*, Admin. R. Con. Doc. 8 [Pub. Doc. 41] at 7 ("[A]bsent information to the contrary, we will continue to treat any affiliated companies found to be collapsible in previous segments as a single entity in the current segment."); *see infra* note 18.

[17] *See AR3 I & D Mem.* Cmt. 7 at 23 (discussing inaccuracies discovered in CBP entry volume data for Regal); *Resp't Selection Mem.*, Admin. R. Con. Doc. 8 [Pub. Doc. 41] at 8 (selecting Regal for individual examination in this review).

[18] The court also notes that the Department has acted inconsistently in its treatment of data from prior reviews as evidence of conditions in this POR. On the one hand, the Department relies, in the absence of evidence to the contrary, on the continued accuracy of information on company affiliations from prior reviews. *See Resp't Selection Mem.*, Admin. R. Con. Doc. 8 [Pub. Doc. 41] at 7; *Pakfood*, __ CIT at __, 753 F. Supp. 2d at 1346–48. But with regard to the discovery that entries subject to this antidumping duty order have been inaccurately reported as non-dutiable in the prior review, the Department does the opposite – it assumes, without evidence, that the inaccurate entry volume reporting discovered in the prior review has not continued into this POR. *See I & D Mem.* Cmt. 1 at 4.

supported by substantial evidence. *Id.* This issue is therefore remanded to the agency for reconsideration. Specifically, upon remand, Commerce must take into account the record evidence of significant entry volume inaccuracies in Type 03 CBP Form 7501 data for merchandise subject to this antidumping duty order, and explain why it is nevertheless reasonable to conclude that the Type 03 CBP Form 7501 data used in this case are not similarly inaccurate, and/or otherwise reconsider its determination.[19]

II. Commerce's Use of Surrogate Value Data from North Korea

A. Background

During administrative review of antidumping duty orders, Commerce determines dumping margins by comparing the export price of subject merchandise to its normal value. 19 U.S.C. § 1677b(a).[20] For exports from a non-market economy ("NME")[21], however, the "sales of merchandise in such country do not reflect the fair [or normal] value of the merchandise." *Id.* at § 1677(18)(A). The Department therefore calculates a surrogate value for such merchandise, based on the best available information regarding the relevant factors of production ("FOPs")[22] in one or more developmentally-comparable market

[19] The court notes in this regard that, as AHSTAC suggested below, *see* AHSTAC's Admin. Case Br., Admin. R. Pub. Doc. 151 at 10–11, one way to corroborate the accuracy of CBP Type 03 entry volume data without undue administrative burden is to compare such data with CBP Type 01 entry volume data (for merchandise declared to be non-dutiable), for entries of merchandise from China falling within the scope of tariff codes subject to this antidumping duty order. Such Type 01 data is as readily available to the Department as Type 03 data, *see I & D Mem.* Cmt. 1 at 3, and thus may be released to interested parties under administrative protective order.

[20] Generally, normal value is the price at which the merchandise is sold in the exporter/producer's home market. *Id.* at § 1677b(a)(1)(B)(i).

[21] In determining whether a nation's economy is non-market, Commerce considers "(i) the extent to which the currency of the foreign country is convertible into the currency of other countries; (ii) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management; (iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country; (iv) the extent of government ownership or control of the means of production; (v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises; and (vi) such other factors as [Commerce] considers appropriate." 19 U.S.C. § 1677(18)(B). Once Commerce makes a determination that a particular foreign country operates as an NME, that determination remains in effect until revoked by Commerce. *Id.* at § 1677(18)(C)(i).

[22] FOPs include hours of labor required, quantities of raw materials employed, amount of energy and other utilities consumed, and representative capital cost, including depreciation. *Id.* at § 1677b(c)(3).

economy countries that produce comparable merchandise. *Id.* at §§ 1677b(c)(1) & (4).[23] The surrogate value calculation approximates normal value by reconstructing the costs of producing comparable merchandise in a comparable market economy.

In this case, because Commerce has determined that China has NME status,[24] the Department calculated such a surrogate 'normal' value for the subject merchandise. *Prelim. Results*, 75 Fed. Reg. at 11,859. The surrogate value calculation included, among other FOPs, a broad market average[25] for the price of tape imported from twenty-seven countries into India, the chosen surrogate market economy.[26] Included in this market average of the price of tape imported into India was the price of tape imported from North Korea.[27]

After soliciting comments from interested parties, the Department continued, over AHSTAC's objections,[28] to include WTA data on the price of tape imported into India from North Korea in its surrogate value calculations for the *Final Results*. *See I & D Mem.* Cmt. 2 at 5 (disagreeing that the North Korean data should be excluded). AHSTAC now challenges this decision.

B. Commerce's Decision is Sustained.

The question before the court is whether Commerce reasonably declined to exclude certain prices, listed in the import statics for India, the chosen surrogate market economy, when calculating the

[23] Commerce resorts to the calculation of surrogate values if it determines that the available NME information does not permit an appropriate normal value to be determined. *Id.* at § 1677b(c)(1)(A) & (B).

[24] *See Prelim. Results*, 75 Fed. Reg. at 11,858; *see also Chrome-Plated Lug Nuts From the People's Republic of China*, 56 Fed. Reg. 46,153, 46,154 (Dep't Commerce Sept. 10, 1991) (final determination of sales at less than fair value).

[25] *See* Surrogate Factor Valuations for Preliminary Results, A-507–893, ARP 08–09 (Mar. 8, 2010), Admin. R. Pub. Doc. 136 ("*FOP Mem.*") 7 & Ex. 17. The Department explained that its "practice when selecting the 'best available information' for valuing FOPs, in accordance with [19 U.S.C. 1677b(c)(1)], is to select, to the extent practicable, [surrogate values] which are publicly available, product-specific, representative of a broad market average, tax-exclusive and contemporaneous with the POR."*Id.* at 3 (citation omitted). Thus, the Department based much of the value on information published by the World Trade Atlas ("WTA"). *See id.* at 2.

[26] *Cf. Fujian Lianfu Forestry Co. v. United States*, __ CIT __, 638 F. Supp. 2d 1325, 1349 (2009) (upholding selection of India, in accordance with 19 U.S.C. § 1677b(c)(4), as a market economy that is sufficiently comparable to China to serve as its primary surrogate country for antidumping purposes).

[27] *FOP Mem.*, Admin. R. Pub. Doc. 136 at Ex. 17.

[28] *See AHSTAC's Admin. Case Br.*, Admin. R. Pub. Doc. 151 at 19–21 (arguing that the Department should exclude data from North Korea because "the agency clearly has discretion to exclude the values from certain countries . . . even absent a lack of developed administrative case history regarding that country").

average value of a factor for producing the subject merchandise in the surrogate country. More specifically, the question is whether Commerce should have excluded the price of tape imported from North Korea when reconstructing the cost of producing (and packing) the subject shrimp in India. As the antidumping statute is silent on this particular question, the court will uphold Commerce's reasonable methodology if it comports with a reasonable reading of the administrative record.

1. The Department's Methodology Is Not Contrary to Law.

As noted above, the Department's methodology here was to use a broad market average of prices of FOPs imported into the chosen surrogate market economy. *See also, e.g.*, *Fujian*, __ CIT at __, 638 F. Supp. 2d at 1349; *Dorbest Ltd. v. United States*, 30 CIT 1671, 1686–87, 462 F. Supp. 2d 1262, 1277 (2006). When relying on WTA import statistics for this purpose, Commerce may not arbitrarily choose which prices to include and which to exclude,[29] even if the data is on exports from known NMEs. *See Jinan II*, __ CIT at __, 637 F. Supp. 2d at 1189 (explaining that NME-origin merchandise may be imported into a market economy at market price).[30]

[29] *See Jinan Yipin Corp. v. United States*, 31 CIT 1901,1936, 526 F. Supp. 2d 1347, 1377–78 (2007) (noting with concern that data from certain countries were crossed off from the WTA data used to value FOPs imported into a surrogate country, but remanding based on a broader legal issue); *Jinan Yipin Corp. v. United States*, __ CIT __, 637 F. Supp. 2d 1183, 1196 (2009) ("*Jinan II*") (remanding the exclusion of such data from Commerce's FOP valuation); *Jinan Yipin Corp. v. United States*, __ CIT __, 774 F. Supp. 2d 1238, 1248 (2011) ("*Jinan III*") (sustaining exclusion of this data once Commerce supported the exclusion with "explicit findings that export subsidies existed [for the relevant imports from such countries] during the time period corresponding to the POR").

[30] The court notes that using import statistics for the chosen surrogate market economy, to obtain the average value of certain materials so as to reconstruct the cost of producing comparable merchandise in the surrogate market economy, does not carry the same likelihood of market price distortion, even if some of those imports may have come from what may potentially be NME countries, as using the price of the subject merchandise in an NME for that merchandise's normal value when calculating a dumping margin. The court also notes that, even in the latter scenario, the exclusion of price data from the NME is not automatic. *See* 19 U.S.C. § 1677b(c)(1) ("If (A) the subject merchandise is exported from a nonmarket economy country, *and (B) [Commerce] finds that available information does not permit the normal value of the subject merchandise to be determined under subsection (a) of this section* [i.e., by using the price at which the foreign like product is first sold for consumption in the NME country], [then] [Commerce] shall determine the normal value of the subject merchandise on the basis of [FOPs in a surrogate market economy].") (emphasis added).

As there is nothing in the antidumping statute, or the Department's regulations and practice,[31] to render this approach unreasonable, the court concludes that the Department's methodology in this respect is not contrary to law. *See Chevron*, 467 U.S. at 842; *Jinan III*, __ CIT __, 774 F. Supp. 2d at 1248.

2. The Department's Methodology Was Reasonably Applied In This Case.

AHSTAC submitted no evidence to support its contention that the WTA data on tape imported into India from North Korea actually contained distorted prices. *See generally AHSTAC's Admin. Case Br.*, Admin. R. Pub. Doc. 151. Even assuming, *arguendo*, that North Korea operates as a non-market economy,[32] the agency reasonably requires that, for antidumping purposes, the determination to exclude from its calculations relevant price data on FOPs imported into a surrogate market economy must be supported with specific evidence of distortive effect. *Cf. Jinan III*, __ CIT at __, 774 F. Supp. 2d at 1248 (sustaining exclusion of the price of certain imported FOPs only once supported with "explicit findings" that such prices were likely distorted "during the time period corresponding to the POR").

Commerce's decision not to exclude this data was therefore supported by a reasonable reading of the record, as nothing in the record indicated that including such data would have a distortive effect on the surrogate value calculation. *See Nippon Steel*, 458 F.3d at 1351.

CONCLUSION

For all the foregoing reasons, the Department's *Final Results*, 75 Fed. Reg. 49,460, are remanded to the agency solely with regard to the determinations of subject entry volumes for purposes of respondent selection under 19 U.S.C. § 1677f-1(c)(2). Upon remand, the

[31] The Department acknowledges that certain of its prior determinations have been aberrational with regard to the policy explained in *ITA Policy Bulletin 03.1, see I & D Mem.* Cmt. 2 at 5, and "seeks to avoid a similar error here." Id.

[32] *See* Mem. L. Supp. Pl.'s Rule 56.2 Mot. for J. on Agency R. 30–31 (citing a report from the Congressional Research Service, discussing United States policy of curtailing trade with North Korea due to, *inter alia*, "its status as a Communist country and a nonmarket economy," and federal legislation that deems North Korea ineligible for non-humanitarian foreign assistance, due to its status as a communist country). The court notes, however, that no similar references were provided to Commerce in support of AHSTAC's argument below. The Department has never made a determination, for antidumping purposes, regarding the status of North Korea's economy. *See I & D Mem.*, Cmt. 2 at 5; AHSTAC's Admin. Case Br., Admin. R. Pub. Doc. 151 at 20 (agreeing that "the agency has not had the occasion to confirm in a regulatory procedure [whether] North Korea operates a non-market economy country [for purposes of the antidumping law]").

Department shall reconsider and provide additional explanation for, and/or modification to,[33] such determinations, consistent with this opinion.

Commerce shall have until October 24, 2011 to complete and file its remand redetermination. Plaintiff shall have until November 23, 2011 to file comments. Defendant and Defendant-Intervenors shall have until December 8, 2011 to file any reply.

It is **SO ORDERED**.

Dated: August 24, 2011
New York, N.Y.

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

[33] The court notes that, in the event that the Department's selection of mandatory respondents is modified upon remand, Defendant-Intervenor Hilltop requests to retain the dumping margin assigned to it upon its individual investigation in this review. *See* Def.-Intervenors' Resp. in Opp'n to Pl.'s Rule 56.2 Mot. for J. Upon Agency R. 11. The court reserves judgment on this question until such time as it becomes relevant to the disposition of a ripe legal issue. *See Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1362 (Fed. Cir. 2008).