

**FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND**

**A. SUMMARY**

The Department of Commerce (“Department”) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (“CIT” or the “Court”) in Ad Hoc Shrimp Trade Action Committee v. United States, Court No. 10-00275, Slip Op. 11-106 (CIT August 24, 2011) (“Remand Opinion and Order”). These final remand results concern the Administrative Review of Certain Frozen Warmwater Shrimp From the People’s Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 75 FR 49460 (August 13, 2010) and accompanying Issues and Decision Memorandum (“PRC Shrimp AR4 Final”). In its Remand Opinion and Order, the CIT determined that “Commerce must take into account the record evidence of significant entry volume inaccuracies in Type 03 CBP Form 7501 data for merchandise subject to this antidumping duty order, and explain why it is nevertheless reasonable to conclude that the Type 03 CBP Form 7501 data used in this case are not similarly inaccurate, and/or otherwise reconsider its determination.”<sup>1</sup>

On October 14, 2011, the Department invited interested parties to comment on the Draft Results of Redetermination Pursuant to Court Remand and gave the parties until October 21, 2011 to submit comments. On October 19, 2011, the Ad Hoc Shrimp Trade Action Committee (“Petitioner”) asked for a four-day extension to October 25, 2011 to submit comments. The Department granted the extension on October 19, 2011. Hilltop International, one of the respondents selected for individual examination, filed comments on October 25, 2011. Petitioner filed comments on October 25, 2011.

As set forth in detail below, pursuant to the Court’s Remand Opinion and Order, we have reconsidered our determination, taking into account all the record evidence pertaining to the Department’s respondent selection methodology applied in this review. We find that Type 03 data

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<sup>1</sup> See Remand Opinion and Order at 12.

obtained from the U.S. Customs and Border Protection (“CBP”) Form 7501 remain the best information available to select respondents for individual examination in this review.

## **B. BACKGROUND**

In PRC Shrimp AR4, Petitioner requested an administrative review of 472 PRC entities.<sup>2</sup> Subsequently, the Department initiated an administrative review for 483 PRC entities.<sup>3</sup> The Department announced in the Initiation Notice that the Department intended to select the largest exporters by volume for individual examination using Type 03 data obtained from CBP.

After the publication of the Initiation Notice but prior to the selection of respondents, Petitioner placed comments on the record objecting to the Department’s intended methodology in selecting respondents, namely, using CBP Type 03 data to ascertain the largest volume (in kilograms) of exports of subject merchandise.<sup>4</sup> In its comments, Petitioner argued that “Type 3 entries are those that have been identified by the importer on import entry documentation as being potentially subject to AD and/or countervailing duties, as opposed to type 1 entries which the importer identifies as not subject to such duties.”<sup>5</sup> Petitioner argued that “it is imperative that the Department obtain and make available (under protective order) to all interested parties complete CBP data relating to ‘Type 1’ entries during the AR4 POR of Chinese merchandise falling within the scope of the tariff codes and issue Q&V questionnaires to all parties upon which this review has been initiated.”<sup>6</sup>

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<sup>2</sup> See Petitioner’s Request for Reviews, dated March 2, 2009, at Appendix A.

<sup>3</sup> We initiated an administrative review of 483 companies because we received review requests for companies which did not overlap with the 472 companies requested by Petitioner. See Notice of Initiation of Administrative Reviews and Requests for Revocation in Part of the Antidumping Duty Orders on Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam and the People’s Republic of China, 74 FR 13178 (March 26, 2009) (“Initiation Notice”). After accounting for duplicate names and additional trade names associated with certain exporters, the number of companies upon which we initiated is actually 477 companies/groups. See Certain Frozen Warmwater Shrimp From the People’s Republic of China: Preliminary Results, Preliminary Partial Rescission of Antidumping Duty Administrative Review and Intent Not To Revoke, In Part, 75 FR 11855 (March 12, 2010) (“Shrimp AR4 Prelim”).

<sup>4</sup> See Petitioner’s comments dated March 30, 2009, (where Petitioner requested that we issue Q&V questionnaires to the 483 companies upon which we initiated a review), and April 9, 2009, (where Petitioner provided arguments against the Type 03 data obtained from CBP and released under administrative protective order to interested parties). Petitioner filed additional comments on April 30, 2009, (where Petitioner further argued against the Type 3 CBP data in light of certain respondents’ communications with the Department regarding the status of their relative POR export activity).

<sup>5</sup> See Petitioner’s comments dated April 9, 2009, at 2.

<sup>6</sup> See id., at 17.

Section 777A(c)(1) of the Tariff Act of 1930, as amended (“Act”) directs the Department to calculate individual dumping margins for each known exporter and producer of the subject merchandise; but also gives the Department discretion, when faced with a large number of exporters/producers, to limit its examination to a reasonable number of such companies if it is not practicable to examine all companies. Consequently, because the Department initiated this administrative review with respect to a large number of companies, it was not practicable or feasible to individually examine all of them. As directed by section 777A(c)(2)(B) of the Act, we selected respondents for individual review, by examining CBP data of Type 03 entries to ascertain the largest volume of exports of subject merchandise.

Petitioner included certain information as evidentiary support for its arguments that CBP Type 03 data were unreliable and unusable for respondent selection purposes.<sup>7</sup> In its brief to the Court, Petitioner stated that the record “contains evidence that entries of subject merchandise had been misclassified as exempt from AD duties, thereby rendering the CBP data unreliable as a proxy for volume of subject merchandise. This evidence includes findings by two federal agencies that subject merchandise had been fraudulently entered as dusted shrimp and had been transshipped through countries not subject to the AD order.”<sup>8</sup> Petitioner also stated in its brief to the Court that “additional evidence consists of Commerce having discovered incorrect entries during verification in the prior POR and information indicating that entries had been misclassified in the instant POR.”<sup>9</sup> Petitioner also argued that:

Commerce did not address the evidence rebutting the presumption of regularity in justifying its exclusive reliance on “type 3” CBP data to select mandatory respondents. Although Commerce articulated the rationale for the presumption and relied on administrative convenience, those bases are insufficient given the evidence on the record impeaching the reliability of the CBP data. Commerce improperly directed AHSTAC to seek relief through CBP and the statute for prevention of circumvention, as Commerce selects mandatory respondents pursuant to its own legal

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<sup>7</sup> See Petitioner’s comments dated March 30, 2009, April 9, 2009, and April 30, 2009; see also Petitioner’s Case Brief dated April 12, 2010.

<sup>8</sup> See Petitioner Brief to CIT, 7-8.

<sup>9</sup> See id.

mandate and the cited statutory provision does not apply to the deliberate misclassification of entries. Commerce neglected to either adequately address the information indicating misclassification in the POR or explain why the misclassification discovered in the prior POR may have ceased. With respect to the findings of fraud documented by federal agencies, Commerce appears to require irrefutable proof of fraud in the instant POR before it will supplement its reliance on “type 3” CBP data. This position conflicts with the rebuttable presumption and ignores the lag-time before agencies conclude their investigations.<sup>10</sup>

The Court found that “[b]ecause Commerce failed to take into account record evidence that fairly detracts from the weight of the evidence supporting its POR subject entry volume determinations, these determinations are not supported by substantial evidence.”<sup>11</sup> Consequently, in the Remand Opinion and Order, the Court directed the Department to “take into account the record evidence of significant entry volume inaccuracies in Type 03 CBP Form 7501 data for merchandise subject to this antidumping duty order, and explain why it is nevertheless reasonable to conclude that the Type 03 CBP Form 7501 data used in this case are not similarly inaccurate, and/or otherwise reconsider its determination.”<sup>12</sup>

Therefore, as instructed by the Court, the Department addresses all the evidence on the record, including that evidence which the Court found detracts from the Type 03 data. Upon reconsideration, the Department explains why it is nevertheless reasonable to conclude that the Type 03 data is reliable and not similarly inaccurate, and remains the best information available on which to base respondent selection.

## **C. FINAL RESULTS OF REDETERMINATION**

### **1. INTRODUCTION**

The Department must conduct its respondent selection process early in the review in order to leave sufficient time for issuance of the questionnaires, analysis of responses, verifications when necessary, and completion of the review within the statutory deadlines. The Department obtains and places shipment information that it intends to use in the selection process on the record at the time of

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<sup>10</sup> See id., at 8.

<sup>11</sup> See id., at 12.

<sup>12</sup> See id.

initiation and provides a short opportunity for comment on that information. The Department considers all timely comments submitted in connection with the respondent selection process and issues its decision promptly.<sup>13</sup> When using CBP data, the Department obtains from CBP a listing of all entries during the POR made in each of the USHTS<sup>14</sup> categories referenced in the scope of the order that are designated as Type 03. Type 03 data are limited to subject merchandise that has been suspended for final determination of liability for antidumping and/or countervailing duties. It is Department's longstanding practice to not conduct reviews for companies that do not have any suspended entries because there are no entries for which the Department can issue assessment instructions.<sup>15</sup> One of the Department's primary functions in the course of an administrative review is to determine the appropriate antidumping duty margin to apply to subject merchandise, for the purpose of directing CBP to liquidate suspended entries of subject merchandise at that rate.<sup>16</sup> As such, Type 03 data are a specific and reliable source of the relative volume of shipments of subject merchandise that have been suspended and are subject to review and assessment.

Moreover, as the respondent selection data are used only to rank the exporters under review by volume of shipments during the POR so that the Department can make a selection determination under section 777A(c)(2)(B) of the Act early in the review, the Department does not and cannot require that the data be flawless. Definitive determinations of whether merchandise is subject to an order often take significant time to resolve and are done pursuant to separate requests and proceeding segments.<sup>17</sup>

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<sup>13</sup> In this case, we initiated the review on March 26, 2009, and selected respondents on May 29, 2009. See Initiation Notice; see also "Memorandum to James Doyle, Director, Office IX, from Irene Gorelik, Senior International Trade Analyst, Office IX, Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China: Selection of Respondents for Individual Review," dated May 29, 2009 ("Respondent Selection Memo").

<sup>14</sup> U.S. Harmonized Tariff Schedule.

<sup>15</sup> See, e.g., Certain Tissue Paper Products from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 18497 (April 4, 2008), unchanged in Certain Tissue Paper Products from the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review, 73 FR 58113 (October 6, 2008) (rescinding the review of Guilin Qifeng after finding that its reported sales were liquidated as not subject to antidumping duties and notifying CBP of potentially misclassified entries).

<sup>16</sup> See section 751(a)(2)(C) of the Act (stating that one of the purposes of an administrative review is to assess the current amount of antidumping duties on entries of subject merchandise).

<sup>17</sup> For example, the Department normally resolves any significant scope questions for reporting purposes (e.g., determinations regarding the proper country of origin if merchandise has been processed in a third country, or

The chosen respondent selection data are not used to *definitively* determine any particular respondent's actual quantity of subject merchandise shipped during the POR. In fact, the Department requires exporters who believe they had no shipments during the POR to file no-shipment certifications, and does not simply rely on the absence of shipments in the CBP data before determining whether that party has any entries subject to review.<sup>18</sup> Thus, the Department recognizes that while any data set (whether Type 01, Type 03 or Q&V questionnaire responses) it uses may contain some errors, it should nevertheless be a reasonably accurate reflection of the relative position of the exporters under review. Accordingly, the Department necessarily balances the need for resolving any questions concerning the shipment data against the need for expeditious respondent selection.

With these goals in mind, the Department further considers the arguments and information placed on the record by Petitioner. The Department first discusses the evidence on the record that, according to Petitioner, demonstrates that Type 03 data is not a reliable basis for respondent selection. The Department then analyzes each of the alternative sources of data that Petitioner has suggested the Department use in lieu of, or in addition to, Type 03 data.

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determinations as to whether the merchandise is subject to an exclusion) in a separate scope segment of the proceeding. Another remedy available under the dumping law is pursuit of an anti-circumvention inquiry. In PRC Shrimp AR4 Final, we stated that the statute:

provides for remedies from alleged circumvention of antidumping duty orders in section 781 of the Act. In addition, the Department's regulations provide for circumvention inquiries to be conducted as separate segments of the proceeding. See 19 CFR 351.225. Because the Department has neither received a request to initiate an anti-circumvention inquiry nor self-initiated a separate anti-circumvention inquiry for the antidumping duty order on shrimp from the PRC, Petitioner's comments are misplaced here and will not be addressed further.

See PRC Shrimp AR4 Final, 75 FR 49460 at Comment 1. The Department notes that, to date, Petitioner has yet to file a request for the Department to conduct an anti-circumvention inquiry in the PRC shrimp case.

<sup>18</sup> See, e.g., Shrimp AR4 Prelim, 75 FR at 11856, where we stated that "several companies filed no shipment certifications indicating that they did not export subject merchandise to the United States during the POR. In order to corroborate these claims, we sent an inquiry to CBP to determine whether CBP entry data is consistent with the statements" of these exporters.

## 2. ANALYSIS OF EVIDENCE ON THE RECORD

### a. Reports to Congress Regarding CBP Investigations

In its comments dated April 9, 2009, Petitioner included limited portions of two reports from government agencies to the U.S. Congress.<sup>19</sup>

#### *CBP Report to U.S. Congress (2007)*

The first report, of which Petitioner provided two pages, is a CBP report to the U.S. Congress regarding CBP's plans to: 1) increase antidumping and countervailing duty collections; and 2) improve antidumping and countervailing duty enforcement actions and compliance initiatives. The information presented to the Department in this submission consists of the "table of contents" and "page 11" of this report.<sup>20</sup> Page 11 of this report, as presented to the Department, contains a narrative listing of "enforcement activities undertaken by CBP during FY 2007 to address circumvention issues."<sup>21</sup> This listing included the following items (in brief): CBP's detection of illegal transshipments of honey from the PRC; undervaluation and misdescription of dynamic random access memory semiconductors from Korea; misclassification outside the scope of the order of Chinese shrimp entered as "dusted" shrimp; smuggling schemes related to polyethylene retail carrier bags from the PRC; and other enforcement operations related to petroleum wax candles, folding gift boxes, and certain lined paper products from the PRC, and porcelain on steel cookware from the PRC and Taiwan.<sup>22</sup> The narrative discussion on this page of the CBP report to the U.S. Congress that is allegedly relevant to this case involves the misclassification of "dusted" shrimp from the PRC.<sup>23</sup> The narrative in this report also states that "CBP recently {2007 or before} completed this operation and

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<sup>19</sup> See Petitioner's respondent selection comments dated April 9, 2009, at Exhibit 1 and 2.

<sup>20</sup> See *id.*, at Exhibit 1.

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> Dusted shrimp is shrimp coated in a light dusting of flour and had been originally excluded from the scope of the PRC shrimp order. However, subsequent to our remand redetermination (Final Results of Redetermination Pursuant to Court Remand, Court No. 05-00192 (October 29, 2009)) found at <http://ia.ita.doc.gov/remands/09-69.pdf>, dusted shrimp is now included within the scope of the order and considered subject to antidumping duty collection. See Certain Frozen Warmwater Shrimp From Brazil, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam: Amended Antidumping Duty Orders in Accordance with Final Court Decision, 76 FR 23277 (April 26, 2011).

has initiated procedures to collect the lost revenue and issue penalties. Further investigations with Immigration and Customs Enforcement (“ICE”) and penalty processing are underway.”<sup>24</sup>

*Government Accountability Office (“GAO”) Report to the U.S. Congress*

In its comments dated April 9, 2009, Petitioner also included a portion of a report from the GAO to the U.S. Congress.<sup>25</sup> This report from February 2009, of which Petitioner provided only pages 16, 19, and 20,<sup>26</sup> discussed shrimp imports from the PRC misclassified as dusted shrimp, similarly discussed in the aforementioned CBP report to the U.S. Congress. The report also discusses a 2007 audit of an importer who was found to have evaded an estimated \$2.2 million in antidumping duties on PRC-origin shrimp transshipped through Indonesia.<sup>27</sup> The remaining narrative on pages 19-20 discusses Food and Drug Administration’s (“FDA”) efforts to regulate seafood imports, not exclusive to shrimp.

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

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<sup>24</sup> See id.

<sup>25</sup> See id., at Exhibit 2.

<sup>26</sup> See id.

<sup>27</sup> See id.

## **b. Various Import Data**

### *U.S. Census Bureau Data*

In Exhibit 3 of Petitioner's comments dated April 9, 2010, Petitioner provided U.S. Census Import Data for each month of the POR, specific to the USHTS subheadings<sup>28</sup> that are included within the scope of the order.<sup>29</sup> Petitioner points to the large export volume within the data, arguing that the total volume (in pounds) for the POR far surpassed the total volume of Type 03 data released to the parties, thereby demonstrating another example of the alleged unreliability of the Type 03 data as a means to select respondents.

This data, while citing to the U.S. Census Bureau, was not provided in the original format and cannot be definitively identified as primary data obtained from the U.S. Census Bureau, such that the Department is able to determine the parameters used in obtaining that specific data. Additionally, in the shrimp case, with few exceptions, the USHTS subheadings are basket categories that may include both subject and non-subject merchandise. For example, "dusted" shrimp, does not have its own

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<sup>28</sup> The Department notes that USHTS subheadings referenced within the scope of the order are provided for convenience and for CBP purposes only and are not dispositive, but rather the written description of the scope of the order is dispositive.

<sup>29</sup> During this POR, the scope of the order (truncated):

includes certain frozen warmwater shrimp and prawns, whether wild caught (ocean harvested) or farm raised (produced by aquaculture), head on or head off, shell on or peeled, tail on or tail off, deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this investigation, regardless of definitions in the Harmonized Tariff Schedule of the United States ("HTS"), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size. . .

Excluded from the scope are: (1) Breaded shrimp and prawns ( HTS subheading 1605.20.1020); (2) shrimp and prawns generally classified in the Pandalidae family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell on or peeled (HTS subheadings 0306.23.0020 and 0306.23.0040); (4) shrimp and prawns in prepared meals (HTS subheading 1605.20.0510); (5) dried shrimp and prawns; (6) Lee Kum Kee's shrimp sauce; (7) canned warmwater shrimp and prawns (HTS subheading 1605.20.1040); (8) certain dusted shrimp; and (9) certain battered shrimp. Dusted shrimp is a shrimp based product: (1) That is produced from fresh (or thawed from frozen) and peeled shrimp; (2) to which a "dusting" layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to individually quick frozen ("IQF") freezing immediately after application of the dusting layer. Battered shrimp is a shrimp based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par fried.

The products covered by this investigation are currently classified under the following HTS subheadings: 0306.13.0003, 0306.13.0006, 0306.13.0009, 0306.13.0012, 0306.13.0015, 0306.13.0018, 0306.13.0021, 0306.13.0024, 0306.13.0027, 0306.13.0040, 1605.20.1010 and 1605.20.1030. These HTS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this investigation is dispositive.

USHTS subheading. One USHTS subheading referenced in the scope of the PRC shrimp order is HTS 0306.13.00.03: Frozen Shrimps and prawns, shell-on, Count size (headless weight) less than 22 per kg. However, the main heading of HTS 0306 is: Crustaceans, whether in shell or not, live, fresh, chilled, frozen, dried, salted or in brine; crustaceans, in shell, cooked by steaming or by boiling in water, whether or not chilled, frozen, dried, salted or in brine; flours, meals, and pellets of crustaceans, fit for human consumption (emphasis added). The words “flours, meals” may include dusted shrimp, which was excluded from the scope of the Order during this POR. Thus, despite being excluded from the order at the time, “dusted” shrimp could have entered under the same USHTS number whether it was classified as Type 01 (non-subject) or Type 03 (subject) at the border. Consequently, Petitioner’s inclusion of U.S. Census Import Data, using the USHTS subheadings, as evidentiary support, does not identify how Type 03 data, for this review period, is wrong or unreliable.

Secondly, the Census Bureau Data (also referred to as IM-145) is simply a derivative of more detailed CBP data. Indeed, in past cases, the Department has explained that:

the IM-145 data is publicly available information that has been scrubbed to ensure that it does not divulge any proprietary information of the parties involved in the transactions, especially in cases where there are only a small number of transactions being aggregated within that data...For that reason, we used the CBP data, which is the underlying source data for the public information released in the IM-145 statistics.<sup>30</sup>

In other words, the Department simply obtains Type 03 data from the underlying source of import data, CBP, to select respondents rather than relying on derivative sources, such as the IM-145 import data. Given that the IM-145 data are a derivative of CBP data, and do not otherwise differentiate between subject and non-subject merchandise, the data do not elucidate how POR Type 03 data are inaccurate.

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<sup>30</sup> See, e.g., Saccharin from the People’s Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 71 FR 7515 (February 13, 2006) and accompanying Issues and Decision Memorandum at Comment 1.

## *Automated Manifest Data*

The American Shrimp Processors Association and Louisiana Shrimp Association (“ASPA/LSA”) placed Automated Manifest (“AMS”) Data on the record. Like the derivative IM-145 data, AMS data is also obtained from CBP and, in the apparently adapted format submitted by the ASPA/LSA, shows the import volume by manufacturer from February 2008 until November 2008 (partial POR).<sup>31</sup> The ASPA/LSA argued that the AMS data they submitted show that “the vast majority of exports from China during the current period of review should be covered by the Order and hence subject to individual exporter cash deposit rates.”<sup>32</sup> The ASPA/LSA also placed the AMS data on the record within their respondent selection comments to call attention to the fact that the largest exporter identified within the data is the company excluded from the Order, Zhangjiang Guolian Aquatic Products Co., Ltd. (“Zhangjiang Guolian”).

As with the Census Bureau IM-145 import data, the AMS data are presented in an altered formatting from the original source. However, while ASPA/LSA made adjustments to purportedly exclude non-subject merchandise, the ASPA/LSA admitted that even after adjustment, the data may still include non-subject merchandise.<sup>33</sup> Furthermore, while compiled from CBP data, the AMS data do not definitively differentiate Type 01 from Type 03 entries, and thus are of little use in identifying specific problems with the Type 03 data.

With respect to both Petitioner’s and ASPA/LSA’s arguments on the record regarding Zhangjiang Guolian, the Department points to the underlying investigation, in which we calculated a *de minimis* antidumping duty margin for this company, and excluded it from the Order.<sup>34</sup> Nevertheless, both Petitioner and domestic parties continue to use this excluded manufacturer/exporter as a benchmark of export activity specific to subject merchandise, when it is, in fact, not subject to the

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<sup>31</sup> See ASPA/LSA Comments dated April 9, 2009, at Exhibit 2.

<sup>32</sup> See *id.*, at 3.

<sup>33</sup> See ASPA/LSA Comments dated April 9, 2009, at footnote 2.

<sup>34</sup> See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the People’s Republic of China, 70 FR 5149 (February 1, 2005) (“Order”).

Order.<sup>35</sup> The ASPA/LSA focus much of their argument on the existence of Zhangjiang Guolian's large volume of exports in 2008, as compared to 2004 (the source for which ASPA/LSA only cited but failed to place on our record).

Regardless of whether Zhangjiang Guolian's exports have increased or not since the underlying investigation, as Zhangjiang Guolian is excluded from the Order, shipments by Zhangjiang Guolian are not relevant to our respondent selection process. Furthermore, we note that, if a company is excluded from an antidumping order, it is quite logical that it would be more competitive *vis-a-vis* other exporters subject to the order; thus, an excluded company is able to increase its sales and export volume, as its merchandise would, naturally, not be subject to antidumping duty cash deposit collection, suspension, or liquidation.<sup>36</sup> When an exporter is excluded from an order, the Department instructs CBP not to collect any antidumping duties for that company. Thus, an excluded company's exports are expected to, and correctly, enter the United States as Type 01, not subject to antidumping duties.

**c. Misclassified Type 03 Entries Found in a Preceding Review**

Petitioner has alleged that because the Department verified the sales of a mandatory respondent (Zhanjiang Regal Integrated Marine Co., Ltd. ("Regal")) in the third administrative review and discovered inaccuracies in the classification of subject merchandise that entered as non-subject (*i.e.*, Type 01) rather than subject to antidumping duty collection (*i.e.*, Type 03), the Type 03 CBP data are unreliable as a means of selecting respondents in this administrative review (AR4). The Court also noted in the Remand Opinion and Order that Petitioner argued "the fact that, in the immediately

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<sup>35</sup> For example, domestic parties even requested an administrative review of this company, which we declined, even though it was excluded from the Order, and whose exports continue to not be subject to suspension. See, e.g., Notice of Initiation of Administrative Reviews of the Antidumping Duty Orders on Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China, 73 FR 18739, 18748 at footnote 5.

<sup>36</sup> See, e.g., Dynamic Random Access Memory Semiconductors From the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 76 FR 2336 (January 13, 2011) and accompanying Issues and Decision Memorandum at Comment 4 (where we stated that "a rise in shipments following the termination of an order reflects the economic logic of the lower rates that result.").

preceding review, Commerce discovered significant inaccuracies, undetected by Customs, in the CBP entry volume data for subject merchandise from the very same respondents as those covered in this review casts sufficient doubt on the presumption that CBP has assured the accuracy of such data for this POR.”<sup>37</sup>

The inaccuracies discovered in the verification in the preceding review are limited to just one respondent: Regal. While the findings may raise the Department’s awareness and generate questions for this respondent in a later review, the Department does not believe it to be reasonable to attribute the underreporting found of one respondent in a prior review to the universe of exporters subject to review in this POR and conclude that therefore the data is wholly unreliable for purposes of respondent selection. In the Shrimp AR3 Final, the Department duly addressed the misclassification issue found at verification by dividing “the total dumping duties owed by the entered value of dutiable entries for certain importers to ensure the proper amount of duties are collected.”<sup>38</sup> In other words, there is no evidence that Regal benefitted monetarily in any way from the misclassification. Accordingly, the Department believes that it is reasonable to assume that the Department’s actions would serve as a deterrent to importers misclassifying entries in future reviews to avoid risk of discovery through verification and subsequent action by either the Department (to the extent allowable under the statute) and/or through CBP enforcement action.

Moreover, while the Department corrected for the underreporting by assessing the total amount of uncollected antidumping duties owed over the reported Type 03 sales, the Department did not consider it necessary to apply facts available or an adverse inference to Regal in that review. To assume Regal’s entries in a different POR are inaccurate, based on information from a prior segment,

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<sup>37</sup> See Remand Opinion and Order at 10-11, citing to Aukerman v. United States, 960 F.2d 1020, 1037; Pakfood Pub. Co., Ltd. v. United States, 753 F. Supp. 2d 1334, 1345-46 (CIT 2011) (“Pakfood”); Cf. Home Products Int’l. Inc. v. United States, 633 F.3d 1369, 1380-81 (Fed. Cir. 2011) (holding that inaccuracies in one review of a producer/exporter cast doubt on similar data regarding such producer/exporter in an adjacent review).

<sup>38</sup> See Third Administrative Review of Frozen Warmwater Shrimp from the People’s Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 10026 (March 9, 2009) (“Shrimp AR3 Prelim”) unchanged in Third Administrative Review of Frozen Warmwater Shrimp From the People’s Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 46565 (September 10, 2009) and accompany Issues and Decision Memorandum at Comment 7 (“Shrimp AR3 Final”).

would be akin to an adverse determination for an exporter absent evidence on the record of that review showing that Regal (or its importers) had misreported relevant entries. Further, the record for AR4 shows that Regal's reported volume of subject exports, while not identical, is reasonably consistent with the volume provided in CBP Type 03 data.<sup>39</sup> Indeed, the misclassified entries, if entered as Type 03, would have strengthened Regal's relative position as one of the top exporters by volume, and Regal would have been selected for review anyway.<sup>40</sup>

The CIT stated in Globe Metallurgical:

{This is} not to suggest that Commerce lacks any statutory authority whatsoever to address a *stand alone transshipment allegation* like Globe's within an administrative review, but there is a difference between Commerce pursuing such an inquiry through the exercise of its gap-filling, policy-making discretion, and the court directing Commerce to do so by affirmative injunction.<sup>41</sup> (emphasis added)

The Department understands, from the CIT's opinion in Globe Metallurgical, that while the Department is able to address the consequences of certain classification problems, such as Regal's misclassification issue in AR3, within the context of a review, the broader responsibility for investigation and enforcement of the classification of merchandise between Type 01 and Type 03 lies primarily with CBP.

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<sup>39</sup> As this data is protected by the Administrative Protective Order, the Department cannot make these figures public knowledge. See "Memorandum to All Interested Parties, re; Fourth Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China: CBP Data for Respondent Selection," dated March 30, 2009, at Attachment I ("CBP Data Memo").

<sup>40</sup> The example provided in the Remand Opinion and Order, regarding continued affiliation determinations from preceding reviews can be distinguished from this case. Affiliation determinations that are bridged from segment to segment are based on analysis and determinations that the Department makes during the course of a proceeding which do not typically change unless the company later undergoes a change in corporate or legal structure. See, e.g., Notice of Initiation of Administrative Reviews of the Antidumping Duty Orders on Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China, 71 FR 17813, 17817 (April 7, 2006) at footnote 14; Certain Frozen Warmwater Shrimp From the People's Republic of China: Preliminary Results and Partial Rescission of the 2004/2006 Administrative Review and Preliminary Intent To Rescind 2004/2006 New Shipper Review, 72 FR 10645, 10646 (March 9, 2007) unchanged in Certain Frozen Warmwater Shrimp From the People's Republic of China: Notice of Final Results and Rescission, in Part, of 2004/2006 Antidumping Duty Administrative and New Shipper Reviews, 72 FR 52049 (September 12, 2007).

<sup>41</sup> See Globe Metallurgical Inc., v. United States, 722 F.Supp.2d 1372, 1381 (CIT 2010) ("Globe Metallurgical").

### 3. SUPPLEMENTS OR ALTERNATIVES TO TYPE 03 DATA

#### a. Type 01 data

While the CBP misclassification issue and transshipment findings reported in the CBP and GAO reports are of significant concern to us, Type 01 data would not provide a more reliable or accurate means by which to determine the relative positions of exporters of subject merchandise, properly suspended, during the POR than Type 03 data. Further, Petitioner did not provide any guidance as to the purpose of obtaining and releasing Type 01 data to interested parties in ascertaining the largest volume of subject merchandise exports for respondent selection, as directed by the statute.<sup>42</sup>

If the Department were to obtain this data, the Department would obtain from CBP a listing of all the entries made during the POR under the USHTS categories referenced in the scope of the Order that are designated as Type 01. The classification of whether a particular entry of merchandise is Type 01 (not subject to AD duties) or Type 03 (subject to AD duties) is recorded on CBP 7501 forms by the importer of record. The classification itself does not yield any specific information that would assist the Department in expeditiously determining whether merchandise should have been reported as Type 03, or making any modifications to the Type 03 data for purposes of respondent selection. The CBP 7501 form does not require a detailed description of the merchandise entering, but rather requires only: 1) the USHTS subheading and the title associated with that USHTS subheading; and 2) the box containing the entry type (a number such as 01, 02, 03, etc.).<sup>43</sup> As mentioned above, the USHTS categories are not helpful because they are not all exclusive to subject merchandise. Further, even if the Department were to find Type 01 data contained some entries of subject-only USHTS categories, further inquiry would be necessary to determine whether the USHTS category was accurately reported, or whether in fact the Type 01 designation was accurate. The Type 01 designation itself does not provide any additional information that would allow the Department to determine the accuracy of the

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<sup>42</sup> See 19 U.S.C. § 1677f-1(c)(2)(B).

<sup>43</sup> See Regal's Questionnaire Response dated October 22, 2009, at Exhibit SC-2 (where the CBP CF-7501 form provides only the exact data noted above, regarding the specificity of the merchandise that entered).

Type 03 data, or to make any additions or deletions to the shipments reported under Type 03.

Additionally, the Type 01 data from CBP cannot in and of itself identify the largest exporters of subject merchandise. Therefore, the Department finds Petitioner's request for Type 01 data as a "corroborative" measure of Type 03 data, or as an alternative source, to be impracticable.

**b. Q&V Questionnaire Responses**

The statute is silent as to the appropriate method to use in gathering data for respondent selection and the CIT has upheld the Department's discretion in this regard.<sup>44</sup> Consistent with the discretion afforded by the statute, the Department changed its practice from issuing Q&V questionnaires in favor of using CBP Type 03 data to select respondents in the third administrative review of shrimp. This change in practice had already been adopted across most antidumping duty cases, including all the companion shrimp cases at the time of the respondent selection at issue in this case. The Department stated in Shrimp AR3 Final that "our practice in selecting respondents in administrative reviews has been to examine CBP data of subject entries and select respondents accounting for the largest volume of exports of subject merchandise, as directed in section 777A(c)(2)(B) of the Act."<sup>45</sup> We noted only one exception to this practice regarding wooden bedroom furniture from the PRC, where the Department was unable to:

examine the volume of subject entries because the units used to measure import quantities were not consistent for the three U.S. Harmonized Tariff Schedule categories identified in the scope of the order. Specifically, where CBP data for volume of exports of subject merchandise is not available, as is the particular case in certain wooden bedroom furniture from the PRC, the Department may look to other means for gathering volume data for the purposes of respondent selection, in accordance with section 777A(c)(2)(B) of the Act.<sup>46</sup>

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<sup>44</sup> See Pakfood, 753 F. Supp. 2d 1334, 1345-46. This identical issue was litigated upon by Petitioner in the companion shrimp from India case, which was ultimately upheld by the CIT.

<sup>45</sup> See Shrimp AR3 Final, 74 FR 46565 at Comment 8, citing to Certain Lined Paper Products from the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review, 73 FR 58540 (October 7, 2008) unchanged in Certain Lined Paper Products from the People's Republic of China: Notice of Final Results of the Antidumping Duty Administrative Review, 74 FR 17160 (April 14, 2009) and accompanying Issues and Decision Memorandum.

<sup>46</sup> See id.

We distinguished the unit of measure issue for CBP data in wooden bedroom furniture from the PRC from this case, as the CBP data for shrimp does not have the issue of inconsistent units of measure, thus measuring volume of exports is not a problem. We further stated that wooden bedroom furniture was the exception to our practice.<sup>47</sup>

Issuing Q&V questionnaires in a case such as this would impose significant burdens on the parties and the Department. Relying on Q&V responses requires significant resources, and time, to send and track the delivery of Q&V questionnaires and responses, to issue follow-up questionnaires when appropriate, and to aggregate and analyze the numerous responses. The review covers nearly 500 companies, most of which were requested by Petitioner.<sup>48</sup> Conversely, obtaining CBP Type 03 data for respondent selection purposes is an efficient and practicable means to gather export volume data pursuant to section 777A(c)(2)(B) of the Act.

Moreover, Q&V responses would not necessarily provide more accurate data than Type 03 data. If respondents and/or their importers participate in widespread misclassification schemes, they are unlikely to provide information in Q&V responses that are materially different from the data reported on CF-7501 as Type 03. As Q&V questionnaires would not likely have yielded more accurate results, and thus contrary to Petitioner's claims, would not have resolved issues with Type 03 data, use of the Type 03 data remains reasonable.

The information provided by Petitioner does not provide a sufficient basis to use an alternative data source, either Type 01 data or responses to Q&V questionnaires. None of the alternatives reliably or expeditiously resolve any issues with respect to the possibility of misclassification of subject merchandise during the POR. Accordingly, Type 03 data remains the most reliable and practicable information on the record with which to select the respondents for individual examination.

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<sup>47</sup> See id.

<sup>48</sup> See Notice of Initiation of Administrative Reviews of the Antidumping Duty Orders on Frozen Warmwater Shrimp from the Socialist Republic of Vietnam and the People's Republic of China, 73 FR 18739 (April 7, 2008); see also Shrimp AR3 Prelim, 74 FR at 10026.

## COMMENTS FROM INTERESTED PARTIES

### Comment 1: Whether the Department Complied with the Court's Remand Order

In its comments on the draft remand results, Petitioner argues that the Department did not comply with the Court's order to "reconsider and provide additional explanation for, and/or modification to, such determinations" of subject entry volumes for the purposes of respondent selection under 19 U.S.C. § 1677f-1(c)(2).<sup>49</sup> Petitioner states that the Department must "reopen the record and take action to comply with the CIT's remand including the issuance of quantity and value ("Q&V") questionnaires to all respondents and/or – as expressly recognized by the CIT as a means to comply with Slip Op. 11-106 – release the Type 01 CBP data for the POR to interested parties."<sup>50</sup>

#### Department's Position:

The Department disagrees with Petitioner's reading of the Court's remand. The Court specifically stated that:

Upon remand, Commerce must take into account the record evidence of significant entry volume inaccuracies in Type 03 CBP Form 7501 data for merchandise subject to this antidumping duty order, and explain why it is nevertheless reasonable to conclude that the Type 03 CBP Form 7501 data used in this case are not similarly inaccurate, and/or otherwise reconsider its determination.<sup>51</sup>

Rather than requiring the Department to obtain and release Type 01 data and issue Q&V questionnaires, the Court, in a footnote, offered:

The court notes that, as AHSTAC suggested below . . . one way to corroborate the accuracy of CBP Type 03 entry volume data without undue administrative burden is to compare such data with CBP Type 01 entry volume data (for merchandise declared to be non-dutiable), for entries of merchandise from China falling within the scope of tariff codes subject to this antidumping duty order.<sup>52</sup>

The Court noted AHSTAC's proposal to gather and release Type 01 CBP data but did not order the Department to follow AHSTAC's suggestion. Contrary to Petitioner's assertions, the Department complied with the Court's remand and re-examined the record evidence and explained why it is

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<sup>49</sup> See Remand Opinion and Order at 19.

<sup>50</sup> See Petitioner's comments at 2-3.

<sup>51</sup> See Remand Opinion and Order at 12 (emphasis added).

<sup>52</sup> See *id.*, at 12, footnote 19.

nevertheless reasonable to conclude that the Type 03 CBP Form 7501 data used in this case are a reasonable basis upon which to base its selection of mandatory respondents for review.

## **Comment 2: Whether the Department Complied With Statutory Obligations**

Petitioner argues that the Department does not comply with its statutory obligations when it states that it does not conduct reviews for companies without any suspended entries.<sup>53</sup> Petitioner states that when mandatory respondents are selected by the largest volume, the Department is required by statute to identify the exporters and producers accounting for the largest volume of the subject merchandise from the exporting country and alleges that, by only reviewing companies with suspended entries, the Department has delegated its functions to importers who classify merchandise as subject or non-subject. Petitioner argues that “the Department, not CBP, has the statutory duty to administer the AD statute.”<sup>54</sup>

### **Department’s Position:**

#### *a. Whether the Department Must Review Unsuspended Entries*

In the draft remand, the Department stated that “[i]t is Department’s longstanding practice to not conduct reviews for companies that do not have any suspended entries because there are no entries for which the Department can issue assessment instructions.”<sup>55</sup> The Department’s statement was not an admission that importers control the scope of an administrative review. The point, instead, was that the Department does not waste administrative resources by conducting a full review that will not result in the assessment of duties.<sup>56</sup>

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<sup>53</sup> See Petitioner’s comments at 6.

<sup>54</sup> See *id.*, at 8.

<sup>55</sup> See Draft Remand Results at 5.

<sup>56</sup> For example, in certain cut-to-length carbon-quality steel plate products from Italy, the Department rescinded its review of an exporter “because there is no entry against which to collect duties.” See Certain Cut-to-Length Carbon-Quality Steel Plate Products From Italy: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 71 FR 39299 (July 12, 2006). Furthermore, 19 CFR 351.213(d)(3) allows the Department to rescind an administrative review, in whole or with respect to a particular exporter or producer, if the Secretary concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise. See, e.g., Magnesium Metal From the People’s Republic of China: Rescission of Antidumping Duty Administrative Review, 76 FR 57021 (September 15, 2011).

The statute provides that the Department shall review and determine “the amount of any antidumping duty.”<sup>57</sup> The statute further provides that any review determination “shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties.”<sup>58</sup> A policy whereby the Department would expend considerable resources to determine whether or not entries should have been suspended but were not, and to determine the amount of dumping on entries for which assessment cannot be effectuated would be a futile exercise. Presumably, Petitioner intends for the Department to simply determine a new cash deposit rate. However, nothing in the statute compels the Department to conduct a review simply to determine cash deposit rates. But even if the Department were to conduct such a review, Petitioner’s goal is illusory, as it cannot resolve the fundamental issue: if exporters and importers are not appropriately declaring merchandise as subject to antidumping duties, they are not only evading assessment but the payment of cash deposits as well.

Only if such entries were also from an exporter for which there were some suspended entries on which to issue assessment instructions as a result of an administrative review is there some merit to conducting a review and including the amount of dumping found on the unsuspended entries in the assessment rate for the suspended entries. However, Petitioner has not protected even this interest in litigating this case. Petitioner requested and obtained an injunction enjoining liquidation of entries for only the two selected mandatory respondents: Hilltop and Regal. Consequently, there has been no legal bar to CBP’s liquidation of all entries suspended from February 2008 to January 2009, apart from Hilltop’s and Regal’s. Furthermore, cash deposit rates were reset with the publication of final results of the subsequent administrative review on August 19, 2011.<sup>59</sup> Therefore, should Petitioner prevail in its claim that Type 03 data cannot be used, and the Court orders the Department to re-do its respondent

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<sup>57</sup> See section 751(a)(1)(B) of the Act.

<sup>58</sup> See section 751(a)(2)(C).

<sup>59</sup> See Certain Frozen Warmwater Shrimp from the People’s Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 76 FR 51940 (August 19, 2011). Only one company, Shantou Yuexing Enterprises Co. has a cash deposit rate set by the final results of this review.

selection in this case, there is only one company the Department could select and individually review: 1) for whom there had been suspended entries; 2) whose cash deposit rate was not superseded by the subsequent review; and 3) only in the event that this exporter reports its POR entry or sales volumes as greater than either Hilltop's or Regal's. However, because those entries were not subject to injunction, there has been no legal bar to their liquidation.

*b. Whether Misclassification of Entries Falls Under the Department's Statutory Mandate*

The Department agrees with Petitioner, in part, with respect to Petitioner's argument that Department decides whether merchandise is within the scope of an antidumping duty order. Indeed, the Department has a specific set of regulations that direct our interpretation of the scope and the statute specifically directs the Department to investigate circumvention allegations involving further processing.<sup>60</sup> However, the Department disagrees with Petitioner's contention that the Department's statutory mandate to identify the exporters and producers accounting for the largest volume of subject merchandise extends to the re-classification of entries. The Department's scope and anti-circumvention inquiries do not extend to classifying or re-classifying merchandise at the border, which is administered by CBP.<sup>61</sup> The Department understands, from the CIT's opinions in Globe Metallurgical and Kinetic Industries, that the broader responsibility for investigation and enforcement of the classification of merchandise between Type 01 and Type 03 lies primarily with CBP.<sup>62</sup> In Globe Metallurgical, the Court affirmed a decision by the Department not to conduct an administrative review of an alleged transshipment because of the resources required to conduct such an investigation, and the possibility of a review in another type of proceeding. The Court acknowledged the Department's deferral of the investigation and enforcement of the mislabeling alleged in that case (related to country of origin) to CBP: "Commerce's recognition of CPB's authority to investigate

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<sup>60</sup> See 19 U.S.C. 1677j; 19 CFR 351.225.

<sup>61</sup> See 19 U.S.C. 1592 (delineating the maximum penalties CBP can pursue in cases of fraud, gross negligence, and negligence when a party enters merchandise into the United States by means of false documents).

<sup>62</sup> See Globe Metallurgical, at 722 F.Supp.2d 1372, 1381; Kinetic Industries Inc. v. United States, Ct. No. 10-325, Slip Op. 11-138 (November 17, 2011).

fraud, gross negligence, or negligence involving entries of merchandise, and that CPB is better positioned to address a standalone country-of-origin issue is also consistent with 19 U.S.C. § 1592.”<sup>63</sup>

In Kinetic Industries, the Court affirmed the Department’s decision not to initiate an administrative review based solely on mislabeling allegations.<sup>64</sup> In that case, Petitioner had requested an administrative review of the antidumping duty order on saccharin from the PRC on five Taiwanese companies, claiming that they were exporting PRC-produced saccharin to the United States and entering the merchandise as Taiwanese in an effort to avoid paying antidumping duties. The Department declined to initiate an administrative review based on these country-of-origin allegations on merchandise entered as non-subject. The CIT found that the Department’s grounds for not employing administrative review procedures in these types of cases were reasonable and that the statute “expressly anticipates review of ‘subject merchandise.’”<sup>65</sup>

To determine whether there is in fact widespread mislabeling of merchandise as non-scope would take considerable time and resources, and is not the purpose of an antidumping administrative review. In fact, the statutory timeline for administrative reviews presents a significant barrier for investigating mislabeling allegations. As stated above, the Department does have other procedures under its practice and the statute to investigate scope and anticircumvention claims, which provide more flexible timelines, but which Petitioner has not requested.

Furthermore, the Department finds that it would be impracticable, if not impossible, to address the classification of entries during its respondent selection process. As explained above, respondent selection takes place early in the review in order to leave time for the issuance of questionnaires,

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<sup>63</sup> See id. The Court also stated that “Globe has not persuaded the court that Commerce, in addition to its statutory duty to calculate dumping margins for known entries of subject merchandise within an administrative review, must also, within the same administrative review, investigate an importer with no known entries of subject merchandise, that has certified it has no such entries (confirmed by CPB data), and that may be fraudulently evading an antidumping order by mislabeling entries of subject merchandise. Suffice it to say, Commerce’s handling of Globe’s transshipment allegation represents a permissible construction of the antidumping statute to which the court must defer.” See id.

<sup>64</sup> See Kinetic Industries Inc. v. United States, Ct. No. 10-325, Slip Op. 11-138 (November 17, 2011) at 7.

<sup>65</sup> See id. at 6, citing section 751(a)(2)(A)(i) of the Act.

analysis of responses, verification, and the completion of the review within statutory deadlines. The Department may be able to address the consequences of certain classification problems within the context of the administrative review (as it did with certain Regal shipments in the prior review) but finds it would be time-prohibitive to investigate the classification of merchandise during the respondent selection process.

**Comment 3: Whether CBP Type 01 Data Could Corroborate CBP Type 3 Data**

In its comments, Petitioner argues that Type 01 data could corroborate Type 03 data. Petitioner claims that Type 01 data is related to Type 03 data and could prove its accuracy.<sup>66</sup>

**Department's Position:**

The Department disagrees with Petitioner's contention that Type 01 data could, in any way, prove or disprove the Type 03 data's accuracy. First, the Department responds to Petitioner's comment that, by not obtaining Type 01 data, the Department is admitting that the data would undermine our respondent selection process.<sup>67</sup> This logic is false. The Department did not obtain Type 01 data from CBP and therefore does not know what information is contained therein. Instead, as explained above, the Department re-examined the record evidence and weighed the usefulness of obtaining Type 01 data.

Second, the Department disagrees with Petitioner that Type 01 data could corroborate the Type 03 data already on the record. Type 01 and Type 03 data are, by definition, mutually exclusive. Type 01 data are comprised of entries classified as non-subject merchandise; Type 03 data are comprised of entries classified as subject merchandise. The Department does not know, and Petitioners do not suggest, a way that the two datasets could be used to verify or corroborate each other. For example, if a company has a large volume of Type 01 entries (non-subject merchandise), it does not logically follow that the same company must also have a large volume of Type 03 entries (subject merchandise).

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<sup>66</sup> See Petitioner's comments at 11.

<sup>67</sup> See *id.*, at 12.

In this case, if a company is a large exporter of breaded shrimp, which are excluded from the antidumping duty order and would enter as Type 01 entries, that company may not be a large exporter of other types of shrimp that are subject to the antidumping duty order. In its draft remand redetermination, the Department noted that Petitioner did not provide any guidance as to the purpose of obtaining and releasing Type 01 data. Despite the Department's note in the draft remand results that such a lack of explanation as to how Type 01 data could be used to help resolve this issue, Petitioner continues to not explain how Type 01 data can be used to corroborate the Type 03 data or to ascertain the largest volume of subject merchandise exports. The Department continues to find that Type 01 data are not a more reliable or accurate means by which to determine the relative positions of exporters of subject merchandise.

**Comment 4: Whether Misclassification Has Continued Through This Review Period**

Petitioner has argued that the CBP and GAO reports that it submitted on the record, along with Regal's misclassification issues from the third administrative review period, are evidence that misclassification of entries has continued through this administrative review period.<sup>68</sup> Furthermore, Petitioner argues that the record shows evidence of unpaid duties.<sup>69</sup> Petitioner further argues that CBP's efforts to counter circumvention undermine the use of Type 03 data.<sup>70</sup>

**Department's Position:**

The Department disagrees that the evidence on the record demonstrates that misclassification of entries occurred during this period of review. First, the CBP Report to U.S. Congress, dated 2007, outlines CBP's plans to increase antidumping and countervailing duty collections and improve antidumping and countervailing duty enforcement actions and compliance initiatives. The report specifically states that CBP completed its operation with regards to "dusted" shrimp and that further

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<sup>68</sup> See Petitioner's comments at 19, 23.

<sup>69</sup> See *id.*, at 20.

<sup>70</sup> See *id.*

investigations were underway with Immigration and Customs Enforcement.<sup>71</sup> Second, the GAO Report to U.S. Congress, dated 2009, discusses a 2007 audit of a shrimp importer who was found to have evaded antidumping duties by transshipping PRC-origin shrimp through Indonesia. Both of these reports were written and published before the 2008-2009 period of review. Neither report identifies any specific importers or exporters found to be providing false information. This information is of a general nature that does not provide the Department with information to either elucidate or correct, if necessary, the data appearing in the Type 03 listing for the POR.

The Department finds that evidence that Regal had misclassified entries during the third period of review does not create a presumption that it also had misclassified entries in the fourth administrative review. Furthermore, as Regal was fully reviewed in this fourth administrative review period, and the Department did not find any evidence that Regal misreported or underreported any sales of subject merchandise, we find that Petitioner's speculative argument regarding Regal's purported continuation of misreporting of sales is unfounded, based on the record evidence of this review period. Further, Petitioner argues that importer misclassification does not typically change between consecutive reviews and argues that the "industry for exporting Chinese shrimp into the United States is structured such that there is a likelihood of entry misclassification."<sup>72</sup> Petitioner has not pointed to any record evidence that demonstrates that the Chinese or U.S. shrimp industry is organized in a way such that misclassification is likely. Petitioner also has not pointed to any facts that support its statement that importer misclassification typically continues from review to review. When the Department has made a finding of affiliation between companies engaging in legitimate business activities, it is reasonable to begin the next review assuming that the corporate structure has not changed (which evidence gathered during the review will confirm or refute). In contrast, Petitioner is asking the Department not merely to presume, but to conclude, that there has been continued behavior

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<sup>71</sup> See Petitioner's respondent selection comments dated April 9, 2009, at Exhibit 1.

<sup>72</sup> See Petitioner's comments at 25.

(at least by the importers) to avoid the payment of dumping duties. In short, Petitioner asserts that the Department should apply an adverse inference in all future administrative reviews and to all respondents that they and/or their importers are misclassifying entries, based on Regal's verification findings in the third administrative review. The Department does not find that the record supports making such an adverse inference in the future or applying it across the entire industry. Furthermore, the record for AR4 shows that Regal's reported volume of subject exports is consistent with the volume reported in the CBP Type 03 data.<sup>73</sup>

Petitioners argue that the Census IM-145 and AMS data indicate misclassified entries during this period of review.<sup>74</sup> The Department is perplexed by this argument because the Census IM-145 data are derivative of more detailed CBP data: the very same data Petitioner has attacked as unreliable and unusable. The Department cannot use the datasets to corroborate (or impugn) the Type 03 data when they are all from the same source. Furthermore, neither dataset contains information about subject merchandise exclusively. Because the datasets may contain information about non-subject merchandise, they cannot be used for respondent selection or as a means to corroborate one another.

Finally, Petitioners argue that Zhangjiang Guolian's AMS entry data indicate that importers are misclassifying shipments of Chinese shrimp to avoid paying antidumping duties.<sup>75</sup> The Department has sufficiently, and repeatedly, explained that Zhangjiang Guolian's entries of merchandise that fits the description of the scope are not subject to the Order because this company was excluded from the Order at the final determination of the less-than-fair-value investigation. Therefore, as noted above, Zhangjiang Guolian's entries are expected to enter the United States as Type 01. Petitioner cannot point to any record evidence that demonstrates any misclassification. The Department notes that

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<sup>73</sup> Petitioner asserts that the Department used proprietary information in its remand redetermination without releasing the information under an administrative protective order. See Petitioner's comments at 26. However, all of this information is accessible under the APO and has been released to Petitioner. See, e.g., "Memorandum to All Interested Parties, from Paul Walker, Analyst, re; Fourth Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China: CBP Data for Respondent Selection," dated March 30, 2009; see also "Memorandum to the File, from Bob Palmer, Analyst, re; Fourth Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Analysis Memo for Zhanjiang Regal Integrated Marine Resources Co., Ltd." dated August 9, 2010.

<sup>74</sup> See Petitioner's comments at 28-30.

<sup>75</sup> See *id.* at 31-32.

Zhangjiang Guolian's increased exports could easily be the result of increased competitiveness because its merchandise is not subject to the antidumping duty cash deposit collection, suspension, or liquidation.

The Department does not find any of these data sources to be helpful in either corroborating the Type 03 data or in identifying any specific flaws in the Type 03 data. The Department understands that reports of misclassification indicate that the Type 03 data may not be complete. But this potential for less than perfect accuracy must be viewed in light of the alternatives available and the need to conduct respondent selection early in the review. Type 01 data in and of itself is not an alternative data source for respondent selection. Quantity and value questionnaires, when a review covers nearly 500 companies, are extremely burdensome and not likely to yield materially different results than the Type 03 data. Accordingly, Type 03 data remains the best information available with which to conduct respondent selection.

**Comment 5: Whether the Department's NME Reseller Policy Applies to This Remand**

Petitioner argues that the Department is "fully aware of importer misclassification to avoid the payment of AD duties."<sup>76</sup> Petitioner argues that although the Department's recent announcement in Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties, 76 FR 65694 (October 24, 2011) ("NME AD 2011") addresses Type 03 misclassification, the Department should also address misclassification of Type 01 entries.<sup>77</sup>

**Department's Position:**

The Department disagrees with Petitioner's interpretation of the policy refinement as outlined in NME AD 2011. In NME AD 2011, the Department implemented a policy refinement regarding the rate at which it will instruct CBP to liquidate certain non-reviewed entries in non-market economy cases. Specifically, the Department said that

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<sup>76</sup> See id., at 36.

<sup>77</sup> See id.

for entries that are not reported in the reviewed company's U.S. sales databases submitted to the Department during an administrative review, or otherwise determined not covered by the review (*i.e.*, the reviewed exporter claims no shipments), the Department will instruct CBP to liquidate such entries at the NME-wide rate as opposed to the company-specific rate declared by the importer at the time of entry.<sup>78</sup>

The goal of the Department's policy refinement was to clarify what rate should apply to particular suspended entries at the time of liquidation and does not address the issue of importer misclassification. It necessarily addresses only merchandise that has already been classified as Type 03 and suspended, addressing what rate to apply to certain entries that were not specifically reviewed. This policy does not address Type 01 entries because those entries are entered as not subject to any antidumping duty order and are not suspended.

## **CONCLUSION**

In accordance with the Court's instructions, we have provided detailed explanations regarding our respondent selection determination using CBP Type 03 data, which was based on substantial evidence on the record of this administrative review. Significant additional research or analysis of data at the time respondent selection must be completed in the review would not only create undue burdens on parties and the Department, but cannot, in this case, yield significantly more accurate results. Absent specific direct evidence of significant errors in Type 03 data for the 2008-2009 POR, or alternative data that is shown to be better, POR Type 03 data remains an accurate and reliable data source for the limited purpose of ranking exporters by volume for selection of mandatory respondents.

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<sup>78</sup> See NME AD 2011, 76 FR at 65694.

Accordingly, it is unnecessary to obtain other data to corroborate the respondent selection determination, as other data would not necessarily provide more accurate results as to the largest exporter of subject merchandise by volume.

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Christian Marsh  
Acting Assistant Secretary  
for Import Administration

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Date