U.S. Customs and Border Protection

Slip Op. 12–98

AMS Associates, Inc., d/b/a Shapiro Packaging, Plaintiff, v. United States, Defendant, and Laminated Woven Sacks Committee, Coating Excellence International, Llc, and Polytex Fibers Corporation, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 11–00101

[Denying as moot plaintiff's claim that the Department of Commerce violated its regulations in instructing Customs to suspend liquidation of certain entries of certain laminated sacks from the People's Republic of China, and denying plaintiff's request for remand to determine a new dumping margin.]

Dated: July 27, 2012

Lizbeth R. Levinson and *Roland M. Wilsa*, Kutak Rock LLP, Washington, DC, for plaintiff.

Tara K. Hogan, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, DC, for defendant. With her on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Rebecca Cantu*, Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce.

Joseph W. Dorn and *Jeffrey B. Denning*, of *King & Spaulding*, Washington, DC, for defendant-intervenors.

OPINION AND ORDER

Musgrave, Senior Judge:

In this case, the U.S. Department of Commerce, International Trade Administration ("Commerce") investigated the country of origin of products not previously subject to antidumping duties and found them to be within the scope of an existing antidumping order. Plaintiff claimed that in doing so Commerce selectively applied its regulations and improperly ordered the retroactive suspension of liquidation of Plaintiff's entries. However, in the interim, the affected entries were liquidated in due course, and there appears no *res* remains affected by the complained of actions by Commerce. For the reasons explained below, Plaintiff's request that the court remand the results of the administrative review for a redetermination of the applicable margin is denied.

I. Facts

Commerce found that laminated woven sacks from the People's Republic of China ("PRC") were being dumped in *Laminated Woven Sacks from the People's Republic of China*. 73 Fed. Reg. 45941 (Aug. 7, 2008) ("LWS Order"). The scope of the LWS Order was defined in part as "bags or sacks consisting of one or more plies of fabric consisting of woven polypropylene strip and/or polyethylene" that are "laminated to an exterior ply of plastic film or to an exterior ply of paper that is suitable for high quality print graphics." LWS Order, 73 Fed. Reg. at 45942.

In September, 2009, Commerce undertook an administrative review of the LWS Order for the period January 31, 2008 through July 31, 2009 ("Period of Review"). During the review petitioners Laminated Woven Sacks Committee ("LWSC") requested that Commerce investigate how respondent Zibo Aifudi Plastic Packaging Co., Ltd. ("Aifudi") determined whether merchandise was subject to the LWS Order due to concerns that not all of Aifudi's production of LWS was being included in the information provided to Commerce.[1] At issue were sacks made in the PRC by Aifudi from fabric that originated elsewhere. Commerce investigated the origin of the Aifudi sacks made with non-PRC origin fabric within the ongoing administrative review. Despite requests by Aifudi, Commerce chose not to initiate a formal scope inquiry under 19 C.F.R. § 351.225.

Aifudi argued to Commerce that a country-of-origin ruling it obtained from U.S. Customs and Border Protection ("CBP") provided an adequate basis for its decision not to include sacks made with non-PRC-origin fabric. *See* HQ N08508, dated May 27, 2008. Pursuant to that ruling, Aifudi declared a non-PRC origin for LWS made with non-PRC origin fabric. As a result, those LWS entries were not subject to antidumping deposits upon entry.

Commerce determined pursuant to a substantial transformation analysis that the PRC was the country of origin of the Aifudi LWS. *Preliminary Decision Regarding the Country of Origin of Laminated Woven Sacks Exported by [Aifudi]*, (May 25, 2010) ("Preliminary Decision"), Tab 7 to Pl's Appx. Based upon this finding, Commerce then issued a "clarification" of its liquidation instructions to CBP. Commerce Instructions to CBP dated July 23, 2010 ("Clarification"), Tab 8 to Pl's Appx. Commerce instructed CBP to "continue to suspend liquidation of all LWS from the PRC, regardless of the origin of the

[1] *See* letter from King & Spalding commenting on respondent's questionnaire responses, dated December 18, 2009, attached as Tab 3 to Appendix to Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's 56.2 Motion for Judgment on the Agency Record ("Pl's Appx.").

woven fabric, that is entered, or withdrawn from warehouse, for consumption, on or after January 31, 2008." Clarification at 2. Plaintiff argued here the effect of the Clarification was to retroactively suspend liquidation of and collect cash deposits on all entries of Aifudi sacks made since January 31, 2008.[2] However, by the time this instruction was transmitted to Customs, all affected entries within the period of review had apparently already liquidated in due course.[3]

In March, 2011, Commerce issued the final results of the LWS administrative review.[4] During the administrative review, Commerce had preliminarily found that Aifudi's antidumping margin was equal to 0.68% in its preliminary results of the administrative review. *Laminated Woven Sacks from the People's Republic of China: Preliminary Results of Antidumping Administrative Review*, 75 Fed. Reg. 55568 (September 13, 2010) ("Preliminary Results"). Shortly thereafter, Aifudi withdrew from the administrative review and requested that all business confidential data that it had submitted be destroyed. *See* Sept. 20, 2010 letter from Ronald Wilsa to Sec. of Commerce, Tab 10 to Pl's Appx. In its place, Shapiro Packaging, the related-party importer of Aifudi's sacks, entered its notice of appearance before Commerce. Commerce stated in the Final Results that because Aifudi withdrew its confidential submissions, "the Department does not have any record evidence upon which to determine whether [Aifudi] is eligible for a separate rate for the review period." Final Results, 76 Fed. Reg. at 14,909. Commerce used adverse facts available as the basis for treating Aifudi as part of the China-wide entity in the final results of the administrative review with a margin of 91.73%, chosen as "the highest rate from any segment of this proceeding". *Id*.

II. Arguments Presented

Plaintiff AMS Associates, Inc., d/b/a Shapiro Packaging ("Shapiro") argues that Commerce violated its own regulations by ordering CBP to retroactively suspend liquidation of LWS entries and collect estimated antidumping duties on shipments entered prior to the initiation of the scope review. Pl's Memo at 12. Shapiro argues that Commerce should not have applied the China-wide rate of 91.73% to imports of Aifudi LWS. Although Shapiro does not contest the appli-

[2] Plaintiff's Memorandum in Support of its 56.2 Motion for Judgment on the Agency Record ("Pl's Memo"), at 7 n. 4.

[3] Following a request by the court, the parties have stipulated that they were unable to identify any entry of LWS made from non-PRC origin fabric that remains unliquidated, despite Commerce's Clarification instruction. *See* Joint Response to Court's Order dated June 26, 2012.

[4] *Laminated Woven Sacks from China: Final Results of First Antidumping Duty Administrative Review*, 76 Fed. Reg. 14906 (March 18, 2011) ("Final Results").

cation of adverse facts available due to Aifudi's withdrawal of its confidential business information, Shapiro argues that the remaining public information is sufficient to support a finding that Aifudi was not state-controlled. Plaintiff's Reply Brief ("Pl's Reply") at 11. Because Commerce failed to consider this information, Shapiro argues, the matter should be remanded for reconsideration. *Id*.

Shapiro also takes issue with Commerce's statement in the Final Results that "the Department does not have any record evidence upon which to determine whether [Aifudi] is eligible for a separate rate". Final Results, 76 Fed. Reg. at 14,909. Shapiro contends that adequate information proving Aifudi's lack of government control exists in the public record and was ignored by Commerce. Pl's Reply at 11. Shapiro requests that the court remand the case to Commerce for determination of an AFA rate other than the China-wide margin. *Id*.

The government argues that Commerce's actions were proper because the agency has the right to determine whether to launch a formal scope inquiry or to investigate scope issues as part of an administrative review. Defendant's Memorandum in Opposition to Plaintiff's Rule 56.2 Motion for Judgment on the Agency Record ("Def's Memo") at 9. On the second issue, the government argues that Aifudi failed to demonstrate its qualifications for a separate rate. Commerce reasonably found that its preliminary determination (based upon the later-withdrawn confidential information) was no longer supported by the record and the evidence provided by Shapiro was insufficient to prove Aifudi's eligibility for a separate rate. Def's Memo at 10.

Petitioner LWSC argues that Commerce did not illegally expand the scope of the orders and that Commerce had previously used the substantial transformation analysis within an administrative review. LWSC's Response to Shapiro's Rule 56.2 Memorandum In Support of its Motion for Judgment on the Agency Record ("LWSC's Resp.") at 13–16. LWSC argues that Shapiro's separate rate argument should be dismissed due to failure to exhaust its administrative remedies. *Id*. at 3. Alternatively, LWSC argues that because Aifudi prevented Commerce from verifying the information that supported its preliminary determination, it should suffer the consequences of Commerce's denial of a separate rate in the final results.

III. Standard of Review

This court upholds a determination by Commerce unless it is "unsupported by substantial evidence on the record or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(I); *NSK Ltd. v. United States*, 510 F.3d 1375, 1379 (Fed. Cir. 2007). As explained in

E.I. DuPont de Nemours & Co. v. United States, 22 CIT 370, 373, 8 F. Supp. 2d 854, 857 (1998) (some citations omitted):

> In determining whether Commerce's interpretation and application of the antidumping statute is in accordance with law, this court applies the two-step analysis articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–3, 104 S.Ct. 2778 (1984), as applied and refined by the Federal Circuit. The first task is 'to determine whether Congress has 'directly spoken to the precise question at issue.'' *Id*. If the statute unambiguously deals with the subject matter in issue, the court, as well as the agency, must give effect to the intent of Congress. *Id*.
>
> 'If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. Considerable weight is accorded Commerce's construction of the antidumping laws, whether that construction manifests itself in the application of the statute, [citations omitted] or in the promulgation of a regulation [citations omitted].

"In order to effectuate review of the reasonableness of agency action, '[c]ourts look for a reasoned analysis or explanation for an agency's decision as a way to determine whether a particular decision is arbitrary, capricious, or an abuse of discretion.'" *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1357 (Fed. Cir. 2010), quoting *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998). An abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represent an unreasonable judgment in weighing relevant factors. *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005).

IV. Scope Inquiry and Suspension of Liquidation Claims

Shapiro's arguments regarding the LWS scope inquiry and suspension of liquidation are moot. The affected entries, if there ever were any, have all apparently liquidated at their original duty rate, unaffected by the allegedly *ultra vires* actions by Commerce. For this reason, the court dismisses that portion of Shapiro's complaint relating to the scope inquiry and Commerce's retroactive instructions suspending entries because no *res* over which the court has jurisdiction remains.

V. Adverse Facts Available Analysis

In non-market economy cases, Commerce presumes state control over respondents' export operations. *Sigma Corp. v. United States*, 117 F.3d 1401, 1404–05 (Fed. Cir. 1997). Respondents subject to the presumption are subject to the country-wide rate unless they affirmatively demonstrate an absence of both *de jure* and *de facto* government control over the company's exports. *Id*. at 1405, *see also* Def.'s Memo at 24, *citing Silicon Carbide from the PRC*, 59 Fed. Reg. 22,585, 22,586–87 (Dept. of Commerce May 2, 1994) (Final Determination). Respondents must provide information regarding corporate structure, ownership, affiliations with other entities and their export sales negotiation process. Def.'s Memo at 24–25 (citations omitted).

In its papers, Shapiro points to record evidence that supports its contention that Aifudi is not a government-controlled entity. Pl's Memo, at 27–28. Shapiro requests a remand to Commerce for a "redetermination". Pl's Memo, at 28. Shapiro argues that Commerce should be ordered to "determine an AFA rate for Aifudi other than the China-wide margin". Pl's Reply at 14. But Shapiro has not convinced the court that there remains sufficient information in the record to permit Commerce to determine a separate rate for Aifudi, now that Aifudi's confidential information has been removed. Shapiro has likewise failed to point to a viable alternate rate that Commerce should use in preference to the PRC-wide rate that has already been selected. For these reasons the court must deny Shapiro's request for a remand.

VI. Conclusion

Plaintiff's claims that Commerce violated its regulations in performing a country of origin scope inquiry during the administrative review, and illegally suspended liquidation of Shapiro entries of LWS with countries of origin other than the PRC are moot and are hereby dismissed.

The court hereby sustains Commerce's decision to apply adverse facts available to Aifudi and as a result the PRC-wide rate to its imports of LWS during the review period. Judgment will enter accordingly.

SO ORDERED.

Dated: July 27, 2012
New York, New York

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

AMS ASSOCIATES, INC., d/b/a SHAPIRO PACKAGING, Plaintiff, v. UNITED STATES, Defendant, and LAMINATED WOVEN SACKS COMMITTEE, COATING EXCELLENCE INTERNATIONAL, LLC, AND POLYTEX FIBERS CORPORATION, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 11–00101

JUDGMENT

This action having been duly submitted for decision, and the court, after due deliberation, having rendered a decision herein; now, therefore, in conformity with said decision, it is **ORDERED, ADJUDGED and DECREED** that this action is hereby dismissed. SO ORDERED.
Dated: July 27, 2012
New York, New York

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

Slip Op. 12–99

MACLEAN-FOGG COMPANY, et. al., Plaintiffs, v. UNITED STATES, Defendant.

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

[Commerce's remand determination is REMANDED.]

Dated: July 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 & Export 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.

[1] This action is consolidated with Court Nos. 11–00210, 11–00220, and 11–00221

OPINION AND ORDER

Pogue, Chief Judge:

This case returns to the court following remand in *MacLean-Fogg Co. v. United States*, 36 CIT __, 836 F. Supp. 2d 1367 (2012) ("*MacLean-Fogg I*"). In *MacLean-Fogg I*, and again upon Plaintiffs' motion for reconsideration in *MacLean-Fogg Co. v. United States*, 36 CIT __, Slip. Op. 12–81 (June 13, 2012) ("*MacLean-Fogg II*"), the court found that the Department of Commerce's ("the Department" or "Commerce") calculation of the all-others 374.15% countervailing duty ("CVD") rate[2], based solely on mandatory respondents' adverse facts available ("AFA") rate, while legally permissible, was neither reasonable in this instance or based on a reasonable reading of the record. *MacLean-Fogg I*, 36 CIT at __, 836 F. Supp. 2d at 1375–76. The court ordered Commerce to either explain how its conclusion is reasonable or, alternatively, recalculate the all-others rate. *Id.* On remand, Commerce continues to base the all-others rate solely on the mandatory respondents' AFA rate, explaining that this is reasonable because the mandatory respondents represent a significant portion of the market and are therefore representative of the all-others companies. *Final Results of Remand Redetermination*, ECF No. 62–1, at 1 ("Remand Results"). Plaintiffs, who are some of the all-others companies to whom the rate applies, again seek review of this rate.

Because Commerce failed to explain how the assumption that Respondents used 100% of the subsidies available throughout the entire People's Republic of China ("PRC") is remedial not punitive – providing no more than an appropriate level of deterrence – the court again remands the rate to Commerce.

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

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[2] *Aluminum Extrustions from the People's Republic of China*, 76 Fed. Reg. 18,521 (Dep't Commerce Apr. 4, 2011) (final affirmative countervailing duty determination) ("*Final Determination*") and accompanying Issues & Decision Memorandum, C-570–968, ARP 09 (Mar. 28, 2011), Admin. R. Pub. Doc. 385 *available at* http://ia.ita.doc.gov/frn/summary/PRC/2011–7926–1.pdf (last visited July 24, 2012) ("*I & D Mem.*") (adopted in *Final Determination*, 76 Fed. Reg. at 18,522).

[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]

In its investigation of Chinese producers and exporters of aluminum extrusions, Commerce designated the three largest exporters as mandatory respondents.[5] These mandatory respondents failed to respond to Commerce's questionnaire. *MacLean-Fogg I*, 36 CIT at __, 836 F. Supp. 2d at 1370. Because the mandatory respondents failed to cooperate, Commerce relied on facts available when calculating the mandatory respondents' CVD rates. 19 U.S.C. § 1677m. Using information provided by the domestic industry, Commerce listed 59 subsidy programs that the importer producers could have availed themselves of and calculated an AFA CVD rate using the highest possible subsidization rate for each of these 59 programs. *I&D Memo* at Comment 8, 67.[6] The resulting AFA rate for the mandatory respondents was 374.15%. *MacLean-Fogg I*, 36 CIT at __, 836 F. Supp. 2d at 1371. By contrast, two companies that were selected as voluntary respondents received much lower individual rates of 8.02% and 9.94% respectively. *Id.*

When calculating the "all-others" rate for the remaining companies, Commerce excluded the voluntary respondents' rates from its calculations in accordance with its regulation, 19 C.F.R. § 351.204(d)(3). *MacLean-Fogg I*, 36 CIT at __, 836 F. Supp. 2d at 1371. Commerce instead averaged the mandatory respondents' rate, resulting in an

[4] Familiarity with the court's prior opinions is presumed.

[5] The merchandise covered by the investigation are aluminum shapes and forms created by the extrusion process and made from aluminum alloys which correspond to the Aluminum Association designations beginning with the numbers 1, 3, or 6. *Final Determination*, 76 Fed. Reg. at 18,521. These forms are produced in a variety of shapes, ranging from solid to hollow profiles in pipes, tubes, bars, and rods. They may also be prepared for assembly by being cut-to-length, machined, drilled, punched, notched, bent, stretched, knurled, swedged, mitered, chamfered, threaded, and spun. *Id.*
When an investigation involves a large number of respondents, the statute allows Commerce to narrow its focus to a reasonable number of exporters or producers. *See* 19 U.S.C. § 1677f-1(e)(2). These are mandatory respondents. In contrast, voluntary respondents are producers or exporters not initially selected for individual examination, but who nonetheless submit information for examination. *See* 19 U.S.C. § 1677m(a); 19 C.F.R.§ 351.204(d). Consequently, the aptly named "all-others" rate refers to all other respondents that do not fall under either of these two categories. *See* 19 U.S.C. § 1671d(c)(1)(B)(i)(I).

[6] Commerce made two changes between the Preliminary and Final determinations which more than doubled the CVD rate. Plaintiffs' Comments on Remand Results at 16, (July 13, 2012), ECF No. 69 ("Pls.' Comments"). It added 23 new subsidy programs and raised the assumed subsidy rate on 29 of the total programs by approximately 2%. *Final Determination*, 76 Fed. Reg. 18,521; *I&D Memo* at Comment 7, 63–66. In doing so, Commerce stated that nothing on the record suggested that these subsidy programs were not available to non-cooperative parties and reasoned that including all of these programs would prevent non-cooperating respondents from avoiding newly discovered subsidy programs. *I&D* Memo at Comment 8, 67.

all-others rate identical to the AFA rate. *Id.* In *MacLean-Fogg I*, Plaintiffs challenged the regulation, the use of AFA rate in the calculation of the all-others rate, and the exclusion of the voluntary respondents' rate, contending that the governing statute, 19 U.S.C. § 1671d(c)(5)(A)(i)–(ii), unambiguously required Commerce to use the rates of all individually investigated respondents when calculating the all-others rate. *Id.* at 1372–73. This court concluded in *MacLean-Fogg I* that this statute was ambiguous, allows the use of facts available in a reasonable manner, and permits Commerce to use mandatory respondents' AFA rates in the calculation of the all-others rate without a finding of noncooperation. *Id.* at 1374 n. 9. Therefore Commerce's regulation and methodology were reasonable. However, the court found that Commerce's methodology was not supported by substantial evidence because it failed to articulate a logical connection for attributing the high mandatory respondents' rate to the all-other companies, and failed to address whether the rate was remedial rather than punitive. *Id.* at 1375–76.

On remand, Commerce chose to use the same methodology and provided additional explanation for its decision. Remand Results at 1. In addition to reiterating its earlier concerns with rate manipulation, Commerce further explained that the mandatory respondents' exports represent a significant portion of the sales of subject merchandise. *Id.* at 4–7. By comparison, the voluntary respondents make up a tiny fraction of that market. *Id.* at 6–7. In light of these significant differences in market share, the Department stated that its continued exclusive use of only the mandatory respondents' rate in the calculation of the all-others rate is a reasonable and reliable reading of record evidence because such a large portion of the market is highly representative of the entire market as a whole. *Id.* at 8. Commerce considered voluntary respondents' share of the industry too low to be probative of the industry's level of subsidization or to validly challenge the representativeness of mandatory respondents' rate. *Id.* at 7. Moreover, to include the voluntary respondents' rates would have run contrary to the policy reasons underpinning Commerce's regulation — namely, a fear of manipulation of the all-others rate and a desire to maintain its integrity from potential distortions. *Id.* at 4–5; *see also Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,310 (Dep't Commerce May 19, 1997). Specifically, Commerce stated that voluntary respondents are more likely self-selected because they know that their CVD rates will be lower. Remand Results at 5. As such, their rates could potentially distort the representativeness of the all-others rate, especially here where such a significant segment of the industry failed to participate, as opposed to the small

percentage of the industry that did. *Id.* The Department further stated that it would have relied on the mandatory respondents' rates regardless of whether they were lower or higher than the voluntary respondents' rates.[7] *Id.* at 7. Having chosen the mandatory respondents as representatives of the market, Commerce considered it "inappropriate to ignore the fact that [AFA] . . . had to be applied to all mandatory company respondents" and thus used the mandatory respondent rates even though they were based on AFA. *Id.* at 8–9 (quoting *Laminated Woven Sacks*, 73 Fed. Reg. at 35,639. Plaintiffs again challenge this rate.

STANDARD OF REVIEW

"The court will sustain the Department's determination upon remand if it complies with the court's remand order, is supported by substantial evidence on the record, and is otherwise in accordance with law." *Jinan Yipin Corp. v. United States*, 33 CIT __, 637 F. Supp. 2d 1183, 1185 (2009) (citing 19 U.S.C. § 1516a(b)(1)(B)(1)).

DISCUSSION

Plaintiffs assert again that Commerce unreasonably excluded the voluntary respondents' rates when calculating the all-others rate and unlawfully applied AFA to the all-others companies. However, they also concede that the court has already recognized that this methodology, which averages the rates of mandatory respondents, even where those rates are all based on AFA, is specifically permitted by the statute. Pls.' Comments at 4; *MacLean-Fogg I*, 36 CIT at __, 836 F. Supp. 2d at 1374–1375. Furthermore, the court has already approved the decision not to include in that average the rates of the voluntary respondents. *Id.*

Nonetheless, as we concluded in *Maclean-Fogg I*, the chosen rate must be based on a reasonable reading of the record evidence. *Id.* at 1376. Specifically, it must be based on reliable evidence in the record and must be relevant to the all-others respondents. *See Dongguan Sunrise Furniture Co. v. United States*, 36 CIT __, Slip Op. 12–79, at *8 (June 6, 2012) ("Commerce must provide some justification for finding that . . . [this] rate . . . is relevant and reliable for this

[7] Indeed, Commerce noted it has previously departed from the mandates of its regulation to include voluntary respondents' rates in its calculations where appropriate. *Id.* at 11 (quoting *Laminated Woven Sacks from the People's Republic of China*, 73 Fed. Reg. 35,639 (Dep't. Commerce June 24, 2008) (final affirmative countervailing duty determination and final affirmative determination, in part, of critical circumstances) ("*Laminated Woven Sacks*"). Commerce considered using the weighted averages of both mandatory and voluntary respondents, but ultimately rejected this approach because it neither complied with its regulation nor mitigated its concern that the inclusion of voluntary respondents could lead to manipulation of the all-others rate. Remand Results at 12.

respondent in this time period."). Commerce's responsibility is to choose "a rate that, on this record, could reasonably be accepted as an approximation of [][the all-others companies'] rate, albeit with a built in increase intended as a deterrent to non-compliance." *KYD, Inc. v. United States*, 36 CIT __, 807 F. Supp. 2d 1372, 1378 (2012). This comports with the SAA requirement that the rate be "reasonably reflective of potential [CVD] margins for non-investigated exporters or producers." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N.4040, 4201 ("SAA").

Here, Commerce defends its choice of mandatory respondents' rates based on its finding that the mandatory respondents' goods represent a significant portion of imports of the subject merchandise. *Remand Results* at 6–7. Because the mandatory respondents were responsible for a large volume of the subject merchandise, Commerce found that they are more representative of all producers and exporters as opposed to the smaller, self-selected sample of voluntary respondents.[8] Commerce points out that using the mandatory respondents' rates allows it to obtain information for a substantial majority of the market. *Id.* at 10. Finally, Commerce notes that it considered other methods of incorporating the voluntary respondents' rate into the all-others rate, but ultimately rejected them due to overwhelming concerns about rate manipulation given the specific facts in this case, namely the striking difference in import volume between the mandatory and voluntary respondents.[9] *Id.* at 10–12. Under these circumstances, Commerce shows it considered the issue carefully and reasonably decided not to give weight to the voluntary respondents' rates.

Plaintiffs continue to attack the use of the mandatory respondents' total AFA rate as not a "reasonable method" per se, but this issue is resolved by the statute. Nothing in the statute requires that the mandatory respondents' rates, even when based on AFA, may only be used to develop rates for uncooperative respondents. Federal Circuit precedent is not to the contrary. Rather, these cases set the parameters summarized in *Dongguan* and *KYD* above. *See, e.g.*, *PAM, S.p.A. v. United States*, 582 F.3d 1336 (Fed. Cir. 2009); *Dongguan*, 36 CIT at

[8] Commerce further noted that with one lone exception, its practice in AD and CVD investigations has never been to limit respondents by statistical sampling, as the statute permits. Remand Results at 8. Rather, it has always selected respondents based on volume. *Id.*

[9] Commerce considered using the approach in *Laminated Woven Sacks*, where they averaged all rates determined to obtain an all-others rate, and it also considered using a weighted average of the mandatory and voluntary respondents' rates. Remand Results at 10–12.

__, Slip Op. 12–79 at *8 (summarizing and citing *Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1323–24 (Fed. Cir. 2010), and *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

Moreover, as Plaintiffs concede, "if mandatory respondents do not cooperate in a countervailing duty investigation, Commerce has no product- or industry-specific information establishing use or rates for individual subsidy programs alleged to have been used." Pls.' Comments at 13. Thus Commerce must necessarily base its rate determination on secondary data that simply cannot be a direct representation of the all-others companies' subsidy experience. Accordingly, Plaintiffs' argument that the rate chosen is based on program-specific CVD rates that include programs from investigations of different products from different industries does not render that rate unreasonable. *See PAM*, 582 F.3d at 1340 ("So long as the data is corroborated, Commerce acts within its discretion when choosing which sources and facts it will rely on to support an adverse inference.").

As Commerce explained, its total-AFA rate methodology in this case' necessarily involved program-specific CVD rates calculated for different programs in investigations of different products from different industries:

> [F]or purposes of deriving the AFA rate for the three noncooperating mandatory respondents, we are using the highest non-de minimis rate calculated for the same or similar program (based on treatment of the benefit) in another PRC CVD investigation. Absent an above-de minimis subsidy rate calculated for the same or similar program, we are applying the highest calculated subsidy rate for any program otherwise listed that could conceivably be used by the non-cooperating companies.

Aluminum Extrusions From the People's Republic of China, 75 Fed. Reg. 54,302, 54,305 (Dep't Commerce Sept. 7, 2010) (preliminary affirmative countervailing duty determination) ("Prelim. Determination"). Commerce further explains that when dealing with noncooperating companies, it is agency practice to "select, as AFA, the highest calculated rate in any segment of the proceeding." *Id.*

Importantly, however, Plaintiffs point out that Commerce assumes use, by all respondents, of 100% of subsidy programs alleged by the petitioning U.S. industry when no respondent in any PRC CVD investigation — including in the underlying investigation — has ever been found to use more than about half such alleged programs. *See* Pls.' Comments at 16–18. Plaintiffs note that "out of 39 total cooperating respondents in the 26 China CVD investigations completed to

date, the most alleged subsidy programs any cooperative respondent has been found to use is only about half." Pls.' Comments at 17. Plaintiffs have attached a survey of CVD investigations from the PRC sorted by percentage of subsidy programs actually used, and it appears that within these programs listed, respondents use approximately 15%-30% of the subsidy programs that Commerce uses in its calculations. Pls.' Comments at Attachment 3. Thus Plaintiffs claim that Commerce's reliance on 100% of the potential subsidies generate an all-others CVD rate not reasonably related to the all-others companies actual experience.[10] Pls.' Comments at 17; *De Cecco*, 216 F.3d at 1032 ("Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to the respondent's actual dumping margin.").

It is Commerce's role to weigh the evidence. *Nucor Corp. v. United States*, 32 CIT 1380, 1414, 594 F. Supp. 2d 1320, 1356 (2008) ("It is well-established that it is an agency's domain to weigh the evidence"). Nonetheless, here Commerce has calculated a deterrent for the mandatory respondents which is based on 100% use of all alleged subsidies. Remand Results at 26, 33–34. While this could be a reasonable choice for non-cooperating companies, Commerce has not placed an explanation on the record why a rate that is based on fewer than "any program otherwise listed that could conceivably be used by the non-cooperating companies," *Prelim. Determination*, 75 Fed. Reg. at 54,305, would not be sufficient to provide a rate relevant to the all-others companies. *See Dongguan*, 36 CIT __, Slip Op. 1279, at *8. For example, Commerce does not explain why the preliminary 137.65% rate, based on the assumed use of 29 programs, rather than the 54 programs included in the Final Determination, would not have been sufficient to provide an appropriate deterrent. *See* Remand Results at 26.

Commerce did not find that the Plaintiffs, the all-others companies, were non-cooperative. Notably, Commerce acknowledged in the I&D Memo that, at the Petitioners' urging, it was departing from the practice of attributing subsidies according to the specific province in which mandatory respondents were located. *I&D Memo* at Comment 8. Rather, Commerce decided in this investigation to apply every single subsidy program available throughout the PRC to the respondents, regardless of their actual location, based on the assumption that "the same types of subsidy programs exist across most provinces

[10] Commerce claims that the Plaintiffs did not demonstrate on the record of this proceeding that any of the alleged subsidy programs were unused, but this argument is unavailing because the information was readily available to Commerce as it appeared in Commerce's published decisions. *See* Pls.' Comments at Attachment 3 (listing decisions and their corresponding Federal Register citation).

and municipalities." *Id.* The all-others companies are not the largest companies in this investigation and Commerce has neither explained 1) how smaller companies, which presumably are located in one province or town, can avail themselves of subsidies that exist in another province or town, nor 2) how the assumption that "the same types of subsidy programs exist across most provinces and municipalities" is a reasonable one for the all-others companies. Thus, Commerce has not explained, based on the evidence in the record, how the all-others rate calculated is not punitive rather than remedial.

Accordingly, we remand for Commerce's consideration of this issue.[11]

CONCLUSION

For the forgoing reasons, Commerce's calculations are REMANDED.

Commerce shall have until August 30, 2012 to complete and file its Remand Results. Plaintiffs and Defendant-Intervenor shall have until September 13, 2012 to file comments. Plaintiffs, Defendant, and Defendant-Intervenor shall have until September 27, 2012 to file any reply.

It is **SO ORDERED**.

Dated: July 30, 2012
New York, New York

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

Slip Op. 12–100

GROBEST & I-MEI INDUSTRIAL (VIETNAM) CO., LTD., et al., Plaintiffs, v. UNITED STATES, Defendant, AD HOC SHRIMP TRADE ACTION COMMITTEE, et al., Defendant-Intervenors.

Before: Donald C. Pogue, Chief Judge
Consol. Court No. 10–00238[1]

[Affirming, in part, and remanding, in part, the Department of Commerce's *Final Results of Redetermination Pursuant to Remand*]

Dated: July 31, 2012

[11] The court has considered all other arguments that the Plaintiffs have put forth and found them to be unavailing. In addition, because the court is remanding the CVD rate for reconsideration, the issue of Plaintiffs' request for review of the preliminary rate is not yet ripe. *See MacLean-Fogg II*, 36 CIT at __, Slip Op 12–81, at *1–3. The court will address the matter once a reasonable final CVD rate has been determined.

[1] This action is consolidated with Court Nos. 10–00253, 1000257, 10–00265, 10–00272, and 10–00273. Order, Oct. 21, 2010, ECF No. 24.

Matthew R. Nicely, *David S. Christy, Jr.*, and *David J. Townsend*, Thompson Hine LLP, of Washington, DC, for the Plaintiffs Grobest & I-Mei Industrial (Vietnam) Co., Ltd.; Bac Lieu Fisheries Joint Stock Co.; C.P. Vietnam Livestock Corp.; Ca Mau Seafood Joint Stock Co.; Cadovimex Seafood Import-Export and Processing Joint-Stock Co.; Cafatex Fishery Joint Stock Corp.; Camau Frozen Seafood Processing Import Export Corp.; Cantho Import Export Fishery Ltd. Co.; Cuulong Seaproducts Co.; Danang Seaproducts Import Export Corp.; Investment Commerce Fisheries Corp.; Minh Hai Export Frozen Seafood Processing Joint-Stock Co.; Minh Hai Joint-Stock Seafoods Processing Co.; Minh Phat Seafood Co., Ltd.; Minh Phu Seafood Corp.; Minh Qui Seafood Co., Ltd.; Ngoc Sinh Private Enterprise; Nha Trang Fisheries Joint Stock Co.; Nha Trang Seaproduct Co.; Phu Cuong Seafood Processing & Import-Export Co., Ltd; Phuong Nam Co. Ltd.; Sao Ta Foods Joint Stock Co.; Soc Trang Seafood Joint Stock Co.; Thuan Phuoc Seafoods and Trading Corp.; UTXI Aquatic Products Processing Corp.; Viet Foods Co., Ltd.

Robert G. Gosselink and *Jonathan M. Freed*, Trade Pacific PLLC, of Washington, DC, for the Consolidated Plaintiffs Cam Ranh Seafoods Processing Enterprise Co.; Contessa Premium Foods Inc.; H&N Foods International.

Adams C. Lee, *Walter J. Spak*, and *Jay C. Campbell*, White & Case, LLP, of Washington, DC, for the Consolidated Plaintiff Amanda Foods (Vietnam) Ltd.

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

Andrew W. Kentz, *Jordan C. Kahn*, *Nathaniel M. Rickard*, and *Kevin M. O'Connor*, Picard Kentz & Rowe LLP, of Washington, DC, for Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee.

Geert M. De Prest and *Elizabeth J. Drake*, Stewart & Stewart, of Washington, DC, and *Edward T. Hayes*, Leake & Andersson, LLP, of New Orleans, LA, for the Defendant-Intervenor American Shrimp Processors Association.

OPINION AND ORDER

Pogue, Chief Judge:

This case returns to court following remand, by *Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 36 CIT , 815 F. Supp. 2d 1342 (2012) ("*Grobest I*"), of the final results of the fourth administrative review of the antidumping duty order on certain frozen warmwater shrimp from the Socialist Republic of Vietnam.[2] Specifically, *Grobest I* remanded the *Final Results* for the Department of Commerce ("Commerce" or "the Department") to (1) provide further explanation or reconsider its policy of zeroing in administrative reviews but not in

[2] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 75 Fed. Reg. 47,771 (Dep't Commerce Aug. 9, 2010) (final results and partial rescission of antidumping duty administrative review) ("*Final Results*"), and accompanying Issues & Decision Memorandum, A-552–802, ARP 08–09 (July 30, 2010), Admin. R. Pub. Doc. 233, available at http://ia.ita.doc.gov/frn/summary/VIETNAM/2010–19577–1.pdf (*"I & D Mem."*) (adopted in *Final Results*, 75 Fed. Reg. at 47,772).

investigations consistent with recent case law from the Court of Appeals for the Federal Circuit; (2) reconsider the request of Plaintiff Grobest & I-Mei Industrial (Vietnam) Co., Ltd. ("Grobest") for individual review as a voluntary respondent consistent with 19 U.S.C. § 1677m(a); and (3) accept Amanda Foods' separate-rate certification and reconsider Amanda Foods' duty rate. *Grobest I*, 36 CIT at , 815 F. Supp. 2d at 1367–68. Upon remand, in the *Final Results of Redetermination Pursuant to Remand*, A-552–802, ARP 08–09 (Apr. 30, 2012), Remand R. Pub. Doc. 6 ("*Remand Results*"), Commerce (1) provided further explanation to support its zeroing policy; (2) declined to individually review Grobest as a voluntary respondent because such review would be unduly burdensome and inhibit the timely completion of the review; and (3) accepted Amanda Foods' separate-rate certificate and assigned it the separate rate of 3.92%. Plaintiffs challenge the first and second determinations in the *Remand Results*. For the reasons discussed below, the court affirms the Remand Results on the first and third determinations, but remands again on the second.

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930[3], codified, as amended, at 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006) and 28 U.S.C. § 1581(c) (2006).

STANDARD OF REVIEW

"The court will sustain the Department's determination upon remand if it complies with the court's remand order, is supported by substantial evidence on the record, and is otherwise in accordance with law." *Jinan Yipin Corp. v. United States*, 33 CIT , 637 F. Supp. 2d 1183, 1185 (2009) (citing 19 U.S.C. § 1516a(b)(1)(B)(i)).

DISCUSSION[4]

I. Commerce's Policy of Zeroing in Administrative Reviews but Not in Investigations

A. Background

In *Grobest I*, Plaintiffs challenged Commerce's policy of employing zeroing in administrative reviews but not in investigations.[5] The

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

[4] Because Commerce's assignment of a separate rate to Amanda Foods is consistent with the remand order and is unchallenged, the court will affirm this determination without further discussion.

[5] Familiarity with the court's prior opinion and the history of the zeroing dispute outlined therein are presumed. For further discussion of the zeroing dispute and a detailed

court remanded the *Final Results* to Commerce for reconsideration and redetermination consistent with the Court of Appeals' holdings in *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) and *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011). *Grobest I*, 36 CIT at , 815 F. Supp. 2d at 1350. In *Dongbu*, the Court of Appeals held that "the government has not pointed to any basis in the statute for reading 19 U.S.C. § 1677(35) differently in administrative reviews than in investigations. . . . In the absence of sufficient reasons for interpreting the same statutory provision inconsistently, Commerce's action is arbitrary." *Dongbu*, 635 F.3d at 1372–73. In *JTEKT*, Commerce attempted to comply with *Dongbu* by pointing out that different methodologies are employed in investigations and reviews. The Court of Appeals rejected Commerce's explanation as insufficient, stating:

> While Commerce did point to differences between investigations and administrative reviews, it failed to address the relevant question — why is it a reasonable interpretation of the statute to zero in administrative reviews, but not in investigations? It is not illuminating to the continued practice of zeroing to know that one phase uses average-to-average comparisons while the other uses average-to-transaction comparisons.

JTEKT, 642 F.3d at 1384. The issue now before the court is whether Commerce's further explanation, as provided in the *Remand Results*, is sufficient to satisfy the Court of Appeals' concerns in *Dongbu* and *JTEKT*.

B. Analysis

In the *Remand Results*, Commerce puts forward three arguments to support its use of zeroing in reviews but not in investigations. First, Commerce argues that the courts have previously affirmed the reasonableness of Commerce's current review and investigation methodologies. Second, Commerce argues that the change of methodology in investigations was a reasonable implementation of an adverse World Trade Organization ("WTO") decision. Finally, Commerce argues that its inconsistent interpretations reasonably account for inherent differences between investigations and reviews.

Commerce contends that its first and second arguments "sufficiently justify and explain why the Department reasonably interpreted section [1677(35)] differently in average-to-average comparisons in antidumping duty investigations relative to all other

explanation of the zeroing methodology, *see* the recent decision in Union Steel v. United States, 36 CIT , 823 F. Supp. 2d 1346 (2012).

contexts." *Remand Results* at 11. However, contrary to Commerce's assertion, in *Dongbu* the Court of Appeals held both of these arguments insufficient to justify the inconsistent interpretations.

The Court of Appeals made clear in *Dongbu* that the question before it — and therefore currently before this court — was novel: "Although we have considered Commerce's zeroing policy in administrative reviews on numerous occasions . . . we agree with [plaintiff] that this court has never addressed the reasonableness of Commerce's interpretation of 19 U.S.C. § 1677(35) with respect to administrative reviews now that Commerce is no longer using a consistent interpretation." *Dongbu*, 635 F.3d at 1371 (citations omitted); *see also Union Steel*, 36 CIT at , 823 F. Supp. 2d at 1355–56. While the Court of Appeals has repeatedly affirmed the use of zeroing in administrative reviews, *see, e.g.*, *Timken Co. v. United States*, 354 F.3d 1334, 1341–45 (Fed. Cir. 2004), and approved Commerce's decision to cease zeroing in investigations, *see U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1360–63 (Fed. Cir. 2010), it has not addressed the question of inconsistent interpretations in prior cases. Therefore, that the Court of Appeals has "upheld the reasonableness of Commerce's changed methodology does not necessarily lead to the conclusion that Commerce's use of zeroing in administrative reviews remains reasonable." *Dongbu*, 635 F.3d at 1372 (responding to the claim that *U.S. Steel Corp.* stands for the proposition that the Court of Appeals has endorsed Commerce's divergent interpretations). Commerce cannot now rely on prior endorsements of its methodology when those cases did not address the relevant question before the court.

Nor does Commerce's proper implementation of an adverse WTO ruling resolve the question. Rather, recognizing that the Court of Appeals has upheld the new investigation methodology as a reasonable implementation of an adverse WTO ruling, *U.S. Steel*, 621 F.3d at 1360–63, Commerce must now show that its decision "compl[ies] with domestic law including reasonably interpreting statutes." *Dongbu*, 635 F.3d at 1372. A proper and reasonable implementation of an adverse WTO ruling may be contrary to law if it leads to an unreasonably inconsistent interpretation of statutory language. *Id.* ("[T]he government's decision to implement an adverse WTO report standing alone does not provide sufficient justification for the inconsistent statutory interpretations."). While implementation of an adverse WTO ruling may be a partial justification, it is not sufficient to resolve the matter. *Union Steel*, 36 CIT at , 823 F. Supp. 2d at 1357–58.

Therefore, the court turns to Commerce's third argument, that the Department's interpretations of 19 U.S.C. § 1677(35) account for

inherent differences between investigations and reviews. Commerce supports this argument in two ways. First, Commerce provides a detailed explanation of the methodological differences between the average-to-average comparison in investigations and the average-to-transaction approach taken in administrative reviews. Second, Commerce explains why the goal of the investigation differs from the goal of the administrative review. Plaintiffs argue that this reasoning does not satisfy the Court of Appeals' concerns in *Dongbu* and *JTEKT* because it is not tied to the language of the statute. Comments on Final Results of Redetermination Pursuant to Court Remand at 7–9, ECF No. 116 ("Pls.' Comments").

When considering whether Commerce's interpretation is reasonable, the court looks first, but not exclusively, to the language of the statute. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984); *see also Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1361 (Fed. Cir. 2007) ("To determine whether Commerce's interpretation . . . is reasonable, we may look to 'the express terms of the provisions at issue, the objectives of those provisions, and the objectives of the antidumping scheme as a whole.'" (quoting *NSK Ltd. v. United States*, 26 CIT 650, 654, 217 F. Supp. 2d 1291, 1297 (2002))). But, as the court pointed out in *Union Steel*, this issue cannot be decided solely on the basis of the statutory language found at § 1677(35)(A). *Union Steel*, 36 CIT at , 823 F. Supp. 2d at 1356–57. The statutory language (the word "exceeds" in particular) has been repeatedly held ambiguous; furthermore, it has been held to reasonably accommodate an interpretation consistent with both zeroing and offsetting methodologies. *Compare Timken*, 354 F.3d at 1341–45, *with U.S. Steel*, 621 F.3d at 1360–63. What is at issue is not simply whether Commerce takes two different interpretations of § 1677(35)(A) in reviews and investigations; what is at issue is whether the statute can accommodate two different means to achieve two different ends. Stated differently: is it reasonable under the statutory scheme as a whole for Commerce to employ a methodology incorporating zeroing in reviews but not in investigations?

To begin answering this question, we note that the statute distinguishes between "the amount by which normal value exceeds the export price or constructed export price," i.e., the dumping margin, and the manner in which this margin becomes the basis for the antidumping duty. Section 1677(35)(A) defines a dumping margin as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Pursuant to 19 U.S.C. § 1673, if Commerce finds sales of subject merchandise at less than fair value and the International Trade Commission finds injury,

then "there shall be imposed upon such merchandise an antidumping duty . . . in an amount equal to the amount by which the normal value exceeds the export price (or constructed export price) for the merchandise." Though a "dumping margin" and an "antidumping duty" are both measures of how much the normal value exceeds the export or constructed export price, § 1673 does not conflate the antidumping duty with the dumping margin. Rather, § 1673 contemplates a calculation methodology for arriving at the antidumping duty when it makes that duty "*an amount equal to the amount* by which normal value exceeds export price" (emphasis added).

However, the process by which a dumping margin becomes an antidumping duty is not provided by statute. *See* U.S. Steel, 621 F.3d at 1360. What the statute does provide is the basis for an antidumping duty. In some instances, the statute simply requires that the antidumping duty be based on the amount by which normal value exceeds export price. *See* 19 U.S.C. §§ 1673, 1673e(c)(3) ("[Commerce] shall publish notice in the Federal Register of the results of its determination of normal value and export price (or the constructed export price), and that determination shall be the basis for the assessment of antidumping duties . . . ."), 1675(a)(2)(C) ("The determination under this paragraph[6] shall be the basis for the assessment of . . . antidumping duties . . . and for deposits of estimated duties.").[7] In other instances, the statute requires that an estimated antidumping duty be based on the weighted average dumping margin, which, in turn, is based on the dumping margin, *see* § 1677(35), also known as the amount by which normal value exceeds export price. *See* 19 U.S.C. § 1673b(d)(1)(B) (requiring security in an amount based on the weighted average dumping margin calculated for the preliminary determination); 19 U.S.C. § 1673d(c)(1)(B)(ii) (requiring security in an amount based on the weighted average dumping margin calcu-

[6] The referenced determination is found in 19 U.S.C. § 1675(a)(2)(A): "For the purpose of paragraph (1)(B), [Commerce] shall determine (i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry."

[7] Two prior opinions of this Court have discussed the definition of dumping margin as it appears in 19 U.S.C. § 1675(a)(2)(A). *See Union Steel*, 36 CIT at , 823 F. Supp. 2d at 1357 ("'[D]umping margin' is itself a very general term that sometimes means 'dumping margin' as a comparison and sometimes actually means 'weighted-average dumping margin' as a percentage . . . ."); *KYD, Inc. v. United States*, 35 CIT , 779 F. Supp. 2d 1361, 1368–69 (2011) ("'The term "dumping margin" means the *amount* by which the normal value exceeds the export price or constructed export price of the subject merchandise.' 19 U.S.C. § 1677(35)(A) (emphasis added)"); *Kyd*, at 1370 n.8. While these two opinions may, perhaps, be read to interpret § 1675(a)(2)(A) slightly differently, any such conflict is irrelevant to the zeroing issue. As discussed elsewhere in this opinion, it is the process by which a dumping margin becomes a dumping duty that is relevant and neither *Union Steel* nor *Kyd* is in conflict with the other or with this opinion on this issue.

lated for the final determination). Thus, pursuant to statute, Commerce must calculate the amount by which the normal value exceeds the export price, i.e., the dumping margin, and this margin becomes the basis for the antidumping duty.

Prescribing that the dumping margin be the basis of the antidumping duty does not tell Commerce how to translate a dumping margin into an antidumping duty. Commerce has reasonably interpreted the various provisions to involve a three-step calculation: (1) calculation of a dumping margin; (2) calculation of a weighted average dumping margin; and (3) application of the weighted average dumping margin to sales or entries to determine the cash deposit or antidumping duty.[8] *See Union Steel*, 36 CIT at , 823 F. Supp. 2d at 1349–50, app. Therefore, the § 1677(35)(A) dumping margin serves as the basis for a § 1677(35)(B) weighted average dumping margin, and the weighted average dumping margin serves as the basis for the antidumping duty or estimated antidumping duty.[9]

Where, then, does zeroing come into the calculation methodology? As the Court of Appeals has held, the statute neither requires nor forbids it at any step in the process. *U.S. Steel*, 621 F.3d at 1361 ("[Section] 1677(35)(A) does not unambiguously preclude — or require — Commerce to use zeroing methodology."). Commerce explains in the *Remand Results*:

> When using an average-to-average comparison methodology, the Department usually divides the export transactions into groups, by model and level of trade (averaging groups), and compares an average export price or constructed export price of transactions within one averaging group to an average normal value for the comparable model of the foreign like product at the same or most similar level of trade. . . . The Department then compares the average export price or constructed export price for the averaging group with the average normal value for the comparable

[8] The Court of Appeals noted in *Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1342 (Fed. Cir. 2001), that "Commerce has adopted two different calculational approaches — one for cash deposits and one for final duties." However, the difference in the approaches is that "the formula for cash deposit rates uses *sales* during the review period as the denominator; the formula for the final duty uses *imports* as the denominator." *Id.* at 1343. The formulas, however, are the same in form and bear the same relation to the dumping margin and weighted average dumping margin.

[9] In this regard, it is worth noting that neither normal value nor export price are constant values. Both fluctuate over the periods of review or investigation and also vary within the various forms of the subject merchandise. Consequently, for these pricing values to result in a manageable assessment rate, Commerce must further treat the data. Such considerations lend further support to the necessity of Commerce developing a methodology for translating dumping margins into antidumping duties and give lie to the notion that a § 1677(35)(A) dumping margin is a sufficient basis upon which to assess an antidumping duty.

> merchandise. This comparison yields an average amount of dumping for the particular averaging group because the high and low prices within the group have been averaged together prior to the comparison. Importantly, under this comparison methodology, the Department does not calculate the extent to which an exporter or producer dumped a particular sale . . . but rather makes the determination "on average" for the averaging group within which higher prices and lower prices offset each other. The Department then aggregates the results from each of the averaging groups to determine the aggregate dumping margins for a specific producer or exporter. At this aggregation stage, negative averaging group comparison results offset positive averaging group comparison results. . . .
>
> . . . Under the average-to-transaction comparison methodology, the Department compares the export price or constructed export price for a particular U.S. transaction with the average normal value for the comparable model of foreign like product. . . . The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an export price less than its normal value. The Department then aggregates the results of these comparisons — *i.e.*, the amount of dumping found for each individual sale — to calculate the weighted-average dumping margin for the period of review. To the extent the average normal value does not exceed the individual export price or constructed export price of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific dumping margins.

Remand Results at 12–14.

Pursuant to both methodologies, Commerce calculates the § 1677(35)(A) dumping margin by subtracting the export price from normal value for each averaging group. Once a dumping margin has been established, Commerce aggregates these dumping margins to determine a weighted average dumping margin. In an investigation, Commerce aggregates all of the dumping margins to determine "overall pricing behavior." *Remand Results* at 14. In a review, Commerce zeros negative margins prior to aggregation to arrive at a more accurate margin and to uncover masked dumping. *Id.* at 7, 14. Thus, "Commerce is not reading 'exceeds' to mean two things. It is reading it as basically irrelevant to the calculation methodology, whether it expresses its view in that manner or not." *Union Steel*, 36 CIT at , 823 F. Supp. 2d at 1357.

Rather than reading "exceeds" in § 1677(35)(A) inconsistently, Commerce adopts two different methodologies for translating the dumping margin into an antidumping duty. In investigations, Commerce adopts a methodology intended to capture overall pricing behavior for the purpose of determining who should and should not fall within the purview of the antidumping duty order; for this purpose, Commerce allows negative margins to offset positive margins. In administrative reviews, however, Commerce has determined that a methodology that establishes the antidumping duty with greater accuracy is warranted both because the importer must actually pay the resulting antidumping duty and because it serves to uncover masked dumping[10]; for this purpose, Commerce zeroes negative dumping margins.

Commerce has offered a reasonable basis for treating investigations and reviews differently. *See Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1379–80 (Fed. Cir. 2001) (requiring agency to provide reasonable explanation for treating the same language in two statutory provisions differently). This reasoning is based in part on the antidumping statute's objective of determining margins as accurately as possible, *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990), in order to remedy the effect of unfair trading practices, *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103–04 (Fed. Cir. 1990). Such is the basis behind seeking accuracy through zeroing in administrative reviews. Commerce's reasoning is also based on its decision to implement an adverse WTO decision regarding investigations, which was properly done consistent with Commerce's authority and has been upheld as reasonable by the Court of Appeals. While implementation of an adverse WTO determination is not a sufficient basis for an inconsistent interpretation of a statute, as noted above, it is a reasonable basis for the Department to reconsider the purpose, and therefore methodology, of an antidumping investigation, i.e., a reasonable basis for departing from its prior position.

[10] Plaintiffs argue that Commerce cannot rely on this reasoning because it has repudiated the necessity of zeroing as a measure to counteract masked and targeted dumping in its recent decision to cease zeroing in reviews. Pls.' Comments at 10–11 (citing *Antidumping Proceedings: Calculation of the Weighted- Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8101, 8104 (Feb. 14, 2012). Plaintiffs did not raise this argument before Commerce. *See* Comments on Draft Results of Redetermination Pursuant to Court Remand, A-552–802, ARP 08–09 (Apr. 5, 2012), Remand R. Pub. Doc. 3. Because Plaintiffs failed to raise this argument before the Department, the court will not now consider it. *See* 28 U.S.C. § 2637(d) (2006); *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) ("In the Court of International Trade, a plaintiff must show that it exhausted its administrative remedies, or that it qualifies for an exception to the exhaustion doctrine.").

Thus, the court agrees with the recent decision in *Union Steel* that "when it comes to reviews, which are intended to more accurately reflect commercial reality, Commerce is permitted to unmask dumping behavior in a way that is not necessary at the investigation stage." *Union Steel*, 36 CIT at , 823 F. Supp. 2d at 1359. Commerce's decision to adjust its methodology to seek overall pricing behavior in investigations and more accurate duties in reviews, by zeroing in reviews but not in investigations, is a reasonable interpretation of the statute. Because Commerce has reasonably interpreted the statute, its explanation for zeroing in administrative reviews but not in investigations is affirmed.

II. Individual Review of Grobest as a Voluntary Respondent

A. Background

In the *Final Results*, Commerce denied a revocation request from Plaintiff Grobest because Grobest was not individually reviewed. In *Grobest I*, Grobest challenged this determination, arguing, *inter alia*, that it should have been reviewed as a voluntary respondent pursuant to 19 U.S.C. § 1677m(a).[11] The court found that Commerce had failed to apply the § 1677m(a) standard when it denied Grobest's request for voluntary respondent status but had, instead, improperly applied the § 1677f-1(c)(2) standard for choosing mandatory respondents. *Grobest I*, 36 CIT at , 815 F. Supp. 2d at 1362–63. Therefore, the court remanded this challenge to Commerce to evaluate Grobest's request for voluntary respondent status consistent with the standard set forth in § 1677m(a). *Id.* at 1364.

B. Analysis

In the *Remand Results*, Commerce again rejected Grobest's request for voluntary respondent status. On remand, Commerce determined that individual review of Grobest "would have been unduly burdensome and inhibited the timely completion of the review." *Remand Results* at 15. Commerce first contends that the workload in this case

[11] Section 1677m(a) reads in relevant part:

> In . . . a review under section 1675(a) of this title in which [Commerce] has, under section 1677f-1(c)(2) of this title . . . limited the number of exporters or producers examined . . . [Commerce] shall establish . . . an individual weighted average dumping margin for any exporter or producer not initially selected for individual examination . . . who submits to [Commerce] the information requested from exporters or producers selected for examination, if (1) such information is so submitted by the date specified (A) for exporters and producers that were initially selected for examination . . . and (2) the number of exporters or producers who have submitted such information is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation.

along with the workload in other antidumping and countervailing duty cases handled by the office in charge of this case made individual review of Grobest unduly burdensome. Second, Commerce contends that having fully extended the time for the preliminary results and partially extended the time for the final results, it could not individually review Grobest without rendering completion of the administrative review untimely.

Grobest challenges the *Remand Results* as an unreasonable interpretation of § 1677m(a). In particular, Grobest contends that "the Department says that even one company can be a 'large' number under the statute. This reading of the statute ignores [the plain language of the provision in] that the term 'so large' refers to a 'number' not a description of the respondents." Pls.' Comments at 16 (citations omitted). Therefore, according to Grobest, Commerce cannot refuse to individually review one or two voluntary respondents because these are not "large numbers." *Id.* at 16–17.

It is not the role of the court to second guess Commerce's allocation of its resources. *See Longkou Haimeng Mach. Co. v. United States*, 32 CIT 1142, 1151, 581 F. Supp. 2d 1344, 1353 (2008). "[A]ny assessment of Commerce's operational capabilities or deadline rendering must be made by the agency itself." *Id.*; *see also Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995) ("[A]gencies with statutory enforcement responsibilities enjoy broad discretion in allocating investigative and enforcement resources."). Because allocation of resources is committed to the sound discretion of the agency, so long as Commerce complies with statutory requirements the court reviews its allocation decision for abuse of discretion, i.e., "whether Commerce's decision was 'based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Torrington*, 68 F.3d at 1351 (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

Insofar as Grobest challenges Commerce's interpretation of the statute pursuant to the initial step in the *Chevron* framework, its argument is unavailing. Contrary to Grobest's assertion, the statute does not unambiguously define "a number so large." Rather, the statute conditions consideration of "a number so large" on whether review of such a number of respondents would be unduly burdensome and inhibit the timely completion of the review. The fact that the statute sets out a standard for interpreting "a number so large" means that there is no definitive number contemplated under the statute. Rather, "number" and "large" are ambiguous statutory terms; thus, the court must consider whether Commerce's interpretation is reasonable. *Chevron*, 467 U.S. at 842–45.

In the *Remand Results*, Commerce chose to examine the burden imposed and the effect upon the timeliness of the review posed by individual investigation of one voluntary respondent. In doing so, Commerce interpreted the statute not to set a floor for the number of voluntary respondents to be reviewed; rather, Commerce interpreted the statute to render every voluntary respondent request subject to an undue burden and timely completion analysis. Such interpretation is reasonable as it contemplates the standard set forth by the statute itself — whether the number of respondents is so large as to be unduly burdensome and inhibit the timely completion of the review. *Cf. F.C.C. v. AT&T Inc.*, 131 S. Ct. 1177, 1184 (2011) ("[S]tatutory interpretation turns on the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009) (internal quotation marks omitted)). In contrast, Grobest's argument that the number of voluntary respondents must reach some arbitrary threshold of largeness fails to consider the relative burdens that may be imposed by review of any one respondent, thereby disregarding the statutorily established standard.

Having considered whether Commerce's statutory interpretation is reasonable, we must now consider whether Commerce's decision amounted to an abuse of discretion. The Court of Appeals has stated that "an agency abuses its discretion where its 'decision (1) is clearly unreasonable, arbitrary, or fanciful; (2) is based on an erroneous conclusion of law; (3) rests on clearly erroneous fact findings; or (4) follows from a record that contains no evidence on which the [agency] could rationally base its decision." *Sterling Fed. Sys., Inc. v. Goldin*, 16 F.3d 1177, 1182 (Fed. Cir. 1994) (quoting *Gerritsen v. Shirai*, 979 F.2d 1524, 1529 (Fed. Cir. 1992)); *see also Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1148–49 (Fed. Cir. 2011) (noting that a clear error of judgment occurs when an action is "arbitrary, fanciful or clearly unreasonable"). When the record cannot support the agency's determination or the agency's exercise of discretion exceeds the limits of the statute, the agency has abused its discretion.

As we explained in *Grobest I*, § 1677m(a) sets a heightened standard that Commerce must meet when denying individual review to a voluntary respondent. *See Grobest I*, 36 CIT at , 815 F. Supp. 2d at 1363. That heightened standard anticipates voluntary respondents placing some burden on the agency and requires that the voluntary respondents receive an individual review in those circumstances. Such an expectation was contemplated by Congress when it noted in the Statement of Administrative Action for the Uruguay Rounds Agreements Act that "Commerce, consistent with Article 6.10.2 of the

Agreement, will not discourage voluntary responses and will endeavor to investigate all firms that voluntarily provide timely responses in the form required . . . .” Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201 (“SAA”). If this were not the case, then no analysis beyond that required in § 1677f-1(c)(2) would be required. *Cf. Grobest I*, 36 CIT at , 815 F. Supp. 2d at 1362 (“To limit voluntary respondents through § 1677f-1(c)(2) is to foreclose review under § 1677m(a) barring the unexpected and irregular.”). We held in *Grobest I* that the agency cannot make a voluntary respondent decision based on its analysis pursuant to § 1677f-1(c)(2); likewise, the agency cannot draw its § 1677m(a) analysis so narrowly that it mirrors the analysis under § 1677f-1(c)(2). It is only when the burden becomes *undue* that Commerce may decline to individually review voluntary respondents.

In this case Commerce has failed to show undue burden and has exercised its discretion in a way that renders the statute meaningless. On remand, Commerce found individual review of one voluntary respondent to be unduly burdensome. However, the facts that Commerce put forward to support that conclusion do not distinguish this case from the paradigmatic review of an antidumping or countervailing duty order.[12] Rather, the burdens Commerce names in the *Remand Results* are the same burdens that occur in every review. In this regard, Commerce’s decision that the burden in this case is undue sets the bar for undue burden too low because it would make indi-

[12] Commerce asserts the following facts to support its determination that review of Grobest would be unduly burdensome: The voluntary respondent materials are voluminous, require careful examination of each response, and are likely to require supplemental questionnaires. *Remand Results* at 15–16. Prior experience examining the mandatory respondent Minh Phu Group required four supplemental questionnaires, six deadline extensions, and an analysis of both export and constructed export price. *Id.* at 16. The second mandatory respondent, Nha Trang, had not been reviewed previously and the Department expected to expend significant resources reviewing Nha Trang for the first time. *Id.* at 16–17. The Department’s prior experience reviewing Grobest led it to believe that a review of Grobest would require a “thorough examination likely involving several supplemental questionnaires,” because the prior review of Grobest required four supplemental questionnaires and four extensions of time. *Id.* at 17. Commerce initiated a new shipper review of Nhat Duc Co., Ltd. on March 26, 2009. *Id.* The Department, and specifically AD/CVD Operations Office 9, was concurrently involved in ten administrative reviews and two investigations with overlapping deadlines. *Id.* at 17–18. High workloads throughout the Import Administration prevented reallocation of resources to Operations Office 9. *Id.* at 18. The review of Minh Phu Group and Nha Trang required seven supplemental questionnaires resulting in 4,535 pages and sixteen databases requiring analysis. *Id.* at 19. Analysis of the factors of production in shrimp cases require more time consuming review because the subject merchandise is valued based on count size. *Id.* at 32. The Department fully extended the deadlines for the Preliminary Results and partially extended the deadlines for the Final Results. Id. at 19–20.

vidual review of voluntary respondents in any typical antidumping or countervailing duty review unduly burdensome, and such a determination renders § 1677m(a) meaningless. *Cf. Grobest I*, 36 CIT at , 815 F. Supp. 2d at 1363; *see also* SAA, vol. 1 at 873, 1994 U.S.C.C.A.N. at 4201.

When Commerce can show that the burden of reviewing a voluntary respondent would exceed that presented in the typical antidumping or countervailing duty review, the court will not second guess Commerce's decision on how to allocate its resources. *See Longkou Haimeng Mach.*, 32 CIT at 1151, 581 F. Supp. 2d at 1353. However, Commerce's failure to make such a showing in this case, thereby rendering § 1677m(a) meaningless, is an abuse of discretion. Therefore, this case is remanded to Commerce to individually review Grobest as a voluntary respondent and, if appropriate in light of the review, to consider Grobest's request for revocation.

CONCLUSION

In light of the foregoing opinion, the *Final Results*, 75 Fed. Reg. at 47,771, as explained by the *Remand Results*, are affirmed in part and remanded in part. Commerce's explanation for why it continued to zero in this review after ceasing zeroing in investigations is affirmed. Commerce's assignment of the separate rate to Amanda Foods is also affirmed. Commerce's rejection of Grobest's request for voluntary respondent status is remanded to Commerce to conduct an individual review of Grobest as a voluntary respondent and to reconsider Grobest's revocation request in light of the results of that review.

Commerce shall have until September 14, 2012, to complete and file its remand redetermination. Plaintiffs and Defendant-Intervenors shall have until September 28, 2012, to file comments. Plaintiffs, Defendant, and Defendant-Intervenors shall have until October 8, 2012, to file any reply.

It is **SO ORDERED.**

Dated: July 31, 2012
New York, New York

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

Slip Op. 12–101

ATAR S.R.L., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN ITALIAN PASTA COMPANY, DAKOTA GROWERS PASTA COMPANY, AND NEW WORLD PASTA COMPANY, Defendant-intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 07–00086

[Affirming a remand redetermination in an administrative review of an antidumping duty order on certain pasta from Italy]

Dated: July 31, 2012

David J. Craven, Riggle & Craven, of Chicago, IL, for plaintiff.

Jane C. Dempsey, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Deborah King*, Attorney-International, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Paul C. Rosenthal and *David C. Smith*, Kelley Drye & Warren LLP, of Washington, DC, for defendant-intervenors.

OPINION

Stanceu, Judge:

Plaintiff Atar S.r.L. ("Atar"), an Italian pasta producer, brought this action to contest the final determination ("Final Results") of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") concluding the ninth administrative review of an antidumping duty order on certain pasta from Italy (the "subject merchandise"). *See Notice of Final Results of the Ninth Admin. Review of the Antidumping Duty Order on Certain Pasta from Italy*, 72 Fed. Reg. 7,011 (Feb. 14, 2007) ("*Final Results*"). At issue in this case are the Department's calculations of the indirect selling expense ("ISE") rate and the constructed value profit rate, both of which are components of the normal value of Atar's subject merchandise when normal value is determined according to the constructed value ("CV") method prescribed in the antidumping statute. Before the court is the decision (the "Third Remand Redetermination") Commerce prepared in response to the remand order the court issued in its third opinion in this litigation. *Final Results of Third Redetermination Pursuant to Ct. Remand* (Dec. 6, 2011), ECF No. 117 ("*Third Remand Redetermination*"). The Final Results assigned Atar a weighted-average dumping margin of 18.18%. *Final Results*, 72 Fed. Reg. at 7012. The Third Remand Redetermination determined for Atar a revised margin of 11.76%. *Third Remand Redetermination* 21. The court sustains the Third Remand Redetermination.

I. BACKGROUND

The court's three previous opinions in this litigation present the background of this litigation, which is supplemented herein.

In *Atar, S.r.L. v. United States*, 33 CIT __, 637 F. Supp. 2d 1068

(2009) ("*Atar I*"), the court held that Commerce failed to apply a "reasonable method," as required by section 773(e)(2)(B)(iii) of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1677b(e)(2)(B)(iii) (2006), when it calculated constructed value profit and ISE rates for Atar's merchandise. In the Final Results, Commerce based its CV profit and ISE rates on data from sales of the six respondents in the previous (eighth) review of the antidumping duty order, excluding sales made outside the ordinary course of trade, *i.e.*, sales made below cost. *Atar I*, 33 CIT at __, 637 F. Supp. 2d at 1085.

In *Atar, S.r.L. v. United States*, 34 CIT __, 703 F. Supp. 2d 1359 (2010) ("*Atar II*"), the court rejected the constructed value profit rate Commerce determined in the remand redetermination responding to *Atar I* (the "First Remand Redetermination"). The court held that Commerce did not comply with the "profit cap" provision of § 1677b(e)(2)(B)(iii). *Atar II*, 34 CIT at __, 703 F. Supp. 2d at 1367. In the First Remand Redetermination, Commerce based its CV profit and ISE calculations on data from two of the six eighth-review respondents, which Commerce chose because it determined that these were the only respondents in the eighth review that realized an overall profit on sales of the like products in the home market during the period of that review. *Results of Remand Redetermination Pursuant to Ct. Remand Order* (Sept. 3, 2009), ECF No. 85 ("*First Remand Redetermination*"). In response to the court's remand order rejecting the Final Results, Commerce did not exclude below-cost sales made by those two respondents. *Id.* at 1–2.

In *Atar, S.r.L. v. United States*, 35 CIT __, 791 F. Supp. 2d 1368 (2011) ("*Atar III*"), the court held that Commerce, in issuing a second redetermination upon remand (the "Second Remand Redetermination") that did not change the ISE and profit rate calculations reached in the First Remand Redetermination, failed to determine a lawful profit cap. *See Results of Redetermination Pursuant to Ct. Remand Order* (Jul. 19, 2010), ECF No. 105 ("*Second Remand Redetermination*"). Specifically, the court held that Commerce erred in concluding that the Second Remand Redetermination's constructed value profit rate, *i.e.*, "the weighted-average profit rate of the two respondents that earned a profit in the *Eighth Administrative Review*, after including sales made both within and outside the ordinary course of trade," also could serve as a lawful profit cap. *Atar III*, 35 CIT at __, 791 F. Supp. 2d at 1374 (internal quotation omitted).

On November 7, 2011, Commerce invited Atar and defendant-intervenors to comment on a draft, pre-issuance version of a written decision Commerce intended to release as the Third Remand Redetermination. *Letter from Program Manager, AD/CVD Operations to*

Atar (Nov. 7, 2011) (Remand Rec. No. 3) ("*Request for Comments*"). Atar raised an objection in a submission filed on November 14, 2011. *Letter from Atar to the Sec'y of Commerce* (Nov. 14, 2011) (Remand Rec. No. 7) ("*Atar's Comments on Draft Remand Results*"). The defendant-intervenors, consisting of American Italian Pasta Company, Dakota Growers Pasta Company, and New World Pasta Company, filed a comment submission objecting to the profit cap determination. *Letter from Def.-Intervenors to the Sec'y of Commerce* (Nov. 11, 2011) (Remand Rec. No. 6).

On December 6, 2011, Commerce filed the Third Remand Redetermination, which essentially was the same as the draft version save for a section responding to comments. On January 5, 2012, plaintiff commented to the court, urging the court to order another remand. Pl.'s Comments on the U.S. Department of Commerce's Dec. 6, 2011 Remand Determination (Jan. 5, 2012), ECF No. 120 ("Atar's Comments"). On February 15, 2012, defendant and defendant-intervenors filed submissions rebutting Atar's arguments and advocating affirmance of the Third Remand Redetermination. Def.'s Reply to Pl.'s Comments Upon the Third Remand Redetermination (Feb. 15, 2012), ECF No. 123; Def.-Intervenors' Reply to Pl.'s Comments on the Third Remand Redetermination (Feb. 15, 2012), ECF No. 124.

II. DISCUSSION

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980 ("Customs Courts Act"), 28 U.S.C. § 1581(c) (2006), which grants this Court jurisdiction of actions commenced under section 516A of the Tariff Act, 19 U.S.C. § 1516a, including those contesting the final results of an administrative review issued under section 751 of the Tariff Act, 19 U.S.C. § 1675(a). The court will sustain the Department's redetermination if it complies with the court's remand order, is supported by substantial evidence on the record, and is otherwise in accordance with law. *See* Tariff Act, § 516A, 19 U.S.C. § 1516a(b)(1)(B)(i).

Previously in this litigation, the court affirmed the Department's decision to determine the normal value of Atar's subject merchandise according to the constructed value method, specifically affirming the Department's findings that Atar did not have a viable home market or comparison market. *Atar I*, 33 CIT at __, 637 F. Supp. 2d at 1092. Therefore, the lawful determination of a CV profit rate, a profit cap, and a CV ISE rate are the only remaining issues in this litigation. In response to the remand order the court issued in *Atar III*, the Third Remand Redetermination calculated a constructed value profit rate, a profit cap, and a constructed value ISE rate for Atar's subject

merchandise. *Third Remand Redetermination* 1. The court concludes, for the reasons discussed below, that the Third Remand Redetermination must be sustained.

A. Calculation of a Constructed Value Profit Rate

Commerce calculated the constructed value profit rate using the method it used in the Final Results, which based the profit rate on a weighted average of the data from the sales of subject merchandise made in the home country and in the ordinary course of trade by the six respondents from the prior (eighth) administrative review. *Third Remand Redetermination* 5. Commerce calculated this rate under the third of three alternative statutory methods, as presented in the final clause of section 773(e)(2)(B) of the Tariff Act ("clause (iii)"), which directs that an amount realized for profit be determined

> based on any other reasonable method, except that the amounts allowed for profit may not exceed the amount normally realized by exporters or producers . . . in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise.

19 U.S.C. § 1677b(e)(2)(B)(iii). In *Atar I*, the court rejected the method used in the Final Results as arbitrary and unreasonable. 33 CIT at __, 637 F. Supp. 2d at 1087–89. In *Atar III*, however, the court stated that "Commerce, on remand, may be able to explain adequately why a CV profit amount that is redetermined by a method excluding non-ordinary-course sales satisfies the 'reasonable method' requirement of clause (iii)." 35 CIT at __, 791 F. Supp. 2d at 1380. The court made this statement in view of the intervening decision of the U.S. Court of Appeals for the Federal Circuit in *Thai I-Mei Frozen Foods Co. v. United States*, 616 F.3d 1300, 1308–09 (Fed. Cir. 2010), which held that Commerce acted in accordance with law in excluding from the CV profit determination that it made in that case, which involved an administrative review of an antidumping duty order on frozen shrimp from Thailand, the data on sales in a third-country comparison market (Canada) that were made outside the ordinary course of trade.

The profit cap Commerce calculated in the Third Remand Redetermination was lower than the underlying CV profit rate determination, and as a result Commerce determined CV profit according to its profit cap, not the underlying profit rate determination. Because a CV profit rate calculated by some means other than those Commerce used may have been lower than the profit cap, the court normally would consider, first, whether the underlying CV profit rate calculated for the Third Remand Redetermination was lawful. However, no

challenge to this rate is properly before the court in this remand proceeding. Atar vaguely alludes to this rate in its comments to the Department on the draft version of the Third Remand Redetermination, stating that "[as] set forth herein, the Department's calculation of the margin for Atar continues to be improper as the Department's method for calculating the *profit* and profit cap[] does not comport with the profit cap and the reasonable method requirements of Section 773(e)(2)(B)(iii) of the Tariff Act of 1930." *Atar's Comments on Draft Remand Results* 1 (emphasis added). This statement, however, is the only reference in the submission to a challenge to the underlying profit rate. The argument "set forth therein" is that "the Department's decision to continue to weight-average the profits and ISE's [*sic*] results in a calculation which does not properly reflect the amount 'normally realized' by exporters and producers." *Id.* at 2. By grounding its objection in the statutory language requiring determination of an amount "normally realized by exporters or producers," Atar expressly limits its argument to the profit cap. *See* 19 U.S.C. § 1677b(e)(2)(B)(iii) (defining the profit cap as the "the amount normally realized by exporters or producers . . . in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise . . ."). Even were the court to consider Atar's vague allusion to the underlying profit rate sufficient to qualify as a challenge to that rate, it would conclude that Atar abandoned any such challenge in its comments to the court. There, Atar presents only a cursory discussion, objecting that the Remand Redetermination does not "address significant concerns raised by the Court in the opinion that accompanied the Remand order" and, in support of that objection, cites language from *Atar III* in which the court discusses shortcomings in the Department's earlier profit cap. Atar's Comments 3–4. Absent from Atar's comments to the court is any discussion plainly contesting the underlying profit rate determination. Before the court, defendant-intervenors support the Third Remand Redetermination in the entirety and thereby do not oppose the Department's calculation of an underlying CV profit rate for Atar's merchandise. The court sustains that rate as unopposed by any party to this case.

B. The Profit Cap

In the Third Remand Redetermination, Commerce calculated Atar's profit cap using a weighted average of the data from the reported home-market sales of the foreign like products made by the six respondents from the prior (eighth) administrative review. *Third Remand Redetermination* 9. Commerce included the data from all

reported sales, including those not made above cost. *Id.* at 11. The court concludes that Commerce used a reasonable method of determining an amount of profit that is "normally realized by exporters or producers . . . in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise." 19 U.S.C. § 1677b(e)(2)(B)(iii). The inclusion of all sales, both above-cost and below-cost, in the profit cap calculation produced a result that more accurately reflected the profit conditions in the home market as a whole than would one confined to sales made in the ordinary course of trade. The court addressed this point in *Atar III*, opining that "[as] demonstrated by the record evidence that four of the six [eighth-review] respondents failed to realize an overall profit, below-cost sales were a significant feature of the home-market conditions affecting the marketing of pasta in Italy." *Atar III*, 35 CIT at __, 791 F. Supp. 2d at 1380. The court reasoned that a profit cap should not be determined, as Commerce previously did in this proceeding (when it excluded the data of four of the six producers), "using an incomplete set of data that could not reflect the actual conditions affecting profitability in the home market." *Id.* at __, 791 F. Supp. 2d at 1378. And as the Court of International Trade has stated in the past, "the goal in calculating CV profit is to approximate the home market profit experience." *Geum Poong Corp. v. United States*, 26 CIT 322, 327, 193 F. Supp. 2d 1363, 1370 (2002); *see Floral Trade Council v. United States*, 23 CIT 20, 30, 41 F. Supp. 2d 319 (1999) (concluding that a profit cap of zero was appropriate where home-market producers of merchandise in the same general category of products as the subject merchandise did not realize a profit).

Taking issue with the profit cap calculation, Atar argues that the Department unlawfully based the profit cap on a weighted average, instead of a simple average, of the data of the six respondents from the prior review. Atar's Comments 3–4. Atar argues that weight-averaging of these data "did not appropriately reflect the data of all of the other producers," pointing to the fact that one of those six respondents had far greater sales volume and profits than the others and that, as a result, the data of that respondent received inordinate weight. *Id.* at 4.

The profit cap provision imposes two express conditions on the profit cap calculation: (1) that it be based on the profit experience of "exporters or producers . . . in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise"; and (2) that it reflect the amount of profit those exporters or producers "normally

realized" in connection with those sales. 19 U.S.C. § 1677b(e)(2)(B)(iii). The statute does not direct Commerce to determine the profits "normally realized" through any specific method. Commerce explained the decision to use a weighted average, as opposed to a simple average, by stating that a weighted average "takes into account the proportionate volume each producer's home market sales represent in relation to the total sales, in determining the profit for the market under consideration." *Third Remand Redetermination* 19.

On the facts of this case, the court cannot conclude that the Department's decision to use a weighted average was unreasonable or inconsistent with the statute. Commerce used the data on all sales, above and below cost, of all producers in the home market, and therefore cannot credibly be accused of basing a profit cap on an incomplete set of data that fails to represent the entire home-market profit experience. Although a simple average would avoid the circumstance to which Atar objects, *i.e.*, the large effect on the outcome resulting from the data of a single producer claimed to be dissimilar to Atar, a simple average arguably would understate the effect of the data of the large producer and give disproportionate effect to the data of the other, smaller eighth-review producers. Although the data of the large producer may be described as "atypical" when compared with the data of the others, the fact remains that the large producer accounted for a significant portion of the home market. A weighted-average method of determining the profit cap recognizes this fact in arriving at a determination of the level of profit that is "normally realized" in the home market. Commerce is obligated to determine an accurate margin, *see Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990), but here it is at least arguable that neither a weighted average nor a simple average would produce a perfectly "accurate" result appropriate for Atar. Commerce, for valid reasons, may well have decided instead to use a simple average instead of a weighted average, and in that event the result may have been held to be in accordance with law. However, Commerce must be allowed a degree of discretion as to its methodological choices in determining a profit cap. The court concludes that, on these facts, the choice between the two methods is one that must be left to the Department's reasonable discretion.

C. Indirect Selling Expense

The Third Remand Redetermination calculated Atar's indirect selling expense ratio "using the weighted-average of the ISE rates calculated for each of the six respondents" from the eighth administra-

tive review. *Third Remand Redetermination* 11. Commerce explained that "the ISE rate would bear no relationship to the profit ratios used to calculate Atar's CV profit unless the Department used data from the same companies to calculate both CV profit and ISE." *Id*. It explained, further, that "a company's profit amount is a function of its total expenses and, therefore, is intrinsically tied to the other financial ratios for the company." *Id.* Under clause (iii), Commerce is to determine selling, general and administrative expenses according to a "reasonable method." 19 U.S.C. § 1677b(e)(2)(B)(iii). The court concludes that, consistent with this provision, Commerce has reasonably determined a rate for Atar's indirect selling expense.

In commenting to the court on the Third Remand Redetermination, Atar devotes only one conclusory statement to the ISE rate, objecting that "[t]he Department has based the profit and the ISE's [*sic*] on un-representative data." Atar's Comments 1. As the court observed previously in this Opinion, Atar specifically directs its objection to the use of a weighted average to the issue of the profit cap calculation. Atar's comment submission to the court does not explain why Atar considers the data Commerce used for the ISE rate to be unrepresentative, and on this record the court does not agree with Atar's negative characterization of those data. Commerce used the data pertaining to the eighth-review respondents because it had no usable, non-proprietary home-market sales data from a respondent in the ninth review from which to calculate an ISE rate. On the record before Commerce, a weighted average of the ISE-related data from all six eighth-review respondents cannot fairly be characterized as unrepresentative.

D. Atar's Objection Arising from the Corticella Data on the Record of the Ninth Review

Atar argues that through no fault of its own it was prejudiced because Corticella Molini e Pastifici S.p.A. ("Corticella"), the only respondent in the ninth review other than Atar that received a dumping margin based on its own sales data, failed to meet the obligation imposed by the Department's regulation, 19 C.F.R. § 351.304 (2008), to place on the record a public summary of confidential data on its home-market sales in the ninth review. Atar's Comments 2–3. Atar posits that, as a result of that failure, Atar received a higher margin than it otherwise would have been assigned. *Id.* Atar argues that the court and Commerce should "take into account" the rate that Atar would have received had Corticella complied with the regulation. *Id.* at 2. On the question of fashioning a possible remedy, Atar argues that "the fact that such data could not form the 'basis' of the calcu-

lation[] does not mean that the Department and the Court cannot take notice of what should have been the proper rate for Atar and ensure that the final selected rate bears some relationship to such rate." *Id.* The court rejects Atar's objection based on the Corticella sales because Atar did not raise this issue before the Department in the remand proceeding and thereby failed to exhaust its administrative remedies.

Atar is correct that Commerce, concerned that use of the confidential data of Corticella would disclose data protected from disclosure as business proprietary information, resorted instead to the data of respondents in the eighth review. It is possible that Atar was prejudiced by the absence of usable, non-proprietary data on Corticella's sales, and it is also possible that Commerce, in determining a revised margin for Atar, could have devised some means of ameliorating any adverse effect on Atar resulting from Corticella's noncompliance. However, Commerce was not given the chance to address Atar's objection when preparing the Third Remand Redetermination. On November 7, 2011, Commerce solicited comments from the parties on the draft version of the Third Remand Redetermination. *Request for Comments.* In its November 14, 2011 comment submission to the Department, Atar challenged only the Department's decision to use a weighted average. *Atar's Comments on Draft Remand Results.* Although it failed to raise before the agency its argument concerning the Corticella data, Atar now urges the court to require Commerce to address the matter in a fourth remand submission. Because the Department did not have the opportunity to consider Atar's objection in preparing the determination now under judicial review, the court declines to do so.

This Court is directed by statute to require the exhaustion of administrative remedies where appropriate. Customs Courts Act, § 301, 28 U.S.C. § 2637(d). The exhaustion doctrine applies to remand proceedings. *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375 (Fed. Cir. 2008). The purpose of the exhaustion requirement is to ensure that a reviewing court conducts its judicial review of an agency decision only after the agency has had the opportunity to consider, and rule on, the matter in question. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). That did not occur in this remand proceeding.

Exceptions to the exhaustion requirement have been judicially recognized, most notably in situations where exhaustion would have been futile or where a pure legal question is involved. *See Corus Staal BV v. United States*, 502 F.3d 1370, 1378–79 & n.4 (Fed. Cir. 2007). However, the court has no basis to conclude that Atar's raising its

objection in its comments to Commerce would have been futile. Commerce did not state in the draft version of its determination that it would be unreceptive to that objection. Moreover, the objection is not grounded purely in a question of law. Applying an exception to exhaustion is a matter for the court's discretion. *Id.* at 1379. The circumstances of this case do not justify the court's excusing the failure of Atar to press its objection before the agency that had the responsibility for issuing the determination now before the court.

III. CONCLUSION

The Third Remand Redetermination complies with the court's order in lawfully determining a profit cap and applying it as a limitation on the constructed value profit determination. The Department's determination of an underlying profit rate is not validly contested by any party and is sustained on that basis. Commerce determined an ISE rate according to a reasonable method, as required by statute. Finally, the court rejects, for failure to exhaust administrative remedies, Atar's challenge to the Third Remand Redetermination based on the Corticella data. Accordingly, the court will enter judgment affirming the Third Remand Redetermination.

Dated: July 31, 2012
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE