U.S. Customs and Border Protection

Slip Op. 15–53

AD HOC SHRIMP TRADE ACTION COMMITTEE, Plaintiff, v. UNITED STATES, Defendant.

Before: Donald C. Pogue,
Senior Judge
Court No. 13–00346

[remanding in part the Department of Commerce's determination of company-specific revocation of antidumping duty order]

Dated: June 5, 2015

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Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. Also on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Melissa M. Brewer*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Pogue, Senior Judge:

This action arises from the seventh administrative review by the U.S. Department of Commerce ("Commerce") of the antidumping duty ("AD") order on certain frozen warmwater shrimp from the People's Republic of China ("PRC" or "China").[1] In this review, Commerce determined to revoke the order with respect to respondent Zhanjiang Regal Integrated Marine Resources Company, Limited ("Regal").[2] Appealing Commerce's determination, Plaintiff Ad Hoc Shrimp Trade Action Committee ("AHSTAC") — an association of domestic warmwater shrimp producers that participated in this review[3] — claims that Commerce's revocation was in

[1] *See Certain Frozen Warmwater Shrimp from the People's Republic of China*, 78 Fed. Reg. 56,209 (Dep't Commerce Sept. 12, 2013) (final results of administrative review; 2011–2012) ("*AR7 Final Results*") and accompanying Issues & Decision Mem., A-570–893, ARP 11–12 (Sept. 12, 2013) ("*AR7 I&D Mem.*").

[2] *AR7 Final Results*, 78 Fed. Reg. at 56,210.

[3] *See* Compl., ECF No. 2, at ¶ 7.

error.[4] Specifically, AHSTAC challenges (1) Commerce's reliance, in concluding that Regal was eligible for company-specific revocation, on data and analysis that were previously held not to have been based on a reasonable reading of the record evidence because, *inter alia*, the agency arbitrarily ignored economic comparability in its evaluation of factor of production data; and (2) Commerce's determination to disregard discrepancies between Regal's verified sales data and the entry information provided by U.S. importers in concluding that the continued application of the AD order to Regal's merchandise was not necessary to offset dumping.[5]

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[6] and 28 U.S.C. § 1581(c) (2012).

As explained below, Commerce's reliance, without reconsideration or additional explanation, on data and analysis from the fifth review of this AD order — despite this Court's prior holding that these same determinations were not based on a reasonable reading of record evidence, and despite material differences between the record of that proceeding and this revocation inquiry — is remanded for reconsideration. On the other hand, Commerce's decision to disregard any discrepancy between Regal's verified sales data and the entry information provided by importers was reasonable, and is therefore sustained.

BACKGROUND

Antidumping duty orders are imposed on imported merchandise that is sold at prices below normal value (i.e., "dumped"), where "normal value" is usually the price at which like products are sold in the exporting country or, for merchandise originating in non-market economies ("NMEs"), a value calculated using appropriate surrogate market economy data.[7] Such orders are regularly reviewed by Commerce, such that the agency determines producer/exporter-specific dumping margins, covering discrete (typically one-year) time periods, by making contemporaneous normal value to export price comparisons.[8] Pursuant to a regulation in effect at the time of the administrative review at issue here, Commerce was authorized to revoke the

[4] *See* [Conf. & Pub.] Mem. of L. in Supp. of [AHSTAC]'s USCIT Rule 56.2 Mot. for J. on the Agency R., ECF Nos. 41 (conf. version) & 42 (pub. version) ("Pl.'s Br.").

[5] *Id.*

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

[7] *See* 19 U.S.C. §§ 1673, 1677b(a)(1)(B)(i), 1677b(c).

[8] *See id.* at § 1675(a).

AD order with respect to particular exporters/producers after considering whether (A) such an exporter/producer had "sold the merchandise at not less than normal value for a period of at least three consecutive years"; (B) such exporter/producer (if previously determined to have sold the merchandise at less than normal value) "agrees in writing to its immediate reinstatement in the order, as long as any exporter or producer is subject to the order, if [Commerce] concludes that the exporter or producer, subsequent to the revocation, sold the subject merchandise at less than normal value"; and (C) whether "the continued application of the antidumping duty order is otherwise necessary to offset dumping."[9]

Pursuant to this regulation, Regal requested company-specific revocation, citing its zero percent dumping margins in the fourth and fifth administrative reviews (and its expected zero percent dumping margins in the sixth and seventh reviews), and certifying in writing its agreement to its immediate reinstatement under the order should Commerce determine in the future that Regal is selling subject merchandise to the United States at prices below normal value.[10] By the time of Commerce's decision regarding this revocation request, Regal had been individually examined in the sixth and seventh reviews, and received zero percent dumping margins in both proceedings.[11]

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[9] 19 C.F.R. § 351.222(b)(2)(i)(A)-(C) (2012). This regulatory provision was subsequently revoked for administrative reviews initiated on or after June 20, 2012. *Modification to Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders*, 77 Fed. Reg. 29,875, 29,876 (Dep't Commerce May 21, 2012). As the review at issue here was initiated on April 30, 2012, the regulation was still in effect. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 77 Fed. Reg. 25,401, 25,403 (Dep't Commerce Apr. 30, 2012).

[10] *See AR7 I&D Mem*. cmt. 2 at 6; Req. for Admin. Review & Revocation, *Certain Frozen Warmwater Shrimp from the People's Republic of China*, A-570–893, ARP 11–12 (Feb. 28, 2012), *reproduced in* [Conf. & Pub.] App. to Def.'s Resp. in Opp'n to Pl.'s Mot. for J. Upon the Agency R., ECF Nos. 55 (conf. version) & 56 (pub. version) ("Def.'s App.") at Tab 1 ("*Revocation Req*.") at 2–3 & Attach. 1. At the time of Regal's request for revocation, the seventh review had not yet been initiated, and the results of the sixth review had not yet been finalized, although Regal had been preliminarily assigned a zero percent margin in the sixth review. *Revocation Req*., ECF Nos. 55 & 56 at Tab 1, at 3.

[11] Where it is not practicable to make individual weighted average dumping margin determinations for each known exporter and producer of the subject merchandise for whom review was requested, Commerce may limit its individualized examination to a smaller number of companies, 19 U.S.C. § 1677f-1(c)(2), and assign to the remaining respondents the "all-others" rate (calculated in accordance with 19 U.S.C. § 1673d(c)(5)) or, where appropriate, the NME countrywide rate. *See Jiangsu Jiasheng Photovoltaic Tech. Co. v. United States*, __ CIT __,28 F. Supp. 3d 1317, 1339–40 n.107 (2014). Regal was individually examined in the sixth and seventh administrative reviews of this order. *Certain Frozen Warmwater Shrimp from the People's Republic of China*, 77 Fed. Reg. 12,801, 12,801 (Dep't Commerce Mar. 2, 2012) (preliminary results, partial rescission, extension of time limits for the final results, and intent to revoke, in part, of the sixth antidumping duty administrative review) (explaining that Commerce selected Regal for individual examination in the sixth

Regal was not, however, individually examined in the fifth review,[12] in which it was assigned a zero percent dumping margin based on its individually-calculated zero percent rate in the previous (fourth) review.[13] Because Regal was not individually examined in the fifth review, Commerce requested from Regal information and sales data from the time period covered by that review, "to confirm that Regal did not dump during that time,"[14] and hence to confirm that Regal did not dump for three consecutive years, as required for revocation eligibility under the regulation.[15] Finding that Regal's fifth review sales data confirmed that Regal did not sell subject merchandise at less than the normal values calculated during that proceeding, Commerce concluded that Regal satisfied this regulatory requirement.[16] As explained below, AHSTAC now challenges this finding in so far as it relies, without additional analysis, on comparison values from the fifth review that were held by this Court to require reconsideration.[17]

AHSTAC's first challenge is directed at Commerce's decision to compare Regal's sales data for the period covered by the fifth administrative review[18] with the normal values calculated during that proceeding.[19] Because Commerce considers China to be a non-market economy, these normal values were based on "the value of the factors of production utilized in producing the merchandise," including "an

review) (unchanged in 77 Fed. Reg. 53,856 (Dep't Commerce Sept. 4, 2012) (final results, partial rescission of sixth antidumping duty administrative review and determination not to revoke in part) ("*AR6 Final Results*")); Decision Mem. for Prelim. Results, Partial Rescission of Antidumping Duty Admin. Review, *Certain Frozen Warmwater Shrimp from the People's Republic of China*, A-570–893, ARP 11–12 (Mar. 12, 2013) at 3 (explaining that Commerce selected Regal for individual examination in the seventh review) (adopted in 78 Fed. Reg. 15,696, 15,696 n.1 (Dep't Commerce Mar. 12, 2013) (preliminary results of administrative review; 2011–2012) (unchanged in *AR7 Final Results*, 78 Fed. Reg. 56,209)).

[12] *Certain Frozen Warmwater Shrimp from the People's Republic of China*, 76 Fed. Reg. 8338, 8341 (Dep't Commerce Feb. 14, 2011) (preliminary results and preliminary partial rescission of fifth antidumping duty administrative review) (explaining that Commerce selected only one company for individual examination in the fifth review, which was not Regal) (unchanged in 76 Fed. Reg. 51,940 (Dep't Commerce Aug. 19, 2011) (final results and partial rescission of [fifth] antidumping duty administrative review) ("*AR5 Final Results*")).

[13] *See AR5 Final Results*, 76 Fed. Reg. at 51,942.

[14] *AR7 I&D Mem.* cmt. 2 at 6.

[15] *See* 19 C.F.R. § 351.222(b)(2)(i)(A).

[16] [Commerce's] Post-Prelim. Analysis for [Regal] and [Another Resp't], *Certain Frozen Warmwater Shrimp from the People's Republic of China*, A-570–893, ARP 11–12 (May 20, 2013), *reproduced in* Def.'s App., ECF Nos. 55 & 56 at Tab 7 ("*Regal Post-Prelim. Mem.*") at 6 (unchanged in the *AR7 Final Results*,78 Fed. Reg. at 56,210).

[17] Pl.'s Br., ECF Nos. 41 & 42, at 13–22.

[18] The period of review for that proceeding was February 1, 2009, through January 31, 2010. *AR5 Final Results*, 76 Fed. Reg. at 51,940.

[19] *See Regal Post-Prelim. Mem.*, ECF Nos. 55 & 56 at Tab 7, at 3.

amount for general expenses and profit plus the cost of containers, coverings, and other expenses" (collectively, the "FOPs"), in a surrogate market economy country.[20] Commerce's selection of the primary surrogate country for the fifth review period was successfully challenged by AHSTAC in that original proceeding.[21] Now AHSTAC again challenges this same determination, as reiterated in the context of Commerce's examination of Regal's fifth review prices, as part of the agency's evaluation of Regal's revocation request.[22]

Specifically, in the original fifth review, Commerce used Indian data to value the FOPs for its normal value calculation.[23] AHSTAC challenged this decision, arguing that record data from Thailand, rather than India, provided the best available information for the normal value calculation.[24] Responding to AHSTAC's challenge, this Court remanded Commerce's determination to use Indian surrogate data in the fifth review, "[b]ecause Commerce's stated reasoning regarding the surrogate country selection in this review does not comport with a reasonable reading of the record."[25] On remand, however, the question was rendered moot when the sole individually-examined respondent was found to be non-credible and uncooperative, and accordingly was assigned, based on adverse facts available,[26] a rate derived from

[20] *See* 19 U.S.C. § 1677b(c)(1); *Regal Post-Prelim. Mem.*, ECF Nos. 55 & 56 at Tab 7, at 3. Although the statute permits Commerce to source its data from multiple surrogate market economies, *see* 19 U.S.C. § 1677b(c)(1), Commerce normally values all factors of production using data from a single surrogate market economy country (the "primary surrogate country"). *See* 19 C.F.R. § 351.408(c)(2); *Clearon Corp. v. United States*, Slip Op. 13–22, 2013 WL 646390, at *6 (CIT Feb. 20, 2013) (noting that Commerce's "preference for the use of a 'single surrogate country'" is reasonable because, "as Commerce points out, deriving the surrogate data from one surrogate country limits the amount of distortion introduced into its calculations").

[21] *See Ad Hoc Shrimp Trade Action Comm. v. United States*, __ CIT __, 882 F. Supp. 2d 1366, 1376 (2012) ("*China Shrimp AR5*").

[22] Pl.'s Br., ECF Nos. 41 & 42, at 13–22.

[23] Issues & Decision Mem., *Certain Frozen Warmwater Shrimp from the People's Republic of China*, A-570–893, ARP 09–10 (Aug. 12, 2011) (adopted in *AR5 Final Results*, 76 Fed. Reg. at 51, 940) ("*AR5 I&D Mem.*") cmt. 2 at 10.

[24] China Shrimp AR5, __ CIT at __, 882 F. Supp. 2d at 1372; *see* 19 U.S.C. § 1677b(c)(1) (requiring that Commerce use the "best available information" in selecting appropriate surrogate FOP values when calculating the normal value of NME merchandise).

[25] *China Shrimp AR5*, __ CIT at __, 882 F. Supp. 2d at 1376.

[26] *See* 19 U.S.C. § 1677e(b) ("If [Commerce] finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce], [Commerce], in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from – (1) the petition, (2) a final determination in the investigation

the domestic industry's petition to impose this AD order.[27] "As a result, [Commerce] did not . . . reexamine the issue of surrogate country selection" in the fifth review, and then subsequently continued to rely on the same surrogate FOP values in examining Regal's fifth review pricing as part of its revocation analysis.[28] AHSTAC now challenges Commerce's determination to continue to rely, without any additional consideration or explanation, on surrogate FOP values that were previously held to have been inadequate when considered in light of other record evidence.[29]

In addition, AHSTAC challenges Commerce's determination that "the continued application of the order is not otherwise necessary to offset dumping."[30] Specifically, AHSTAC argues that a discrepancy between the volume of entries identified by U.S. importers as Regal's subject merchandise and the volume of such shipments revealed in Regal's own data reflects a "chronic concern with respect to Regal's subject merchandise being incorrectly entered . . . throughout the

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under this subtitle, (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or (4) any other information placed on the record.").

[27] *See* Final Results of Redetermination Pursuant to Ct. Remand, Ct. No. 11–00335, ECF No. 74, at 2 ("[B]ecause we have found [the sole individually-examined respondent] to be part of the PRC-wide entity, which is receiving [a rate based entirely on adverse facts available], there are no calculated margins for this period of review . . . and it is [therefore] unnecessary to select a surrogate country in which to value a respondent's factors of production . . . ."); *id.* at 24 ("[T]he PRC-wide rate. . . represents a rate calculated in the petition in the [original investigation into whether sales of subject merchandise were being made at less than fair value] . . . ."); *Ad Hoc Shrimp Trade Action Comm. v. United States*, __ CIT __, 925 F. Supp. 2d 1315 (2013) (affirming Commerce's determination to rely on adverse facts available in re-calculating the individually-investigated respondent's rate, but remanding the rate for adequate corroboration); *Ad Hoc Shrimp Trade Action Comm. v. United States*, __ CIT __, 992 F. Supp. 2d 1285 (2014) (sustaining the agency's revisited corroboration of the PRC-wide rate).

[28] *Regal Post-Prelim. Mem.*, ECF Nos. 55 & 56 at Tab 7, at 3 ("The [Court of International Trade] remanded the final results [of the fifth review] to [Commerce] for further consideration . . . . However, pursuant to the [redetermination on remand], [Commerce] ultimately was not required to respond to the surrogate country issue in the remand as the question was rendered moot after adverse facts available were applied to the sole respondent. As a result, [Commerce] did not perform an antidumping calculation or reexamine the issue of surrogate country selection. Therefore, [Commerce], consistent with the determination made in the *AR5 Final Results*, continues to find India to be a reliable source for [surrogate FOP values for the period covered by the fifth review] . . . .") (citation omitted).

[29] *See* Pl.'s Br., ECF Nos. 41 & 42, at 13–22.

[30] *Regal Post-Prelim. Mem.*, ECF Nos. 55 & 56 at Tab 7, at 6 (applying 19 C.F.R. § 351.222(b)(2)(i)(C))(unchanged in the AR7 Final Results, 78 Fed. Reg. at 56,210); *see* Pl.'s Br., ECF Nos. 41 & 42, at 22–35 (challenging this determination).

three-year revocation period."[31] AHSTAC claims that this discrepancy is evidence indicating that the continued application of the order with respect to Regal remains necessary.[32]

Following a statement of the relevant standard of review, each challenge is addressed in turn.

STANDARD OF REVIEW

The court upholds Commerce's antidumping determinations if they are in accordance with law and supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i). Where, as here, the antidumping statute does not directly address the question before the agency, the court will defer to Commerce's construction of its authority if it is reasonable. *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (relying on *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938), and the substantial evidence standard of review "can be translated roughly to mean 'is [the determination] unreasonable?'" *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (citation omitted, alteration in the original); *On-Line Careline, Inc. v. America Online, Inc.*, 229 F.3d 1080, 1085 (Fed. Cir. 2000) ("The substantial evidence standard requires the reviewing court to ask whether a reasonable person might find that the evidentiary record

[31] Pl.'s Br., ECF Nos. 41 & 42, at 31. This discrepancy was first noted in the third administrative review of this order, in which Commerce found that "certain importers improperly classified [some of Regal's] subject entries as non-dutiable." Issues & Decision Mem., *Certain Frozen Warmwater Shrimp from the People's Republic of China*, A-570–893, ARP 07–08 (Aug. 28, 2009) (adopted in 74 Fed. Reg. 46,565 (Dep't Commerce Sept. 10, 2009) (final results and partial rescission of [third] antidumping duty administrative review)) cmt. 7 at 23. In the fourth review, responding to a court-ordered remand to reexamine the agency's reliance on importer-provided entry volume data to select Regal for individual examination as one of the largest exporters of subject merchandise by volume, *see Ad Hoc Shrimp Trade Action Comm. v. United States*, __ CIT __, 791 F. Supp. 2d 1327, 1330–34 (2011), Commerce verified that no such discrepancy of entry volumes existed during the period covered by that review, *see Ad Hoc Shrimp Trade Action Comm. v. United States*, __ CIT __, 828 F. Supp. 2d 1345, 1351 (2012). The discrepancy again appeared, however, during the sixth review, when Commerce again found that Regal's reported U.S. sales quantity differed from that reported by U.S. importers of Regal's subject merchandise. *See* Issues & Decision Mem., *Certain Frozen Warmwater Shrimp from the People's Republic of China*, A-570–893,ARP 10–11 (Aug. 27, 2012) (adopted in AR6 Final Results, 77 Fed. Reg. at 53,858) ("*AR6 I&D Mem.*") cmt. 7 at 36. And while conceding that Commerce verified the accuracy of Regal's own sales data for the period covered by the seventh review, AHSTAC contends that the discrepancy continued into that period as well. Pl.'s Br., ECF Nos. 41 & 42, at 29.

[32] *See* Pl.'s Br., ECF Nos. 41 & 42, at 32–35.

supports the agency's conclusion.") (citations omitted). Importantly, "[t]he substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." *Univ. Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Moreover, an agency acts arbitrarily, and therefore unreasonably, when it "entirely fail[s] to consider an important aspect of the problem" or "offer[s] an explanation for its decision that runs counter to the evidence before [it]." *Motor Vehicle Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).[33]

DISCUSSION

I. Commerce's Choice of Surrogate Factor of Production Values for the Fifth Review Period Is Not Supported by Substantial Evidence.

First, AHSTAC challenges Commerce's decision — in examining Regal's fifth review period sales to evaluate Regal's revocation request — to continue to rely on the same surrogate market economy data that were previously held to be inadequate when read in light of the other record evidence.[34] Specifically, Commerce's choice of surrogate market economy values in the fifth review was based on the agency's selection of India as the primary surrogate market economy country for China.[35] Because Commerce's selection of an appropriate surrogate market economy must be such that the chosen dataset provides the "best available information" for approximating the NME producers' experience,[36] Commerce chooses a primary surrogate country that is economically comparable to the NME country[37] (measured in terms of the countries' comparative per capita gross national

[33] Although the Court in *State Farm* was discussing the "arbitrary or capricious" (rather than the "substantial evidence") standard of review, this reasoning is also relevant here because an agency determination that is arbitrary is *ipso facto* unreasonable. *See, e.g., Ward v. Sternes*, 334 F.3d 696, 704 (7th Cir. 2003) (noting that "a decision [that] is so inadequately supported by the record as to be arbitrary [is] therefore objectively unreasonable") (quotation marks and citations omitted).

[34] Pl.'s Br., ECF Nos. 41 & 42, at 13–22.

[35] *See AR5 I&D Mem.* cmt. 2 at 10.

[36] *See* 19 U.S.C. § 1677b(c)(1); *AR7 I&D Mem*. cmt. 2 at 10 (emphasizing the importance of surrogate data's resemblance to the NME producers' experience).

[37] 19 U.S.C. § 1677b(c)(4)(A).

income ("GNI")[38]), is a significant producer of comparable merchandise,[39] and provides publicly-available, reliable, and relevant data.[40] In *China Shrimp AR5*, this Court held that Commerce acted arbitrarily in the fifth review by disregarding "the concern that India's per capita GNI was nearly a third of China's [during the relevant time period], whereas Thailand's per capita GNI was nearly identical thereto,"[41] despite the record evidence that the quality of the available datasets from these two potential surrogates was nearly indistinguishable.[42]

Defendant argues that, in revisiting the issue in the context of Regal's revocation request, Commerce recognized "that the Court had previously remanded Commerce's fifth review primary surrogate country selection," and that Commerce therefore "reconsidered its surrogate country selection for the limited purpose of evaluating Regal's revocation request."[43] But in fact the agency itself explicitly states that Commerce did *not* reconsider this matter. Specifically, Commerce explained that because it "ultimately was not required to respond to the surrogate country issue," *Commerce "did not . . . reexamine the issue of surrogate country selection" and "[t]herefore . . . continues to find India to be a reliable source for [surrogate values* for the calculation of normal value for the period covered by the fifth review]."[44] Disregarding the court's holding in *China Shrimp AR5*, Commerce did not consider or weigh the effect of the significant

[38] *Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates*, 72 Fed. Reg. 13,246, 13,247 (Dep't Commerce Mar. 21, 2007) ("*Surrogate Country Selection Policy*") (explaining that "[Commerce] uses per capita income to measure [economic] comparability").

[39] 19 U.S.C. § 1677b(c)(4)(B).

[40] *See* 19 U.S.C. § 1677b(c)(1); Import Admin., U.S. Dep't Commerce, *Non–Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited May 11, 2015) ("*Commerce Policy 4.1*") ("[D]ata quality is a critical consideration affecting surrogate country selection. After all, a country that perfectly meets the requirements of economic comparability and significant producer is not of much use as a primary surrogate if crucial factor price data from that country are inadequate or unavailable.").

[41] *China Shrimp AR5*, __ CIT at __, 882 F. Supp. 2d at 1376.

[42] *See id*. at 1375 ("Commerce found that the Indian and Thai data were so similar in quality that Commerce was unable to make a distinction between the two countries based on the data sets' specificity to the input in question, exclusivity of taxes and import duties, contemporaneity with the period of investigation or review, or public availability – i.e., based on its usual data-evaluation standards.") (citing *AR5 I&D Mem.* cmt. 2 at 7).

[43] Def.'s Resp. in Opp'n to Pl.'s Mot. for J. Upon the Agency R., ECF Nos. 53 (conf. version) & 54 (pub. version) ("Def.'s Br.") at 11 (citing *AR7 I&D Mem*. cmt. 2 at 7–10; *Regal Post-Prelim. Mem*., ECF Nos. 55 & 56 at Tab 7, at 2–3).

[44] *Regal Post-Prelim. Mem.*, ECF Nos. 55 & 56 at Tab 7, at 3 (emphasis added) (unchanged in *AR7 I&D Mem*. cmt. 2 at 7 (relying on and citing explanation contained in *Regal*

divergence between India and Thailand's respective economic comparability to China when determining, based on reasoning reiterated from the fifth review, that while the record provided adequate surrogate FOP datasets from both potential surrogates, the Indian dataset provided the best available information.[45]

Defendant emphasizes Commerce's position that "[w]ithin a given [GNI] range, differences in per capita GNI between the countries do not imply any difference in level of economic development,"[46] and argues that "given that minor GNI differences do not correlate to differences in countries' levels of economic development, Commerce's methodology of considering data quality in choosing among the countries that are at a comparable level of economic development and significant producers of subject merchandise is reasonable."[47] But this argument ignores this Court's repeated holdings that where, as here, adequate data is available from more than one country that is both at a level of economic development comparable to the NME and a significant producer of comparable merchandise, Commerce must weigh the relative merits of such potential surrogates' datasets in a

Post-Prelim. Mem., ECF Nos. 55 & 56 at Tab 7, at 3)); *see also AR7 I&D Mem*. cmt. 2 at 9–10 (relying on the agency's original analysis in the fifth review, without any indication of reconsideration).

[45] *Compare AR7 I&D Mem.* cmt. 2 at 9 ("[Commerce] does not believe that the [antidumping statute] requires it to compare relative GNI of the [potential surrogate] countries in its analysis."); id. at 7 ("[Commerce] continue[s] to regard both Thailand and India as being at the *same* level of economic development as the PRC.") (emphasis added), *and AR5 I&D Mem*. cmt. 2 at 6–7 (relied on in *AR7 I&D Mem*. cmt. 2 at 7) ("[When selecting surrogate market economy countries for the normal value calculation in NME cases, Commerce] creates a list of possible surrogate countries that are to be *treated as equally comparable* in evaluating their suitability for use as a surrogate country[, regardless of any differences among the potential surrogates in terms of their relative GNI proximity to the per capita GNI of the NME country] . . . . [C]onsistent with [this policy], [Commerce] continues to find that [India and Thailand] are *equally* economically comparable to the PRC for purposes of [surrogate value] calculations.") (emphasis added), *with China Shrimp AR5*,__ CIT at __, 882 F. Supp. 2d at 1375 ("An unexplained and conclusory blanket policy of simply ignoring relative GNI comparability within a particular range of GNI values does not amount to a reasonable reading of the evidence in support of a surrogate selection where more than one potential surrogate within that GNI range is a substantial producer of comparable merchandise for which adequate data is publicly available. Rather, in such situations, Commerce must explain why its chosen surrogate's superiority in one of the three eligibility criteria outweighs another potential surrogate's superiority in one or more of the remaining criteria.") (citing *Amanda Foods (Vietnam) Ltd. v. United States*, 33 CIT 1407, 1413, 647 F. Supp. 2d 1368, 1376 (2009)); *id*. at 1376 ("Contrary to the Government's assertions, . . . this record is not so clear as to lead to the conclusion that [the] difference in data quality [between the Indian and Thai surrogate value datasets] necessarily outweighed the concern that India's per capita GNI was nearly a third of China's, whereas Thailand's per capita GNI was nearly identical thereto.") (quotation marks and citation omitted).

[46] *AR7 I&D Mem.* cmt. 2 at 8; *see* Def.'s Br., ECF Nos. 53 & 54,at 15–16.

[47] Def.'s Br., ECF Nos. 53 & 54, at 16 (footnote omitted).

way that does not arbitrarily discount the accuracy-enhancing value of sourcing surrogate data from a market economy whose economic development is as close as possible to that of the NME, and in that regard may provide the "best available information."[48]

Here, the record of the fifth review, like that of the AD proceeding at issue in *Viet Hoan*,[49] clearly reveals the basis for the court's concern. During the fifth review, Commerce found that both India and Thailand fell within a range of GNI values comparable to the per capita GNI of China, that both of these potential surrogates were significant producers of comparable merchandise, and that "[t]here exist[ed] on the record sufficient, publicly available surrogate factor information for the majority of FOPs from both India and Thailand" that was "of roughly equal specificity," and that otherwise satisfied the agency's usual data-quality standards.[50] But in deciding which of these two datasets would provide the "best available" information, Commerce (both in the original fifth review and in examining Regal's fifth review pricing as part of its revocation analysis) categorically

[48] *See* 19 U.S.C. § 1677b(c)(1); *China Shrimp AR5*, __ CIT at __,882 F. Supp. 2d at 1375–76; *Amanda Foods*, 33 CIT at 1413, 647 F. Supp. 2d at 1376; *Viet Hoan Corp. v. United States*,__ CIT __, 49 F. Supp. 3d 1285, 1302–06 (2015). Although Commerce cites to *Fujian Lianfu Forestry Co. v. United States*, 33 CIT 1056, 638 F. Supp. 2d 1325 (2009), for the broad proposition that the agency may select India as the primary surrogate for China "even though there were other economically-comparable countries with GNIs closer to the GNI of China," *AR7 I&D Mem.* cmt. 2 at 8 & n.36, the record in that case (unlike the record here, or in *Viet Hoan*, for example) revealed that Commerce's surrogate country selection was based on significant and substantial differences between the alternative datasets. *Compare China Shrimp AR5*, __ CIT at __, 882 F. Supp. 2d at 137576, *and Viet Hoan*, __ CIT at __, 49 F. Supp. 3d at 1304 (each discussing the unusual level of scrutiny Commerce resorted to in those cases to distinguish between multiple suitable datasets), *with Fujian*, 33 CIT at 1079–80, 638 F. Supp. 2d at 1350–51 & n.11 (explaining Commerce's findings in that case that the "Indian data provided [significantly] more comprehensive coverage of, and were more specific to, the inputs used in the production [of the subject merchandise]"; noting that no alternative data was available for several important inputs; and emphasizing that the plaintiff in that case did not "contest Commerce's finding that Indian data provide[d] greater coverage than Philippine data for valuing inputs specific to the production [of the subject merchandise]" or "Commerce's finding that Indian data provided more specific input values"). Thus the question of whether it is reasonable for Commerce to ignore relative economic comparability when evaluating datasets of otherwise similar quality was not before the court in *Fujian*. *See Fujian*, 33 CIT at 1075–80, 638 F. Supp. 2d at 1347–51 (rejecting the plaintiff's argument that India's per capita GNI differed so greatly from China's that it should not have been a surrogate candidate at all; noting that the plaintiff had conceded the clear superiority of the Indian data in terms of its specificity and comprehensiveness; and not addressing the issue of how to distinguish between datasets of very similar quality).

[49] *See Viet Hoan*, __ CIT at __, 49 F. Supp. 3d at 1304–05 (noting that "Commerce indicated the unusual level of scrutiny it would need to apply to distinguish between otherwise usable data sets" but nevertheless denied that "weighing the relative GNIs of the countries [may] improve [its] selection of the best available information").

[50] *AR5 I&D Mem*. cmt. 2 at 7.

and formulaically disregarded the evidence that the Indian data came from a country whose per capita GNI was barely a third of China's, whereas the Thai data was from an economy whose per capita GNI was virtually identical to China's.[51]

Commerce's refusal to account for the accuracy-enhancing value of relative GNI proximity when evaluating the relative merits of alternative satisfactory datasets, to determine which set constitutes the best available surrogate value information, is arbitrary and, therefore, unreasonable.[52] Commerce's own comparability metric implies that, all other considerations being roughly equal, surrogate data from a country whose GNI is nearly *identical* to that of the NME would be more likely to better approximate the values that would prevail within the NME itself, if the latter were a market economy, than would data from a country whose per capita GNI diverges from that of the NME by multiple orders of magnitude.[53]

Commerce maintains, as it did in *China Shrimp AR5*, that significant "differences of quality of data sources" adequately support the agency's selection of Indian rather than Thai surrogate values to determine the normal comparison values in the fifth review, notwithstanding the Thai economy's far greater comparability to that of China.[54] Specifically, Commerce relies on its reasoning from the fifth review that "the data from India were superior to that from Thailand [because,] of the ten FOPs, three had a more specific Indian [Harmonized Tariff Schedule ('HTS')] number while seven had equally specific Indian and Thai HTS numbers," and because the Indian financial statement on record was from a producer that, like Regal, was "a

[51] *See AR7 I&D Mem*. cmt. 2 at 8 (reproducing the GNI data, showing that during the relevant time period, "the PRC had a GNI of $2,940, India had a GNI of $1,070 . . . [and] Thailand had a GNI of $2,840") (citation omitted). The accuracy of these GNI values is not in dispute.

[52] *China Shrimp AR5*, __ CIT at __, 882 F. Supp. 2d at 1375–76; *Amanda Foods*, 33 CIT at 1413, 647 F. Supp. 2d at 1376; *Viet Hoan*, __ CIT at __, 49 F. Supp. 3d at 1302–06.

[53] *See Surrogate Country Selection Policy*, 72 Fed. Reg. at 13,247 (noting that "the closest country to [an NME]'s level of economic development" is the country whose per capita GNI most closely approximates that of the NME); *id*. (implying a spectrum of economic comparability by stating that Commerce is not obligated to choose the "country [that] is the most economically comparable to the NME" when "us[ing] per capita income to measure comparability"). Here, the very existence of this dispute implies a meaningful difference in the outcome of the normal value calculation, depending on whether the Thai or the Indian surrogate values are used, and it is unreasonable for Commerce to imply that this difference (which is at least partially due to the GNI disparity between the two countries from which the competing data is sourced) has no bearing on the relative accuracy of the resulting normal value calculations, or on the question of which dataset constitutes the best available information for this purpose.

[54] *See AR7 I&D Mem*. cmt. 2 at 10; *China Shrimp AR5*, __ CIT at __, 882 F. Supp. 2d at 1375–76.

shrimp farmer as well as shrimp processor."[55] But by Commerce's usual data evaluation standards, the record contained adequate and suitable data from both India and Thailand, because Commerce was unable to make a distinction between the two countries based on the datasets' specificity to the input in question, exclusivity of taxes and import duties, contemporaneity with the period of review, or public availability.[56]

Thus, to differentiate between the two satisfactory datasets, Commerce focused on minute, seemingly hair-splitting differences. Because the Indian and Thai data generally were of such similar quality that Commerce was unable to distinguish them using its usual standards, the agency compared Indian and Thai information for valuing shrimp larvae, the critical input used by the mandatory respondent in the fifth review to produce the subject merchandise. Here again Commerce found that the Indian and Thai information for valuing shrimp larvae was of very similar quality, but the Thai data were specific to black tiger shrimp, whereas the Indian data did not specify a species. Based on this distinction, Commerce concluded that because the sole mandatory respondent neither produced nor sold black tiger shrimp, the Indian shrimp larvae data were superior (because, unlike the Thai data, they did not specify the species of shrimp to which they pertained).[57] But unlike the sole mandatory respondent in the fifth review, Regal did not use shrimp larvae to produce the subject merchandise,[58] so the relative quality of Indian and Thai

[55] *AR7 I&D Mem*. cmt. 2 at 10 (relying on *AR5 I&D Mem*. cmt. 2 at7, 10); *see AR5 I&D Mem*. cmt. 2 at 10 ("[B]ecause the Indian shrimp larvae [i.e., the critical input used by the sole individually-investigated ('mandatory') respondent in the fifth review] [surrogate value] source fulfills more of [Commerce]'s [surrogate value] selection criteria, and the Indian surrogate company, Falcon Marine, is more reliable than the surrogate financial data from Thailand [due to the absence of convincing evidence that the Thai company, Seafresh, is an integrated producer that farms as well as processes shrimp], we will continue to use India as the primary surrogate country for the valuation of FOPs and surrogate financial ratios.").

[56] *China Shrimp AR5*, __ CIT at __, 882 F. Supp. 2d at 1375(citing *AR5 I&D Mem*. cmt. 2 at 7); *see Commerce Policy Bulletin 04.1* ("In assessing [the quality and suitability of surrogate value data in NME cases], it is [Commerce]'s stated practice to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data.").

[57] *China Shrimp AR5*, __ CIT at __, 882 F. Supp. 2d at 1375–76 (quotation and alteration marks omitted) (citing *AR5 I&D Mem*.cmt. 2 at 8).

[58] Pl. [AHSTAC]'s [Conf. & Pub.] Reply Mem. in Supp. of USCIT Rule 56.2 Mot. for J. on the Agency R., ECF Nos. 57 (conf. version) & 58 (pub. version) ("Pl.'s Reply") at 8 (relying on [Commerce's] Surrogate Factor Valuations for the [Seventh Admin. Review] Post-Prelim. Analysis for Regal in [the Fifth Review], *Certain Frozen Warmwater Shrimp from the People's Republic of China*, A-570–893, ARP 11–12 (May 20, 2013), *reproduced in* [Conf. & Pub.] App. to Mem. in Supp. of Pl.'s Reply Mem. in Supp. of its USCIT Rule 56.2 Mot. for J. on the Agency R., ECF Nos. 59 (conf. version) & 60 (pub. version) ("Pl.'s Reply App.") at

larvae data is not relevant. As AHSTAC points out, Regal used a different set of FOPs from those used by the respondent in the original fifth review and, unlike that respondent, Regal used broodstock rather than shrimp larvae as its critical input for producing the subject merchandise.[59] And as Commerce itself concluded, the better surrogate value data for Regal's broodstock came from Thailand, not India.[60]

Thus Commerce's reasoning that its original analysis in the fifth review supports its conclusion here that the Indian data is superior to the Thai data because the former more closely matches Regal's own FOPs and production process[61] is not supported by a reasonable reading of the evidence. Not only is this reasoning belied by Commerce's own finding in the original fifth review that the Indian and Thai data were of "roughly equal specificity," this reasoning is moreover no longer applicable, because Regal's FOPs are substantially different from those originally considered by Commerce in the fifth review, and particularly because the key factor of production on which Commerce based its data-evaluation in the original fifth review (shrimp larvae) was not used by Regal at all.

Commerce's alternative reasoning — that the Indian data provided the best available surrogate information for Regal's fifth review normal value calculation because the Indian financial statement on record more closely approximated Regal's experience[62] — is also not supported by substantial evidence. This is because Commerce did not account for or in any way address the additional evidence submitted by AHSTAC in support of its argument that the Thai financial statement on the record is from a company that, like the Indian company, and like Regal, is also an integrated producer (i.e., a shrimp farmer as well as shrimp processor).[63] Specifically, Commerce reasoned in the original fifth review that the evidence was insufficient to conclude

Tab 3 ("*Regal AR5 SV Mem*.") at 3–4, Ex. 1). *See Regal AR5 SV Mem*., ECF Nos. 59 & 60 at Tab 3, at 3 (noting that "[b]roodstock was not a reported [surrogate value] in the original [fifth] review" and concluding that Global Trade Atlas data from Thailand "is clearly an exact match to the FOP used by Regal during the [period of review]").

[59] Pl.'s Reply, ECF Nos. 57 & 58, at 7–8 (relying on *Regal AR5 SV Mem.*, ECF Nos,. 59 & 60 at Tab 3, at 3–4, Ex. 1).

[60] *Regal AR5 SV Mem.*, ECF Nos. 59 & 60 at Tab 3, at 3. Commerce also selected Thailand as the primary surrogate country for the sixth and seventh reviews. *See* Def.'s Br., ECF Nos. 53 & 54, at 17–18; Pl.'s Br., ECF Nos. 41 & 42, at 15.

[61] *AR7 I&D Mem*. cmt. 2 at 10 (relying on *AR5 I&D Mem.* cmt. 2 at 7, 10).

[62] *Id.* at 10 & n.42.

[63] *See AR7 I&D Mem.* cmt. 2 at 10 (relying on *AR5 I&D Mem*. cmt. 2at 10); *AR5 I&D Mem*. cmt. 2 at 9–10 (concluding that the Indian company's financial statement on record more closely approximated the NME respondent's experience than the Thai company's financial statement because, like the respondent in that review, the Indian company was "a shrimp

that the Thai company was an integrated producer, because the certification submitted by AHSTAC in support of this claim did not clearly indicate that it applied to this specific company.[64] But in this revocation proceeding, AHSTAC submitted additional evidence in support of its claim that this specific Thai company was indeed certified as a hatchery, farm, and processing plant.[65] Commerce completely ignored this evidence, instead relying entirely on its original fifth review analysis.[66]

But most importantly, Commerce completely (and categorically) ignored the *biggest* difference in quality between the two datasets, which is that the Thai data was from a market economy that very nearly mirrored China's level of economic development (by Commerce's own metric, which "uses per capita income to measure [countries' economic] comparability"[67]), whereas the Indian data reflected values present in an economy whose per capita GNI was multiple orders of magnitude lower than China's. In doing so, Commerce arbitrarily ignored an important aspect of the issue.[68]

farmer as well as shrimp processor," whereas the Thai company's financial statement provided no "indication that [the company] farms and processes shrimp") (citation omitted); *AR7 I&D Mem*. cmt. 2 at 10 n.42 (noting that Regal, like the respondent in the original fifth review, uses an integrated production process that both farms and processes shrimp).

[64] *See AR5 I&D Mem*. cmt. 2 at 9–10 (explaining that AHSTAC submitted evidence from "an organization that certifies shrimp hatcheries, farms, feed mills, and processing plants for 'Best Aquaculture Practices,'" which listed the Thai company within a set of companies receiving a group certification, but concluding that "[e]ven if [Commerce] were to assume that these facilities were somehow related," it was unable to conclude that the Thai company was an integrated producer because this evidence concerned the "Seafresh Industry Group – Thailand, [whereas] the financial statement on the record of this proceeding is specifically for Seafresh Industry Public Company Ltd., not Seafresh Industry Group – Thailand").

[65] Pl.'s Reply, ECF Nos. 57 & 58, at 10 (citing [AHSTAC's] Data on Surrogate Values for the Fifth Admin. Review (2009–2010), *Certain Frozen Warmwater Shrimp from the People's Republic of China*, A-570–893, ARP 11–12 (Feb. 4, 2013), *reproduced in* Pl.'sReply App., ECF Nos. 59 & 60 at Tab 5, at 7, Ex. 6(b)).

[66] *See AR7 I&D Mem*. cmt. 2 at 10 (relying on *AR5 I&D Mem.* cmt. 2 at 10).

[67] *Surrogate Country Selection Policy*, 72 Fed. Reg. at 13,247; *see also* id. (noting that "the closest country to [an NME]'s level of economic development" is the country whose per capita GNI most closely approximates that of the NME).

[68] *China Shrimp AR5*, __ CIT at __, 882 F. Supp. 2d at 1375–76; *see also Vinh Hoan*, __ CIT at __, 49 F. Supp. 3d at 1305 ("[T]he ultimate question is what is the best available information to value [an NME respondent's] factors of production? Thus, Commerce must choose the [primary surrogate] country that furthers this goal. The analysis suggested by [*China Shrimp AR5*], and adopted here, is that Commerce must compare differences in economic comparability with differences in the other factors, including data quality, when the facts so require."); *id.* at 1304 (explaining that the record of that case, like that of *China Shrimp AR5*, required comparison of potential surrogates' relative economic comparability to the NME country, because the record revealed that multiple countries' datasets satisfied

Accordingly, the agency's reliance in this revocation proceeding upon its original fifth review analysis of surrogate dataset alternatives is not supported by substantial evidence, and must therefore be remanded for reconsideration.

II. Regal's Import Volume Discrepancy

AHSTAC additionally challenges Commerce's determination that "the continued application of the order [as to Regal] is not otherwise necessary to offset dumping,"[69] claiming that a discrepancy between the volume of entries identified by Regal's U.S. importers as merchandise subject to the AD order and the volume of such shipments revealed in Regal's own data indicates that the continued application of the order with respect to Regal remains necessary.[70] But as Commerce explains, the agency conducted an on-site verification of Regal as part of this revocation proceeding, during which Commerce reviewed and analyzed Regal's sales data for the periods covered by the fifth, sixth, and seventh reviews.[71] Commerce "completed [quantity and value] reconciliations and completeness tests for [those periods]," found no discrepancies, and therefore concluded that "there is no basis to find that Regal's reported data is inaccurate."[72] AHSTAC concedes that Commerce verified the accuracy of Regal's sales data, and does not challenge that finding.[73]

Thus, consistent with Commerce's prior findings in this regard,[74] to the extent that the record reveals a discrepancy between the volume of subject merchandise exported by Regal and that reported as such by U.S. importers, the inaccuracies are in the information submitted to U.S. Customs and Border Protection ("Customs") by the importers,

the agency's threshold suitability criteria and, like in *China Shrimp AR5*, Commerce was therefore compelled to resort to an "unusual level of scrutiny . . . to distinguish between otherwise usable data sets").

[69] *Regal Post-Prelim. Mem.*, ECF Nos. 55 & 56 at Tab 7, at 6 (applying 19 C.F.R. § 351.222(b)(2)(i)(C))(unchanged in the *AR7 Final Results*, 78 Fed. Reg. at 56,210); Pl.'s Br., ECF Nos. 41 & 42, at 22–35.

[70] *See* Pl.'s Br., ECF Nos. 41 & 42, at 32–35.

[71] *AR7 I&D Mem.* cmt. 6 at 14.

[72] *Id.*; *see* Verification of the Sales and Factors Responses of [Regal], *Certain Frozen Warmwater Shrimp from the People's Republic of China*, A-570–893, ARP 11–12 (June 21, 2013), *reproduced in* Def.'s App, ECF Nos. 55 & 56 at Tab 8 (pub. version) & ECF No. 55 at Tab 15 (conf. version).

[73] *See* Pl.'s Br., ECF Nos. 41 & 42, at 29.

[74] *See AR6 I&D Mem.* cmt. 7 at 38 ("Regal has cooperated with [Commerce] and provided all requested information by the applicable deadlines[,] . . . [and] no record evidence demonstrates that Regal attempted to misclassify entries of subject merchandise. Moreover, there is no information on the record that indicates Regal underreported its U.S. sales information.") (citation omitted); *supra* note 31 (detailing relevant history).

not in the data used by Commerce to determine that Regal did not export to the United States at dumped prices during the relevant time periods. Because Commerce is concerned solely with the latter inquiry, and because the agency adequately verified that the necessary data for that determination was accurate, Commerce reasonably concluded that this discrepancy did not affect the accuracy of Regal's verified sales information, upon which Commerce based its determination that the continued application of the order as to Regal was not necessary to offset dumping.[75] Because Regal's own information was verified as accurate, the discrepancy in reported import volume has no bearing on the accuracy of the dumping determination, and is a matter that is more appropriately addressed to Customs' enforcement authority.[76]

Accordingly, Commerce's determination that any discrepancy between Regal's verified sales data and entry data reported by U.S. importers to Customs does not impugn the accuracy of Commerce's dumping determinations, or its consequent determination that the continued application of the order as to Regal is not necessary to offset dumping, is sustained.

CONCLUSION

For all of the foregoing reasons, Commerce's company-specific revocation of this antidumping duty order as to Regal is remanded solely for reconsideration of the surrogate data used to determine normal value for Regal's price comparisons during the period covered by the fifth administrative review. Commerce shall have until July 17, 2015, to complete and file its remand results. Plaintiff shall have until July 31, 2015, to file its comments, and the agency shall then have until August 10, 2015, to respond.

It is SO ORDERED.

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[75] *See AR7 I&D Mem.* cmt. 6 at 14.

[76] *See* Def.'s Br., ECF Nos. 53 & 54, at 31 ("Commerce verified the data submitted by Regal, ensured there were no discrepancies, and calculated a dumping margin based on the verified information that supported Regal's revocation request. . . . To the extent [AHSTAC] wishes to pursue claims regarding importer misclassification, Commerce previously has explained that it generally refers such matters to [Customs].") (quoting *AR6 I&D Mem.* cmt. 7 at 38 ("[Customs] is the U.S. government authority responsible for determining whether the importer has properly classified merchandise as subject or non-subject at time of entry.") (citation omitted); *AR5 I&D Mem.* cmt. 1 at 4 ("[C]omplaints of deliberate misclassification of entries or fraudulent activity regarding entries into the United States should be properly lodged with [Customs].") (citing *Globe Metallurgical Inc. v. United States*, __ CIT __, 722 F. Supp. 2d1372, 1381 (2010))); *Globe Metallurgical*, __ CIT at __, 722 F. Supp. 2d at 1381 (noting that "Commerce's recognition of [Customs]'s authority to investigate fraud, gross negligence, or negligence involving entries of merchandise" is consistent with 19 U.S.C. § 1592).

Dated: June 5, 2015
New York, NY

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

Slip Op. 15–54

P.F. STORES, INC., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE AND VAUGHAN-BASSETT FURNITURE COMPANY, INC., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 14–00200

[Granting Defendant's and Defendant-Intervenors' motions to dismiss Plaintiff's complaint for lack of subject-matter jurisdiction.]

Dated: June 9, 2015

Josh Levy, Peter S. Herrick, P.A., of Florida, argued for Plaintiff. On the brief was *Peter Stanwood Herrick*.

Douglas Glenn Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With him on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Shana Ann Hofstetter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

J. Michael Taylor, King & Spalding, LLP, of Washington, DC, argued for Defendant-Intervenors. With him on the brief were *Daniel Lawrence Schneiderman* and *Joseph W. Dorn*.

OPINION

Kelly, Judge:

This matter is before the court on Defendant's, United States, and Defendant-Intervenors', American Furniture Manufacturers Committee for Legal Trade and Vaughan-Bassett Furniture Company, Inc., motions to dismiss. Plaintiff, P.F. Stores, Inc. ("Plaintiff" or "PF Stores"), argues the court has 28 U.S.C. § 1581(i) (2012)[1] jurisdiction because the U.S. Department of Commerce's ("Commerce") actions resulted in Plaintiff's entries being deemed liquidated. Defendant and Defendant-Intervenors argue the court lacks subject-matter jurisdiction because Plaintiff failed to avail itself of adequate judicial remedies under 28 U.S.C. § 1581(a). The court finds that it lacks subject-

[1] Further citations to Title 28 of the U.S. Code are to the 2012 edition.

matter jurisdiction to hear Plaintiff's claims and dismisses Plaintiff's complaint for the reasons set forth below.

BACKGROUND

PF Stores is an importer of wooden bedroom furniture manufactured in China by Dream Rooms Furniture (Shanghai) Co. Ltd. ("Dream"). *See* Compl. ¶¶ 1, 4–5, Aug. 26, 2014, ECF No. 2 ("Pl.'s Compl."). PF Stores' entries were subject to the third administrative review of the antidumping order on wooden bedroom furniture from the People's Republic of China, covering entries made in 2007. *See Wooden Bedroom Furniture from the People's Republic of China*, 74 Fed. Reg. 41,374 (Dep't Commerce Aug. 17, 2009) (final results of antidumping duty administrative review and new shipper reviews). Dream filed suit in this Court contesting the results of the third administrative review and obtained an injunction against liquidation of its entries on September 22, 2009. *See* Pl.'s Compl. ¶¶ 6–7, Ex. A. The injunction provided that the subject entries "shall be liquidated in accordance with the final court decision in this action, including all appeals and remand proceedings, as provided in section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(e) (2006)." Pl.'s Compl. Ex. A at 2.

The court consolidated Dream's action with five other actions contesting the results of the third administrative review on November 6, 2009. Def.'s Mot. Dismiss & App. DA40, Dec. 3, 2014, ECF No. 14 ("Def.'s Mot. & App."). After several remands, the court sustained Commerce's third remand results on February 5, 2013. *See Lifestyle Enterprise, Inc. v. United States*, 37 CIT __, __, 896 F. Supp. 2d 1297, 1299 (2013). Two parties to the consolidated action, not including Dream, appealed the court's slip opinions. *See* Def.'s Mot. & App. DA33–DA34 (docket listing notices of appeal).

On June 13, 2013, the *Lifestyle* court granted an unopposed motion made by the Defendant-Intervenors in this case, to sever and deconsolidate three of the previously consolidated actions, including Dream's action. *See* Def.'s Mot. & App. DA34, DA42–43. The court further ordered that Dream's injunction was "hereby amended as follows . . . all entries exported by Orient International Holding Shanghai Foreign Trade Co., Ltd. and Dream Rooms Furniture (Shanghai) Co., Ltd. shall be liquidated without delay in accordance with this Court's February 5, 2013 final judgment for the period January 1, 2007 to December 31, 2007 . . . ." *Id.* at DA43

In a message dated June 25, 2013, Commerce issued instructions to U.S. Customs and Border Protection ("CBP") to liquidate entries of furniture exported by Dream during 2007 at a final rate of 216.01%.

See Pl.'s Compl. ¶ 10, Ex. B at 1. In September 2013, CBP liquidated the entries imported by Plaintiff and exported by Dream at the rates provided in these instructions. Def.'s Mot. & App. DA46, DA49. Plaintiff filed protests arguing that the entries it imported from Dream were deemed liquidated pursuant to Section 504(d) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1504(d) (2012),[2] six months from the court's February 5, 2013 slip opinion. *Id.* at DA44–DA49. CBP denied these protests on May 21 and June 5, 2014. *Id.* at DA46, DA49.

Plaintiff does not challenge the denial of its protests in this action. Rather, Plaintiff argues that it challenges various Commerce actions for which the court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1581(i) because the court could not have jurisdiction pursuant to 28 U.S.C. §§ 1581(a) or (c). *See* Pl.'s Mot. Opposing Def.'s Mot. Dismiss 3–4, Feb. 6, 2015, ECF No. 19 ("Pl.'s Opp'n Def.'s Mot. Dismiss").[3]

JURISDICTION

"The Court of International Trade, like all federal courts, is a court of limited jurisdiction." *See Sakar Int'l, Inc. v. United States*, 516 F.3d 1340, 1349 (Fed. Cir. 2008). A party invoking the court's jurisdiction bears the burden of establishing it and may not expand jurisdiction by creative pleading. *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). It is well-settled that a party may not invoke jurisdiction under § 1581(i) "when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) (citations omitted). Thus, the court must look to the "true nature of the action" to determine whether jurisdiction under § 1581(i) exists. *Norsk Hydro Can.*, 472 F.3d at 1355.

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

[3] Plaintiff enumerated three counts in its complaint: (1) Commerce's liquidation instructions were null and void because they were issued beyond the ten day period prescribed in 19 U.S.C. § 1675(a)(3)(C) for Commerce to transmit to the Federal Register for publication the final disposition and to issue instructions to the Customs Service with respect to the liquidation of entries pursuant to the review, and thus, the subject entries should be "deemed liquidated" pursuant to 19 U.S.C. § 1504(d); (2) the period for deemed liquidation under 19 U.S.C. § 1504(d) is triggered when final results of the third remand are published in the Federal Register, and here, final results of the third remand were never published in the Federal Register, thus, the entries should be treated as having been liquidated under § 1504(d); and (3) pursuant to the Administrative Procedure Act, 5 U.S.C. § 702 ("APA") Commerce's instructions were erroneous because they were untimely and never published in the Federal Register, thus, the subject imports were deemed liquidated. *See* Pl.'s Compl. ¶¶ 13–20.

DISCUSSION

As indicated above, Plaintiff claims jurisdiction exists pursuant to 28 U.S.C. § 1581(i), the Court of International Trade's residual jurisdiction, which provides:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.
>
> This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.

28 U.S.C. § 1581(i). The true nature of Plaintiff's claims involves a protestable CBP decision regarding liquidation and/or deemed liquidation, therefore § 1581(a) jurisdiction would not have been manifestly inadequate.

Plaintiff asserts, in each of its three counts, that its entries were deemed liquidated pursuant to 19 U.S.C. § 1504(d). *See* Pl.'s Compl. ¶¶ 13–20. Plaintiff argues that deemed liquidation occurred as a result of a failure of Commerce to: 1) comply with a statutory time period for issuing liquidation instructions, 2) publish notice of a final disposition in the Federal Register, or 3) issue valid liquidation instructions in violation of the APA. *Id.* All of these "deemed liquidation" theories essentially argue that administrative errors caused CBP to liquidate entries it should not have liquidated. However, a decision by CBP as to liquidation is a protestable CBP decision re-

gardless of any administrative errors which Commerce may have committed prior to CBP's decision. While CBP makes no decision as to the substance of Commerce's instructions, *i.e.*, antidumping duty rates, the decision as to when to implement those instructions through the process of liquidation belongs to CBP. *See, e.g.*, *Cemex, S.A. v. United States*, 384 F.3d 1314, 1324 (Fed. Cir. 2004) (footnotes omitted) (explaining that Customs makes no decision in calculating antidumping duties, but makes a decision regarding liquidation).

Section 1504(d) provides:

> (d) Removal of suspension
> Except as provided in section 1675(a)(3) of this title, when a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry, unless liquidation is extended under subsection (b) of this section, within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry (other than an entry with respect to which liquidation has been extended under subsection (b) of this section) not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted by the importer of record or (in the case of a drawback entry or claim) at the drawback amount asserted by the drawback claimant.

19 U.S.C. § 1504(d). Section 1514(a)(5) specifically identifies decisions under § 1504(d) as protestable decisions. It provides that CBP decisions,

> including the legality of all orders and findings entering into the same, as to—
>
> . . .
>
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof, including the liquidation of an entry, pursuant to either section 1500 of this title or section 1504 of this title;
>
> . . .
>
> shall be final and conclusive upon all persons . . . unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of Title 28 within the time prescribed by section 2636 of that title.

19 U.S.C. § 1514(a)(5). Pursuant to 19 U.S.C. § 1515, CBP reviews protests of CBP decisions listed in 19 U.S.C. § 1514, and the Court of International Trade reviews actions contesting the denial of such protests under its 28 U.S.C. § 1581(a) jurisdiction. Therefore, under 19 U.S.C. § 1514(a)(5), Plaintiff could have protested the liquidation based upon a claim that the goods had already been deemed liquidated and contested any denial of such a protest under 28 U.S.C. § 1581(a). While Plaintiff protested CBP's liquidation of its entries pursuant to § 1514(a)(5), it did not file a claim at this Court contesting the denial of its protests. As Plaintiff did not pay the duties and interest due upon liquidation, it did not meet the jurisdictional prerequisites for bringing an action to challenge the denial of a protest. *See* 28 U.S.C. § 2637(a). However, as the U.S. Court of Appeals for the Federal Circuit has held, jurisdiction under § 1581(i) is not appropriate "when jurisdiction under another subsection of § 1581 is or could have been available . . . ." *Miller*, 824 F.2d at 963 (citations omitted). Thus, Plaintiff's claims must be dismissed for lack of jurisdiction because a remedy under § 1581(a) would not have been manifestly inadequate.

The Court of Appeals addressed deemed liquidation claims in *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1373–76 (Fed. Cir. 2002). In *Fujitsu*, the plaintiff argued that the Court of International Trade had § 1581(i) jurisdiction to review its untimely protested deemed liquidation claims. *Id.* The plaintiff filed several protests with Customs, contesting interest assessed on its entries. *Id.* at 1369. Subsequently, the plaintiff filed supplemental letters with Customs claiming that its merchandise had been deemed liquidated pursuant to 19 U.S.C. § 1504(d) at the rate claimed at the time of entry. *Id.* at 1369–70. The plaintiff's deemed liquidation theory was rejected because the plaintiff "could have invoked the jurisdiction of the Court of International Trade under 28 U.S.C. § 1581(a) if, pursuant to 19 U.S.C. § 1514(a)(5), it had timely protested the liquidations . . . ." *Id.* at 1374. At the time of *Fujitsu*, the clause "including the liquidation of an entry, pursuant to either section 1500 or section 1504 of this title" was not in 19 U.S.C. § 1514, and, yet, the Court of Appeals held that decisions as to deemed liquidation were protestable and not subject to § 1581(i) jurisdiction. The subsequent amendment of the statute to explicitly include "section 1504" in the text only confirmed the Court of Appeals' holding. *See Alden Leeds Inc. v. United States*, 476 Fed. App'x 393, 397 (Fed. Cir. 2012).

Responding to Defendant's motion to dismiss, Plaintiff argues that § 1581(c) is not available because it is not challenging the final results of an administrative review, but rather Commerce's "automatic as-

sessment procedure." Pl.'s Opp'n Def.'s Mot. & App. 6. The court agrees in part with Plaintiff's argument. Plaintiff could not have brought its claims in a § 1581(c) case. As Plaintiff explains, "[i]t had no objections to the Court's June 2013 order." *Id.* at 7. Moreover, as Plaintiff explains, "[t]here is no dispute that Commerce's liquidation instructions are consistent with both the final results and the court's June, 2013 order." *Id.* at 8. However, this does not save Plaintiff because as discussed above, Plaintiff's claims are a challenge to CBP's decision as to liquidation, or deemed liquidation. CBP liquidated Plaintiff's entries at the rate specified in Commerce's liquidation instructions. Thereafter, Plaintiff filed protests with CBP, arguing that the entries had already been deemed liquidated at the rate asserted at the time of entry because liquidation occurred more than six months after the *Lifestyle* court issued its opinion on February 5, 2013. *See* Def.'s Mot. & App. 7, DA44–45, 47–48. In denying Plaintiff's protests, CBP determined that the goods had not been deemed liquidated at the entered rate. CBP found that pursuant to 19 U.S.C. § 1504(d), it had not received notice that suspension of liquidation had been removed until Commerce issued liquidation instructions on June 25, 2013. *See id.* at 7, DA46, DA49. According to CBP, the six month deadline for deemed liquidation had not yet passed when CBP liquidated Plaintiff's entries. *Id.* Any objection Plaintiff had to CBP's decision would have formed the basis of a claim under 28 U.S.C. § 1581(a) pursuant to 19 U.S.C. § 1514(a)(5).

Plaintiff incorrectly claims that it is challenging a Commerce decision. Pl.'s Opp'n Def.'s Mot. & App. 6. Each of its deemed liquidation theories rest upon the foundation that something other than Commerce's liquidation instructions on June 25, 2013 served as notice to Customs and triggered the running of the six months deemed liquidation timeframe provided by 19 U.S.C. § 1504. If, under Plaintiff's theories, something other than Commerce's instructions triggered the six month time frame but Customs did not acknowledge it, that would have been Customs' error. The court does not reach the question of whether these theories of notice have merit. However, the true nature of Plaintiff's claim is that Customs failed to act as required by 19 U.S.C. § 1504(d) and that is a protestable decision.

Responding to Defendant-Intervenors' motion to dismiss, Plaintiff argues "[Plaintiff] did not file a section 1581(a) claim in this Court *supra*. Therefore, the [sic] 1581(a) was not a viable option for [Plaintiff]." Pl.'s Mot. Opposing Def.-Intervenors' Mot. Dismiss 4, Feb. 6, 2015, ECF No. 20 ("Pl.'s Opp'n Def-Intervenors' Mot. Dismiss"). Plaintiff's reasons for not filing a § 1581(a) claim, not having "the $190,000 in duties and interest to pay prior to the filing of the summons, and,

more importantly [that] there was no Customs error in the liquidations," fall flat. Pl.'s Opp'n Def-Intervenors' Mot. Dismiss 3–4. Plaintiff's inability to pay the duties necessary to file a § 1581(a) claim do not make remedies available under § 1581(a) inadequate. *See Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006) (citations omitted). Moreover, as the court discussed above, the true nature of Plaintiff's claims is that CBP incorrectly liquidated its merchandise. That CBP decision is protestable. Plaintiff's argument that "there was no Customs error in the liquidations" does not change the fact that it is complaining about a CBP decision to liquidate the goods. Plaintiff's artful pleading and responses to motions to dismiss do not set forth a claim for which the court has subject-matter jurisdiction.

Plaintiff unpersuasively attempts to analogize its claims and the facts of this case to a "proactive" version of the facts of *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550 (Fed. Cir. 1997). Plaintiff argues that *Fujitsu* "would be inapplicable where as here [Plaintiff] is, *inter alia*, in essence defending a possible government enforcement action." Pl.'s Opp'n Def-Intervenors' Mot. Dismiss 5. In *Cherry Hill*, the Court of Appeals allowed the defendant importer and surety to pursue a deemed liquidation theory as an affirmative defense in an enforcement action brought by the government. The facts and reasoning of that case are inapplicable. The entire reasoning of the case was premised on the fact that defendants were involved in a government enforcement action, not pursuing a claim against the government. *Cherry Hill*, 112 F.3d at 1552.

Plaintiff's attempt to analogize to *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297 (Fed. Cir. 2004), also must fail. As Defendant explains, Plaintiff's argument challenging liquidation instructions pursuant to *Shinyei Corp.* is faulty because "Commerce's liquidation instructions are consistent with both the final results and the Court's June 2013 order that directed liquidation without delay." Def.'s Mot. & App. 13. As indicated above, Plaintiff concedes this in its brief. *See* Pl.'s Opp'n Def.'s Mot. Dismiss 8. None of the other cases Plaintiff cites to support this argument persuade the court either. The distinguishing factor in all those cases is that the party challenged the substance of Commerce's liquidation instructions, not CBP's decision to liquidate. *See Shinyei Corp.*, 355 F.3d at 1306 (explaining that the plaintiff's action challenged the rate in Commerce's liquidation instructions as inconsistent with a final court decision, a Commerce

decision not listed in 19 U.S.C. § 1516a); *Mitsubishi Elecs.*, 44 F. 3d at 977 (denying jurisdiction under § 1581(a) because the plaintiff's challenge was to Commerce's decision as to the rates in its liquidation instructions).

For the foregoing reasons, Plaintiff's claims are dismissed with prejudice. The court will issue a judgment in accordance with this opinion.

Dated: June 9, 2015
New York, New York

/*s*/ *Claire R. Kelly*
CLAIRE R. KELLY, JUDGE

Slip Op. 15–55

HUTCHISON QUALITY FURNITURE, INC., Plaintiff, v. UNITED STATES, DEFENDANT.

Before: Claire R. Kelly, Judge
Court No. 14–00248

[Granting Defendant's motion to dismiss Plaintiff's complaint for lack of subject-matter jurisdiction.]

Dated: June 9, 2015

John M. Peterson, *Richard F. O'Neill*, *Russell Andrew Semmel*, Neville Peterson, LLP, of New York, NY, for Plaintiff.

Stephen Carl Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With him on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Shana Ann Hofstetter*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Kelly, Judge:

This matter is before the court on Defendant's, United States, motion to dismiss. Plaintiff, Hutchison Quality Furniture, Inc. ("Plaintiff" or "Hutchison"), argues the court has 28 U.S.C. § 1581(i) (2012)[1] jurisdiction because the U.S. Department of Commerce's ("Commerce") actions resulted in Plaintiff's entries being deemed liquidated. Defendant argues the court lacks subject-matter jurisdiction because Plaintiff failed to avail itself of adequate judicial remedies under 28 U.S.C. § 1581(a). Alternatively, Defendant argues that

[1] Further citations to Title 28 of the U.S. Code are to the 2012 edition.

Plaintiff has failed to state a claim.[2] The court finds that it lacks subject-matter jurisdiction to hear Plaintiff's claim and dismisses Plaintiff's complaint for the reasons set forth below.[3]

BACKGROUND

Hutchison, an importer of furniture, entered merchandise as G.S. Sales Inc. ("G.S. Sales"), produced by Tianjin First Wood Co. ("Tianjin First"), a Chinese producer, and exported by Orient International Holding Shanghai Foreign Trade Co., Ltd. ("Orient International"). Compl. ¶¶ 11–12, Oct. 7, 2014, ECF No. 6 ("Pl.'s Compl."). Hutchison's entries were subject to the third administrative review of the antidumping order on wooden bedroom furniture from the People's Republic of China, covering entries made in 2007. *See Wooden Bedroom Furniture from the People's Republic of China*, 74 Fed. Reg. 41,374 (Dep't Commerce Aug. 17, 2009) (final results of antidumping duty administrative review and new shipper reviews). Orient International filed suit in this Court contesting the results of the third administrative review and obtained an injunction against liquidation of its entries on September 9, 2009. *See* Pl.'s Compl. ¶¶ 21, 25, 28, Ex. A. The injunction provided "that the entries subject to this injunction shall be liquidated in accordance with the final court decision in this action, including all appeals, as provided in 19 U.S.C. § 1516a(e)." Pl.'s Compl. Ex. A at 2.

The court consolidated Orient International's action with five other actions contesting the results of the third administrative review. Pl.'s Compl. ¶ 32. After several remands, the court sustained Commerce's third remand results on February 5, 2013. *See Lifestyle Enter., Inc. v. United States*, 37 CIT __, __, 896 F. Supp. 2d 1297, 1299 (2013). In

[2] The court cannot reach the issue of whether Plaintiff has failed to state a claim because the court lacks subject-matter jurisdiction over Plaintiff's claim for the reasons set forth in this opinion.

[3] American Furniture Manufacturers Committee for Legal Trade ("AFMC") and Vaughan-Bassett Furniture Company, Inc. (collectively "Proposed Intervenors" or "Amicus Curiae") moved to intervene as defendant-intervenors in this action. *See* Partial Consent Mot. Intervene, Dec. 4, 2014, ECF No. 11. Plaintiff opposed this motion. *See* Mem. Hutchison Quality Furniture, Inc. Opp'n Mot. Intervene, Dec. 23, 2014, ECF No. 16. Thereafter, the court issued a Memorandum and Order deferring decision on intervention until after the court ruled on Defendant's Motion to Dismiss and allowing Proposed Intervenors to participate as Amicus Curiae. *See* Memorandum & Order, Dec. 31, 2014, ECF No. 17. Because the court dismisses this action with prejudice, Amicus Curiae's pending motion for leave to intervene in this action is denied as moot. Defendant adequately represents Amicus Curiae's interest with respect to whether subject-matter jurisdiction exists to hear Plaintiff's claim if any appeal is taken to the U.S. Court of Appeals for the Federal Circuit. Moreover, Amicus Curiae may, pursuant to Federal Rule of Appellate Procedure 29, seek to file an amicus-curiae brief with the Court of Appeals.

early April, two parties to the consolidated action filed notices of appeal, not including Orient International. Pl.'s Compl. ¶ 38.

On June 13, 2013, the *Lifestyle* court granted an unopposed motion made by one of the Proposed Intervenors in this case, AFMC, to sever and deconsolidate three of the previously consolidated actions, including Orient International's action. *See* Pl.'s Compl. ¶¶ 47–48. The court further ordered that Orient International's injunction was "hereby [amended as follows] . . . all entries exported by Orient International Holding Shanghai Foreign Trade Co., Ltd. and Dream Rooms Furniture (Shanghai) Co., Ltd. shall be liquidated without delay in accordance with this Court's February 5, 2013 final judgment for the period January 1, 2007 to December 31, 2007 . . . ." *Id.* ¶ 48 (citations omitted).

In a message dated June 25, 2013, Commerce issued instructions to U.S. Customs and Border Protection ("Customs" or "CBP") to liquidate entries of furniture exported by Orient International during 2007 at a final rate of 83.55%. *See* Pl.'s Compl. ¶ 50, Ex. B at 2–3. In September 2013, CBP liquidated the entries imported by Plaintiff at the rates provided in these instructions. *Id.* ¶ 52.

Plaintiff challenges the validity of Commerce's liquidation instructions. It alleges that the merchandise at issue here was deemed liquidated six months following the Feburary 5, 2013 judgment in *Lifestyle*. As a result, it contends that "the Liquidation Instructions [that] list June 13, 2007 as the 'effective date' on which the suspension of liquidation of the subject entries was dissolved," are in fact invalid. Pl.'s Compl. ¶ 2. Plaintiff explains that it "seeks a declaratory judgment that entries covered by the challenged liquidation instructions, and not affirmatively liquidated by [CBP] within six (6) months of February 5, 2013 are deemed liquidated by operation of law . . . ." *Id.* ¶ 3.

JURISDICTION

"The Court of International Trade, like all federal courts, is a court of limited jurisdiction." *See Sakar Int'l, Inc. v. United States*, 516 F.3d 1340, 1349 (Fed. Cir. 2008). A party invoking the court's jurisdiction bears the burden of establishing it and may not expand jurisdiction by creative pleading. *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). It is well-settled that a party may not invoke jurisdiction under § 1581(i) "when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly

inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) (citations omitted). Thus, the court must look to the "true nature of the action" to determine whether jurisdiction under § 1581(i) exists. *Norsk Hydro Can.*, 472 F.3d at 1355.

DISCUSSION

As indicated above, Plaintiff claims jurisdiction exists pursuant to 28 U.S.C. § 1581(i), the Court of International Trade's residual jurisdiction, which provides:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.
>
> This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.

28 U.S.C. § 1581(i). The true nature of Plaintiff's claim involves a protestable CBP decision regarding liquidation and/or deemed liquidation, therefore § 1581(a) jurisdiction would not have been manifestly inadequate.

Plaintiff asserts in its single count that its entries were deemed liquidated by operation of law pursuant to Section 504(d) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1504(d) (2012).[4] *See* Pl.'s Compl.

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

¶ 58. Plaintiff's "deemed liquidation" theory is that the *Lifestyle* court's February 5, 2013 judgment was a final court decision and constituted notice to CBP triggering the six month period specified in § 1504(d). *Id.* ¶¶ 53–58. However, a decision by CBP as to liquidation is a protestable decision regardless of whether the *Lifestyle* court's judgment constituted a final court decision or whether the court's judgment constituted notice to CBP starting the six month period in § 1504(d). While CBP makes no decision as to the substance of Commerce's instructions, *i.e.*, antidumping duty rates, the decision as to when to implement those instructions through the process of liquidation belongs to CBP. *See, e.g.*, *Cemex, S.A. v. United States*, 384 F.3d 1314, 1324 (Fed. Cir. 2004) (footnotes omitted) (explaining that Customs makes no decision in calculating antidumping duties, but makes a decision regarding liquidation). As stated, Plaintiff's theory of its case is that the *Lifestyle* court's judgment constituted notice to CBP under § 1504(d).

Section 1504(d) provides:

> (d) Removal of suspension
>
> Except as provided in section 1675(a)(3) of this title, when a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry, unless liquidation is extended under subsection (b) of this section, within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry (other than an entry with respect to which liquidation has been extended under subsection (b) of this section) not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted by the importer of record or (in the case of a drawback entry or claim) at the drawback amount asserted by the drawback claimant.

19 U.S.C. § 1504(d). Section 1514(a)(5) specifically identifies decisions under § 1504(d) as protestable decisions. It provides that CBP decisions,

> including the legality of all orders and findings entering into the same, as to—. . .
>
> . . .
>
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof, including the liquidation of an entry, pursuant to

> either section 1500 of this title or section 1504 of this title;
> . . .
>
> shall be final and conclusive upon all persons . . . unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of Title 28 within the time prescribed by section 2636 of that title.

19 U.S.C. § 1514(a)(5). Pursuant to 19 U.S.C. § 1515, CBP reviews protests of CBP decisions listed in 19 U.S.C. § 1514 and the Court of International Trade reviews actions contesting the denial of such protests under its 28 U.S.C. § 1581(a) jurisdiction. Therefore, under 19 U.S.C. § 1514(a)(5), Plaintiff could have protested the liquidation based upon a claim that the goods had already been deemed liquidated and contested the denial of such protest under 28 U.S.C. § 1581(a). In fact, Plaintiff protested CBP's liquidation of its entries, alleging the entries were not covered by the scope of the antidumping duty order, but Plaintiff did not file a claim contesting the denial of its protest. As of the date CBP liquidated Plaintiff's entries, Plaintiff could have filed a protest under § 1514(a)(5) claiming that the entries had already been deemed liquidated by operation of law. Plaintiff did not allege these grounds in the protest it filed with CBP. Thus, Plaintiff's claim must be dismissed for lack of jurisdiction because a remedy under § 1581(a) would not have been manifestly inadequate.

The U.S. Court of Appeals for the Federal Circuit addressed deemed liquidation claims in *Fujitsu Gen. Am., Inc. v. United States.*, 283 F.3d 1364, 1373–76 (Fed. Cir. 2002). In *Fujitsu*, the plaintiff argued that the Court of International Trade had § 1581(i) jurisdiction to review its untimely protested deemed liquidation claims. *Id.* After its entries were liquidated, the plaintiff filed protests challenging the interest Customs assessed on its entries. *Id.* at 1369. The plaintiff later argued to Customs that its entries had, in fact, been deemed liquidated by operation of law under 19 U.S.C. § 1504(d) and should have been liquidated at the rate asserted at the time of entry. *Id.* at 1369–70. The plaintiff's deemed liquidation theory was rejected because the plaintiff "could have invoked the jurisdiction of the Court of International Trade under 28 U.S.C. § 1581(a) if, pursuant to 19 U.S.C. § 1514(a)(5), it had timely protested the liquidations . . . ." *Id.* at 1374. At the time of *Fujitsu*, the clause "including the liquidation of an entry, pursuant to either section 1500 or section 1504 of this title" was not in 19 U.S.C. § 1514, and, yet, the Court of Appeals held that decisions as to deemed liquidation were protestable and not subject to

§ 1581(i) jurisdiction. The subsequent amendment of the statute to explicitly include "section 1504" in the text only confirmed the Court of Appeals' holding. *See Alden Leeds Inc. v. United States*, 476 Fed. App'x 393, 397 (Fed. Cir. 2012).

Plaintiff responds that it seeks a declaratory judgment to the effect that Commerce's liquidation instructions erroneously stated the date the *Lifestyle* court's injunction was lifted "and consequential relief declaring Customs' tardy liquidations to be barred by § 1504(d) . . . ." Resp. Mem. Hutchison Quality Furniture, Inc. Opp'n Def.'s Mot. Dismiss 14, Mar. 27, 2015, ECF No. 29 ("Pl.'s Resp."). It argues that "Customs lacked authority to hold an action of Commerce invalid in connection with its consideration of any protest filed under 19 U.S.C. § 1514 . . . ." *Id*. at 15. This argument is unavailing because, as discussed above, the true nature of Plaintiff's claim is a challenge to CBP's decision to liquidate. CBP decides when to liquidate merchandise. Plaintiff's theory of the case is that Customs did not need to wait for liquidation instructions from Commerce because, per § 1504(d), Customs had already received notice from a court with jurisdiction over the entries that suspension of liquidation was removed when the *Lifestyle* court issued its decision on February 5, 2013. *See* Pl.'s Compl. ¶¶ 49, 57, 58. Thus, according to Plaintiff's own argument, Plaintiff is challenging a decision by CBP as to the appropriate time for liquidation. Such a decision would have been protestable under 19 U.S.C. § 1514(a)(5), as the court held in *Fujitsu*. Whether such a protest has merit is an issue the court does not reach. What matters for purposes of jurisdiction is that Plaintiff alleges that CBP did not recognize the goods had been deemed liquidated and, therefore, liquidated them.

Plaintiff's attempt to analogize its claim to one challenging the substance of Commerce's liquidation instructions is similarly unavailing. As Defendant explains, *Shinyei Corp. of Am. v. United States*, 524 F.3d 1274 (Fed. Cir. 2008) ("*Shinyei II*"), is inapposite and "d[id] not address whether deemed liquidations are protestable events." The United States' Reply Supp. Mot. Dismiss 3, April 24, 2015, ECF No. 38. In *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297 (Fed. Cir. 2004) ("*Shinyei I*") the Court of Appeals reversed the Court of International Trade's dismissal of an action where the plaintiff challenged Commerce's liquidation instructions as incorrectly implementing Commerce's final administrative review results. *See Shinyei II*, 524 F.3d at 1279–80. In *Shinyei II*, the Court of Appeals held "that nothing in the deemed-liquidation statute forbids the Court of International Trade from ordering reliquidation as a remedy for Commerce's failure to comply with 19 U.S.C. § 1675(a)(2)(C) in its

liquidation instructions to Customs." *Id.* at 1282. Moreover, the Court of Appeals explained in both *Shinyei II* and *Koyo Corp. of U.S.A. v. United States*, 497 F.3d 1231 (Fed. Cir. 2007), that deemed liquidations contrary to the final results are unlawful and may be protested where Customs errs or may be challenged under § 1581(i) where Commerce errs in issuing its liquidation instructions. *Shinyei II*, 524 F.3d at 1283–84; *Koyo Corp.*, 497 F.3d at 1237–38. The distinguishing factor in all the cases Plaintiff cites is that the party challenged a decision made by another agency, not CBP's decision to liquidate. *See Shinyei I*, 355 F.3d at 1306 (explaining that the plaintiff's action challenged the rate in Commerce's liquidation instructions as inconsistent with a final court decision, a Commerce decision not listed in 19 U.S.C. § 1516a); *Target Corp. v. United States*, 34 CIT 1570, 1573–74 (Dec. 23, 2010) (granting a preliminary injunction where the plaintiff claimed that the liquidation instructions at issue were inconsistent with the final results of an administrative review); *Celta Agencies, Inc. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1348, 1350 (2012) (dismissing the plaintiff's claim that liquidation instructions unlawfully directed Customs to assess duties on the plaintiff's entry at the all others rate because § 1581(a) was unavailable and the case was untimely for purposes of the court's § 1581(i) jurisdiction); *Conoco, Inc. v. U.S. Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1586 (Fed. Cir. 1994) (finding jurisdiction under § 1581(i) for the plaintiff's challenge to Foreign Trade Zones Board's imposition of conditions on the grant of subzone status because there was no protestable CBP decision).

For the foregoing reasons, Plaintiff's claims are dismissed with prejudice. The court will issue a judgment in accordance with this opinion.

Dated: June 9, 2015
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE