U.S. Customs and Border Protection

Slip Op. 12–145

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

Before: Donald C. Pogue
Chief Judge
Court No. 11–00335

[final results of administrative review remanded]

Dated: November 30, 2012

Andrew W. Kentz, *David A. Yocis*, *Jordan C. Kahn*, and *Nathaniel Maandig Rickard*, Picard Kentz & Rowe LLP, of Washington, DC, for Plaintiff Ad Hoc Shrimp Trade Action Committee.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Melissa M. Brewer*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Mark E. Pardo and *Andrew T. Schutz*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, for Defendant-Intervenors Hilltop International and Ocean Duke Corporation.

OPINION AND ORDER

Pogue, Chief Judge:

This action seeks review of four determinations by the United States Department of Commerce ("Commerce") in the fifth administrative review of the antidumping duty order on certain frozen warmwater shrimp from the People's Republic of China ("China" or the "PRC").[1] Before the court is Plaintiff's motion pursuant to USCIT Rule 56.2 for judgment on the agency record. By its motion, Plaintiff

[1] *See Certain Frozen Warmwater Shrimp from the People's Republic of China*, 76 Fed. Reg. 51,940 (Dep't Commerce Aug. 19, 2011) (final results and partial rescission of antidumping duty administrative review), Admin. R. (Index) Pub. Doc. 7 ("*Final Results*") and accompanying unpublished Issues and Decision Memorandum, A-570–893, ARP 09–10 (Aug. 12, 2011), Admin. R. (Index) Pub. Doc. 4, *available at* http://ia.ita.doc.gov/frn/summary/PRC/2011–21259–1.pdf (last visited Nov. 29, 2012) ("*I & D Mem.*") (adopted in the *Final Results*, 76 Fed. Reg. at 51,940).

Ad Hoc Shrimp Trade Action Committee ("AHSTAC") seeks a remand to the agency for reconsideration of Commerce's I) exclusive reliance on certain data obtained from U.S. Customs and Border Protection ("Customs" or "CBP") to select respondents for individual examination in this review ("mandatory respondents"); II) selection of India as the primary surrogate country for China, which Commerce treats as a non-market economy ("NME"); III) decision to use Indian data as the exclusive source for valuing the labor factor of production ("FOP"); and IV) determination not to exclude imports from North Korea when using Indian import statistics to calculate surrogate FOP values. *See* Mem. of Law in Supp. of Pl. [AHSTAC]'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 39 ("Pl.'s Br."). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[2] and 28 U.S.C. § 1581(c) (2006).

As explained below, I) Commerce's mandatory respondent selection is sustained; II) Commerce's surrogate country selection is remanded; and III) and IV) judgment regarding Commerce's labor valuation, as well as Commerce's decision not to exclude data on Indian imports from North Korea when calculating surrogate FOP values, is deferred pending Commerce's reconsideration of its primary surrogate country selection.

STANDARD OF REVIEW

When reviewing Commerce's antidumping decisions under 19 U.S.C. § 1516a(a)(2), this Court sustains Commerce's determinations, findings, or conclusions unless they are "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 review analyzes whether the challenged determination, finding, or conclusion is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006).

DISCUSSION

I. Respondent Selection

AHSTAC first challenges Commerce's selection of the mandatory respondent in this review, Hilltop International ("Hilltop"). Pl.'s Br. at 38–40. Commerce selected Hilltop for mandatory individual examination because, based on entry data obtained from Customs, Hilltop was the largest Chinese exporter of the subject merchandise, by

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

volume, during the period of review ("POR").[3] *Certain Frozen Warmwater Shrimp from the People's Republic of China*, 76 Fed. Reg. 8,338, 8,338 (Dep't Commerce Feb. 14, 2011) (preliminary results and preliminary partial rescission of fifth antidumping duty administrative review), Admin. R. Pub. Doc. 97 ("*Preliminary Results*").[4]

AHSTAC argues that Commerce's selection was not supported by substantial evidence because, in the course of a prior review of this antidumping duty order, Commerce discovered that some entries of subject merchandise had been misclassified by their importer as merchandise not covered by the order.[5] *See* Pl.'s Br. at 39. As this misclassification was not detected by Customs, CBP import data for that prior review period inaccurately reported entry volumes of subject merchandise. AHSTAC contends that Commerce should have inferred from this pre-POR discovery that importers similarly misclassified subject entries during the POR at issue, and therefore that the CBP entry data are unreliable for determining the actual volume of subject merchandise entered by each respondent during the POR. *See id.*

This Court has previously held that, "[i]n 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 [may] reasonably conclude[] that such data, collected in the regular course of business under penalty of law for fraud and/or negligence, presents reliably accurate information." *Pakfood Pub. Co. v. United States*, __ CIT __, 753 F. Supp. 2d 1334, 1345 (2011) (emphasis added, footnote and citations omitted). Nonetheless, AHSTAC contends that misclassification of a respondent's entries during the period of the third review

[3] The POR for this fifth administrative review was February 1, 2009, through January 31, 2010. *Final Results*, 76 Fed. Reg. at 51,940.

[4] *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.").

[5] Entries are designated by the importer, under penalty of the law for fraud and/or negligence, 19 U.S.C. § 1592, with a two-digit code. *See* U.S. Customs & Border Prot., Dep't of Homeland Sec., *CBP Form 7501 Instructions* 1 (July 24, 2012), *available at* http://forms.cbp.gov/pdf/7501_instructions.pdf (last visited Nov. 29, 2012). "The first digit of the code identifies the general category of the entry (i.e., consumption= 0, informal = 1, warehouse = 2). The second digit further defines the specific processing type within the entry category." *Id.* Consumption entries covered by an antidumping duty order must be designated as type 03, whereas consumption entries that are free and dutiable are designated as type 01. *Id.*

constitutes evidence that Customs data for entries made during the period of the fifth review is inaccurate. Pl.'s Br. at 39.

This precise issue was already decided in *Ad Hoc Shrimp Trade Action Comm. v. United States*, __ CIT __, 828 F. Supp. 2d 1345, 1351 (2012). That decision concluded that Commerce adequately considered the effect of the misclassification, in the third review, on the quality of the data used in subsequent reviews of this antidumping duty order. *Id.* Specifically, in the fourth review, Commerce verified that misclassifications identified during the third review – the very same misclassifications that form the sole evidentiary basis for AHSTAC's present argument, Pl.'s Br. at 39 – were no longer continuing. *Ad Hoc Shrimp Trade Action Comm.*, __ CIT at __, 828 F. Supp. 2d at 1351. Commerce thus reasonably resolved any question arising from these misclassifications regarding the continued accuracy of CBP entry volume data for respondents subject to this antidumping duty order. *Id.*

Because AHSTAC presents no new evidence to impugn the accuracy of Customs entry volume data for the POR at issue here, *see* Pl.'s Br. at 39, Commerce reasonably concluded that these data were reliable for purposes of mandatory respondent selection in this review. *See Pakfood*, __ CIT at __, 753 F. Supp. 2d at 1345; *Ad Hoc Shrimp Trade Action Comm.*, __ CIT at __, 828 F. Supp. 2d at 1351. Thus, as AHSTAC presents no further basis on which to challenge Commerce's mandatory respondent selection, *see* Pl.'s Br. at 38–40, Commerce's determination in this regard is sustained.

II. Surrogate Country Selection

A. *Background*

With regard to the selection of surrogate market economy countries in NME cases,[6] it is Commerce's policy[7] to begin the surrogate coun-

[6] In antidumping proceedings, Commerce generally treats China as an NME, and did so in this case. *Preliminary Results*, 76 Fed. Reg. at 8,340 ("In every case conducted by the Department involving the PRC, the PRC has been treated as an NME country. In accordance with [19 U.S.C. § 1677(18)(C)(i)], any determination that a foreign country is an NME country shall remain in effect until revoked by [Commerce]. None of the parties to this proceeding has contested such treatment.") (citation omitted). When calculating dumping margins for merchandise originating from NME-designated countries, Commerce determines the normal value of such merchandise based on the best available information regarding the relevant FOPs in one or more economically comparable market economy countries that produce comparable merchandise ("surrogate countries"). *See* 19 U.S.C. § 1677b(c)(1), (4); *Preliminary Results*, 76 Fed.Reg. at 8,340 (explaining that Commerce calculated the normal value of subject merchandise in this review in accordance with 19 U.S.C. § 1677b(c)).

[7] Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection*

try selection process by creating a list of potential surrogate countries whose per capita gross national income ("GNI") falls within a range of comparability to the GNI of the NME in question (the "potential surrogates list"). *See Commerce Policy 4.1*.[8] "The surrogate countries on [this potential surrogates] list are not ranked and [are] considered equivalent in terms of economic comparability." Id. (noting that this practice "reflects in large part the fact that the statute does not require [Commerce] to use a surrogate country that is at a level of economic development *most* comparable to the NME country") (emphasis in original).

Applying this policy in the administrative review at issue here, Commerce compiled a potential surrogates list of six countries (India, the Philippines, Indonesia, Thailand, Ukraine, and Peru). *Selection of Surrogate Country*, A-570–893, ARP 09–10 (July 20, 2010), Admin. R. Pub. Doc. 56 ("*Surrogate Country Mem.*"). Commerce then, without further explanation, "determined [the countries on this list] to be at a level of economic development comparable to the PRC in terms of per capita [GNI]." *Id.* The relevant per capita GNI values, whose accuracy is not in dispute,[9] were as follows:

Process, Policy Bulletin 04.1(2004), *available at* http://ia.ita.doc.gov/policy/bull04–1.html (last visited Nov. 29, 2012) ("*Commerce Policy 4.1*").

[8] Having compiled a list of countries with GNI values comparable to that of the NME, Commerce next identifies the countries on that list that are producers of merchandise comparable to the merchandise subject to the antidumping duty order or investigation. *Commerce Policy 4.1*. From this list of economically comparable producers of comparable merchandise, Commerce then determines which countries are *significant* producers of such merchandise. *Id.* Finally, "if more than one country has survived the selection process to this point, the country with the best factors data is selected as the primary surrogate country." *Id.* (footnote omitted). Commerce evaluates relative data quality based on the data set's specificity to the input in question, exclusivity of taxes and import duties, contemporaneity with the period of investigation or review, and public availability. *Id.* Plaintiff does not challenge these aspects of Commerce's surrogate country selection policy.

The policy bulletin provides one exception to this general sequence. *Commerce Policy 4.1* ("Occasionally, there are also cases in which it is more appropriate for the team to address economic comparability only *after* the significant producer of comparable merchandise requirement is met. Cases where particular emphasis on 'significant producer of comparable merchandise' is warranted are generally those that involve subject merchandise that is unusual or unique (with correspondingly unusual or unique inputs or other unique aspects of the cost of production), e.g., crawfish, which is produced by only a few countries.") (emphasis in original, citation omitted). No party argues that this exception describes circumstances similar to the record here, so this aspect of Commerce's policy is not at issue.

[9] Commerce relied on data obtained from the World Bank's World Development Report (2010), which reports data from 2008. *Surrogate Country Mem.* Attach. I.

China:	$2,940
India:	$1,070
Philippines:	$1,890
Indonesia:	$2,010
Thailand:	$2,840
Ukraine:	$3,210
Peru:	$3,990

Id. at Attach. I.

Commerce acknowledged that India "is not as close [in terms of GNI] to China as the other [potential] surrogate countries in the list" and noted that "the disparity in per capita GNI between India and China has consistently grown in recent years." *Id.* Nevertheless, Commerce determined to include India on the potential surrogate list. *Id.*[10]

After receiving comments from interested parties,[11] Commerce preliminarily selected India as the primary surrogate country for China in this review, "because India is at a comparable level of economic development . . . , is a significant producer of comparable merchandise, . . . has publicly available and reliable data[,] . . . [and] has been the primary surrogate country in past segments." *Preliminary Results*, 76 Fed. Reg. at 8,342 (citing Mem. Re Surrogate Factor Valuations for the Preliminary Results, A-570–893, ARP 09–10 (Feb. 7, 2011), Admin. R. Pub. Doc. 93 (discussing Indian data sources without comparing India to other countries)).

In its case brief to the agency, AHSTAC argued that, for the final results of this review, Commerce should choose Thailand, rather than India, as the primary surrogate country. AHSTAC Case Br., A-570–893, ARP 09–10 (Mar. 28, 2011), Admin. R. Pub. Doc. 109 ("*AHSTAC Case Br.*") at 1–13. AHSTAC maintained that "(1) the record contains publicly available and reliable surrogate value data for Thailand that is at least as comprehensive, if not more comprehensive, than that for India, while (2) Thailand is at a much closer level of economic development to the PRC than is India, and (3) is an even more significant producer of comparable merchandise." *Id.* at 2; *see also* id. at 13 ("Given th[e] wide disparity in economic comparability – and the largely minor differences in the quality of the factor

[10] Commerce noted, however, that should the disparity in per capita GNI between India and China continue to grow, Commerce "may determine in the future that the two countries are no longer 'at a comparable level of economic development' within the meaning of the statute." *Id.*

[11] *See Preliminary Results*, 76 Fed. Reg. at 8,339.

data available for India and Thailand – the only rational choice for [Commerce] is to select Thailand rather than India as the surrogate country for the final results.").

After considering AHSTAC's claim, Commerce continued to use India as the primary surrogate country. *See Final Results*, 76 Fed. Reg. at 51,940 (listing no changes to surrogate country selection from the *Preliminary Results*); *I & D Mem.* cmt. 2 at 10.

AHSTAC now argues that Commerce's selection of India as the primary surrogate country for China in this review was not supported by a reasonable reading of the record. Pl.'s Br. at 10–18. Commerce responds that the court should decline to consider this argument because AHSTAC failed to exhaust its administrative remedies. Def.'s [2d] Corrected Resp. in Opp'n to Pl.'s Mot. for J. upon the Agency R., ECF Nos. 59 (confidential) and 62 (public) ("Def.'s Br.") at 18. In the alternative, Defendant asserts that a reasonable reading of the record supports Commerce's decision. *Id.* at 22–26. Each issue will be considered in turn.

B. *Exhaustion of Administrative Remedies*

In actions challenging antidumping determinations, "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (2006). Generally, a party sufficiently exhausts its administrative remedies regarding a challenge to an antidumping proceeding if that party participates in the proceeding and presents the challenge in its administrative case brief. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, __ CIT __, 675 F. Supp. 2d 1287, 1300 (2009) ("It is 'appropriate' for litigants challenging antidumping actions to have exhausted their administrative remedies by including all arguments in their case briefs submitted to Commerce.") (quoting 28 U.S.C. § 2637(d)). An argument raised in the case brief satisfies the administrative exhaustion requirement "if it alerts the agency to the argument with reasonable clarity and avails the agency with an opportunity to address it." *Luoyang Bearing Corp. v. United States*, 28 CIT 733, 761, 347 F. Supp. 2d 1326, 1352 (2004) (citing *Hormel v. Helvering*, 312 U.S. 552 (1941); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)).

Here AHSTAC argues that the record does not support Commerce's choice of India for the primary surrogate country because the record contains quality data from another country that was much more economically comparable to China while also meeting Commerce's remaining eligibility criteria. Pl.'s Br. at 12–17. AHSTAC sufficiently alerted the agency to this argument when AHSTAC contended, in its

case brief before the agency, that Thailand was the only rational surrogate country choice because, out of all of the potential surrogates that satisfied Commerce's eligibility criteria, Thailand's per capita GNI was closest to that of China. *AHSTAC Case Br.* at 2, 13–14. Because the argument presented in AHSTAC's case brief includes the challenge AHSTAC now seeks to have adjudicated, AHSTAC properly exhausted its administrative remedies in this regard. *See Luoyang Bearing*, 28 CIT at 761, 347 F. Supp. 2d at 1352.

Moreover, Commerce explicitly addressed AHSTAC's economic comparability argument in its Issues and Decision Memorandum. *I & D Mem.* cmt. 2 at 5 (noting AHSTAC's argument that "Thailand has a per capita [GNI] that is much closer to that of the PRC than is India[']s]") and 6–7 (addressing AHSTAC's relative economic comparability argument but concluding that, "consistent with [Commerce's] policy . . . , [Commerce] continues to find that [India and Thailand] are equally economically comparable to the PRC for purposes of [surrogate value] calculations"). Judicial review of this issue is therefore appropriate, because Commerce had the opportunity to consider AHSTAC's argument, make its ruling, and state the reasons for its decision.[12]

C. *Commerce Acted Unreasonably*

In the administrative review, Commerce defended its primary surrogate country selection against AHSTAC's challenge by relying on its policy of treating all countries on the potential surrogates list as equally economically comparable, regardless of relative differences among them in terms of GNI comparability to the NME in question. *I & D Mem.* cmt. 2 at 6–7 (relying on *Commerce Policy 4.1*). Commerce defended this policy on the ground that "the statute does not require [Commerce] to use a surrogate country that is at a level of economic development *most* comparable to the NME country," *Commerce Policy 4.1* at n.5 (emphasis in original); *see also I & D Mem.* cmt. 2 at 6–7; Def.'s Br. at 22 – i.e., Commerce defended its policy on the ground that the statute does not expressly prohibit it.

But the absence of an express statutory prohibition does not render permissible all that is not expressly prohibited. "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and

[12] *Cf. Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946) (holding that a reviewing court usurps the agency's function when it deprives the agency of "an opportunity to consider the matter, make its ruling, and state the reasons for its action") (footnote omitted).

rational." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). Without some link to Commerce's statutory authority and the particular evidence in this case, an explanation that amounts to "we did it because it is our policy to do so" is not an explanation that "a reasonable mind might accept as adequate to support a conclusion." *Cf. Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (defining "substantial evidence"). A policy that, though not expressly prohibited, is nevertheless unreasonable, cannot serve as a basis for Commerce's reasoned decision-making.

Commerce's policy of disregarding relative GNI differences among potential surrogates for whom quality data is available and who are significant producers of comparable merchandise is not reasonable, because it arbitrarily discounts the value of economic comparability relative to the remaining eligibility criteria (i.e., significant production of comparable merchandise and quality of data). While it is true, as Commerce emphasizes, that the most economically comparable country would not be a reasonable surrogate choice if the dataset from that country was inadequate, *Commerce Policy 4.1* ; Def.'s Br. at 22, this is equally true of the remaining criteria. Thus, for example, the most economically comparable country would be an unreasonable surrogate choice if it were not a significant producer of comparable merchandise,[13] and the country with the absolute best dataset would similarly be an unreasonable surrogate choice if it were not economically comparable to the NME in question.[14] Indeed, Commerce's own policy suggests that none of the three surrogate country eligibility criteria – economic comparability, significant production of comparable merchandise, and quality data – is preeminent. *See Commerce Policy 4.1* (explaining that "the relative importance that [Commerce] attaches to each [eligibility criterion] will necessarily vary depending on the specific facts in each case").

Because none of Commerce's three surrogate country eligibility criteria is preeminent, it follows that relative strengths and weaknesses among potential surrogates must be weighed by evaluating the extent to which the potential surrogates satisfy each of the three criteria. If, for example, one potential surrogate has superior data quality and another is closer in GNI to the NME in question, Commerce must weigh these differences when selecting the appropriate surrogate. *Amanda Foods (Vietnam) Ltd. v. United States*, __ CIT __, 647 F. Supp. 2d 1368, 1376 (2009). An unexplained and conclusory blanket policy of simply ignoring relative GNI comparability within a

[13] *See Shandong Rongxin Imp. & Exp. Co. v. United States*, __CIT __, 774 F. Supp. 2d 1307, 1316 (2011).

[14] *Cf. Dorbest Ltd. v. United States*, 604 F.3d 1363, 1371–73 (Fed. Cir. 2010).

particular range of GNI values does not amount to a reasonable reading of the evidence in support of a surrogate selection where more than one potential surrogate within that GNI range is a substantial producer of comparable merchandise for which adequate data is publicly available. *See id.* Rather, in such situations, Commerce must explain why its chosen surrogate's superiority in one of the three eligibility criteria outweighs another potential surrogate's superiority in one or more of the remaining criteria. *Id.*

The Government argues that Commerce provided the necessary explanation in this case when it stated that India was a more appropriate surrogate than Thailand, notwithstanding the relative GNI disparity, because "the Thai data were unsuitable with respect to the most critical factor of production." Def.'s Br. at 22. But this argument mischaracterizes Commerce's decision. Commerce did not decide that the superiority of Indian data quality outweighed the superiority of Thailand's economic comparability to the NME. Rather, Commerce decided that it need not consider relative economic comparability, or weigh one country's strength in economic comparability against another's strength in data quality. *I & D Mem.* cmt. 2 at 6–7. Because Commerce has provided no reasonable explanation as to why potentially slight differences in data quality necessarily outweigh potentially large differences in economic comparability, a blanket policy of simply refusing to engage in this inquiry does not amount to reasoned decision-making.

In addition, even assuming, *arguendo*, that Commerce's decision rests on the determination that Thai data quality rendered Thailand unusable as a primary surrogate in this review, the record does not support such a conclusion. Indeed, Commerce found that the Indian and Thai data were so similar in quality that Commerce was unable to make a distinction between the two countries based on the datasets' specificity to the input in question, exclusivity of taxes and import duties, contemporaneity with the period of investigation or review, or public availability – i.e., based on its usual data-evaluation standards. *I & D Mem.* cmt. 2 at 7.

"Because the Indian and Thai import data did not allow [Commerce] to make a distinction between the two countries," Commerce compared Indian and Thai information for valuing shrimp larvae, the critical input for producing the subject merchandise. *Id.* Here again Commerce found that, as with Indian and Thai import statistics generally, Indian and Thai information for valuing shrimp larvae was of very similar quality. *See I & D Mem.* cmt. 2 at 8. Both countries provided relevant information that was publicly available, and "neither source [was] definitively tax/duty-exclusive or representative of

a broad-market average." *Id.* The distinction between the two countries' shrimp larvae data that Commerce focused upon was that the Thai data were specific to black tiger shrimp, whereas the Indian data did not specify a species. *Id.* Based on this distinction, Commerce concluded that because the sole mandatory respondent had stated that it neither produced nor sold black tiger shrimp during the POR, the Indian shrimp larvae data were superior (because, unlike the Thai data, they did not specify the species of shrimp to which they pertained). *Id.* Thus Commerce concluded that Indian data were superior to Thai data essentially based on a finding that a subset of the Indian data is more vague than its counterpart within the Thai data. *See id.*

Contrary to the Government's assertions, however, this record is not so "clear" as to lead to the conclusion that this insubstantial, if not illusory,[15] difference in data quality necessarily outweighed the concern that India's per capita GNI was nearly a third of China's, whereas Thailand's per capita GNI was nearly identical thereto. *See* Def.'s Br. at 22–23. The conclusion that Commerce need not have weighed relative GNI proximity against relative data quality in the course of its surrogate selection, "because the clear difference in data quality provide ample basis for Commerce's selection decision," *see id.*, is not supported by the record.

Because Commerce's stated reasoning regarding the surrogate country selection in this review does not comport with a reasonable reading of the record, this issue is remanded for further consideration.

III. Labor Wage Rate Valuation

Commerce's current methodology, which was applied in this review, is to value the surrogate labor wage rate FOP using data from the chosen primary surrogate country. *I & D Mem.* cmt. 5 at 24 (citing *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092 (Dep't Commerce June 21, 2011)).[16] AHSTAC appears to chal-

[15] AHSTAC suggests that, although the Indian data did not specify a shrimp species, it is highly likely that they too, like the Thai data, pertained to black tiger shrimp. Pl.'s Br. at 16 ("[T]he record establishes that black tiger is the main species produced in India and that vannemai (the main species in China) was approved for sale in India only shortly before the POR.") (citing Ex. 4C to First Surrogate Value Submission for [Hilltop], A-570–893, ARP 09–10 (Sept. 10, 2010), Admin. R. Pub. Doc. 70, at 30).

[16] Commerce recently changed its methodology for calculating surrogate labor wage rate values in antidumping proceedings involving merchandise from NME-designated countries. For a detailed discussion of this policy change, *see Camau Frozen Seafood Processing Imp. Exp. Corp. v. United States*, No. 1100399, 2012 WL 5519636, at *5–8 (CIT Nov. 15, 2012).

lenge Commerce's application of this methodology in this review only insofar as AHSTAC disagrees with Commerce's chosen primary surrogate, as discussed above. *See I & D Mem.* cmt. 5 at 23 (describing AHSTAC's argument that Commerce "should choose Thailand as the primary surrogate country and value labor using Thai labor data"); Pl.'s Br. at 29 (suggesting that AHSTAC would not object to Commerce's valuing labor using data from "another [surrogate] country that was economically comparable to China and had non-aberrant labor data").

Because the challenged labor valuation is premised on Commerce's selection of India as the primary surrogate country in this review, and because Commerce's selection of India as the primary surrogate is remanded for further consideration, judgment regarding Commerce's labor valuation will be deferred until Commerce's selection of the primary surrogate country is finalized. *Cf., e.g.*, *Tianjin Magnesium Int'l Co. v. United States*, __ CIT __, 722 F. Supp. 2d 1322, 1340 (2010).

IV. Use of Data on Imports into India from North Korea

AHSTAC also challenges Commerce's determination not to exclude data on imports into India from North Korea when calculating surrogate FOP values in this review. Pl.'s Br. at 35–38. As with Commerce's surrogate labor wage rate valuation, the determination not to exclude data on imports from North Korea, when using Indian import statistics to calculate surrogate FOP values, presupposes the selection of India as the primary surrogate country. *See I & D Mem.* cmt. 6; *see also id.* cmt. 5 at 24 (describing Commerce's general practice of valuing all FOPs using data from the primary surrogate country); Def.'s Br. at 38. As with Commerce's surrogate labor wage rate valuation, therefore, judgment regarding this issue will be deferred until Commerce's selection of the primary surrogate country is finalized. *Cf., e.g.*, *Tianjin Magnesium*, __ CIT at __, 722 F. Supp. 2d at 1340.

CONCLUSION

For the reasons stated above, Commerce's *Final Results*, 76 Fed. Reg. 51,940, are affirmed with regard to Commerce's selection of the mandatory respondent, and remanded with regard to Commerce's selection of the primary surrogate country for this review. Commerce shall reconsider its primary surrogate country selection and either provide additional explanation, based on a reasonable reading of the record, or make an alternative primary surrogate selection that is supported by the record. Commerce shall have until January 29, 2013 to complete and file its remand determination. Plaintiff and Defendant-Intervenors shall have until February 12, 2013 to file

comments. Plaintiff, Defendant, and Defendant-Intervenors shall have until February 26, 2013 to file any reply.

It is SO ORDERED.

Dated: November 30, 2012
New York, NY

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

Slip Op. 12–146

MACLEAN-FOGG CO., et al., Plaintiffs, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Intervenors.

Before: Donald C. Pogue,
Chief Judge
Consol.[1] Court No. 11–00209

[Commerce's final results on redetermination are AFFIRMED.]

Dated: November 30, 2012

Thomas M. Keating, Lisa M. Hammond, and *Kazumune V. Kano*, Hodes Keating & Pilon, of Chicago, IL, for Plaintiffs MacLean-Fogg Co. and Fiskars Brand, Inc.

Mark B. Lehnardt, Lehnardt & Lehnardt LLC, of Liberty, MO, for Plaintiff-Intervenors Eagle Metal Distributors, Inc. and Ningbo Yili Import & Expert Co., Ltd.

Craig A. Lewis, T. Clark Weymouth, and *Brian S. Janovitz*, Hogan Lovells US LLP, of Washington, DC, for Plaintiff-Intervenor Evergreen Solar, Inc.

Tara K. Hogan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the briefs was *Joanna Theiss*, Attorney, Office of the Chief Counsel for the Import Trade Administration, U.S. Department of Commerce, of Washington, DC.

Stephen A. Jones, Christopher T. Cloutier, Daniel L. Schneiderman, Gilbert B. Kaplan, Joshua M. Snead, and *Patrick J. Togni*, King & Spalding LLP, of Washington, DC, for Defendant-Intervenor Aluminum Extrusions Fair Trade Committee.

OPINION

Pogue, Chief Judge:

This case returns to court following remand in *MacLean-Fogg Co. v. United States*, 36 CIT __, 853 F. Supp. 2d 1336 (2012) ("*MacLean-Fogg III*"). *MacLean-Fogg III* found that the Department of Commerce's ("the Department" or "Commerce") application, to the Plaintiffs, of the all-others 374.15% countervailing duty ("CVD") rate required reconsideration or further explanation because Commerce

[1] This action is consolidated with Court Nos. 11–00210, 1100220, and 11–00221.

failed to properly explain why the assumption that Plaintiffs, like the mandatory respondents in this investigation,[2] used 100% of subsidies available throughout the People's Republic of China ("PRC" or "China") was remedial and not punitive. The court ordered Commerce to either explain how its assumption was remedial and not punitive, or, alternatively, recalculate the rate applicable to the Plaintiffs' merchandise.

On remand, Commerce recalculated the all-others rate, finding appropriate a rate equal to the mandatory respondents' preliminary rate: 137.65%. *Final Results of Redetermination Pursuant to Court Remand*, ECF No. 80 at 1 (Dep't Commerce Sept. 13, 2012) ("*Remand Results*") (citing *Aluminum Extrusions from the People's Republic of China*, 75 Fed. Reg. 54,302 (Dep't Commerce Sep. 7, 2010) (preliminary affirmative countervailing duty determination)). Explaining that this rate is remedial and not punitive, Commerce stated that the preliminary rate is not based on all the subsidy programs that were identified in the investigation and ultimately used in the final rate calculation for the mandatory respondents. Rather, Commerce excluded programs that were identified as used solely by the voluntary respondents and assumed a lower subsidy rate for those programs than the subsidy rate used in the final rate calculation. *Remand Results* at 22. Plaintiffs seek review of the reduced rate. The court affirms Commerce's rate because Commerce adequately explained why the 137.65% rate is not punitive but is a reasonable calculation for the all-others companies.

We have jurisdiction pursuant to Section 516A(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(2)(B)(i) (2006) and 28 U.S.C. § 1581(c).[3]

---

[2] When, as in this case, an investigation involves a large number of potential respondents, the governing statute allows Commerce to select a smaller number of respondents to act as mandatory respondents. 19 U.S.C. § 1677f-1(e)(2). The remaining respondents have the option of asking for voluntary respondent status and submitting information for examination. 19 U.S.C. § 1677m(a); 19 C.F.R. § 351.204(d). Companies not selected as mandatory or voluntary respondents receive a rate that is calculated for "all-other" companies. 19 U.S.C. § 1671d(c)(1)(B)(i)(I). To calculate this all-others rate, Commerce is directed by statute to use the weighted average rate of all individually investigated companies, or, in the event that these rates are calculated using adverse facts available ("AFA"), any reasonable method, which may include use of rates calculated using AFA. 19 U.S.C. § 1671d(c)(5)(A)(i)–(ii) ("Section 1671d"); *MacLean-Fogg Co. v. United States*, 36 CIT __, 836 F. Supp. 2d 1367, 1374 n.9 (2012) ("*MacLean-Fogg I*"). In addition, Commerce promulgated -- and this court has upheld --19 C.F.R. § 351.204(d)(3), which states that for the purposes of calculating the all-others rate, voluntary respondents' rates will not be considered. *MacLean-Fogg I*, 836 F. Supp. 2d at 1374 (noting Commerce's concerns that voluntary respondents are a self-selecting group more likely to have a lower CVD rate, the inclusion of which could skew the all-others rate).

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

BACKGROUND[4]

Commerce designated the three largest exporters of extruded aluminum from China as mandatory respondents in this investigation. *MacLean-Fogg I*, 836 F. Supp. 2d at 1370. When the mandatory respondents failed to cooperate, Commerce resorted to adverse facts available to calculate their CVD rate, with a resulting rate of 374.15%. *Id.* at 1370–71; 19 U.S.C. § 1677f1(e)(2). Two companies asked for and received voluntary respondent status. After its investigation of these respondents, Commerce calculated final voluntary respondent CVD rates which ranged from 8%-10%. Finally, pursuant to the controlling statute and regulations, Commerce averaged the rates calculated for the mandatory respondents and arrived at a rate of 374.15% for the remaining companies, otherwise known as the all-others companies. *MacLean-Fogg I*, 836 F. Supp. 2d at 1371; *see* 19 C.F.R. § 351.204(d)(3).

Plaintiffs sought review, claiming that the statutory language in Section 1671d unambiguously called for the all-others rate to be calculated using only individually investigated respondents, which in this case, Plaintiffs claimed, were the voluntary respondents because those were the only respondents who cooperated with Commerce's investigation. *MacLean-Fogg I* held that Section 1671d was ambiguous with regard to the permitted data source and that Commerce was permitted to use the AFA rate in calculating the all-others rate, provided it did so in a reasonable manner. *MacLean-Fogg I*, 836 F. Supp. 2d at 1373—74. Nonetheless, the court remanded the all-others rate to Commerce for reconsideration because Commerce had failed to articulate a logical connection between the AFA mandatory respondent rate and the all-others companies. *Id.* at 1376.

A subsequent opinion concluded that Commerce's preliminary all-others rate in the preliminary determination was also subject to review under the same reasonableness standard because it had legal effect on the entries made during the interim time period between the issuance of the preliminary and final CVD rates, both as a cash deposit rate and, if an annual review was sought, as a cap on the final rate for those particular entries. *MacLean-Fogg Co. v. United States*, 36 CIT __, 853 F. Supp. 2d 1253, 1256 (2012) ("*MacLean-Fogg II*"). Thus *MacLean-Fogg II* required consideration of the lawfulness of the preliminary rate once Commerce provided a reasonable final CVD rate. *Id.*

[4] The court has, on two previous occasions, remanded this case to Commerce to explain how the calculation of the all-others rate for non-mandatory respondents is reasonable. Familiarity with the court's prior decisions is presumed.

Commerce then provided its first set of remand results. *See MacLean-Fogg III*, 853 F. Supp. 2d at 1338. In these results, Commerce did not recalculate the all-others rate, but rather, provided data showing that the rate calculated for the mandatory respondents is logically connected to the all-others companies because the mandatory respondents comprise a significant portion of the Chinese extruded aluminum producers and exporters and thus are representative of the Chinese extruded aluminum industry as a whole. In contrast, the all-others companies and voluntary respondents make up a fraction of the market. Therefore, and the court agreed, it was reasonable to use the mandatory respondents' rate in Commerce's calculation because the mandatory respondents were more representative of business practices in the Chinese extruded aluminum market. *Id.* at 1341. *MacLean-Fogg III* concluded that Commerce had provided sufficient reasoning for excluding voluntary respondents' rates from the all-others rate calculation. Nonetheless, *MacLean-Fogg III* also concluded that Commerce failed to explain how the all-others rate was remedial and not punitive when it assumed use of all subsidy programs across the PRC while at the same time stating that the all-others companies were significantly smaller than the mandatory respondents. *Id.* at 1341–43. Accordingly, the court ordered Commerce to reconsider the all-others rate or further explain its reasoning. *Id.*

In response to the court's second remand order, Commerce submitted the remand results currently under review. In these remand results, Commerce has chosen to designate the all-others rate as equal to the preliminary rate it calculated for the mandatory respondents: 137.65%. Commerce reasons that because this rate does not utilize the full measure of subsidy programs used to calculate the final 374.15% rate, and excludes all programs that were used only by the voluntary respondents, it is in keeping with the court's order to calculate a rate that is remedial and not punitive. Additionally, by reverting to the preliminary determination rate, Commerce assumed program-specific subsidy rates of 8.54%, which are approximately 2% lower than the final rate calculated for the mandatory respondents. Defendant's Response to Comments Regarding the Second Remand Redetermination, ECF No. 85 at 27–28 ("Defendant's Reply").

Plaintiffs argue that the all-others rate is still punitive because it includes more subsidy programs than the all-others companies could utilize, and is based on high usage rates of the subsidy programs, rates that are not in keeping with historical trends and voluntarily submitted information. Joint Plaintiffs' Comments on Commerce's Second Remand Redetermination, ECF No. 83 at 2–4 ("Plaintiffs'

Comments"). Furthermore, Plaintiffs assert that the reasonableness of the preliminary rate is still under consideration by the court and request an opportunity to further brief their claims once the court has ruled on the Second Remand Determination. *Id.* at 2 n.2. Plaintiffs argue that the all-others rate should be based on the rates assessed on voluntary respondents and historical data identified from similar or identical programs. *Id.* at 36–38.

STANDARD OF REVIEW

When reviewing Commerce's determinations in a countervailing duty investigation, the court determines whether they are "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 evidence which, considering the record as a whole, "a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 491 (1951) (citing *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The conclusion Commerce reaches need not be the best or only possible conclusion, merely a reasonable one. *See Nat'l Cable & Telecomms. Assn. v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

DISCUSSION

As an initial matter, Plaintiffs assert that Commerce must take into consideration the "limited geographic footprint" of the all-others companies when assuming use of subsidy programs.[5] Plaintiffs' Comments at 13. Of the subsidy programs that Commerce factored into its CVD rate calculations, some were available only to producers and exporters located in specific geographic areas.[6] *See id.* at 14–15. Plaintiffs assert that because the record shows none of the all-others companies had a presence in two cities, Liaoyang and Wenzhou, Commerce unreasonably included the subsidy programs from the two localities in its calculations. Furthermore, Plaintiffs contend, when Commerce included every location-specific subsidy program in its calculations, Commerce unreasonably assumed that each all-others company was somehow present in and able to avail itself of subsidy programs across the entire PRC. *Id.* at 15.

---

[5] Plaintiffs also raise an argument that has been heard and settled, namely that the all-others rate is unreasonably based on AFA and is not permitted by statute. But the statute expressly permits the use of AFA rates in the calculation of the all-others rate. *See MacLean-Fogg I*, 836 F. Supp. 2d at 1373–74.

[6] Plaintiffs point out that ten location-specific programs were available only in certain regions and provinces. Relying on the addresses provided by Petitioners before the investigation began, Plaintiffs claim that Commerce unreasonably included subsidy programs from two cities where the all-others companies do not have a presence. Plaintiffs' Comments at 15.

Commerce notes in response that the rate used here is based on an assumed use of 29 subsidy programs, which stands in contrast to the 54 programs identified and used in the final rate calculation for the mandatory respondents. Defendant's Reply at 8—9. Furthermore, the 137.65% rate does not include the location-specific subsidy programs that were clearly identified on the record as being used only by the voluntary respondents. *Id.* Finally, Commerce explains that the data Plaintiffs rely on to demonstrate that none of the all-others companies are located in Liaoyang and Wenzhou is unsubstantiated, and that it is not reasonable to extrapolate, without investigation, that the addresses on file are the locations of manufacturing facilities, or that there is no cross-ownership or affiliation between the all-others companies. *Remand Results* at 24–25. In sum, Commerce's position is that it is charged with fine-tuning an all-others rate based on incomplete record evidence. Defendant's Reply at 10–11.

The court agrees with Commerce. The assumptions guiding Commerce's decision to use the preliminary rate are reasonable given the limitations of the administrative record. Plaintiffs' reliance on the addresses provided in the Petition is unavailing because Commerce raises the reasonable concern that these addresses do not accurately convey locations of manufacturing facilities nor does they account for potential cross-ownership.

While Plaintiffs assert that no record evidence exists to support Commerce's claim that some of the all-others companies may be cross-owned, there is similarly no record evidence to establish that they are not cross-owned. Nor is there evidence to support Plaintiffs' assertions that the addresses provided in the Petition are the addresses for manufacturing facilities. Without gathering additional data – which could have been submitted or obtained had the Plaintiffs asked for voluntary respondent status – Commerce's choice is a reasonable one given the uncertainty surrounding the addresses on record. When Commerce reduced the number of subsidy programs used for its CVD rate calculation for the all-others companies, it addressed the issue raised by *MacLean-Fogg III* that the all-others rate was unreasonably assuming 100% use of all subsidy programs available in the PRC.

Plaintiff's efforts to demonstrate that the current rate is not a perfect fit and to provide alternative rates are not without weight, but Commerce's obligation is only to provide a reasonable rate, not a perfect one. *See Nat'l Cable & Telecomms.*, 545 U.S. at 980.

Next, Plaintiffs contend that Commerce failed to account for historic trends which show non-use of most alleged subsidy programs and attack the program-specific subsidy rates that go into calculating

the final all-others rate, asserting that these rates are aberrant and unrepresentative. Plaintiffs propose several different subsidy rates, based on historic use of subsidy programs and weighted averages. While these rates could possibly be reasonable, they are not the only reasonable ones. All that Commerce is required to provide is a reasonable rate, not necessarily the one that this court or another party feels is a better fit. *See id.*

Here Commerce was faced at the outset with "the difficult task of selecting an all-others rate with limited information before it." *MacLean-Fogg I*, 836 F. Supp. 2d at 1376. Plaintiffs had the opportunity to ask for voluntary respondent status and failed to do so. Plaintiffs' effort to detail possible rates based on historic trends and geographic location is the type of effort and cooperation that the court would hope parties would provide when they are individually investigated, whether as mandatory or voluntary respondents. Furthermore, the court notes that Plaintiffs have the opportunity to ask for voluntary status in an annual review of their CVD rate. 19 C.F.R. § 351.221.

Finally, *MacLean-Fogg II* also concluded that the lawfulness of the preliminary rate, which was based on the same methodology that was remanded in *MacLean-Fogg I*, would be reviewed following determination of a final rate. However, in the interim, Commerce provided additional explanation, in its subsequent remand results, showing that the preliminary methodology was reasonable because the mandatory respondents in this investigation comprise the vast majority of extruded aluminum producers and exporters in China, whereas the all-others companies represent a small fraction of the industry. *See MacLean-Fogg III*, 853 F. Supp. 2d at 1339. Therefore, and for the same reasons provided for the final rate in *MacLean-Fogg III*, the methodology used to calculate the preliminary rate for the mandatory respondents, and ultimately to calculate the all-others rate as it has now been revised, is sustained.

CONCLUSION

For the reasons stated above, Commerce's final results upon redetermination are AFFIRMED. Judgment will be entered accordingly.

Dated: November 30, 2012
New York, NY

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