U.S. Court of International Trade

Slip Op. 17–76

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

Before: Claire R. Kelly, Judge
Court No. 15–00279

[Sustaining the final results of redetermination, pursuant to court remand, in the ninth administrative review of the antidumping duty order on certain frozen warmwater shrimp from the Socialist Republic of Vietnam.]

Dated: June 29, 2017

Nathaniel Jude Maandig Rickard and *Roop Kiran Bhatti*, Picard, Kentz & Rowe, LLP, of Washington, DC, for plaintiff.

Kara Marie Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *James H. Ahrens, II*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

OPINION

Kelly, Judge:

Before the court for review is the U.S. Department of Commerce's ("Commerce") remand determination filed pursuant to the court's order in *Ad Hoc Shrimp Trade Action Committee v. United States*, 41 CIT __, 219 F. Supp. 3d 1286 (2017) ("*Ad Hoc Shrimp I*"). *See* Final Results of Redetermination Pursuant to Court Remand, Jun. 7, 2017, ECF No. 66–1 ("Remand Results").

In *Ad Hoc Shrimp I*, the court remanded to Commerce the final results in the ninth administrative review of the antidumping duty order on certain frozen warmwater shrimp from the Socialist Republic of Vietnam ("Vietnam") for redetermination of the surrogate data selected to value the labor factor of production in this review. *Ad Hoc Shrimp I*, 41 CIT at __, 219 F. Supp. 3d at 1300. Specifically, the court remanded for Commerce to explain or reconsider its methodology for demonstrating labor data to be aberrational, and to explain or reconsider why the Bangladeshi labor data the agency selected is not aberrational, in light of record evidence of systemic labor abuses in the Bangladeshi shrimp industry, or to reconsider its selection. *See id.*

For the reasons that follow, Commerce's Remand Results comply with the court's order in *Ad Hoc Shrimp I* and accordingly are sustained.

BACKGROUND

The court assumes familiarity with the facts of this case as discussed in the previous opinion ordering remand to Commerce, and here recounts the facts relevant to the court's review of the Remand Results. *See Ad Hoc Shrimp I*, 41 CIT at __, 219 F. Supp. 3d at 1288–90.

In the final determination of this administrative review, Commerce selected Bangladesh as the primary surrogate country for valuing respondents' factors of production. Issues and Decision Memorandum for the Final Results, A-552–802, 46–55, (Sept. 8, 2015), ECF No. 18–2 ("Final Decision Memo"). Over objections from Ad Hoc Shrimp Trade Action Committee ("Ad Hoc Shrimp"), Commerce also selected labor wage rate data from the Bangladeshi shrimp industry to value the labor factor of production. *Id.* at 46–55.

Plaintiff, Ad Hoc Shrimp, commenced this action to challenge Commerce's decision to use labor wage rate data for the Bangladeshi shrimp industry, published by the Bangladesh Bureau of Statistics ("BBS"), to value the labor factor of production in this review. *See* Mem. L. Support Pl. Ad Hoc Shrimp Trade Action Committee's USCIT Rule 56.2 Mot. J. Agency R. 15–39, Apr. 20, 2016, ECF No. 27. Ad Hoc Shrimp presented evidence of systemic labor abuses throughout the shrimp industry in Bangladesh, which Ad Hoc Shrimp alleged render the BBS labor data inherently unreliable and aberrational. *See id.* at 22–28. Defendant responded that Commerce's determination that the Bangladeshi data was the best available information was supported by substantial evidence, as Plaintiff did not present "specific quantitative evidence" of aberration; that is, Plaintiff did not present quantitative evidence establishing that "labor conditions in Bangladesh depressed wage rates in Bangladesh." Def.'s Resp. Opp'n Pls.' Rule 56.2 Mots. J. Agency R. 23, Sept. 29, 2016, ECF No. 42 ("Def.'s Resp."). Defendant and Commerce emphasized that Plaintiff's evidence did not allow the agency to conduct a quantitative analysis of the data, as is its practice for assessing aberration. *Id.* at 16–20; *see* Final Decision Memo at 49–54. Defendant alleged that, because a quantitative analysis was not possible, Commerce reasonably concluded that Plaintiff had not met its burden of proving aberration. Def.'s Resp. at 18–20.

The court remanded for Commerce to: 1) clarify or reconsider its practice with regard to how Plaintiff can demonstrate quantitatively

that data is aberrational given its claims stem from alleged systemic labor abuses; and 2) explain why the Bangladeshi wage rate data is not aberrational in light of record evidence of systemic labor abuses; or if the data is aberrational why, it is nonetheless the best available information, or reconsider its determination that the Bangladeshi data is the best available information. *Ad Hoc Shrimp I*, 41 CIT at __, 219 F. Supp. 3d at 1300.

Commerce filed the Remand Results on June 7, 2017. Commerce reconsidered its requirement of a quantitative analysis for evaluating a claim of aberrational labor data, concluding that a quantitative analysis is not reasonable where, as here, the petitioner has presented evidence of systemic labor abuse. Remand Results at 8. Commerce explained that, because "wages among economically comparable countries and across industries often vary considerably," it determined that "a quantitative comparison of data across countries, or within a single country, does little to address whether or not a labor value is 'aberrational.'" *Id.* Commerce concluded that "the petitioner cannot reasonably be expected to 'demonstrate quantitatively' that potential surrogate labor values are aberrational when its claims stem from systematic labor abuses." *Id.* Commerce determined that, in light of the record here and the alternate data available, the Bangladeshi wage rate data does not constitute the best available information for valuing the labor factor of production in this review, *id.* at 10–11, ultimately selecting the Indian wage rate data on the record instead. *Id.* at 10.

Following publication of the Remand Results, Ad Hoc Shrimp filed comments in support of the remand determination, noting "the absence of any challenge to the Remand Results from any party to this proceeding" and requesting that the court sustain the Remand Results. Pl. Ad Hoc Shrimp Trade Action Committee's Comments on Remand Results 1–2, Jun. 12, 2017, ECF No. 67.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012),[1] which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also

[1] 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.

reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

To determine normal value for subject merchandise exported from a nonmarket economy country,[2] Commerce uses surrogate values for the factors of production ("FOP") "based on the best available information[3] regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority."[4] 19 U.S.C. § 1677b(c)(1); *see* 19 C.F.R. §§ 351.408(a)–(c) (2015).[5] Commerce determines what data constitutes the best available information using criteria developed through practice.[6] *Qingdao Sea–Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014). Commerce has a regulatory preference to value all FOPs using data from a single surrogate country, 19 C.F.R. § 351.408(c)(2), and its current practice is to value labor using industry-specific data from the primary surrogate country, as published in Chapter 6A of the ILO Yearbook of Labor Statistics. *Antidumping Methodologies in Proceedings Involving Non Market Economies: Valuing the Factor of Produc-*

[2] The term "nonmarket economy country" means any foreign country that Commerce determines "does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). In such cases, Commerce must "determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise . . . [together with other costs and expenses]." 19 U.S.C. § 1677b(c)(1).

[3] As "best available information" is not statutorily defined, Commerce has discretion to determine what data constitutes the best available information in a given case and to value the FOPs accordingly. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011); *Nation Ford Chemical Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (Commerce has considerable discretion in choosing the surrogate values that most accurately reflect the price that the NME producer would have paid had it purchased the FOP from a market economy country). This discretion is broad but is not unlimited; "the critical question is whether the methodology used by Commerce is based on the best available information and establishes the antidumping margins as accurately as possible." *Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001).

[4] Commerce selects for each FOP a surrogate value from a market economy country that is economically comparable to the NME country and a significant producer of the merchandise in question. 19 U.S.C. §§ 1677b(c)(4)(A)–(B); 19 C.F.R. § 351.408(b) (2015).

[5] Further citations to Title 19 of the Code of Federal Regulations are to the 2015 edition.

[6] To determine what constitutes the best available information, Commerce evaluates the quality and reliability of data sources from the countries offered to value respondents' FOPs favoring data that is: (1) specific to the input in question; (2) representative of a broad market average of prices; (3) net of taxes and import duties; (4) contemporaneous with the period of review; and (5) publicly available. *See* Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004), *available at* http://ia.ita.doc.gov/policy/bull041.html (last visited Jun. 26, 2017); *see also Qingdao Sea–Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014).

tion, Labor, 76 Fed. Reg. 36,092, 36,093 (Jun. 21, 2011); *see* Final Decision Memo at 46. Where ILO rates are not available, Commerce's preferred practice is to use industry-specific labor wage rate data from the primary surrogate country. Final Decision Memo at 46, 48.

Commerce has acknowledged that aberrational values should not be used to value FOPs. *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,366 (Dep't Commerce May 19, 1997). Where there is evidence that data is aberrational, Commerce must address that evidence in order to demonstrate that the data is nonetheless the best information available. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (noting that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Commerce's usual practice for determining whether data is aberrational is to require a quantitative analysis, comparing either data from economically comparable countries or historical data from the country at issue to determine if the data is unreliable or an outlier. *See* Remand Results at 7–8.

In *Ad Hoc Shrimp I*, the court determined that Commerce had not addressed Ad Hoc Shrimp's evidence of alleged systemic labor abuses and thus had not reasonably found the BBS labor data to be the best available information on the record. *See Ad Hoc Shrimp I*, 41 CIT at __, 219 F. Supp. 3d at 1294–1300. The court remanded to Commerce to clarify or reconsider its determination. *Id.*, 41 CIT at __, 219 F. Supp. 3d at 1300.

On remand, Commerce complied with the court's order. Commerce reconsidered its methodology for determining whether labor data is aberrational. Remand Results at 5–9. Commerce concluded that, due to the distinct nature of the labor FOP, a quantitative analysis for assessing whether prospective surrogate labor values are aberrational is not reasonable.[7] *Id.* at 8. Thus, Commerce concluded that, due to the distinct nature of the labor FOP, its "normal practice of determining if a surrogate value is 'aberrational' using a quantitative analysis cannot, and does not, provide a path by which the petitioner can demonstrate that the Bangladeshi wage rate data are aberrational, given its claim of systemic labor abuses."[8] *Id.* at 9.

[7] Commerce determined that "a quantitative comparison of data across countries, or within a single country, does little to address whether or not a labor value is 'aberrational,'" because "wages among economically comparable countries and across industries often vary considerably." Remand Results at 9. Commerce likewise determined that "the petitioner cannot reasonably be expected to 'demonstrate quantitatively' that potential surrogate labor values are aberrational when its claims stem from systematic labor abuses." *Id.* at 8.

[8] Commerce did not indicate how a petitioner could demonstrate labor wage rate data to be aberrational, when the claim is one of systemic labor abuses or otherwise.

Commerce subsequently reconsidered its determination that the Bangladeshi BBS data constitutes the best available information:

> Although the Department's practice with respect to claims of aberration does not enable the petitioner to demonstrate quantitatively that the Bangladeshi data are aberrational in light of its claim, we acknowledge that additional considerations may affect a determination as to whether potential surrogate value data constitute the best available information. Given the Court's concerns with respect to the evidence of labor abuses in Bangladesh provided by the petitioner, and given that there are no allegations of systematic labor abuses specific to the shrimp processing industries in certain other potential surrogate countries on the record, we have elected to conclude that the Bangladeshi wage rate is not the best available information on the record with which to value the respondents' labor FOPs.

Id. at 10. Commerce concluded that, notwithstanding the primary surrogate country selection of Bangladesh, the Indian wage rate data on the record constituted the best available information to value the labor FOP in this review. *Id.*

Commerce has complied with the court's order. No party challenges Commerce's Remand Results, and the Remand Results are sustained.

CONCLUSION

In accordance with the foregoing, Commerce's final determination on remand complies with the court's order and is sustained. Judgment will enter accordingly.

Dated: June 29, 2017
New York, New York

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

Slip Op. 17–77

SHANDONG DONGFANG BAYLEY WOOD CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Chief Judge
Court No. 17–00094

[Dismissing the action for lack of subject matter jurisdiction]

Dated: July 3, 2017

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, D.C., for plaintiff. With him on the brief were Alexandra H. Salzman, J. Kevin Horgan, John J. Kenkel, and Judith L. Holdsworth.

Tara K. Hogan, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Jessica R. DiPietro*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

OPINION

Stanceu, Chief Judge:

Plaintiff Shandong Dongfang Bayley Wood Co., Ltd. ("Bayley") initiated this action on May 2, 2017, seeking certain declaratory and equitable relief following the publication of the preliminary results of a countervailing duty investigation. Compl. (May 2, 2017), ECF No. 2. Plaintiff seeks a writ of mandamus to compel the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") to take certain actions, including considering a questionnaire response submitted by Bayley, conducting a verification of Bayley, and assigning Bayley a lower cash deposit rate. Pl. Dongfang Bayley Wood Co., Ltd. Petition for Writ of Mandamus (May 2, 2017), ECF No. 7 ("Pl.'s Mandamus Petition"). Plaintiff also moves for expedited consideration of its petition for a writ of mandamus. Pl.'s Mot. for Expedited Consideration of Application for Writ of Mandamus and for an Order to Show Cause why the Court Should Not Shorten the Time for Def.'s Resp. Thereto (May 2, 2017), ECF No. 8. In that motion, plaintiff urges the court to limit to 14 days the period (normally, 30 days) within which defendant may respond to its petition. *Id.* at 2. On May 24, 2017, defendant moved to dismiss for lack of subject matter jurisdiction. Def.'s Mot. to Dismiss and Resp. in Opp. to Pl.'s Application for Writ of Mandamus (May 24, 2017), ECF No. 17 ("Def.'s Mot. to Dismiss"). Bayley responded to the motion to dismiss on June 1, 2017. Pl.'s Resp. to Def.'s Mot. to Dismiss and Reply in Supp. of its Application for a Writ of Mandamus (June 1, 2017), ECF

No. 19 ("Pl.'s Resp."). Defendant replied on June 20, 2017. Def.'s Reply to Pl.'s Resp. in Opp. to Mot. to Dismiss (June 20, 2017), ECF No. 24. On June 22, 2017, plaintiff filed a letter to "inform[] the Court of developments subsequent to the filing of its briefs" (the "Letter"). Letter Pertaining to Events Subsequent to Briefing in Underlying Administrative Proceedings 1 (June 22, 2017), ECF No. 25 ("Pl.'s Letter").

Because it lacks subject matter jurisdiction, the court must dismiss this action.

I. BACKGROUND

Commerce published notice of its initiation of a countervailing duty ("CVD") investigation of certain hardwood plywood products from the People's Republic of China ("China" or the "PRC") in late 2016 for the period of January 1 through December 31, 2015 ("period of investigation" or "POI"). *Certain Hardwood Plywood Products From the People's Republic of China: Initiation of Countervailing Duty Investigation*, 81 Fed. Reg. 91,131, 91,132 (Int'l Trade Admin. Dec. 16, 2016). Along with Linyi Sanfortune Wood Co., Ltd. ("Sanfortune"), Commerce identified Bayley as one of two "mandatory" respondents, i.e., respondents that it would investigate individually, concluding that these two Chinese producers/exporters "accounted for the largest volume of exports of the merchandise under consideration during the POI." *Decision Mem. for the Prelim. Affirmative Determination: Countervailing Duty Investigation of Certain Hardwood Plywood Products from the People's Republic of China*, C-570–052, at 2 (Int'l Trade Admin. Apr. 17, 2017) available at http://enforcement.trade.gov/frn/summary/prc/2017–08328–1.pdf (last visited June 19, 2017) ("*Prelim. Decision. Mem.*").

Commerce published the preliminary results of the CVD investigation ("Preliminary Results") on April 25, 2017. *Certain Hardwood Plywood Products From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, in Part, and Alignment of Final Determination With Final Antidumping Duty Investigation*, 82 Fed. Reg. 19,022 (Int'l Trade Admin. Apr. 25, 2017). Commerce preliminarily assigned Bayley a countervailable subsidy rate of 111.09%. *Id.* at 19,023. Commerce did not assign this rate based on a review of countervailable subsidies provided to Bayley but instead relied upon its authority under section 776 of the Tariff Act of 1930 ("Tariff Act") to use an inference that is adverse to a non-cooperating

party when selecting from among "facts otherwise available." *See* 19 U.S.C. § 1677e(a), (b). Plaintiff initiated this action following the publication of the Preliminary Results.

II. DISCUSSION

In reaching the Preliminary Results, Commerce found that Bayley withheld necessary information that Commerce requested, failed to provide information within established deadlines, and significantly impeded this proceeding by not fully disclosing its affiliation with certain specified other entities. *Prelim. Decision Mem.* 24–31. Bayley raises several claims in its complaint, all of which stem from these findings.

In Count I, Bayley alleges that Commerce acted contrary to law in rejecting a questionnaire response submitted by Bayley and an affiliate. Compl. ¶ 33. Plaintiff claims, in Count II, that Commerce "unlawfully applied total adverse facts" in response to an allegation by the petitioner in the investigation "of a 'control' relationship between Bayley and a U.S. customer without issuing a *single* supplemental questionnaire to Bayley on the subject, contrary to 19 U.S.C. § 1677m(d), which requires the Department to identify deficiencies and provide a respondent the opportunity to cure deficiencies." *Id.* at ¶ 35. In Count III, Bayley claims that "[t]he Department's preliminary adverse findings, and certainly its pronouncements that the decisions were final, were inappropriate and arbitrary and capricious," alleging, *inter alia*, that Bayley fully complied with the Department's instructions and that Commerce improperly failed to investigate claims that would have benefitted Bayley. *Id.* at ¶ 37. Finally, in Count IV plaintiff claims that Commerce unlawfully refused to conduct a verification of Bayley although conducting a verification of the other mandatory respondent. *Id.* at ¶ 39.

In section 516A of the Tariff Act, Congress specifically has provided for the judicial review in the U.S. Court of International Trade of certain determinations issued under the antidumping duty ("AD") and countervailing duty laws. *See* 19 U.S.C. § 1516a(a). A preliminary affirmative countervailing duty determination is not among those reviewable determinations, although review in this Court of a *final* affirmative countervailing duty determination is expressly authorized. *See* 19 U.S.C. § 1516a(a)(2)(B) (making reviewable "[f]inal affirmative determinations by the administering authority . . . under section 1671d . . . of this title"). Should Commerce reach a final affirmative countervailing duty determination in the ongoing investigation, Bayley will have the opportunity to contest that determination upon publication and, specifically, the opportunity to assert the

claims it includes in its complaint. This Court potentially would have subject matter jurisdiction of such an action according to 28 U.S.C. § 1581(c).

Bayley asserts jurisdiction under this Court's "residual" jurisdiction provision, 28 U.S.C. § 1581(i). Compl. ¶ 3. Resort to this jurisdictional provision is available only if the remedy potentially available in an action brought according to 28 U.S.C. § 1581(c) would be "manifestly inadequate." *NEC Corp. v. United States*, 151 F.3d 1361, 1368 (Fed. Cir. 1998) (quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)).

"It is incumbent upon the plaintiff properly to allege the jurisdictional facts, according to the nature of the case." *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 182 (1936). Bayley, therefore, bears the burden of demonstrating the manifest inadequacy of its remedy under 19 U.S.C. § 1516a(a)(2)(B) and 28 U.S.C. § 1581(c). This it has failed to do.

Bayley states in its complaint that the current due date for issuance of the final determination is August 30, 2017 and that Commerce may extend this deadline to November 5, 2017. Compl. ¶ 11. In the concluding paragraph, the complaint alleges that "[u]nless corrected by the timely intervention of this Court, the Department's refusal to verify will significantly impair Bayley's ability to meaningfully participate in the countervailing duty investigation with respect to the issue of its affiliations, in violation of the express procedural protections afforded it under the countervailing duty statute." *Id.* at 15. Although maintaining that "[t]his Court has jurisdiction by reason of 28 U.S.C. § 1581(i)(2) and (4)," *id.* ¶ 3, plaintiff alleges in its complaint no facts from which the court may conclude that the remedy available upon its contesting a final affirmative CVD determination (if there is one in the administrative proceeding) is manifestly inadequate.

Bayley makes certain allegations in its petition for mandamus, in its motion to expedite, and in its reply to the motion to dismiss, that bear generally on the question of whether the remedy available under 19 U.S.C. § 1516a(a) is manifestly inadequate. These allegations are, generally, that the 111.09% cash deposit rate is causing it competitive harm by preventing it from exporting. *See*, e.g., Pl.'s Mandamus Petition 19 ("Bayley will suffer tens of millions of dollars in lost sales, commencing immediately, as a result of the Department's failure to fulfill its clear investigatory duties."); Pl.'s Resp. 15 (stating that the rate "is 100 margin points higher than the entire Chinese industry" and that "Bayley is missing out on millions of dollars' worth of sales now"). These arguments fail to suffice, not only because they are not grounded in factual allegations made in the complaint, but also be-

cause, even had they been, they would be insufficient to demonstrate the inadequacy of the judicial review mechanism Congress provided in 19 U.S.C. § 1516a(a)(2)(B) and 28 U.S.C. § 1581(c).

Bayley has not shown that the court's entertaining the objections Bayley raises now is the only means by which it may pursue an adequate remedy, i.e., one that will allow Bayley a meaningful opportunity to demonstrate an entitlement to a different rate, and fails even to demonstrate that the jurisdictional path it advocates necessarily would be superior to the judicial review mechanism Congress explicitly provided. In this case, Commerce has not completed the investigation but, according to Bayley's own complaint, will do so later this year. Nevertheless, Bayley seeks remedies that would require the court, based on the incomplete administrative record made to date, to delve into the merits of a determination that is not yet final, including "[s]etting Bayley's provisional measures rate at 9.89%, the rate for 'all others,' pending further investigation" and "[g]ranting Plaintiff such other relief as the Court may deem appropriate to ensure that the Department considers the remainder of this investigation in accordance with law and an open mind." Compl. 14. As defendant points out, Congress intended for a preliminary affirmative CVD determination to be "reviewable, if at all, only in connection with the review of the final determination." Def.'s Mot. to Dismiss 8 (quoting H.R. Rep. No. 96–1235, at 48 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3760). Bayley argues, further, that "Bayley's importers will also suffer millions in economic harm by reason of the Department's instructions to collect 111% CVD duties retroactively from them for 90 days prior to April 25, 2017" but makes no argument that this is imminent harm to *Bayley* showing that the ordinary means of obtaining judicial review of a Commerce determination will be inadequate in the circumstances of this litigation. Pl.'s Mandamus Petition 19.

Finally, nothing in plaintiff's June 22, 2017 Letter changes the foregoing analysis as to jurisdiction. In the Letter, plaintiff makes a number of allegations concerning the countervailing duty investigation and the Department's parallel antidumping duty investigation. Pl.'s Letter. Plaintiff alleges that Commerce has failed to issue it certain questionnaires, *see* Pl.'s Letter 1 ("the Department has not issued any supplemental questionnaires to Bayley subsequent to its Preliminary Determination"), and plaintiff concludes that this failure "further demonstrat[es] that the Department has effectively finished its investigation of Bayley and made a final decision in the Preliminary Determination." Pl.'s Letter 2. Commerce does not make a "final decision" in a preliminary determination; it makes a *preliminary*

determination. *See*, e.g., 19 C.F.R. § 351.205(a) ("Whether the Secretary's preliminary determination is affirmative or negative, *the investigation continues*." (emphasis added)). Plaintiff posits that the final determination will contain a certain result, but the countervailing duty investigation is not yet complete and the final determination is still pending.

In its Letter, Bayley also objects to actions Commerce is alleged to have taken in the AD investigation that, as to Bayley, are similar or equivalent to those it took in the CVD investigation. Bayley concedes, however, that the AD investigation is ongoing, Commerce having only recently issued a preliminary determination therein. Pl.'s Letter 2 ("On June 16, 2017, the Department made its Preliminary Determination in the related Antidumping Duty investigation of Hardwood Plywood from China."). Bayley argues that Commerce "will not verify Bayley in either the AD or CVD investigation without an order from this Court." *Id.* at 5. Plaintiff asserts that "[c]ounsel to Bayley has been contacted by the Department to schedule verification for the other respondents starting as early as the middle of July" and that "[t]hus, immediate action by this Court is even more pressing and necessary." *Id.* Judicial review of an affirmative final AD determination, if there is one, will also be potentially available to Bayley. Plaintiff's allegations in the Letter, which fail to demonstrate that the remedy available under this jurisdictional path would be inadequate, do not suffice to allow the court to exercise jurisdiction according to 28 U.S.C. § 1581(i).

III. CONCLUSION

Because plaintiff has failed to meet its burden of demonstrating that the remedy potentially available to it under 19 U.S.C. § 1516a(a)(2)(B) and 28 U.S.C. § 1581(c) is manifestly inadequate, this action must be dismissed for lack of subject matter jurisdiction. Judgment will enter accordingly.

Dated: July 3, 2017
New York, New York

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

Slip Op. 17–78

SDC INTERNATIONAL AUST. PTY. LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 16–00062

JUDGMENT

This case concerns the sixth administrative review of the antidumping duty order on certain steel nails from the People's Republic of China ("PRC"). *See Certain Steel Nails From the PRC*, 81 Fed. Reg. 14,092 (Dep't Commerce Mar. 16, 2016) ("Final Results"). Plaintiff SDC International Aust. PTY. Ltd.'s ("plaintiff" or "SDC") commenced suit in this Court to challenge the Final Results in one respect: the inclusion of permutations of SDC's company name in the PRC-wide entity, subjecting those name permutations to the PRC-wide rate (118.04 percent), instead of SDC's separate rate (11.95 percent). *See* Compl.; *see also* Pl.'s 56.2 Br., ECF No. 28.

After plaintiff filed its motion for judgment on the agency record the parties jointly asked the court to remand this matter for further consideration by the United States Department of Commerce ("Commerce"). On January 20, 2017, the court directed Commerce to reconsider whether it improperly included permutations of SDC's company name as a part of the PRC-wide entity. *See* Order of Jan. 20, 2017, ECF No. 31.

Before the court are the final results of Commerce's redetermination following remand. *See* Final Results of Redetermination Pursuant to Voluntary Remand Order, ECF No. 35 ("Remand Results"). In the Remand Results, Commerce determined that it would

> continue to grant a separate rate to the name SDC provided on its business license – 'SDC International Aust. PTY. LTD.' – and no other names. However, [Commerce] will amend [its] [Final Results] and issue accompanying liquidation instructions indicating that any entries under 'SDC International Australia Pty., Ltd.' and 'SDC International Australia (Pty) Ltd.' for this review period may be assessed at the separate rate for 'SDC International Aust. PTY. LTD.' [Commerce] will no longer list these name permutations in the PRC-wide entity . . . .

Remand Results at 5–6. In its comments, SDC indicates its agreement with Commerce's determinations on remand, and since "this is the relief that Plaintiff sought in this action," asks the court to sustain the Remand Results. Pl.'s Cmts. Remand Results, ECF No. 37, 1–2. The defendant United States submits that it has complied with the court's remand order and, there being no further dispute in

this action, it, too, asks the court to sustain the Remand Results. *See* Def.'s Resp. Pl.'s Cmts. Remand Results, ECF No. 38.

Accordingly, it is hereby

ORDERED that the Final Results, except for the matters covered by the Remand Results, are sustained; it is further

ORDERED that the Remand Results are sustained; and it is further

ORDERED that the subject entries whose liquidation was enjoined in this action, *see* ECF No. 11 (order granting consent motion for preliminary injunction), must be liquidated in accordance with the court's final decision, as provided for in 19 U.S.C. § 1516a(e) (2012).

Dated: July 3, 2017
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON, JUDGE

Slip Op. 17–79

BEIJING TIANHAI INDUSTRY CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and NORRIS CYLINDER COMPANY, Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 12–00203

[Plaintiff's Rule 54(b) motion is granted, and the United States Department of Commerce's Final Results of Redetermination Pursuant to Court Remand are remanded.]

Dated: July 5, 2017

Mark E. Pardo, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, argued for plaintiff. With him on the brief were *Andrew T. Schutz* and *Brandon M. Petelin*.

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Edward M. Lebow, Haynes and Boone, LLP, of Washington, DC, argued for defendant-intervenor. With him on the brief was *Nora L. Whitehead*.

OPINION AND ORDER

Eaton, Judge:

The United States Department of Commerce's ("Commerce" or the "Department") second results of redetermination pursuant to the court's remand order in *Beijing Tianhai Industry Co. v. United States*, 39 CIT __, 106 F. Supp. 3d 1342 (2015) ("*BTIC II*") and the parties' comments are before the court. *See* Final Results of Redetermination Pursuant to Court Remand (Dep't Commerce Feb. 8, 2016) ("Second Remand Results"); *see also* Pl.'s Cmts. Second Remand Results, ECF No. 108; Def.'s Resp. Pl.'s Cmts. Second Remand Results, ECF No. 112; Def.-Int.'s Resp. Pl.'s Cmts. Second Remand Results, ECF No. 113.

Also before the court is the Rule 54(b) motion of plaintiff Beijing Tianhai Industry Co. ("plaintiff" or "BTIC"), seeking to revise the court's interlocutory decision in *Beijing Tianhai Industry Co. v. United States*, 38 CIT __, 7 F. Supp. 3d 1318 (2014) ("*BTIC I*") in light of the United States Court of Appeals for the Federal Circuit's decision in *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364 (Fed. Cir. 2017). *See* Pl.'s R. 54(b) Mot. Revise J., ECF No. 121 ("Pl.'s R. 54(b) Mot.").

Defendant the United States ("defendant" or "Government"), on behalf of Commerce, and defendant-intervenor Norris Cylinder Company ("defendant-intervenor" or "Norris") oppose the motion. *See* Def.'s Resp. Pl.'s R. 54(b) Mot., ECF No. 122 ("Def.'s R. 54(b) Resp."); Def.-Int.'s Resp. Pl.'s R. 54(b) Mot., ECF No. 123 ("Def.-Int.'s R. 54(b) Resp.").

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2012). For the reasons that follow, the court grants plaintiff's Rule 54(b) motion and remands this matter to Commerce.

BACKGROUND

The pertinent background facts are set forth in the court's opinions in *BTIC I* and *BTIC II*, and are supplemented here.

In May 2012, Commerce made its final affirmative less-than-fair-value determination on imports of high pressure steel cylinders from the People's Republic of China ("PRC"). *See High Pressure Steel Cylinders From the PRC*, 77 Fed. Reg. 26,739 (Dep't Commerce May 7, 2012) (final determination), and accompanying Issues and Decision Memorandum ("Issues & Dec. Mem.") (collectively, "Final Determination"). Commerce found that BTIC had engaged in targeted dumping by time period, *i.e.*, from October 1, 2010, through December 31, 2010, and assigned it a 6.62 percent margin. *See* Issues & Dec. Mem., Cmt. 4; *see also High Pressure Steel Cylinders From the PRC*, 77 Fed. Reg. 37,377 (Dep't Commerce June 21, 2012) (antidumping duty order).

To calculate BTIC's margin, Commerce used the average-to-transaction ("A-T") method[1] because it found that its normally used average-to-average ("A-A") method[2] "conceal[ed] differences in price patterns between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group." Issues & Dec. Mem. at 24. Commerce applied the A-T method, with zeroing,[3] not only to those sales that Commerce determined constituted a pattern of export prices that "differed sig-

[1] The A-T method compares "the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise . . . ." 19 U.S.C. § 1677f-1(d)(1)(B).

[2] The A-A method compares "the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise . . . ." 19 U.S.C. § 1677f-1(d)(1)(A)(i).

[3] Zeroing is a method used for calculating an exporter's weighted average dumping margin "where negative dumping margins (i.e., margins of sales of merchandise sold at nondumped prices) are given a value of zero and only positive dumping margins (i.e., margins for sales of merchandise sold at dumped prices) are aggregated." *Union Steel v. United States*, 713 F.3d 1101, 1104 (Fed. Cir. 2013).

nificantly" among time periods, *i.e.*, 10 transactions representing 5.04 percent of the volume of BTIC's U.S. sales, but to *all* of BTIC's U.S. sales during the period of investigation, *i.e.*, October 1, 2010, to March 31, 2011 ("POI"). *See* Issues & Dec. Mem., Cmt. 4.

Plaintiff filed its motion for judgment on the agency record in April 2013. *See* Pl.'s Mem. Supp. Mot. J. Agency R., ECF No. 32 ("Pl.'s Mem."). Among the issues raised in plaintiff's opening brief was whether Commerce's practice of applying the A-T method to all of BTIC's U.S. sales, not just the "targeted dumped" sales, contravened the language and intent of the targeted dumping statute, 19 U.S.C. § 1677f-1(d)(1)(B) (2006). *See* Pl.'s Mem. 16–18.

Commerce's practice of applying the A-T method to all U.S. sales replaced Commerce's prior practice, embodied in 19 C.F.R. § 351.414(f)(2) (2007), known as the "Limiting Regulation." The Limiting Regulation provided, in pertinent part: "Where the criteria for identifying targeted dumping . . . are satisfied, the Secretary normally will limit the application of the [A-T] method to those sales that constitute targeted dumping under [19 C.F.R. § 351.414(f)(1)(i)]." 19 C.F.R. § 351.414(f)(2). That is, where (1) "there is targeted dumping in the form of a pattern of export prices . . . for comparable merchandise that differ significantly among . . . periods of time;" and (2) "[t]he Secretary determines that such differences cannot be taken into account using the [A-A] method or the [T-T] method and explains the basis for that determination," then Commerce "normally will limit the application of the [A-T] method to those sales that constitute targeted dumping . . . ." 19 C.F.R. § 351.414(f)(1)-(2). In 2008, Commerce attempted to withdraw its regulations governing targeted dumping cases, including 19 C.F.R. § 351.414(f), the provision that contains the Limiting Regulation. *See* Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 Fed. Reg. 74,930 (Dep't Commerce Dec. 10, 2008) ("Withdrawal Notice").

In its opening brief, plaintiff cited the Limiting Regulation—in particular the rationale underlying the regulation—as support for its argument that applying A-T to all of BTIC's U.S. sales was contrary to law:

> In the preamble to [the Limiting Regulation], Commerce explained that it would be "*unreasonable and totally punitive*" to apply the targeted dumping remedy to all sales in situations in which only a minimal portion of the sales database was found to be targeted. Commerce further noted that application of the targeted dumping remedy would only be appropriate in situations "in which targeted dumping by a firm is so pervasive that

> the [A-T] method becomes the benchmark for gauging the fairness of that firm's pricing practices." Commerce's withdrawal of this regulation does not alter the fact that Commerce did provide a well reasoned and rational explanation as to why a targeted dumping remedy should be limited to the targeted sales *to avoid unreasonable and unduly punitive results*. Suspiciously absent from Commerce's justification for applying the targeted dumping [remedy] to 100% of BTIC's sales is any reasoned attempt to demonstrate that this approach is not unduly punitive in light of the insignificant portion of sales found to be targeted.

Pl.'s Mem. 22 (quoting *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,375 (Dep't Commerce May 19, 1997) (final rule)). In other words, BTIC cited the Department's own words to challenge the lawfulness of Commerce's practice of applying the A-T method to all U.S. sales, including non-targeted dumped sales, made during the POI on the grounds that it was punitive and unreasonable.

Meanwhile, the validity of Commerce's withdrawal of the Limiting Regulation under the Administrative Procedure Act ("APA") was the subject of litigation before this Court. *See, e.g.*, *Gold East Paper (Jiangsu) Co. v. United States*, 37 CIT __, 918 F. Supp. 2d 1317 (2013); *Mid Continent Nail Corp. v. United States*, 38 CIT __, __, 999 F. Supp. 2d 1307, 1321 (2014), *aff'd* 846 F.3d 1364 (Fed. Cir. 2017) ("Commerce violated its obligation to provide notice and opportunity for comment prior to the rescission of the [Limiting Regulation]."). The Court's opinion in *Gold East Paper (Jiangsu) Co. v. United States* was an interlocutory decision issued in June 2013—after BTIC's opening brief was filed in this case, but before the Government filed its response brief. In *Gold East Paper*, this Court held that Commerce's withdrawal of the Limiting Regulation violated the APA and was therefore invalid. *See Gold East Paper*, 37 CIT at __, 918 F. Supp. 2d at 1327–28.[4]

[4] Subsequently, in response to the *Gold East Paper* case, Commerce issued a Federal Register notice and solicited comments regarding the Department's proposal not to apply previously withdrawn targeted dumping regulations, including the Limiting Regulation. *See Non-Application of Previously Withdrawn Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 78 Fed. Reg. 60,240 (Dep't Commerce Oct. 1, 2013) (proposed rule). After consideration of the comments received, the Department "continue[d] to find that the targeted dumping regulations, including 19 CFR 351.414(f)(2) (2007), the 'Limiting Rule', are inoperative." *Non-Application of Previously Withdrawn Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 79 Fed. Reg. 22,371, 22,377 (Dep't Commerce Apr. 22, 2014) ("Final Rule"). The final rule deeming the Limiting Regulation inoperative was effective on May 22, 2014, and applied to investigations commenced on or after that date. Final Rule, 79 Fed. Reg. at 22,371.

On August 2, 2013, the Government filed its response to plaintiff's opening brief. The Government defended Commerce's application of the A-T method to all of BTIC's U.S. sales during the POI, and not solely the targeted dumped sales, arguing that Commerce's interpretation of the targeted dumping statute was in accordance with law. *See* Def.'s Resp. Pl.'s Mot. J. Agency R., ECF No. 43 ("Def.'s Resp.") 17 ("Commerce is the agency charged with administering the antidumping statute, and Commerce's interpretation of this statute as permitting the use of the [A-T] method to all of a respondent's sales is reasonable, consistent with the remedial purposes of the antidumping law, and entitled to *Chevron* deference. Accordingly, the Court should sustain Commerce's application of the [A-T] method to all of BTIC's sales as being in accordance with law."). In addition, in a footnote, defendant called the court's attention to *Gold East Paper*:

> For the sake of completeness, we note that a recent interlocutory decision of this Court held that the regulation, 19 C.F.R. § 351.414(f)(2) (2007), was not properly withdrawn, [*Gold East Paper*], but we will not address that complex issue because BTIC concedes the regulation has been withdrawn, BTIC has never challenged the withdrawal of the regulation at any point during the history of this proceeding, and the issue is not before the Court.

Def.'s Resp. 20 n.5 (citations omitted). Defendant-intervenor also referenced *Gold East Paper* in its response brief, asserting that plaintiff had waived any argument against the validity of the withdrawal of the Limiting Regulation under the APA because it had not raised that issue in its opening brief. *See* Def.-Int.'s Resp. Pl.'s Mot. J. Agency R., ECF No. 42, 15 n.8 (citations omitted) ("Although the validity of Commerce's withdrawal under the [APA] has been discussed by this Court, most recently in [*Gold East Paper*], BTIC did not challenge the withdrawal's validity in its [opening] [b]rief. As a result, BTIC has waived its opportunity to make such an argument in this case.").

Plaintiff filed its reply brief on September 4, 2013, in which it argued that *Gold East Paper* was relevant authority that the court should consider in deciding whether Commerce's failure to limit the application of the A-T method to its targeted dumped U.S. sales was contrary to law:

> [T]here is no question that BTIC has challenged the validity of the targeted dumping methodology and findings used by Commerce in this investigation and that its challenge specifically

> opposes Commerce's application of the targeted dumping remedy to 100% of BTIC's sales. Accordingly, this [C]ourt's recent decision in *Gold E. Paper* is relevant to that issue and should be considered in the instant case, particularly with respect to the issue of whether it is proper for Commerce to apply a targeted dumping remedy to sales that were not found to be targeted.

Pl.'s Reply Br., ECF No. 50 ("Pl.'s Reply") 11.

On November 5, 2013, after the close of briefing, the court held oral argument. Subsequently, BTIC filed two notices of supplemental authority, to which the Government responded, that addressed the validity of the withdrawal of the Limiting Regulation in light of decisions issued by this Court. *See* Pl.'s Notice of Suppl. Auth., ECF No. 66 (discussing *Timken Co. v. United States*, 38 CIT __, 968 F. Supp. 2d 1279 (2014)); Def.'s Resp. Pl.'s Notice Suppl. Auth., ECF No. 67; Pl.'s Second Notice Suppl. Auth., ECF No. 80 (discussing *Mid Continent*, 38 CIT at __, 999 F. Supp. 2d at 1307); Def.'s Resp. Pl.'s Second Notice Suppl. Auth., ECF No. 81.

The court then ordered that the parties submit additional briefing regarding the "status of the withdrawal of the regulation limiting [Commerce's] application of the [A-T] method under 19 U.S.C. 1677f-1(d)(1)(B) (2006) to sales that have been identified as targeted." Order of Apr. 30, 2014, ECF No. 70. The court ordered briefing on five issues, including "[w]hether plaintiff[] [had] waived consideration of this issue by failing to raise it in [its] initial brief."[5] *Id*.

In its supplemental brief, plaintiff argued against a finding of waiver:

> The court's consideration of the legal status of Commerce's targeted dumping regulation, [*i.e.*, the Limiting Regulation,] and the effect of that regulation on the underlying proceeding, does not require the court to resolve any new legal claim. Rather, it

[5] The court ordered briefing on the following issues:

(1) Whether plaintiff[] [has] waived consideration of [the issue of the status of the withdrawal of the Limiting Regulation] by failing to raise it in [its] initial brief.

(2) The adequacy of the two Comment Requests. In particular, the nature of the responses to these requests and what further or different response might have resulted had interested parties known that the Department was considering withdrawing the regulation.

(3) The significance, if any, of the labeling of the Dec. 10, 2008 Federal Register entry as an "interim final rule," whether the Department received any response to its provision of an opportunity to comment on the withdrawal, the nature of the responses, if any, and any further action the Department took with respect to the "interim final rule."

(4) The holding in *Gold East Paper* and the footnote in *Baroque Timber Indus. (Zhongshan) Co. v. United States*, 37 CIT __, __, 925 F. Supp. 2d 1332, 1340 n.10 (2013).

(5) Whether the methodology described in the rule was being applied at the time of the Dec. 10, 2008 Federal Register entry.

Order of Apr. 30, 2014, ECF No. 70.

> requires the court to apply the *proper construction of governing law* to claims that Plaintiff has already indisputably asserted and briefed in this case.

Pl.'s Suppl. Br. Pursuant to Ct. Apr. 30, 2014 Order, ECF No. 77, 2.

Defendant and defendant-intervenor argued that despite having challenged the validity of the withdrawal of the Limiting Regulation under the APA before Commerce, plaintiff failed to raise that issue in its opening brief before the court and, as a result, waived any argument regarding the validity of the withdrawal. *See* Def.'s Suppl. Br., ECF No. 75, 1–2; *see also* Def. Int.'s Suppl. Br. Regarding the Withdrawal of 19 C.F.R. § 351.414(f) (2007), ECF No. 76, 1–5.

After receiving the parties' supplemental briefs, the court issued *BTIC I*. There, the court discussed the regulatory framework applicable to targeted dumping cases. With respect to the Limiting Regulation, the court stated:

> The withdrawn regulation . . . required [Commerce] to identify the set of sales that made up the "pattern of export prices" constituting the targeted dumping, and to limit its application of the A-T methodology to those sales. Thus, were the regulation in effect for this case, the A-T methodology would be applied only for the October 1, 2010 to December 31, 2010 period. Following withdrawal, however, the regulation no longer prohibited [Commerce] from applying A-T to all of a respondent's sales and thus no longer restricted the use of A-T to only those sales that constitute the pattern of "targeted dumping."

BTIC I, 38 CIT at __, 7 F. Supp. 3d at 1327. The court declined to reach defendant's claim that plaintiff had waived any argument that the Limiting Regulation was improperly withdrawn, holding that even if the withdrawal was executed improperly, plaintiff could not show that it had been harmed by Commerce's error. *Id*. at __, 7 F. Supp. 3d at 1332 n.7 & 1333 (applying a harmless error analysis and noting that, at that time, "the Federal Circuit ha[d] not passed on the applicability of the harmless error rule in the context of a violation of the notice and comment requirements of the APA . . ."). Accordingly, the court concluded that "as part of its analysis on remand in this case, the Department need not adhere to the requirements of 19 C.F.R. § 351.414(f) (2007)." *Id*. at __, 7 F. Supp. 3d at 1337.

The court went on to examine, among other issues, whether Commerce had satisfied the requirements of 19 U.S.C. §

1677f-1(d)(1)(B)(i) and (ii).[6] Holding that Commerce had not satisfied the explanation requirement in clause (ii), the court remanded for Commerce to explain adequately "why the standard methodologies [*i.e.*, the A-A method and the T-T method] cannot account for the pattern identified under 19 U.S.C. § 1677f-1(d)(1)(B)(i) . . . ." *BTIC I*, 38 CIT at __, 7 F. Supp. 3d at 1338.

In *BTIC II*, the court considered the first remand results and held that Commerce had explained adequately why the T-T method was not appropriate to use in this case, but remanded a second time solely for Commerce to explain why the A-A method could not account for the differences in the observed pattern of prices. *BTIC II*, 39 CIT at __, 106 F. Supp. 3d at 1349–50, 1351. In accordance with the court's remand instructions, Commerce issued the Second Remand Results, which are currently before the court.

In the Second Remand Results, Commerce continued to find that "the [A-A] method cannot take into account the pattern of prices that differ significantly for BTIC," and, therefore, that using the A-T method was appropriate in this investigation. Second Remand Results at 10. By way of explanation, Commerce stated that on remand it applied a "meaningful difference" analysis, "under which the Department compare[d] the weighted-average dumping margins calculated using the standard [A-A] method and an alternative comparison method based on the [A-T] method." Second Remand Results at 5. In making these margin calculations, Commerce continued to use U.S. prices that reflected 100 percent of BTIC's U.S. sales. Applying the "meaningful difference" analysis here, Commerce found that "the masking in this investigation is such that the [A-A] method showed no amount of dumping at all," whereas "[b]y contrast, the [A-T] method revealed above *de minimis* dumping."[7] Second Remand Results at 9–10. In other words, for Commerce, the difference between a zero percent margin and a non-*de minimis* margin was "meaningful," and justified the use of the A-T method.

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[6] In *BTIC I*, the court held that plaintiff had failed to exhaust its administrative remedies with respect to its claim that Commerce had not satisfied the pattern requirement of 19 U.S.C. § 1677f-1(d)(1)(B)(i). Therefore, the court declined to consider that claim. *BTIC I*, 38 CIT at __, 7 F. Supp. 3d at 1331.

[7] In the Second Remand Results, Commerce set out a number of hypothetical scenarios to demonstrate that applying the A-T method would only be appropriate under certain limited circumstances. Specifically, A-T will be appropriate

> where there is an identifiable above *de minimis* amount of dumping along with an amount of offsets generated from non-dumped sales such that the amount of dumping is changed by a meaningful amount when those offsets are applied. Both [the amount of dumping and the amount of offsets] are measured relative to the total export value (*i.e.*, absolute price level) of the subject merchandise sold by the exporter in the U.S. market.

Second Remand Results at 9.

After the Second Remand Results were published, the Federal Circuit issued its *Mid Continent* decision. The *Mid Continent* Court held that Commerce violated the APA by failing to provide notice and an opportunity to comment prior to withdrawing the Limiting Regulation. *Mid Continent*, 846 F.3d at 1386. The Court also held that Commerce's failure to provide notice and an opportunity to comment prior to withdrawing the Limiting Regulation was not harmless error. *Id*. ("Commerce failed to comply with notice-and-comment rulemaking under the APA by repealing the Limiting Regulation in *Withdrawal Notice*, [and] that its failure cannot be excused for good cause or harmless error . . . .").

As a result of the Federal Circuit's decision, it is clear that the Limiting Regulation was in effect between December 10, 2008, when Commerce attempted unsuccessfully to withdraw it, and May 22, 2014, the effective date of the final rule withdrawing the Limiting Regulation after notice and comment. *See id.* at 1372. That is, the Limiting Regulation was in effect at the time Commerce issued the Final Determination.

In the wake of the *Mid Continent* decision, plaintiff filed a motion pursuant to Rule 54(b), urging the court to revise its decision in *BTIC I* in light of the Federal Circuit's holdings.

STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Regarding the court's review of interlocutory decisions, Rule 54(b) provides in pertinent part, "any order or other decision . . . that adjudicates fewer than all of the claims . . . does not end the action as to any of the claims . . . and may be revised at any time before the entry of a judgment adjudicating all the claims . . . ." USCIT 54(b). This Court has held that it may reconsider a prior, non-final decision pursuant to its plenary power, which is recognized by Rule 54(b). *Union Steel v. United States*, 36 CIT __, __, 836 F. Supp. 2d 1382, 1394 (2012) (relying on Rule 54(b) as authority to reconsider the court's affirmance of Commerce's use of zeroing in a prior, non-final decision); *Timken Co. v. United States*, 6 CIT 76, 77, 569 F. Supp. 65, 68 (1983) ("[T]he court retains the plenary power to modify or alter its prior non-final rulings, particularly where the equitable powers of the court are invoked." (citations omitted)).

DISCUSSION

By its motion, plaintiff asks the court "to exercise its authority, pursuant to Rule 54(b),... and remand this Civil Action to [Commerce] with instructions to recalculate BTIC's margin of dumping to conform to the decision by the [Federal Circuit], in [*Mid Continent*]." Pl.'s R. 54(b) Mot. 1. The Government "agree[s] with BTIC that [*Mid Continent*] now controls the merits of the issue regarding the withdrawn regulation"; however, it urges the court to rule on the "separate but related question of whether BTIC had waived its arguments concerning the withdrawn regulation in this case," which the court declined to consider in *BTIC I*. Def.'s R. 54(b) Resp. 1. For its part, Norris urges the court to deny plaintiff's Rule 54(b) motion on the grounds that *Mid Continent* is "distinguishable" from this case because, unlike the plaintiff in *Mid Continent*, here BTIC "did not raise the issue [of whether Commerce's withdrawal of the Limiting Regulation was proper under the APA] in its opening brief, and, therefore, the issue is not properly before this Court." Def.-Int.'s R. 54(b) Resp. 7. According to defendant-intervenor, "as BTIC failed to raise the issue of the 2008 Withdrawal, it waived consideration of the issue, despite any intervening case law." Def.-Int.'s R. 54(b) Resp. 9.

The court finds that remand is appropriate in this case for Commerce to reconsider its application of the A-T method to all of BTIC's sales in light of the Limiting Regulation, which the *Mid Continent* Court found was in effect when Commerce made its Final Determination.

As summarized above, in *BTIC I*, the court addressed plaintiff's argument "that [the Limiting Regulation] was improperly withdrawn and that the Department's application of A-T to all of its sales [was] contrary to that regulation." *BTIC I*, 38 CIT at __, 7 F. Supp. 3d at 1332. The court examined the text of the Limiting Regulation, observing that that "were the regulation in effect for this case, the A-T methodology would be applied only for [the targeted dumping period, *i.e.*,] the October 1, 2010 to December 31, 2010 period." *Id.* at __, 7 F. Supp. 3d at 1327. The court held, however, that since the Limiting Regulation was not in effect at the time Commerce made its Final Determination, Commerce was not prohibited from applying A-T to all of BTIC's sales. *Id.* at __, 7 F. Supp. 3d at 1327. Further, the court held that even if the Limiting Regulation was improperly withdrawn for failure to comply with the APA notice-and-comment requirement, plaintiff would not have a claim to that effect because BTIC could not show that it was harmed by Commerce's error. *Id*. at __, 7 F. Supp. 3d at 1333 ("While it may be that the Withdrawal Notice failed to comply with the APA's notice and comment requirement, plaintiff's argument

that the Department must continue to apply 19 C.F.R. § 351.414(f) (2007) in this case is unpersuasive. That is, even if Commerce erred in its issuance of the Withdrawal Notice, that error is harmless as it applies to plaintiff, and the Department is not bound by the withdrawn regulation here."). Based on its harmless error ruling, the court in turn decided that it did not have to reach the waiver issue. *See id.* at __, 7 F. Supp. 3d at 1332 n.7 ("The Department and defendant-intervenor have argued that this claim should be deemed waived because of plaintiff's failure to raise this issue in its opening brief. Because the court finds that plaintiff's argument fails on the merits, it declines to reach the waiver issue.").

Generally, under the doctrine of the law of the case, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983) (citations omitted). However, there are well-established exceptions to this rule. For example, the law of the case does not preclude a court from revisiting an issue on which it has ruled in an earlier stage of a litigation "where 'controlling authority has since made a contrary decision of the law applicable to the issues.'" *Koyo Seiko Co. v. United States*, 95 F.3d 1094, 1097 (Fed. Cir. 1996) (quoting *Gould, Inc. v. United States*, 67 F.3d 925, 930 (Fed. Cir. 1995)).

Mid Continent makes it clear that Commerce's failure to comply with notice-and-comment rulemaking invalidated the withdrawal of the Limiting Regulation under the APA and that this failure to comply was not excusable as harmless error. *See Mid Continent*, 846 F.3d at 1386 ("Commerce failed to comply with notice-and-comment rulemaking under the APA by repealing the Limiting Regulation in [the] *Withdrawal Notice*, [and] that its failure cannot be excused for good cause or harmless error . . . ."). In light of *Mid Continent*, therefore, the legal basis for the court's rulings on the applicability of the Limiting Regulation and harmless error in *BTIC I* no longer holds, and remand is appropriate for Commerce to consider the Limiting Regulation in determining the scope of sales to which the A-T method ought to apply. *See Koyo Seiko Co.*, 95 F.3d at 1097; *see also SKF USA, Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001) ("A remand is generally required if the intervening event [*e.g.*, a new legal decision,] may affect the validity of the agency action.").

The Government's and Norris' arguments on waiver do not persuade the court otherwise. Federal Circuit case law on waiver teaches that, generally, "arguments not raised in the opening brief are waived." *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312,

1319 (Fed. Cir. 2006) (citation omitted); *see also Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002). However, the doctrine of waiver is a prudential rule, and considerations of "litigation fairness and procedure" may guide a court's decision as to whether a party has waived an issue. *See Novosteel SA*, 284 F.3d at 1274 (ruling that "[a]s a matter of litigation fairness and procedure," an issue was waived "given that the parties must give a trial court a fair opportunity to rule on an issue other than by raising that issue for the first time in a reply brief"); *see also United States v. Ford Motor Co*., 463 F.3d 1267, 1277 (Fed. Cir. 2006) ("It is unfair to consider an argument to which the government has been given no opportunity to respond.").

This not a case where a new legal theory was raised for the first time in the plaintiff's reply brief, thereby depriving the defendant of a fair opportunity to respond to the plaintiff's claim. In its opening brief, BTIC made a substantive legal challenge to Commerce's practice of applying the A-T method to all of its sales, not just those identified as targeted dumped sales—a practice that, while not prohibited, was not Commerce's preferred or "normal" practice under the Limiting Regulation. Plaintiff used the rationale of the Limiting Regulation to support its argument that the practice of applying A-T to all sales was contrary to law. In its reply brief, plaintiff responded to the defendant's arguments that certain cases issued by this Court, including *Gold East Paper*, were not relevant to the issues in this case. Plaintiff argued that such cases were, indeed, relevant to the question of the lawfulness of Commerce's practice of applying A-T to all of BTIC's U.S. sales and that the court ought to consider them. *See* Pl.'s Reply 11.

Moreover, there can be no serious dispute that all parties have had an opportunity to be heard on the 2008 withdrawal of the Limiting Regulation. In light of *Gold East Paper*, the court decided it would be assisted by additional briefing on the status of the purportedly withdrawn Limiting Regulation. Plaintiff, the Government, and Norris filed the requested briefs. After this additional briefing and oral argument, the court in *BTIC I* ruled on the status of the Limiting Regulation and found that it was not in effect. The court also held that even if Commerce's withdrawal of the Limiting Regulation was in error, plaintiff could not establish that it had been harmed by that error. These issues are among those addressed by the Federal Circuit in *Mid Continent*.

Accordingly, since *Mid Continent* is an intervening controlling authority that bears on the court's rulings in *BTIC I* that Commerce was not required to apply the Limiting Regulation and that the with-

drawal of the Limiting Regulation was harmless error as to plaintiff, issues with respect to which the parties have had ample opportunity to be heard, the court concludes that remand is appropriate. *SKF USA, Inc.*, 254 F.3d at 1028.

Since the Limiting Regulation was in effect at the time of the Final Determination, Commerce must apply this regulation. *BTIC I*, 38 CIT at __, 7 F. Supp. 3d at 1326 ("[O]nce the Department has promulgated a regulation, it is obliged to follow its own regulation so long as the regulation remains in force." (citing *Pujiang Talent Diamond Tools Co. v. United States*, 37 CIT __, __, Slip Op. 13–58 at 15 (May 3, 2013), *aff'd* 561 Fed. Appx. 988 (Fed. Cir. 2014))). Accordingly, on remand Commerce shall reconsider: (1) its determination that 19 U.S.C. § 1677f-1(d)(1)(B)(ii) may be satisfied by applying a "meaningful difference" analysis that relies on 100 percent of BTIC's U.S. sales; and (2) should it continue to determine that using the A-T method is appropriate, the scope of BTIC's U.S. sales to which the A-T method applies, and revise its dumping margin calculations as may be appropriate.

CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that this matter is remanded to Commerce; and it is further

ORDERED that the remand results shall be filed on or before August 4, 2017; comments to the remand results shall be due thirty (30) days following filing of the remand results; and replies to such comments shall be due fifteen (15) days following filing of the comments.

Dated: July 5, 2017
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON, JUDGE