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Case No. A-570-893
Administrative Review (§ 751)
02/01/08-01/31/09
Fourth Administrative Review
REMAND
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VIA ELECTRONIC FILING

The Honorable Rebecca M. Blank
Acting Secretary of Commerce
Attn: Import Administration
APO/Dockets Unit, Room 1870
U.S. Department of Commerce
Pennsylvania Avenue and 14th Street, NW
Washington, DC 20230

Re: Remand Redetermination in the Fourth Administrative Review of the Antidumping Duty Order of Certain Frozen Warmwater Shrimp from the People's Republic of China: Comments on Draft Remand Redetermination

Dear Acting Secretary Blank:

On behalf of the Ad Hoc Shrimp Trade Action Committee ("Domestic Producers" or "AHSTAC"),[1] the Petitioner in the original investigation of Certain Frozen Warmwater Shrimp from the People's Republic of China and a participating interested party in the fourth

[1] AHSTAC is an interested party to this proceeding under 19 U.S.C. § 1677(9)(F) (2006) and the Petitioner in the underlying investigation. The members of AHSTAC are: Nancy Edens; Papa Rod, Inc.; Carolina Seafoods; Bosarge Boats, Inc.; Knight's Seafood Inc.; Big Grapes, Inc.; Versaggi Shrimp Co.; and Craig Wallis.

administrative review ("AR4") of the antidumping ("AD") duty order on frozen warmwater shrimp from the People's Republic of China ("China" or "PRC"), we hereby submit comments on the Draft Results of Redetermination Pursuant to Court Remand ("Draft Results") released by the U.S. Department of Commerce (the "Department" or "Commerce") in response to the U.S. Court of International Trade's ("CIT") decision in Ad Hoc Shrimp Trade Action Committee v. United States ("Slip Op. 11-106").[2] Comments are due on October 25, 2011.[3] Accordingly, these comments are timely filed.

INTRODUCTION

The Draft Results fail to meaningfully respond to the CIT's remand. Specifically, the Department does not address the Slip Op. 11-106 holding that the presumption of regularity ordinarily attaching to the Type 03 data released by U.S. Customs and Border Protection ("CBP" or "Customs") vanished in light of the evidence already on the record, requiring Commerce to support its selection of mandatory respondents with substantial evidence.[4] Rather than comply, the Draft Results advance a theory that the Department only reviews suspended entries.[5] This construction impermissibly conflicts with the statute, is not shown to be an established agency practice, and does not supplant the need for substantial evidence.[6] The Department should re-open the record and take action to comply with the CIT's remand including the issuance of

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2 Court No. 10-00275, 2011 Ct. Intl. Trade LEXIS 105 (Aug. 24, 2011).

3 See U.S. Department of Commerce Internal Memorandum from J. Startup to File, Case No. A-570-893 (Oct. 19, 2011); Letter from C. Bertand, U.S. Department of Commerce, to All Interested Parties, Case No. A-570-893 (Oct. 14, 2011).

4 Infra, Section I.

5 See Draft Results at 5, 15 n.43.

6 Infra, Section II.

quantity and value ("Q&V") questionnaires to all respondents and/ or – as expressly recognized by the CIT as a means to comply with Slip Op. 11-106 – release the Type 01 CBP data for the POR to interested parties under an administrative protective order ("APO"). [7]

In response to the record evidence already found to cast doubt on the reliability of Type 03 CBP data, the Draft Results make arguments either rejected by the CIT or otherwise without merit.[8] The Department has yet to provide the requisite substantial evidence needed to support its selection of mandatory respondents through reliance on Type 03 CBP data on the record of the instant administrative review proceeding. Moreover, as recently announced in the Federal Register, the Department is fully aware of the prevalence of misclassification by importers to avoid the payment of applicable AD duties.[9]

I. THE DEPARTMENT MUST HAVE SUBSTANTIAL EVIDENCE TO SUPPORT ITS RELIANCE ON CBP TYPE 03 DATA TO SELECT RESPONDENTS

The methodology by which the Department selects the "exporters and producers accounting for the largest volume," will be upheld if it "is reasonable . . . and is not arbitrarily applied."[10] In AR4, Commerce selected Zhanjiang Regal Integrated Marine Resources Co. Ltd. ("Regal") and Hilltop International ("Hilltop") as mandatory respondents because they had the largest volume of merchandise during the period of review ("POR") according to entries identified as Type 03 – i.e., subject to an AD duty order – by importers on the CBP Form ("CF")

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7 Infra, Section III; see Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *17 n.19.

8 Infra, Section IV.

9 Infra, Section V.

10 Pakfood Pub. Co. v. United States, 724 F. Supp. 2d 1327, 1338 n.18 (CIT 2010) ("Pakfood I") (quoting 19 U.S.C. § 1677f-1(c)(2)(B)) (citations omitted).

7501 entry summaries during the POR.[11] Domestic Producers challenged the Department's reliance on CBP Type 03 data before the agency and the CIT.[12] Slip Op. 11-106 concluded that "the Department's entry volume determinations and hence its selection of mandatory respondents in this review, were unsupported by substantial evidence."[13] This standard requires "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[14]

The CIT rejected the defense that the CBP Type 03 data in this review benefitted from the presumption of regularity.[15] Because the record evidence cast doubt on that data, this presumption "completely vanishe{d}."[16] The Department was "upon remand" directed to:

> 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

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11 See U.S. Department of Commerce Internal Memorandum from I. Gorelik to J. Doyle, Case No. A-570-893 (May 29, 2009), Public Record ("P.R.") 41 ("Respondent Selection Memo"); U.S. Customs and Border Protection, CBP Form 7501 Instructions (Mar. 17, 2011), available at: http://forms.cbp.gov/pdf/7501_instructions.pdf ("7501 Instructions").

12 See Letter from Dewey & LeBoeuf LLP to U.S. Department of Commerce, Case No. A-570-893 (Apr. 9, 2009), P.R. 18 ("AHSTAC April 9, 2009 Letter"); Memorandum of Law in Support of Plaintiff's Rule 56.2 Motion for Judgment Upon the Agency Record (Mar. 15, 2011) ("AHSTAC Motion").

13 Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *11.

14 Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938), accord Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984).

15 Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *12 ("CBP data are presumptively reliable as evidence of respondent-specific POR entry volumes. . . . The record in this review, however, contains evidence sufficient to call this presumptive reliability into question." (citation and footnote omitted)).

16 Id. at *17 n.15 (citing Aukerman Co. v. R. L. Chaides Const. Co., 960 F.2d 1020, 1037 (Fed. Cir. 1992)).

> CBP Form 7501 data used in this case are not similarly inaccurate, and/or otherwise reconsider its decision.[17]

In order to withstand CIT review, the Draft Results must contain "substantial evidence" supporting the Department's reliance on CBP Type 03 data to select mandatory respondents.[18] Practicality concerns are not relevant to this inquiry because "ease of administration does not make an administrative determination any less arbitrary when it otherwise had no substantial evidence to support it."[19] In light of this overarching legal requirement, Domestic Producers now address the substance of the Draft Results.

II. THE CLAIM THAT ONLY SUSPENDED ENTRIES ARE COVERED IS UNFOUNDED AND DOES NOT PROVIDE SUBSTANTIAL EVIDENCE

The Draft Results advance – for the first time in this litigation – a legal theory concerning entries that the Department considers subject to AD duty order administrative reviews.[20] According to the Department, only entries identified by importers as Type 03 on the CF 7501 entry summaries are suspended and thereby covered by the review.[21] To support this proposition the Department cites to a single administrative proceeding, Certain Tissue Paper Products from the People's Republic of China ("Tissues from China").[22] The agency explains:

> It is the Department's longstanding practice not to conduct reviews for companies that do not have *any* suspended entries because there are no entries for which the Department can issue assessment instructions. . . .

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17 Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *17 (emphases added).

18 19 U.S.C. § 1516a(b)(1)(B)(i).

19 United States v. Udy, 381 F.2d 455, 458 (10th Cir. 1967).

20 See Draft Results at 5, 15 n.43.

21 See id.

22 See id. at 5 n.14 (citing Certain Tissue Paper Products from the People's Republic of China: Final Results and Final Rescission, in part, of Antidumping Duty Administrative Review, 73 Fed. Reg. 58,113 (Oct. 6, 2008)), 15 n.43.

> It is the Department's longstanding practice, which has been upheld by the Courts, to not conduct reviews for companies that do not have any suspended entries. That is to say, if a company's exports have not been suspended, the Department has no entries for which to order the assessment of antidumping duties.[23]

This alleged agency practice is at odds with the statute that requires the Department to "assess antidumping duties on entries of merchandise covered by the determination."[24] Although the Department notes this mandate,[25] the agency does not and cannot explain how equating "entries of merchandise covered" by the AD duty order with only those that are suspended complies with the statute.[26] Because this proffered construction impermissibly conflicts with the plain meaning of the statute, no deference is afforded under the first step of the analysis articulated in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.[27]

Even if the second step of Chevron were reached,[28] the Department's use of suspension to support reliance on Type 03 CBP data is not a "reasonable means of effectuating the statutory purpose."[29] When mandatory respondents are selected by largest volume, the Department is required by statute to identify the "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country."[30] Under the novel approach now

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23 Id. at 5, 15 n.43 (emphasis in original).

24 19 U.S.C. § 1675(a)(2)(C); see id. § 1675(a)(2)(A) ("the administering authority shall determine—(ii) the dumping margin for each such entry.").

25 See Draft Results at 5 n.15 (citing 19 U.S.C. § 1675(a)(2)(C)).

26 19 U.S.C. § 1675(a)(2)(ii); see Draft Results at 5, 15 n.43.

27 467 U.S. 837, 842-43 (1984).

28 See id.

29 Ceramerica Regiomontana, S.A. v. United States, 10 CIT 399, 404, 636 F. Supp. 961 (1986), aff'd, 810 F.2d 1137 (Fed. Cir. 1987).

30 19 U.S.C. § 1677f-1(c)(2)(B).

advanced, this agency function is delegated to importers who alone decide whether to identify merchandise as Type 03 on the CF 7501 entry summaries.[31] Errors on these forms – through inadvertence or worse – would bind the Department when assessing the largest exporters and producers to select mandatory respondents. This unreasonable construction "contravenes statutory objectives."[32]

The Department in any event has not established a "longstanding practice, which has been upheld by the Courts."[33] To do so, the Department must identify judicial precedent and more than a single administrative proceeding.[34] Tissues from China in fact undermines the Draft Results by reinforcing the need for administrative review determinations to be supported by substantial evidence. There, the Department "preliminarily rescinded the review with respect to Guilen Qifeng Paper Co., Ltd. . . . because the record showed no suspended entries of merchandise exported during the POR."[35] Tissues from China does not support the Department's continued reliance on Type 03 CBP data to select mandatory respondents in this review without substantial evidence. The Department is directed by statute to select the largest

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31 See 7501 Instructions at 1 ("Record the appropriate entry type code by selecting the two-digit code for the type of entry summary being filed.").

32 Ipsco, Inc. v. United States, 899 F.2d 1192, 1195 (Fed. Cir. 1990).

33 Draft Results at 15 n.43.

34 Domestic Producers are aware of an administrative review where the Department assessed AD duties on entries not identified as Type 03. See Notice of Final Determination of Sales at Less than Fair Value: Certain Cut-To-Length Carbon Quality Steel Plate Products from Italy, 64 Fed. Reg. 73,234, 73,239-40 (Dec. 29, 1999) (the Department including in its AD duty administrative review sales of goods that entered under a temporary importation bond ("TIB")); 7501 Instructions at 2 (TIB entries to be identified as Type 23 on CBP Form 7501 entry summaries).

35 Tissues from China, 73 Fed. Reg. at 58,114.

exporters and producers;[36] whether respondents proven to lack suspended entries may be entitled to rescission based on record evidence, as in Tissues from China, does not affect the preliminary determination as to which respondents are to be individually examined.

In a common theme throughout this litigation, the Department in its suspension argument deflects its statutory responsibility in the direction of CBP. The Draft Results state: "One of the Department's primary functions in the course of an administrative review is to determine the appropriate antidumping duty margin to apply to subject merchandise, for the purpose of directing CBP to liquidate suspended entries of subject merchandise at that rate."[37] Under this logic, the Department need not consider any entries other than those identified by importers as Type 03 because CBP could not order those entries to be liquidated. This circular reasoning ignores the record evidence in AR4 demonstrating the likelihood that subject merchandise was incorrectly entered as other than Type 03 – as found by the CIT in Slip Op. 11-106.[38]

The Department, not CBP, has the statutory duty to administer the AD statute. This responsibility may not be passed to another agency because the Department is "the 'master' of the antidumping laws."[39] With respect to the demarcation of authority with CBP, the U.S. Court of Appeals for the Federal Circuit ("CAFC") has held that only the Department has the authority to determine whether specific merchandise is subject to an AD duty order.[40] CBP "has a merely

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36 See 19 U.S.C. § 1677f-1(c)(2)(B).

37 Draft Results at 5.

38 See Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *11-17.

39 Torrington Co. v. United States, 68 F.3d 1347, 1351 (Fed. Cir. 1995).

40 See Xerox Corp. v. United States, 289 F.3d 792, 794-95 (Fed. Cir. 2002).

ministerial role in liquidating antidumping duties,"[41] and "may not independently modify, directly or indirectly the {Commerce} determinations, their underlying facts, or their enforcement."[42] Accordingly, the Department cannot shirk its statutory responsibility by empowering CBP or individual importers to define the universe of subject entries for purposes of selecting respondents in an administrative review. Moreover, the Draft Results state that "the CBP misclassification issue and transshipment findings . . . are of significant concern to us."[43] The Department can address this problem with an affirmative demonstration as to the validity of the Type 03 CBP data relied upon for respondent selection in accordance with Slip Op. 11-106.

The Department's efforts to minimize its reliance on the Type 03 CBP data lack persuasiveness. The Draft Results state that "the respondent selection data are used only to rank the exporters under review by volume of shipments during the POR so that the Department can make a selection determination. . . ."[44] However, this foundational determination sets the parameters of the administrative review by selecting the mandatory respondents.[45] The Type 03 CBP data are critical because they lead directly to the dumping margins assigned to respondents.[46] The Draft Results next explain that "the Department does not and cannot require that the data be flawless."[47] Domestic Producers do not advocate for a perfect dataset but instead

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41 Mitsubishi Elecs. Am., Inc. v. United States, 44 F.3d 973, 977 (Fed. Cir. 1994).

42 Royal Bus. Machs., Inc. v. United States, 1 CIT 80, 87 n.18, 507 F. Supp. 1007 (1980).

43 Draft Results at 14 (emphasis added).

44 Id. at 5.

45 See 19 U.S.C. § 1677f-1(c)(2)(B).

46 See Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 75 Fed. Reg. 49,460, 49,463 (Aug. 13, 2010), P.R. 183 ("Final Results").

request that the Department's selection of largest exporters and producers be supported by substantial evidence.[48] The CIT in Slip Op. 11-106 found that this requirement was not initially complied with,[49] and the standard remains unsatisfied in the Draft Results.

III. TO PROVIDE SUBSTANTIAL EVIDENCE, THE DEPARTMENT SHOULD RELEASE TYPE 01 CBP DATA AND/ OR ISSUE Q&V QUESTIONNAIRES

Slip Op. 11-106 endorsed the Domestic Producers' suggestion that the Department on remand release the Type 01 CBP data for the POR to interested parties under APO.[50] Type 01 entries are those identified by the importer on CF 7501 entry summaries as not subject to AD duties.[51] In ordering remand, the CIT:

> note{d} in this regard that, as AHSTAC suggested below, . . . , one way to corroborate the accuracy of the 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 . . . , and thus may be released to interested parties under {APO}.[52]

The Draft Results refuse to release Type 01 CBP data.[53] The Department first cross-references its suspension argument stating that: "Type 01 data would not provide a more reliable or accurate means by which to determine the relative positions of exporters of subject

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47 Draft Results at 5.

48 See AHSTAC Motion.

49 Compare Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *11-17, with Issues and Decision Memorandum (cmt. 1) (Aug. 9, 2010), appended to Final Results, P.R. 180 ("AR4 IDM").

50 See id. at *17 n.19.

51 See 7501 Instructions at 1.

52 Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *17 n.19 (citation omitted) (emphases added).

53 See Draft Results at 14-15.

merchandise, properly suspended, during POR than Type 03 data."[54] However, even if reviews only cover suspended entries, the Department cannot forego the need for substantial evidence to support its reliance on the Type 03 CBP data.[55] The Department next casts blame as follows: "Petitioner did not provide any guidance as to the purpose of obtaining and releasing Type 01 data to interested parties in ascertaining the largest volume of subject merchandise exports for respondent selection, as directed by the statute."[56] Yet in explaining the value to both the Department and the CIT, Domestic Producers stated as follows: "By comparing 'type 3' CBP data for entries claimed subject to AD duties and 'type 1' CBP data for entries claimed to be exempt, Commerce and interested parties could evaluate the accuracy of entry data provided by importers."[57]

The CIT understood the benefit of using Type 01 CBP data to assess whether the Type 03 CBP data accurately reflected volumes of subject merchandise in the POR.[58] The Draft Results resist this deduction and emphasize the agency work involved by stating that the Type 01/ Type 03 "classification itself does not yield any specific information that would assist the Department in expeditiously determining whether merchandise should have been reported as Type 03, or making any modifications to the Type 03 data for purposes of respondent selection."[59] The Draft Results conclude that releasing Type 01 CBP data under APO is "impracticable" because "the

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54 Id. at 14 (emphasis added).

55 Supra, Section II.

56 Draft Results at 14 (emphasis in original).

57 AHSTAC Motion at 19; see AHSTAC April 9, 2009 Letter at 2-3, 8, 17.

58 See Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *17 n.19.

59 Draft Results at 14 (emphasis added).

Type 01 data from CBP cannot in and of itself identify the largest exporters of subject merchandise."[60] Because these data are not on the record of this review, this claim is entirely unsupported.

Providing Type 01 CBP data to interested parties under APO and soliciting comment is a minimal administrative undertaking, as recognized by the CIT.[61] The Department's resource concerns are alleviated by having interested parties provide preliminary analysis through comment. There is simply no basis for the continued refusal to release Type 01 CBP data under APO. The Department's steadfast confidence that the Type 03 CBP data serves as a reliable proxy for the volume of subject merchandise in the POR can be efficiently measured by interested parties. If this information is found to corroborate the Type 03 CBP data, the Department will have record evidence to support its respondent selection. With the Department's refusal now beginning to create the impression that releasing the Type 01 CBP data will undermine its respondent selection, Domestic Producers urge the Department to follow this CIT-endorsed approach before finalizing its remand redetermination.[62]

Agency work that may be necessitated by the release of Type 01 CBP data under APO results from the statutory requirement for "substantial evidence."[63] Practicality is not a basis to avoid an administrative effort unless and until the foundational record evidence requirement is satisfied.[64] As the Department correctly identifies, the U.S. Harmonized Tariff Schedule

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60 Id. at 15 (emphasis added), 15 (emphasis on original).

61 See Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *17 n.19.

62 See id.

63 19 U.S.C. § 1516a(b)(1)(B)(i).

64 See id.; Udy, 381 F.2d at 455.

("USHTS") subheadings used on the CF 7501 entry summaries do not perfectly align with the scope of the AD duty order.[65] Because the Department alone decides whether merchandise is within the scope of an AD duty order,[66] reviewing the Type 01/ Type 03 data comparison will require agency attention. The Draft Results, however, improperly use this reality to avoid releasing the data as follows:

> the USHTS categories are not helpful because they are not all exclusive to subject merchandise. Further, even if the Department were to find Type 01 data contained in some entries of subject-only USHTS categories, further inquiry would be necessary to determine whether the USHTS category was accurately reported, or whether in fact the Type 01 designation was accurate.[67]

Domestic Producers have repeatedly suggested releasing the Type 01 CBP data under APO to minimize the administrative burden, but some Department work is required to comply with Slip Op. 11-106. Domestic Producers have also consistently advocated for the more resource-intensive exercise of sending Q&V questionnaires to all respondents to obtain more reliable data for the volumes of shrimp imported from China during the POR – in addition to, or instead of, releasing the Type 01 CBP data under APO.[68] The Draft Results once again reject this approach because:

> Issuing Q&V questionnaires in a case such as this would impose significant burdens on the parties and the Department. Relying on Q&V responses requires significant resources, and time, to send and track the delivery of Q&V questionnaires and responses, to issue follow-up questionnaires when appropriate, and to aggregate and analyze the numerous responses.[69]

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65 See Draft Results at 9, 14.

66 See Xerox, 289 F.3d at 794-95.

67 Draft Results at 14-15 (emphasis added).

68 See AHSTAC April 9, 2009 Letter at 8; AHSTAC Motion at 18-19.

69 Draft Results at 16 (emphases added).

This endeavor is precisely the level of effort that would comply with Slip Op. 11-106. While not unsympathetic to the Department's resource constraints,[70] Domestic Producers from the outset explained that the respondent selection was untenable and the agency proceeded with the risk that resources would be required upon remand.[71] Again, the statute mandates administrative undertaking by requiring "substantial evidence."[72] The Draft Results further try to avoid additional work by stating that "Q&V responses would not necessarily provide more accurate data than Type 03 data. If respondents and/or their importers participate in widespread misclassification schemes, they are unlikely to provide information in Q&V responses that are materially different from the data reported on CF-7501 as Type 03."[73] Again, however, because the record is devoid of responses to Q&V questionnaires, this claim is entirely unsupported. The Department's experience with Regal in the immediately preceding (third) administrative review ("AR3") further belies the assertion presented, as the export shipment data provided by Regal to the agency was inconsistent with the importer data reported to CBP on the CF 7501 entry summaries.[74]

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70 The Deputy Assistant Secretary for Import Administration testified that "we have adequate resources" to address the circumvention of AD duties. Testimony of Ronald K. Lorentzen, U.S. Senate Committee on Appropriations, Hearing on Unfair Trade Enforcement including Anti-Dumping Laws (May 25, 2011), at 67:41-43, available at: http://appropriations.senate.gov/webcasts.cfm?method=webcasts.view&id=b4367085-a336-4ed4-9a0f-46395c478017.

71 See AHSTAC April 9, 2009 Letter.

72 19 U.S.C. § 1516a(b)(1)(B)(i).

73 Draft Results at 16 (emphasis added).

74 Infra, Section IV.B.

Domestic Producers explained to the Department and the CIT that Q&V questionnaires have the potential to provide information that is superior to CBP data.[75] Specifically:

> One reason why Q&V questionnaires yield more accurate import volume than CBP data is that they can specifically inquire about transshipped merchandise from those having first-hand knowledge. As AHSTAC relayed to Commerce, the Q&V questionnaire issued to respondents in the second administrative review of warmwater shrimp from China asked them to identify '{s}ubject merchandise produced by your company but exported/shipped through another company to the United States during the POR.' . . . This direct question provides a means of accurately assessing import volume without reliance on the importer, an improvement over CBP data . . . .[76]

The Draft Results emphasize that "the Department changed its practice from issuing Q&V questionnaires in favor of using CBP type 03 data to select respondents" and that this switch withstood CIT review in Pakfood Public Co. v. United States ("Pakfood II").[77] However, Pakfood II was not followed in Slip Op. 11-106 because the record for that Thai review did not contain similar evidence casting doubt on the Type 03 CBP data – despite arguments by the United States and Hilltop to the contrary.[78] In light of Slip Op. 11-106, the Draft Results improperly restate the Department's initial basis for relying on Type 03 CBP data as follows: "obtaining CBP Type 03 data for respondent selection purposes is an efficient and practicable

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75 See AHSTAC April 9, 2009 Letter at 16; ASHTAC Motion at 18-19.

76 AHSTAC Motion at 19 (citation omitted).

77 See Draft Results at 15 & n.44 (citing Pakfood II, 753 F. Supp. 2d at 1345-46) ("This identical issue was litigated by Petitioner in the companion shrimp from India {sic} case, which was ultimately upheld by the CIT.").

78 Compare Pakfood II, 753 F. Supp. 2d at 1345-46 with Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *11-17; see Defendant's Opposition to Plaintiff's Motion for Judgment Upon the Agency Record (May 18, 2011) ("U.S. Opposition"), at 8-9; Defendant-Intervenors' Response Brief in Opposition to Plaintiffs' Rule 56.2 Motion for Judgment Upon the Agency Record ("Hilltop Opposition") at 7.

means to gather export volume data pursuant to section 777A(c)(2)(b) of the Act."[79] Here, the presumption of regularity has vanished and the Department must affirmatively demonstrate the propriety of its reliance on Type 03 data through substantial evidence.[80]

The Department next cites Wooden Bedroom Furniture from the People's Republic of China ("Furniture from China") where it did employ Q&V questionnaires as an "exception to our practice."[81] The Draft Results distinguish Furniture from China because that merchandise had "inconsistent units of measure."[82] Similarly, Slip Op. 11-106 is a compelling basis for the Department to make an "exception to {its} practice."[83] The Department here must support its respondent selection with substantial evidence and Q&V questionnaires provide a means to do so. Accordingly, the Department should now issue Q&V questionnaires to all respondents and/ or release the Type 01 CBP data for the POR to interested parties under APO.[84]

IV. THE DEPARTMENT'S NEW ATTACKS ON THE RECORD EVIDENCE HAVE BEEN REJECTED BY THE CIT OR OTHERWISE LACK PERSUASIVENESS

Slip Op. 11-106 directed the Department to "take into account the record evidence of significant entry volume inaccuracies in Type 03 CBP Form 7501 data for merchandise subject

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79 Draft Results at 16 (emphasis added).

80 See Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *17 & n.15; Aukerman, 960 F.2d at 1037; Udy, 381 F.2d at 455; 19 U.S.C. § 1516a(b)(1)(B)(i).

81 See Draft Results at 15-16; Initiation of Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture From the People's Republic of China, 75 Fed. Reg. 9869, 9870 (Mar. 4, 2010).

82 Draft Results at 16.

83 See id. at 15-16.

84 If this administrative undertaking requires an extension for the Department to file its remand redetermination with the CIT, Domestic Producers would consent to an extension for that purpose. See Defendant's Consent Motion for an Extension of Time to File Remand Results (Oct. 20, 2011) (Domestic Producers consenting to a 39-day extension).

to this antidumping duty order."[85] The CIT reviewed the evidence that "{t}he Department refused to consider" and concluded that the record compelled the Department to justify its reliance on Type 03 CBP data with substantial evidence.[86] Yet the Department appears to construe this instruction as an invitation to once again challenge the record evidence.[87] As set forth below, the Department's arguments have either already been rejected by the CIT or are otherwise without merit for each category of record evidence: (a) the fraudulently misclassified entries discovered by federal agencies and reported to Congress;[88] (b) the significant inaccuracies in CBP entry volume data discovered by the Department during verification in AR3;[89] and (c) the information indicating fraudulently misclassified entries during the AR4 POR.[90]

A. The Agency Reports to Congress Detailing Circumvention

Slip Op. 11-106 explained that in the administrative review, Domestic Producers "placed on the record, inter alia, two reports to Congress - from CBP and the U.S. Government Accountability Office {"GAO"}, respectively."[91] These reports documented rampant fraud to circumvent AD duties on Chinese shrimp and were released contemporaneously with the POR.[92] The Draft Results first emphasize that the Domestic Producers only attached certain pages from

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85 Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *17.

86 Id. at *9, *11-17.

87 See Draft Results at 6-14.

88 Infra, Section IV.A

89 Infra, Section IV.B

90 Infra, Section IV.C.

91 Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *7.

92 See AHSTAC Motion at 12-15; AHSTAC April 9, 2009 Letter Exs. 1, 2.

these reports.[93] The Department fails to explain why the submission of excerpts from public reports published by federal government agencies is relevant to consideration of the material placed on the record. Nevertheless, should the Department attribute any relevance to the issue, Domestic Producers make the following points:

- Domestic Producers attached only the pages considered salient as a convenience;[94]
- The CIT held that the record (including only selected pages of the CBP and GAO reports) contained sufficient evidence to vanquish the presumption of regularity;[95]
- The reports are and remain publicly available;
- Interested parties could have placed additional pages on the record but did not;[96]
- If the Department thought that the record would benefit from the additional pages, it could have obtained them and placed them on the record during the review;
- The Department may re-open the record now to add the additional pages or allow interested parties to do so; and
- Speculation as to the content of pages not included on the record neither counters the record evidence nor qualifies as substantial evidence.[97]

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93 See Draft Results at 6 ("Petitioner included limited portions of two reports from government agencies to the U.S. Congress"), 6-7 (CBP report submission "consists of the 'table of contents' and 'page 11' of this report."), 7 ("Petitioner provided only pages 16, 19, and 20" of the GAO report).

94 See AHSTAC April 9, 2009 Letter Exs. 1, 2.

95 Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *11-17.

96 See 19 C.F.R. § 351.301 (2010).

97 See Jinan Yipin Corp. v. United States, 31 CIT 1901, 1912, 526 F. Supp. 2d 1347 (2007).

The Draft Results attempt to minimize the effect of this record evidence and use it to support the Department's respondent selection.[98] According to the Department:

> These reports indicate that CBP investigated and found misclassification (including transshipment) of shrimp subject to the antidumping duty order. The evidence, however, is for a time prior to the POR and does not indentify and specific exporters or importers found to be providing false information. Accordingly, this information does not specify how the Type 03 data is inaccurate for the POR in question or a means by which to correct or supplement the Type 03 data. In fact, given the success of the CBP investigations noted in the reports, it is reasonable to conclude that the POR Type 03 data contained less errors and omissions than in prior years, as importers would have been on notice that any misclassification activity is at risk of being found and prosecuted.[99]

These very arguments were made unsuccessfully before the CIT, and they are no more effective upon remand. The United States claimed that the CBP and GAO reports had no bearing on the instant POR because they related to earlier entries.[100] Domestic Producers replied that the reports are in fact specific to the POR "because they showed the ongoing problem of imported Chinese warmwater shrimp being misclassified by numerous federal agencies . . . In contrast, the record is devoid of any evidence that the pattern may have ceased."[101] The CIT did not accept the United States' position that the Department repeats in the Draft Results.[102] Given Slip Op. 11-106, the CBP and GAO reports refute the presumption of regularity and require the Department's reliance on Type 03 CBP data to be supported by substantial evidence.[103]

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98 See Draft Results at 6-8.

99 Id. at 8 (emphases added).

100 See U.S. Opposition at 10-11.

101 Plaintiff's Reply Memorandum in Support of Rule 56.2 Motion for Judgment on the Agency Record (June 13, 2011) ("AHSTAC Reply"), at 3-4.

102 See Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *11-17.

103 See id.

The notion that CBP's documented effort is a panacea for rampant circumvention is misleading at best. The United States similarly attempted to inform the CIT that "the reports of CBP's investigation demonstrated that CBP is conducting a successful campaign against evasion of antidumping duties by shrimp importers."[104] Domestic Producers replied that such a conclusion "is not supported by the record that reflects massive unpaid duties and CBP only having 'initiated procedures to collect lost revenue and penalties.' . . . Moreover, this argument awkwardly attempts to turn evidence demonstrating importer misclassification into support for the reliability for 'type 3' CBP data."[105] The CIT did not accept the United States' position.[106] The documented CBP effort to counter circumvention does not constitute substantial evidence that the Type 03 CBP data are reliable for the purposes of respondent selection. Quite to the contrary, this record evidence demonstrates that the presumption of regularity afforded to Type 03 CBP data is inappropriate in these circumstances.[107]

B. Importer Misclassification Discovered During the Regal Verification in AR3

In Slip Op. 11-106, the CIT emphasized that the Department itself discovered significant inaccuracies during its verification of Regal in AR3.[108] The CIT cited a recent CAFC opinion for the proposition that the "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

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104 U.S. Opposition at 11.

105 AHSTAC Reply at 4 (quoting AHSTAC April 9, 2009 Letter Ex. 1: U.S. Customs and Border Protection, Report to Congress on (1) U.S. Customs and Border Protection's Plans to Increased AD/CVD Collections and (2) AD/CVD Enforcement Actions and Initiative (2008), at 11).

106 See Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *11-17.

107 See id.

108 See id. at *14 (footnote and citation omitted), *16 n.18 (citations omitted).

regarding such producer/exporter in an adjacent review."[109] The CIT found the Regal verification data highly relevant and dismissed the Department's efforts to isolate record evidence between consecutive reviews as hypocritical in light of the Commerce position upheld in Pakfood II.[110] As explained by the CIT:

> 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 covered in this review casts sufficient doubt on the presumption that Customs has assured the accuracy of such data for this POR. . . .
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> 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. . . . 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 .[111]

The Department's various responses to the AR3 Regal data are each without merit. First, the Draft Results state that: "The inaccuracies discovered in the verification in the preceding review are limited to just one respondent: Regal. The Department does not believe it to be reasonable to attribute the underreporting found of one respondent in a prior review to a universe of exporters subject to review in this POR."[112] The Department additionally argues that the

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109 Id. at *14 (citing Home Prods. Int'l v. United States, 633 F.3d 1369, 1380-81 (Fed. Cir. 2011)).

110 See Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *14, *16 n.18; Pakfood II, 753 F. Supp. 2d at 1346-48.

111 Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *14 (footnote and citation omitted) (emphasis added), *16 n.18 (emphases added).

112 Draft Results at 12.

problem in the prior review was corrected such that the issue was fully resolved.[113] As stated in the Draft Results:

> In the Shrimp AR3 Final, the Department duly addressed the misclassification issue found at verification by dividing 'the total dumping duties owed by the entered value of dutiable entries for certain importers to ensure the proper amount of duties are collected.' In other words, there is no evidence that Regal benefitted monetarily in any way from the misclassification. Accordingly, the Department believes that it is reasonable to assume that the Department's actions would serve as a deterrent to importers misclassifying entries in future reviews to avoid risk of discovery through verification and subsequent action by either the Department (to the extent allowable under the statute) and/or through CBP enforcement action.
>
> Moreover, while the Department corrected for the underreporting by assessing the total amount of uncollected antidumping duties owed over the reported Type 03 sales, the Department did not consider it necessary to apply facts available or an adverse inference to Regal in that review. To assume Regal's entries in a different POR are inaccurate, based on information from a prior segment, would be akin to an adverse determination for an exporter absent evidence on the record of that review showing that Regal (or its importers) had misrepresented entries. Further, the record for AR4 shows that Regal's reported volume of subject exports, while not identical, is reasonably consistent with the volume provided in CBP Type 03 data. Indeed, the misclassified entries, if entered as Type 03, would have strengthened Regal's relative position as one of the top exporters by volume, and Regal would have been selected for review anyway.[114]

This line of reasoning was not accepted by the CIT.[115] Slip Op. 11-106 expressly found that the Department could not rely on prior segment data when it suits the agency (affiliations in Pakfood II) while refusing such data when it desires (Regal inaccuracies here).[116] The

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113 See Draft Results at 12.

114 Draft Results at 12-13 (footnotes omitted) (emphases added); see Issues and Decisions Memorandum (cmt. 7) ("AR3 IDM"), appended to Third Administrative Review of Frozen Warmwater Shrimp from the People's Republic of China: Final Results and Partial Rescission of Antidumping Administrative Review, 74 Fed. Reg. 46,565 (Sept. 10, 2009) ("Shrimp AR3 Final").

115 See Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *11-17.

116 See id. at *16 n.18.

Department now tries to explain away this inconsistency by noting: "Affiliation determinations that are bridged from segment to segment are based on analysis and determinations that the Department makes during the course of a proceeding which do not typically change unless the company later undergoes a change in corporate or legal structure."[117] This qualified, self-serving statement proves the CIT concern that the Department selectively relies on previous segment data. Entry misclassification should be treated the same as company affiliations; per CIT and CAFC precedent, such information in consecutive segments will presume to continue without record evidence to the contrary.[118] This conclusion is particularly warranted with respect to Regal – "the same producer/exporter subject to the same antidumping duty order."[119]

Moreover, the Department's reasoning is backwards. Because the data relied upon for respondent selection (Type 03 entry information from CBP) is derived from importers as opposed to responses to Q&V questionnaires supplied by respondents, the relevant actor in the previously discovered misclassification scheme was the U.S. importer. The Department presents neither a rationale nor any possible explanation for why an importer that misclassified entries of Chinese shrimp in the AR3 POR would have ceased that activity during the AR4 POR. Such an explanation is especially warranted because the verification in AR3 occurred on January 19–23, 2009,[120] at the conclusion of the AR4 POR that lasted from February 1, 2008 through January

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117 Draft Results at 13 n.39 (emphasis added).

118 See Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *14, *16 n.18; Pakfood II, 753 F. Supp. 2d at 1346-48; Home Prods., 633 F.3d at 1380-81.

119 Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *14 (citing Home Prods., 633 F.3d at 1380-81). Regal was one of two respondents selected for individual examination in AR4 and one of three respondents selected in AR3. See Respondent Selection Memo at 8; AR3 IDM (cmt. 8).

120 See Shrimp AR3 Final, 74 Fed. Reg. at 10,026.

31, 2009.[121] There is no basis on the record of this review to conclude that the actions of the unnamed importer implicated in the misclassification scheme in the prior review were isolated or aberrational. Rather, the record evidence demonstrated that duty evasion has been widespread and routine.

The Department's claim that the AR3 duty adjustment cured the broader issue is without merit. The CIT did not accept this position that the Department advances in the Draft Results.[122] Domestic Producers replied by emphasizing the superficial nature of this resolution as follows:

> Commerce in China AR3 merely adjusted its duty-collection as opposed to the problem being resolved in any meaningful fashion. . . . Furthermore, Commerce made its finding and took remedial action after the January 31, 2009 closing of the AR4 POR. . . . There is, therefore, no basis upon which to assume that such practices did not continue through the AR4 POR.[123]

Even setting aside the temporal impossibility that findings ultimately made in AR3 impacted actions taken prior to the discovery of those inaccuracies during the AR4 POR, there is no reason to assume that this duty-collection adjustment served as a "deterrent" against future misclassification.[124] The consequences for the U.S. importer implicated are not public. Further, by merely recalculating in response to the discovery of inaccurate entry data, the Department fails to create any incentive for Chinese exporters to insist that their U.S. importers accurately classify entries of Chinese shrimp.

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121 See Final Results, 75 Fed. Reg. at 49,460.

122 See AHSTAC Motion at 15-16; Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *11-17.

123 AHSTAC Reply at 5 (citations omitted).

124 Draft Results at 13.

The Department improperly relies on the lack of evidence that "Regal benefitted monetarily . . . from the misclassification."[125] Per the Department's AR3 findings, the importer benefits from misclassification without the exporter's knowledge.[126] The Draft Results imply Regal's lack of culpability by the agency's determination not to apply facts available.[127] As a preliminary response, the Department decides whether to apply facts available under a separate statutory provision concerning cooperation and information availability that has no bearing on respondent selection.[128] Moreover, the concern is not whether producers and exporters have knowledge of inaccurate entries. For reasons ranging from benign to malicious, importers may lack the knowledge necessary to identify whether their entries are covered by an AD order. The Regal AR3 verification revealed that the industry for exporting Chinese shrimp into the United States is structured such that there is a likelihood of entry misclassification. This nature of the industry – like company affiliations – should be presumed to continue from review to review unless record evidence establishes otherwise.[129] Importer misclassification and company affiliations "do not typically change" between consecutive reviews.[130] The Department appears to set arbitrary criteria for when prior segment data remains relevant by requiring that the producer "benefitted monetarily" or the agency applied "facts available."[131]

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125 Id. at 12.

126 See AR3 IDM (cmt. 7).

127 See Draft Results at 13.

128 See 19 U.S.C. § 1677e.

129 See Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *14, *16 n.18.

130 Draft Results at 13 n.39.

131 Id. at 12-13.

The Draft Results further treat the entry inaccuracies discovered during the AR3 Regal verification as irrelevant to AR4 through an analysis that is devoid of transparency. When relying on a comparison of Regal export volumes in AR3 and AR4, the Department notes: "As this data is protected by the {APO}, the Department cannot make these figures public."[132] If proprietary information is used in agency decision-making, the Department is to provide interested parties with a confidential explanation under APO.[133] Mere generalizations and claims of confidentiality are not "substantial evidence."[134] In a position similar to that of Hilltop before the CIT,[135] the Department now posits that Regal would have been selected as a mandatory respondent even with misclassification.[136] Such guesswork is untenable; the Draft Results' conclusion "rests on speculation, not findings of fact that are supported by substantial evidence."[137] Moreover, as found by the CIT, the Regal AR3 verification reveals the continuing inaccuracy of Type 03 CBP data as opposed to supporting the Department's AR4 respondent selection.[138]

The Department concludes its discussion of the Regal AR3 verification by again pointing to CBP.[139] However, the Department alone has the statutory authority to select mandatory

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132 Id. at 13 n.38.

133 See 19 C.F.R. § 351.306(a).

134 See 19 U.S.C. § 1516a(b)(1)(B)(i).

135 See Hilltop Opposition at 11-14; AHSTAC Reply at 10; Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *27 n.33.

136 Draft Results at 13.

137 Jinan Yipin, 31 CIT at 1912.

138 See Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *14, *16 n.18.

139 See Draft Results at 13-14.

respondents and such determinations must be supported by "substantial evidence."[140] The Draft Results, relying on Globe Metallurgical Inc. v. United States,[141] state "that while the Department is able to address the consequences of certain classification problems, such as Regal's misclassification issue in AR3, within the context of a review, the broader responsibility for investigation and enforcement of the classification of merchandise between Type 01 and Type 03 lies primarily with CBP."[142] This argument was made by the United States and Hilltop before the CIT.[143] Domestic Producers replied that "Globe Metallurgical . . . is readily distinguishable because Commerce was asked to investigate alleged transshipment in an administrative review . . . . Globe Metallurgical therefore lacks relevance to whether Commerce selected mandatory respondents in accordance with 19 U.S.C. § 1677f-1(c)(2)(B)."[144] The CIT did not accept the position of the United States and Hilltop that the Department now advances.[145]

A related defense also advanced unsuccessfully by the United States and Hilltop before the CIT involves the availability of relief through the statute entitled: "Prevention of circumvention of antidumping duty . . . orders."[146] Record evidence was initially rejected from consideration based on this statute "{b}ecause the Department has neither received a request to initiate an anti-circumvention inquiry nor self-initiated a separate anti-circumvention inquiry for

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140 19 U.S.C. § 1516a(b)(1)(B)(i); see id. § 1677f-1(c)(2)(B).

141 722 F. Supp. 2d 1372 (CIT 2010).

142 Draft Results at 14 (emphases added).

143 See U.S. Opposition at 11; Hilltop Opposition at 7-11; AR4 IDM (cmt. 1) at 4.

144 AHSTAC Reply at 8-9 (footnote and citations omitted).

145 See Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *11-17.

146 19 U.S.C. § 1677j; See U.S. Opposition at 11 n.3; Hilltop Opposition at 8-10.

the antidumping duty order on shrimp from the PRC."[147] Domestic Producers responded by thoroughly explaining the inapplicability of this statute.[148] However, the Department now faults Domestic Producers alone for not utilizing this statute.[149] If the Department remains convinced that this statute can be used effectively in this proceeding, it is fully capable of "self-initiat{ing} an anti-circumvention inquiry" as the agency initially suggested.[150] Such an action would be consistent with the Department's statement that "the CBP misclassification issue and transshipment findings . . . are of significant concern to us."[151]

In short, despite Slip Op. 11-106, the Department has yet to support its reliance on CBP Type 03 data to select mandatory respondents with substantial evidence. The CIT found that the Regal AR3 verification required the Department to demonstrate the regularity of that data.[152] The various responses and excuses set forth in the Draft Results do not satisfy this requirement.

C. Information Indicating Misclassified Entries in the Instant POR

The CIT litigation involved information on the record that Domestic Producers argued made a compelling case that misclassification was occurring in the AR4 POR.[153] Slip Op. 11-106 did not address this aspect of the record evidence, instead remanding for the Department to revisit its reliance on the Type 03 CBP data because the agency reports and Regal AR3

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147 AR4 IDM (cmt. 1) at 4 (emphasis added).

148 See AHTSAC Motion at 22-24; AHSTAC Reply at 9.

149 See Draft Results at 5. n16 ("The Department notes that, to date, Petitioner has yet to file a request for the Department to conduct an anti-circumvention inquiry in the PRC shrimp case.").

150 AR4 IDM (cmt. 1) at 4.

151 Draft Results at 14.

152 See Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *14.

153 See AHSTAC Motion at 16-18; U.S. Opposition at 12-14; AHSTAC Reply at 3, 5-6.

verification were "sufficient" to vanquish the presumption of regularity.[154] In other words, the CIT did not need to reach this category of record evidence to order remand.[155] Yet the Department once again challenges the evidence indicating misclassification in the AR4 POR.[156] The Draft Results begin with U.S. Census Bureau data that Domestic Producers placed on the record to demonstrate the discrepancy with the volume of subject merchandise reflected in the Type 03 CBP data.[157] Although this data is publicly available and the Department remains able to conduct its own review for accuracy, the Draft Results attack the submission as follows:

> This data, while citing to the U.S. Census Bureau, was not provided in the original format and cannot be definitively identified as primary data obtained from the U.S. Census Bureau, such that the Department is able to determine the parameters used in obtaining that specific data. . . . Secondly, the Census Bureau Data (also referred to as IM-145) is simply a derivative of more detailed data.[158]

The Department next challenges the Census Bureau data because, "in the shrimp case, with few exceptions, the USHTS subheadings are basket categories that may include both subject and non-subject merchandise."[159] However, in the Draft Results: "The Department notes that USHTS subheadings referenced within the scope of the order are provided for convenience and for CBP purposes only and are not dispositive, but rather the written description of the order is dispositive."[160] Only the Department has the authority to determine whether merchandise is

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154 Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *12.

155 See id. at *11-17.

156 See Draft Results at 8-12.

157 See id. at 8-10.

158 Id. at 9 (emphases added).

159 Id.

160 Id. at 8 n.27.

covered by the scope of an AD duty order.[161] The Department could therefore review the Census Bureau data and assess the extent to which it was over-inclusive, and rely on that analysis to support its decision-making. Without any evidence, however, the Department's renewed refusal to consider the Census Bureau data does not support its reliance on the Type 03 CBP data to select mandatory respondents.

Once again, the Department misunderstands its task on remand and shifts responsibility to CBP. The CIT instructed the Department to revisit its respondent selection and render a reasoned determination;[162] the CIT did not accept arguments that CBP was the proper agency to hear misclassification concerns.[163] Yet the Department continues to fault Domestic Producers for failing to conclusively establish the inaccuracy of the Type 03 CBP data and implicate CBP as the data source, as follows:

> Petitioner's inclusion of U.S. Census Import Data, using HTSUS subheadings as evidentiary support, does not identify how Type 03 data, for this review period, is wrong or unreliable. . . .
>
> {T}he Department simply obtains Type 03 data from the underlying source of import data, CBP, to select respondents rather than relying on derivative sources, such as the IM-145 import data. Given that IM-145 data are a derivative of CBP data, and do not otherwise differentiate between subject and non-subject merchandise, the data do not elucidate how POR Type 03 data are inaccurate.[164]

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161 See Xerox, 289 F.3d at 794-95.

162 See Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *17.

163 See id. at *11-17; AHSTAC Motion at 22-24; U.S. Opposition at 11; Hilltop Opposition at 7-11; AHSTAC Reply at 8-9.

164 Draft Results at 9-10 (emphasis added).

The Department repeats these attacks when addressing the Automated Manifest ("AMS") data on the record.[165] Domestic Producers argued before the CIT that this evidence showed a likelihood of misclassification involving shrimp claimed to be sourced from Zhanjiang Guolian Aquatic Products Co., Ltd. ("Zhanjiang Guolian"), the only Chinese company excluded from the AD duty order.[166] The Department begins by stating that the "AMS data is also obtained from CBP" and complaining that the submission was in "an apparently adapted format."[167] The Draft results continue by emphasizing that "the AMS data are presented in an altered formatting from the original source."[168] Once again, the Department remains able to verify this publicly available data if it has concerns as to the legitimacy of that data. The Draft Results next explain that, due to imprecise USHTS subheading correlation with the AD duty order scope, "the data may still include non-subject merchandise. Furthermore, while compiled from CBP data, the AMS data do not definitely differentiate Type 01 from Type 03 entries, and thus are of little use in identifying specific problems with the Type 03 data."[169]

As with the Census Bureau data, the Department's reactions to the AMS data lack merit and fail to provide substantial evidence supporting its reliance on the Type 03 CBP data used to select mandatory respondents. The AMS data showed a surge in entries attributed to Zhangjiang Guolian, potentially indicating that importers misclassified shipments of Chinese shrimp during

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165 See id. at 10-12.

166 See AHSTAC Motion at 16-18.

167 Draft Results at 10 (emphasis added).

168 Id. (emphasis added).

169 Id. at 10-11 (footnote omitted).

the POR as from that company to avoid having to pay applicable AD duties.[170] This information was one piece of the record evidence that Domestic Producers identified as casting doubt on the Type 03 CBP data, as opposed to a conclusive demonstration as to the problematic extent of that data. Moreover, it need not serve this function because the CIT has ruled that the Department must support its reliance on the Type 03 CBP data with substantial evidence.[171] Repeated attacks on the record evidence do not satisfy this requirement.

The Department claims that the suspicious uptick in Zhangjiang Guolian imports shown by the AMS data is at once not relevant and entirely explainable by "economic logic,"[172] as the United States argued before the CIT.[173] The Draft Results state:

> Regardless of whether Zhangjiang Guolian's exports have increased or not since the underlying investigation, as Zhangjiang Guolian is excluded from the order, shipments by Zhangjiang Guolian are not relevant to our respondent selection process. Furthermore, we note that, if a company is excluded from an antidumping order, it is quite logical that it would be more competitive *vis-a-vis* other exporters subject to the order; thus an excluded company is able to increase its sales and export volume, as merchandise would, naturally, not be subject to antidumping duty cash deposit collection, suspension, or liquidation. When an exporter is excluded from an order, the Department instructs CBP not to collect antidumping duties for that company. Thus, an excluded company's exports are expected to, and correctly, enter the United States as Type 01, not subject to antidumping duties.[174]

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170 See AHSTAC Motion at 17.

171 See Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *11-17.

172 Draft Results at 11 n.35 (quoting Issues and Decision Memorandum (cmt. 4), appended to Dynamic Random Access Memory Semiconductors from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 76 Fed. Reg. 2336 (Jan. 13, 2011)); see id. at 11-12.

173 See U.S. Opposition at 12-13.

174 Draft Results at 11-12 (footnote omitted) (emphases added).

The CIT did not accept the United States' position that the Department now advances.[175] In response to the claim that the surge in entries attributed to Zhangjiang Guolian is logical, Domestic Producers replied that: "One would likewise just as easily expect increased misclassification of entries attributed to the excluded company, particularly given the extensive documented fraud regarding this antidumping duty order."[176] Moreover, entries attributed to Zhangjiang Guolian cannot be ignored simply because the exporter was excluded from the AD duty order; the Department in the investigation "except{ed} merchandise produced and exported by Zhangjiang Guolian because this company has a de minimis margin."[177] As one example, merchandise exported by Zhangjiang Guolian but produced by a company subject to the AD duty order remains covered by that order.[178] The definitive statement in the Draft Results that all "shipments by Zhangjiang Guolian are not relevant to our respondent selection process" therefore lacks record support.[179]

The Zhangjiang Guolian data on the record in AR4 demonstrates the need for the Department to release the Type 01 CBP data for the POR to interested parties under APO. With knowledge from the Regal AR3 verification that Chinese shrimp is likely misclassified when imported in the United States, a surge in imports attributed to the lone excluded Chinese

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175 See Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *11-17.

176 AHSTAC Reply at 5.

177 Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the People's Republic of China, 70 Fed. Reg. 5149, 5152 (Feb. 1, 2005) (emphasis added).

178 See 19 C.F.R. § 351.204(e)(3)(ii) ("Normally, the exclusion of Exporter A would be limited to subject merchandise produced by Producer X. If Exporter A began to export subject merchandise produced by Producer Y, this merchandise would be subject to the antidumping duty order, if any.").

179 Draft Results at 11.

company suggests that importers are incorrectly identifying some of those entries as Type 01 instead of Type 03. If the Type 01 data is released under APO, interested parties can analyze import patterns in comparison to those of Type 03.[180] This undertaking may enable a determination of whether entries were properly attributed to Zhangjiang Guolian.

In short, Domestic Producers maintain that the Census Bureau and AMS data support a conclusion that significant misclassification of subject merchandise occurred in AR4. Nevertheless, the dispute over this category of evidence need not be resolved because of the overwhelming amount of other record evidence that vanquished the presumption of regularity ordinarily afforded to Type 03 CBP data.[181] The Draft Results lack the substantial evidence required for the Department to rely on the Type 03 CBP data to select mandatory respondents.

V. THE DEPARTMENT IS AWARE OF IMPORTER MISCLASSIFICATION

On October 24, 2011, the Department published an announcement in the Federal Register to address its concerns that importers importing merchandise from non-market countries ("NME") such as China are misclassifying entries to avoid paying applicable AD duties.[182] As explained by the Department:

> The Department is aware of instances where merchandise from a non-reviewed exporter enters the United States at the cash despot rate of an exporter subject to review but where the basis for that cash deposit is not consistent with information subsequently reported to the Department during an administrative review. . . .[183]

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180 Supra, Section III.

181 See Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *11-17.

182 See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,76 Fed. Reg. 65,694 (Oct. 24, 2011) ("NME AD Duties").

183 Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties, 76 Fed. Reg. 34,046 (June 10, 2011) ("NME AD Proposal") (emphasis added).

> {I}n administrative review of {AD} orders covering merchandise produced in NME countries, importers will sometimes declare in their entry documentation a cash deposit rate that is associated with a company which has a company-specific rate, as opposed to the NME-wide rate, but the sales underlying the particular entry are not reported to or reviewed by the Department in the course of the administrative review covering that company.[184]

The Department in these passages recognizes a specific type of importer misclassification where entries are properly entered as Type 03 on the CF 7501 entry summaries but improperly attributed to the wrong company to obtain a separate AD duty rate as opposed to the NME-wide rate. This misclassification will only come to the Department's attention if: (a) the importer identifies the entry as Type 03; and (b) the agency identifies the discrepancy during an administrative review after selecting the company to which the entry is attributed for individual examination. Only with such happenstance will the Department be made aaware that an importer is misclassifying entries in this way to benefit from a separate rate.

The policy shift recently announced by the Department does not address – and may compound – the concern that entries subject to AD duties are being misclassified as Type 01 on CF 7501 entry summaries. As set forth in the Federal Register: "The Department will instruct CBP to apply the NME-wide rate to entries suspended at a reviewed exporter's rate, but which are not reported to or reviewed by the Department during the administrative review process."[185] This solution imposes the NME-wide rate to such entries unless and until the Department after review concludes that they are entitled to a separate rate.[186] However, there is nothing to similarly prevent a benefit to importers from misclassifying entries as Type 01 to altogether

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184 NME AD Duties, 76 Fed. Reg. at 65,694 (emphasis added).

185 Id.

186 See id.

avoid detection by the Department. Importers who were previously able to avoid the NME-wide rate by misclassifying Type 03 entries as attributed to a separate-rate company now have an incentive to incorrectly enter subject merchandise as Type 01.

This policy announcement reveals that the Department is fully "aware" of importer misclassification to avoid the payment of AD duties.[187] This acknowledgement casts doubt on the statements in the Draft Results that the CBP efforts and Regal AR3 duty-adjustment have satisfactorily resolved the problem of importer misclassification.[188] It is disingenuous for the Department to develop a new policy that addresses a very specific type of importer misclassification involving entries already identified as Type 03 while simultaneously ignoring the reality that importers are misclassifying entries as Type 01.[189] If "the CBP misclassification issue and transshipment findings . . . are of significant concern to" the Department,[190] Commerce ought to similarly address the means of circumvention through the incorrect designation of entry type on the CF 7501 entry summaries. The Department can do so in this remand by affirmatively demonstrating substantial evidence to support its reliance on the Type 03 CBP data in this review, as required by the CIT.[191]

CONCLUSION

Slip Op. 11-106 found that the Department's respondent selection was unsupported by the requisite substantial evidence. Rather than comply with the statutory obligation, the Draft

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187 NME AD Proposal, 76 Fed. Reg. at 34,046.

188 See Draft Results at 8, 12-13.

189 Compare id. with NME AD Duties, 76 Fed. Reg. at 65,694; NME AD Proposal, 76 Fed. Reg. at 34,046.

190 Draft Results at 14.

191 See Ad Hoc Shrimp, 2011 Ct. Intl. Trade LEXIS 105, at *11-17.

Results advance an unfounded novel legal theory concerning suspension and launch a renewed assault on the record evidence already found sufficient. Domestic Producers urge the Department to satisfy this legal requirement before finalizing its remand redetermination.

* * *

This submission is being served today as indicated on the attached certificate of service. Please contact any of the undersigned should you require clarification of any aspect of this submission.

Respectfully submitted,

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PUBLIC CERTIFICATE OF SERVICE
ADMINISTRATIVE REVIEW (REMAND)
ANTIDUMPING DUTY ORDER ON CERTAIN FROZEN WARMWATER SHRIMP FROM THE PEOPLE'S REPUBLIC OF CHINA
A-570-893
(02/01/2008 – 01/31/2009)

I, Jordan Charles Kahn, hereby certify that a copy of the foregoing submission was served on this 25th day of October 2011, by hand delivery on the following parties:

On behalf of the United States:

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