SLIP OP. 03–151

BEFORE: RICHARD K. EATON, JUDGE

ZHEJIANG NATIVE PRODUCE & ANIMAL BY-PRODUCTS IMPORT & EXPORT CORP., ET AL., PLAINTIFFS, v. UNITED STATES, DEFENDANT.

COURT NO. 02–00057
PUBLIC VERSION

[Commerce's final antidumping determination remanded.]

Decided: November 21, 2003

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*Bruce M. Mitchell, Jeffrey S. Grimson, Mark E. Pardo, Adam M. Dambrov*), for plaintiffs Zhejiang Native Produce & Animal By-Products Import & Export Corp., Kunshan Foreign Trade Co., China (Tushu) Super Food Import & Export Corp., High Hope International Group Jiangsu Foodstuffs Import & Export Corp., National Honey Packers & Dealers Association, Alfred L. Wolff, Inc., C.M. Goettsche & Co., China Products North America, Inc., D.F. International (USA), Inc., Evergreen Coyle Group, Inc., Evergreen Produce, Inc., Pure Sweet Honey Farm, Inc., and Sunland International, Inc.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Reginald T. Blades, Jr.*); *Robert LaFrankie*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Collier Shannon Scott, PLLC (*Michael J. Coursey, John M. Herrmann*), for defendant-intervenors American Honey Producers Association and Sioux Honey Association.

OPINION AND ORDER

EATON, Judge: This matter is before the court on the motion for judgment upon the agency record pursuant to USCIT R. 56.2 of plaintiffs Zhejiang Native Produce & Animal By-Products Import & Export Corp. ("Zhejiang"), Kunshan Foreign Trade Co. ("Kunshan"), China (Tushu) Super Food Import & Export Corp., High Hope International Group Jiangsu Foodstuffs Import & Export Corp. ("High Hope"), National Honey Packers & Dealers Association, Alfred L. Wolff, Inc., C.M. Goettsche & Co., China Products North America,

Inc., D.F. International (USA), Inc., Evergreen Coyle Group, Inc., Evergreen Produce, Inc., Pure Sweet Honey Farm, Inc., and Sunland International, Inc. ("Plaintiffs").[1] Plaintiffs challenge certain aspects of the United States Department of Commerce, International Trade Administration's ("Commerce") final determination of sales at less than fair value of honey from the People's Republic of China ("PRC"). *See* Honey From the P.R.C., 66 Fed. Reg. 50,608 (ITA Oct. 4, 2001) ("Final Determination"), *as amended by* 66 Fed. Reg. 63,670; Issues and Decision Memorandum for the Antidumping Investigation of Honey from the P.R.C., Pub. R. Doc. 216 ("Decision Memorandum"). Jurisdiction lies under 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. §§ 1516a(a)(2)(A)(i)(II) and (B)(i) (2000).

BACKGROUND

Commerce conducted two separate investigations of honey from the PRC—the first was commenced in 1994 ("First Investigation") and the second in 2000 ("Second Investigation").[2] The First Investigation resulted in an affirmative preliminary determination of sales at less than fair value. *See* Honey From the P.R.C., 60 Fed. Reg. 14,725 (ITA Mar. 20, 1995) (notice of prelim. determination). Subsequently, Commerce entered into a suspension agreement with the government of the PRC. *See* Honey From the P.R.C., 60 Fed. Reg. 42,521 (ITA Aug. 16, 1995) (notice of suspension of investigation); Agreement Suspending the Antidumping Investigation on Honey From the P.R.C., Aug. 2, 1995, U.S.-P.R.C., *reprinted in* 60 Fed. Reg. at 42,522–27 ("Suspension Agreement").[3] The Suspension Agreement recited that it was entered into "pursuant to the provisions of Section 734(*l*) of the Tariff Act of 1930, as amended" (19 U.S.C. § 1673c(*l*)), and that pursuant to it, "the Department shall suspend

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[1] Zhejiang, Kunshan, China (Tushu) Super Food Import & Export Corp., and High Hope are exporters of honey subject to the antidumping duty order issued in Honey From the P.R.C., 66 Fed. Reg. 63,670 (ITA Dec. 10, 2001) (am. prelim. determination and antidumping duty order) ("Amended Final Determination"). Am. Compl. ¶2. C.M. Goettsche & Co., China Products North America, Inc., D.F. International (USA), Inc., Evergreen Coyle Group, Inc., Evergreen Produce, Inc., Pure Sweet Honey Farm, Inc., Sunland International, Inc., and the members of the National Honey Packers & Dealers Association, a trade association, are importers of such honey. *Id*.

[2] The Second Investigation, which resulted in the Final Determination at issue here, covered

> natural honey, artificial honey containing more than 50 percent natural honey by weight, preparations of natural honey containing more than 50 percent natural honey by weight, and flavored honey. The subject merchandise includes all grades and colors of honey whether in liquid, creamed, comb, cut comb, or chunk form, and whether packaged for retail or in bulk form.

Final Determination, 66 Fed. Reg. at 50,610 ("Subject Merchandise").

[3] The scope of the Suspension Agreement covered products that were nearly identical to the Subject Merchandise. *See* Suspension Agreement, 60 Fed. Reg. at 42,522.

its antidumping investigation with respect to honey produced in the PRC . . . ." Suspension Agreement, 60 Fed. Reg. at 42,522–23. The Suspension Agreement also stated that it was entered into "[f]or the purpose of encouraging free and fair trade in honey, establishing more normal market relations, and preventing the suppression or undercutting of price levels of the domestic product . . . ." *Id.* at 42,522.

The Suspension Agreement included terms providing for the establishment of export limits,[4] a reference price,[5] and certain action the government of the PRC would be required to take in order to effectively restrict the volume of exports of honey to the United States, including the establishment of a quota certification program.[6] *See* Suspension Agreement, 60 Fed. Reg. at 42,523–24. The Suspension

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[4] The Suspension Agreement stated that "the Government of the PRC will restrict the volume of direct or indirect exports to the United States of honey products from all PRC producers/exporters, subject to the terms and provisions set forth [herein]." Suspension Agreement, 60 Fed. Reg. at 42,522.

[5] The reference price, issued quarterly by Commerce, represented a price below which the merchandise subject to the Suspension Agreement could not be sold. The Suspension Agreement provided a formula by which Commerce calculated the reference price:

> The reference price equals the product of 92 percent and the weighted-average of the honey unit import values from all other countries for the most recent six months of data available at the time the reference price is calculated. The source of the unit import values will be publicly available United States trade statistics from the United States Bureau of the Census.

Suspension Agreement, 60 Fed. Reg. at 42,524. In 1998, the Suspension Agreement was amended with respect to the reference price. By this amendment, the base period for calculating reference prices changed "from the most recent six months of data to the most recent three months of data." Agreement Suspending the Antidumping Investigation on Honey From the P.R.C., 63 Fed. Reg. 20,578, 20,578 (ITA Apr. 27, 1998) (notice of amendment to the Suspension Agreement).

[6] The quota certificate program in place while the Suspension Agreement was in effect involved several steps carried out by Commerce and various departments of the PRC government, including the China Chamber of Commerce of Importers and Exporters of Foodstuffs, Native Produce and Animal By-Products (the "Chamber"), the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC"), and departments within MOFTEC, such as the Foreign Trade Administration Department ("FTA"), and the Quota Licensing Board ("QLB"). First, Commerce established and notified MOFTEC of a quota for honey exported to the United States from the PRC. Then, through a bidding process conducted within the PRC, the quota was allocated among the largest honey exporters. Next, those exporters were notified by the FTA of their eligibility for an export license. Once it received a quota allocation and notice that it was eligible for an export license, the exporter could enter a contract for the sale of honey to the United States. If a contract for sale was entered into by the exporter, the Chamber reviewed the contract price to ensure that it complied with the reference price. Then, to obtain an export license, the exporter submitted various documentation to the QLB, including the FTA notice of quota allocation, the sales contract, and the notice of eligibility for an export license from the Chamber. On receiving the export license, the exporter could apply for a quota certificate. Finally, the PRC Customs Service authorized exportation after reviewing the license, quota certificate, and other appropriate documentation. *See* Honey From the P.R.C., 66 Fed. Reg. 24,101, 24,102–03 (ITA May 11, 2001) ("Preliminary Determination"), *as amended by* Honey From the P.R.C., 66 Fed. Reg. 40,191 (Aug. 2, 2001) ("Amended Preliminary Determination") (discussing whether existence of export licensing program was consistent with Commerce's determination of separate rates);

Agreement was in effect from August 16, 1995, through August 16, 2000. *See* Termination of Suspended Antidumping Duty Investigation on Honey From the P.R.C., 65 Fed. Reg. 46,426 (ITA July 28, 2000) ("Termination").

On July 3, 2000, Commerce gave notice that it would conduct a five-year review of the suspended antidumping investigation.[7] *See* Noitce [sic] of Initiation of Five-Year ("Sunset") Revs., 65 Fed. Reg. 41,053 (ITA July 3, 2000). On July 28, 2000, Commerce terminated this investigation "[b]ecause no domestic interested party responded to the notice of initiation by the applicable deadline . . . ." Termination, 65 Fed. Reg. at 46,426.[8]

Following the expiration of the Suspension Agreement by its terms on August 16, 2000, the Second Investigation was commenced. On September 29, 2000, the domestic honey industry filed a petition with Commerce and the United States International Trade Commission ("ITC"), alleging, among other things, that it was being injured as a result of less than fair value sales of honey from Argentina and the PRC. *See* Antidumping and Countervailing Duty Pet., Honey from Arg. and the P.R.C. (Sept. 29, 2000), Pub. R. Doc. 1. Thereafter, Commerce initiated its preliminary investigation. *See* Honey From Arg. & the P.R.C., 65 Fed. Reg. 65,831 (ITA Nov. 2, 2000) (notice of initiation of antidumping duty investigation). Commerce identified the period of investigation ("POI") as January 1, 2000, through June 30, 2000, a period during which the Suspension Agreement was in effect. *See* Prelim. Determination, 66 Fed. Reg. at 24,102. In November 2000, the ITC determined that there was a reasonable indication that the domestic honey industry was materially injured by reason of imports of honey from Argentina and the PRC. *See* Honey From Arg. & China, 65 Fed. Reg. 69,573 (ITC Nov. 17, 2000) (notice of prelim. injury determination); Honey From Arg. & China, USITC Pub. No. 3369, Inv. Nos. 701–TA–402 and 731–TA–892–893 (Nov. 2000) ("ITC Preliminary Determination"). By letter dated February 23, 2001, the petitioners alleged that there was a reasonable basis to be-

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see also Letter from Akin, Gump, Strauss, Hauer & Feld, LLP to Commerce of 4/12/01, Pub. R. Doc. 120 at 3–8.

[7] By statute, Commerce shall conduct a review of an investigation, suspended by agreement, five years after the date on which notice of such suspension was published in order to determine "whether . . . termination of the investigation suspended under section . . . 1673c of [title 19] would be likely to lead to continuation or recurrence of dumping . . . and of material injury." 19 U.S.C. § 1675(c)(1); *see also* 19 U.S.C. § 1675a(c) (listing factors Commerce considers in conducting sunset review).

[8] Where no interested party responds to the notice of initiation of a five-year review, Commerce "shall issue a final determination, within 90 days after the initiation of a review, revoking the order or terminating the suspended investigation to which such notice relates." 19 U.S.C. § 1675(c)(3)(A); 19 C.F.R. § 351.218(d)(1)(iii)(B) (2000); *see also* Statement of Administrative Action, accompanying H.R. REP. NO. 103–826(I), at 880 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4206 ("SAA") (stating provision intended to "eliminate needless reviews").

lieve or suspect that critical circumstances existed with respect to imports of honey from the PRC. *See* Letter from Collier Shannon Scott, PLLC to Commerce of 2/23/01, Pub. R. Doc. 76. On May 11, 2001, Commerce published its affirmative preliminary determination of sales at less than fair value of honey from the PRC.[9] *See* Prelim. Determination, 66 Fed. Reg. at 24,101.

In October 2001, Commerce made its final affirmative antidumping determination, which contained affirmative determinations of critical circumstances with respect to Zhejiang, High Hope, Kunshan, and the PRC-wide entity.[10] *See* Final Determination, 66 Fed. Reg. at 50,610. The Second Investigation resulted in Commerce's determination that honey from the PRC "is being sold, or is likely to be sold, in the United States at less than fair value," *id.* at 50,608, and the assessment of antidumping duty margins ranging between 25.88% and 183.80%. *See* Am. Final Determination, 66 Fed. Reg. at 63,672.

By this action, Plaintiffs challenge (1) Commerce's calculation of antidumping duty margins, (2) its determination with respect to critical circumstances, and (3) the reliability of certain sources of valuation data. For the reasons set forth below, the court remands the Final Determination for further action in conformity with this opinion.

STANDARD OF REVIEW

When reviewing a final determination in an antidumping duty investigation, "[t]he 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); *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i) (2000)) ("As required by statute, [the court] will sustain the agency's antidumping determinations unless they are 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.' "). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Consol.*

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[9] After the correction of certain ministerial errors, Commerce preliminarily determined that critical circumstances were present with respect to High Hope and the PRC-wide entity, but not Zhejiang. *See* Prelim. Determination, 66 Fed. Reg. at 24,108; Am. Prelim. Determination, 66 Fed. Reg. at 40,192.

[10] Here, the PRC-wide entity is comprised of unnamed companies in the PRC that export honey to the United States and that failed to respond to Commerce's questionnaires. Commerce applied a single "PRC-wide rate" to all such exporters "based on . . . [the] presumption that those respondents who failed to demonstrate entitlement to a separate rate constitute a single enterprise under common control by the government of the PRC." Prelim. Determination, 66 Fed. Reg. at 24,104 (citing Synthetic Indigo From the P.R.C., 65 Fed. Reg. 25,706, 25,707 (ITA May 3, 2000) (final determination)).

Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Id.* (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted).

DISCUSSION

I. *Commerce's antidumping determination using the nonmarket economy methodology prescribed in 19 U.S.C. § 1677b(c) is in accordance with law and supported by substantial evidence*

Commerce has the duty to "determine[ ] [whether] a class or kind of merchandise is being, or is likely to be, sold in the United States at less than its fair value . . . ." 19 U.S.C. § 1673(1); *see also* 19 U.S.C. § 1677(34) (defining "dumping" as "the sale or likely sale of goods at less than fair value."). To make this determination, Commerce must compare the normal value of the foreign like product in the home or third country market to the imported product's export price or constructed export price. *See* 19 U.S.C. § 1677b(a); 19 C.F.R. § 351.401(a).

In the market economy context, normal value is "the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price . . . ." 19 U.S.C. § 1677b(a)(1)(B)(i); *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1379 n.1 (Fed. Cir. 2001). In the nonmarket economy ("NME")[11] context, however, normal value may be determined in accordance with 19 U.S.C. § 1677b(c)(1), which provides that "[i]f . . . the subject merchandise is exported from a nonmarket economy country, and . . . [Commerce] finds that available information does not permit the normal value of the subject merchandise to be determined [under 19 U.S.C. § 1677b(a)]," then Commerce

> shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of contain-

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[11] An NME country is defined as "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).

> ers, coverings, and other expenses. Except as provided in [19 U.S.C. § 1677b(c)(2)[12]], the valuation of the factors of production shall be based on the *best available information* regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.

19 U.S.C. § 1677b(c)(1) (emphasis added); *Shakeproof Assembly Components*, 268 F.3d at 1379 n.1; *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1445 (Fed. Cir. 1994) ("Simply put, if the ITA cannot determine FMV pursuant to the general provisions of § 1677b(a), then the ITA must use the factors of production methodology to *estimate* FMV for the merchandise in question.") (emphasis in original).[13] Commerce enjoys wide, although not unlimited, discretion in determining what information is "best" in valuing the factors of production. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (citing *Lasko Metal Prods., Inc.*, 43 F.3d at 1446; *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992); *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1372 (Fed. Cir. 1999)); *id.* ("Whether such analogous information from the surrogate country is 'best' will necessarily depend on the circumstances, including the relationship between the market structure of the surrogate country and a hypothetical free-market structure of the NME producer under investigation.").

Export price is determined in accordance with the methodology set forth in 19 U.S.C. § 1677a(a):

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[12] This provision states:

> If [Commerce] finds that the available information is inadequate for purposes of determining the normal value of subject merchandise under paragraph (1), the administering authority shall determine the normal value on the basis of the *price* at which merchandise that is—
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> (A) comparable to the subject merchandise, and
>
> (B) produced in one or more market economy countries that are at a level of economic development comparable to that of the nonmarket economy country,
>
> is *sold* in other countries, including the United States.

19 U.S.C. § 1677b(c)(2) (emphasis added).

[13] Title 19 U.S.C. § 1677b(c)(3) sets out a non-exhaustive list of relevant factors of production, including "hours of labor required, . . . quantities of raw materials employed, . . . amounts of energy and other utilities consumed, and . . . representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3). In valuing such factors of production, Commerce "shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are . . . at a level of economic development comparable to that of the nonmarket economy country, and . . . significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4)(A)–(B); *see also Sigma Corp. v. United States*, 117 F.3d 1401, 1408 (Fed. Cir. 1997) ("[T]he process of constructing foreign market value for a producer in a nonmarket economy country is difficult and necessarily imprecise . . . .").

> [T]he [export price is the] price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under [19 U.S.C. § 1677a(c)].

19 U.S.C. § 1677a(a); *see also* SAA at 822 ("If the first sale to an unaffiliated purchaser in the United States, or to an unaffiliated purchaser for export to the United States, is made by the producer or exporter in the home market prior to the date of importation, then Commerce will base its calculation on export price."). The dumping margin, determined by Commerce, is "the amount by which the normal value exceeds the export price . . . of the subject merchandise." 19 U.S.C. § 1677(35)(A). By these procedures Commerce endeavors to determine antidumping duty margins as accurately as possible. *See Lasko Metal Prods. Inc.*, 43 F.3d at 1446 (quoting *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1991 (Fed. Cir. 1991)) ("The Act sets forth procedures in an effort to determine margins 'as accurately as possible.' "); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) ("It is the duty of ITA to determine dumping margins as accurately as possible.") (internal quotation omitted).

Here, in determining whether the Subject Merchandise was being sold or was likely to be sold at less than fair value in the United States, Commerce found, as it has in the past, that the PRC was an NME country,[14] and calculated normal value using the NME methodology found in 19 U.S.C. § 1677b(c)(1). *See* Prelim. Determination, 66 Fed. Reg. at 24,102 ("When the Department is investigating imports from an NME, [19 U.S.C. § 1677b(c)(1)] directs us to base the normal value (NV) on the NME producer's factors of production, valued in a comparable market economy that is a significant producer of comparable merchandise."). In doing so, Commerce relied on data from India in valuing the factors of production.[15] *Id.* at 24,105. To calculate export price, Commerce used data from actual sales of the Subject Merchandise directly to unaffiliated purchasers in the

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[14] "The Department has treated the PRC as a non-market economy . . . country in all past antidumping investigations." Prelim. Determination, 66 Fed. Reg. at 24,102 (citing Bulk Aspirin from the P.R.C., 65 Fed. Reg. 33,805 (ITA May 25, 2000) (final determination); Certain Non-Frozen Apple Juice Concentrate from the P.R.C., 65 Fed. Reg. 19,873 (ITA Apr. 13, 2000) (final determination)). "Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority." 19 U.S.C. § 1677(18)(C)(i). Here, Plaintiffs do not dispute Commerce's designation of the PRC as an NME country.

[15] The factors of production as reported by certain PRC honey producers and their suppliers included: raw honey, electricity, coal, water, labor, beeswax, truck freight rates, rail transportation, inland water transportation, brokerage and handling, factory overhead, selling, general, and administrative expenses, and packing materials. *See* Prelim. Determination, 66 Fed. Reg. at 24,106.

United States. *Id.* Commerce further calculated weighted-average export prices, pursuant to 19 U.S.C. § 1677f–1(d)(1)(A)(i).[16] *Id.* In the Final Determination, Commerce made an affirmative dumping finding and assigned antidumping duty margins ranging between 25.88% (for Zhejiang) and 183.80% (for the PRC-wide entity). *See* Am. Final Determination, 66 Fed. Reg. at 63,672. In addition, Commerce found the following with respect to the relevance of the Suspension Agreement, and in particular the reference price, to its finding of sales at less than fair value:

> The reference prices issued by the Department under the suspension agreement were established to provide minimum selling prices for exports of honey to the United States. . . . These reference prices were not formulated to eliminate completely all sales at less than fair value but rather were designed to meet the statutory criteria for [19 U.S.C. § 1673c(*l*)] agreements: the elimination of price suppression or undercutting.[17] The agreement did not prohibit the PRC producers/exporters from selling subject merchandise at prices higher than the reference prices in order to eliminate completely any sales at less than fair value. Indeed, the language of the agreement itself did not address the issue of sales at less than fair value, nor did it require PRC producers/exporters to sell honey to the United States at non-dumped prices.

Decision Mem., Pub. R. Doc. 216 at 6.

Plaintiffs argue that Commerce failed to use the "best available information," as 19 U.S.C. § 1677b(c)(1) requires, in determining normal value. Plaintiffs contend that since their U.S. sales of honey

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[16] Title 19 U.S.C. § 1677f–1(d)(1)(A)(i) states that Commerce "shall determine whether the subject merchandise is being sold in the United States at less than fair value . . . by comparing 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).

[17] This rule governing suspension agreements with NME countries, states that Commerce

> may suspend an investigation under this part upon acceptance of an agreement with a nonmarket economy country to restrict the volume of imports into the United States of the merchandise under investigation only if the administering authority determines that—
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> (A) such agreement satisfies the requirements of subsection (d) of this section [relating to the public interest, effective monitoring, and the opportunity for comments by exporters], and
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> (B) will prevent the suppression or undercutting of price levels of domestic products by imports of the merchandise under investigation.

19 U.S.C. § 1673c(*l*)(1).

complied with the reference price contained in the Suspension Agreement, Commerce's determination that these sales were made at less than fair value is "*prima facie* evidence that the data selected by Commerce to make its dumping calculation was unreasonable (and not the 'best available information')." *See* Br. Supp. Pls.' Mot. J. Agency R. ("Pls.' Mem.") at 14–15 (citation omitted). According to Plaintiffs, the inclusion of the reference price provision in the Suspension Agreement necessarily prevented the special rule governing suspension agreements with NME countries (19 U.S.C. § 1673c(*l*)) from being the authority for the Suspension Agreement. Rather, Plaintiffs insist that, even though the Suspension Agreement states it was entered into pursuant to 19 U.S.C. § 1673c(*l*), the presence of the reference price requires a finding that the Suspension Agreement was entered into pursuant to 19 U.S.C. § 1673c(b),[18] and that the Suspension Agreement was thus designed to "eliminate completely" any dumping of the Subject Merchandise. *Id.* at 13 ("[T]he 'special rule' [found in 19 U.S.C. § 1673c(*l*)] for nonmarket economy suspension agreements only establishes new criteria for *quantitative* restrictions. Any price restrictions must still comply with the standard requirements for all suspension agreements, which include setting price levels that eliminate less than fair value sales." (emphasis in original) (citing 19 U.S.C. § 1673c(b)(2)); Pls.' Reply Br. ("Pls.' Reply") at 4 ("[U]nder the plain language of the statute, any *price* based limitations included in an NME suspension agreement would not be subject to the criteria established by 19 U.S.C. § 1673c(*l*)(1) because this provision does not address price restrictions. Instead, a price based restriction would need to comply with the requirements of 19 U.S.C. § 1673c(b), which specifically governs suspension agreements based on price limitations.") (emphasis in original). Plaintiffs contend that the legislative history surrounding the enactment of 19 U.S.C. § 1673c(*l*) supports this argument.[19] Plaintiffs further claim

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[18] By statute, Congress authorized Commerce to suspend investigations where an agreement is entered for the purpose of eliminating completely sales at less than fair value:

> The administering authority may suspend an investigation if the exporters of the subject merchandise who account for substantially all of the imports of that merchandise agree—
>
> (1) to cease exports of the merchandise to theUnited States within 6 months after the date on which the investigation is suspended, or
>
> (2) to revise their prices to eliminate completely any amount by which the normal value of the merchandise which is the subject of the agreement exceeds the export price (or the constructed export price) of that merchandise.

19 U.S.C. § 1673c(b).

[19] In this regard, Plaintiffs direct the court's attention to the legislative history accompanying the enactment of 19 U.S.C. § 1673c(*l*):

> The Senate amendment provides a special rule under [19 U.S.C. § 1673c] for suspending antidumping investigations of imports from non-market economy countries based on

that the Suspension Agreement's reference to 19 U.S.C. § 1673c(f)(2)(A)[20] is also evidence that it was intended to eliminate sales at less than fair value because by its terms, 19 U.S.C. § 1673c(f)(2)(A) applies if the suspension agreement at issue "is [one] described in [19 U.S.C. § 1673c(b)]," i.e., one to eliminate the occurrence of dumping or to cease exports altogether. 19 U.S.C. § 1673c(f); *see* Pls.' Mem. at 13. Thus, based on the premise that the Suspension Agreement is an agreement to eliminate dumping, Plaintiffs claim that by failing to take the reference price into consideration in calculating normal value, Commerce did not determine normal value based on the best available information and thus failed in its duty to calculate margins as accurately as possible. *See* Pls.' Mem. at 15 (citation omitted).

The United States ("Government") on behalf of Commerce argues that Commerce's use of its standard NME methodology to calculate antidumping duty margins is in accordance with law and supported by substantial evidence. The Government contends that the Suspension Agreement is irrelevant for purposes of calculating antidumping duty margins because the purpose of the reference price provision was to prevent price suppression in the United States market, not to eliminate the dumping of honey. Def.'s Opp'n Pls.' Mot. J. Agency R. ("Def.'s Resp.") at 22. The Government asserts that this is clear from the Suspension Agreement itself, which recites that it was entered into pursuant to 19 U.S.C. § 1673c(*l*). *See id*. at 24–25. Furthermore, the Government argues that "[t]he fact that the reference prices were based upon the average unit value of honey imports into the United States from all other countries, and not from prices or costs associated with [the calculation of] [normal value] (in this case, from the surrogate country India) demonstrates that these prices were not intended to eliminate 'less than fair value' sales." *Id*. at 26. Thus,

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quantitative restraint agreements. Such agreements must satisfy the general requirements for suspension agreements, including public interest criteria, and prevent suppression or undercutting of domestic price levels.

H.R. CONF. REP. NO. 100–576, at 593 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1626.

[20] Title 19 U.S.C. § 1673c(f)(2)(A) provides:

> If the agreement accepted by the administering authority is an agreement described in subsection (b) [relating to agreements to eliminate completely sales at less than fair value or to cease exports of merchandise], then—
>
> (i) notwithstanding the affirmative preliminary determination required under paragraph (1)(A), the liquidation of entries of subject merchandise shall not be suspended under [19 U.S.C. § 1673b(d)(2)],
>
> (ii) if the liquidation of entries of such merchandise was suspended pursuant to a previous affirmative preliminary determination in the same case with respect to such merchandise, that suspension of liquidation shall terminate, and
>
> (iii) the administering authority shall refund any cash deposit and release any bond or other security deposited under [19 U.S.C. § 1673b(d)(1)(B)].

19 U.S.C. § 1673c(f)(2)(A)(i)–(iii).

the Government maintains that "Commerce . . . correctly calculated antidumping margins in this case based upon the actual price and 'factor' information submitted on the record, and not based upon irrelevant 'reference prices' contained in the expired suspension agreement." *Id.* at 26–27.

The court finds Commerce's antidumping determination and calculation of antidumping duty margins to be in accordance with law and supported by substantial evidence. As the PRC is an NME country, Commerce applied the NME methodology pursuant to 19 U.S.C. § 1677b(c) to determine normal value for Zhejiang, Kunshan, and Inner Mongolia Autonomous Region Native Produce & Animal By-Products Import & Export Corp. ("Inner Mongolia"), which represented, by volume, the three largest exporters of the Subject Merchandise during the POI. Prelim. Determination, 66 Fed. Reg. at 24,101. Commerce selected and valued the factors of production using data from India and explained its calculations. *See id.* at 24,105–06; *see generally* Prelim. Analysis Mem. of 5/4/01, Conf. R. Docs. 47–49; Verification Mem. of 7/72/01, Conf. R. Docs. 64–66; Final Analysis Mem. of 9/26/01, Conf. R. Docs. 73–75; Am. Final Analysis Mem. of 11/28/01, Conf. R. Doc. 78. Commerce determined export price by referring to sales and pricing information submitted by Plaintiffs regarding sales made to unaffiliated purchasers in the United States during the POI. *See* Prelim. Determination, 66 Fed. Reg. at 24,105; *see also* Prelim. Analysis Mem., Conf. R. Docs. 47–49 at 1–2; Section C & D Questionnaire Resps. of Inner Mongolia, Conf. R. Doc. 22, Ex. C–1; Kunshan, Conf. R. Doc. 23, Ex. C–1; Zhejiang, Conf. R. Doc. 24, Ex. C–1 (U.S. sales listings). Plaintiffs' questionnaire responses indicate that they freely negotiated the contract price for the sale of honey with U.S. purchasers.[21] *See, e.g.*, Kunshan Section A Supp. Questionnaire Resp., Pub. R. Doc. 73 at 9 ("[P]rices with U.S. customers are determined as a result of negotiations with those U.S. customers."). Commerce's comparison of normal value and export price led to the conclusion that the Subject Merchandise was being sold or was likely to be sold at less than fair value in the United States. The mathematical accuracy of Commerce's computation of antidumping duty margins is not in dispute. *See Lasko Metal Prods. Inc.*, 43 F.3d at 1446.

What is in dispute is whether Commerce used the best available information in making the comparison. The court does not agree with Plaintiffs' argument that Commerce erred by finding Plaintiffs' U.S. sales were made at less than fair value where those sales were made in compliance with the Suspension Agreement. First, nothing in the statutes or regulations that guide Commerce's antidumping determination in the NME context requires (or for that matter per-

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[21] Following these negotiations, the Chamber reviewed the sales contracts to monitor compliance with the reference price contained in the Suspension Agreement.

mits) Commerce to consider the terms of a suspension agreement. *See* 19 U.S.C. §§ 1677b(c), 1677a(a); 19 C.F.R. § 351.408(a). Second, contrary to Plaintiffs' contention, the inclusion of the reference price does not require the court to find that the Suspension Agreement was entered into pursuant to 19 U.S.C. § 1673c(b). While 19 U.S.C. § 1673c(*l*) authorizes Commerce to enter into suspension agreements that restrict the volume of imports with NME countries, subsection (*l*) does not provide any guidance with respect to how volume restriction is to be achieved, the terms that may or may not be included in an agreement to restrict the volume of imports, or the permissible means by which prevention of the "suppression or undercutting of price levels of domestic products by imports" might be realized. Certainly, the statute cannot be read to restrict an agreement to a single term related only to quantity, and to forbid a term dealing with price. Rather, it appears that the terms of such agreements are products of negotiation, and are designed to give effect to the suspension agreement's purpose—here, to prevent the suppression or undercutting of price levels of the domestic product. *See, e.g.*, *Bethlehem Steel Corp. v. United States*, 25 CIT ___, ___, 146 F. Supp. 2d 927, 928 (2001) (noting that, in general, a suspension agreement is "a unique form of settlement agreement"); *see also Bethlehem Steel Corp. v. United States*, 25 CIT ___, ___, 159 F. Supp. 2d 730, 750 n.38 (noting "negotiated 'reference price' " in subsection (c) suspension agreement at issue was price below which exporters were prohibited from selling steel in United States).[22] Third, the language of the Suspension Agreement clearly provided that its purpose was to prevent price suppression and undercutting and to restrict the volume of imports, not to eliminate dumping directly. Suspension Agreement, 60 Fed. Reg. at 42,522. There are numerous references to this purpose in the Suspension Agreement.[23]

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[22] In addition, it is worth noting that reference prices are generally used in suspension agreements entered pursuant to 19 U.S.C. §§ 1673c(*l*) and (c), but not (b). *See, e.g., Elkem Metals Co. v. United States*, 23 CIT 170, 171, 44 F. Supp. 2d 288, 289 (1999) ("In this [subsection (*l*)] Agreement, the Government of Ukraine agreed to limit its exports of silicomanganese to the United States and ensure that those exports within the agreed quantitative limits were sold at or above a prescribed reference price."); *Bethlehem Steel*, 25 CIT at ____, 159 F. Supp. 2d at 750 n.38 (reference price included in subsection (c) suspension agreement); *U.S. Steel Group v. United States*, 25 CIT ____, ____, 162 F. Supp. 2d 676, 680 (2001) (reference price included in subsection (*l*) agreement entered with the Ministry of Trade of the Russian Federation).

[23] *See, e.g.*, Suspension Agreement, 60 Fed. Reg. at 42,524 ("The Government of the PRC will restrict the volume of direct or indirect exports of subject merchandise by means of semi-annual quota allocations and Quota Certificates."); *id.* ("MOFTEC shall provide to the Department a report identifying each quota recipient and the volume of quota which each recipient has been accorded . . . ."); *id.* ("Before it issues a Quota Certificate, MOFTEC will ensure that the Relevant Period's quota volume is not exceeded and that the price for the subject merchandise is at or above the reference price."); *id.* ("The Government of the PRC shall take action, including the imposition of penalties, as may be necessary to make effective the obligations resulting from the price restrictions, export limits, and Quota Certifi-

The most convincing evidence that the reference price utilized in the Suspension Agreement was not designed to eliminate the dumping margin, however, is that it was arrived at by using none of the tools used in an antidumping case, i.e., a fair comparison of the normal value and export price. Rather, it was determined by reference to a number representing 92% of "the weighted-average of the honey unit import values from all other countries." *Id.* at 42,524. Subsection (b) agreements, by contrast, normally include provisions relating to the establishment of normal value.[24]

Moreover, the legislative history surrounding 19 U.S.C. § 1673c(*l*) does not strengthen Plaintiffs' position. This history merely echoes the language of 19 U.S.C. § 1673c(*l*). Subsection (*l*) permits Commerce to enter into agreements with NME countries "to restrict the volume of imports into the United States of the merchandise under investigation only if [Commerce] determines" certain statutory criteria have been met, i.e., that the agreement "will prevent the suppression or undercutting of price levels of domestic products by imports of the merchandise under investigation," as well as comply with the public interest requirements. 19 U.S.C. § 1673c(*l*)(1)(A)–(B). Similarly, the legislative history states that this provision authorizes the "suspen[sion] of antidumping investigations of imports from non-market economy countries based on quantitative restraint agreements," and further notes that "[s]uch agreements must satisfy the general requirements for suspension agreements, including public interest criteria, and prevent suppression or undercutting of domestic price levels." H.R. CONF. REP. NO. 100–576, at 593, *reprinted in* 1988 U.S.C.C.A.N. at 1626. Nothing in the statute or legislative history dissuades the court from concluding that the goal of the Suspension Agreement, the restriction of the volume of imports and the prevention of price suppression and undercutting, may lawfully be achieved through the use of a reference price.

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cates."); *id.* ("On or after the effective date of this Agreement, the United States shall require presentation of a Quota Certificate as a condition for entry of subject merchandise into the United States. The United States will prohibit the entry of any subject merchandise not accompanied by a Quota Certificate."). Nowhere does the Suspension Agreement mention the elimination of dumping.

[24] *See, e.g.*, Dynamic Random Access Memory Semiconductors of 256 Kilobits & Above from Japan, 51 Fed. Reg. 28,396, 28,398 (ITA Aug. 7, 1986) (suspension of investigation) (pre-URAA agreement where parties agreed to "make any necessary price revisions to eliminate completely any amount by which the foreign market value of its merchandise exceeds the United States price of its merchandise subject to this Agreement."); Sodium Azide From Japan, 62 Fed. Reg. 973, 974 (ITA Jan. 7, 1997) (suspension of antidumping duty investigation) (indicating agreement among signatories not to sell merchandise at less than normal value as determined by Commerce based on cost information from the period of investigation); Certain Cut-to-Length Carbon Steel Plate From S. Afr., 62 Fed. Reg. 61,751, 61,753 (ITA Nov. 19, 1997) (suspension agreement) (defining normal value for purposes of the agreement); Steel Wire Rod From Venez., 63 Fed. Reg. 8948, 8952 (ITA Feb. 23, 1998) (suspension of antidumping duty investigation) (describing calculation of suspension agreement normal values).

Finally, the court finds that the Suspension Agreement's reference to 19 U.S.C. § 1673c(f)(2)(A) does not in itself establish that the agreement was entered into to eliminate dumping. Rather, this reference was likely included because there is no statutory provision specifically directed to agreements concluded in the NME context by which the suspension of liquidation may be terminated. *See* 19 U.S.C. § 1673c(f)(2)(A)(ii).

As Commerce has complied with the statutes guiding its determinations with respect to the calculation of normal value in the NME context, and the calculation of export price, and as there is no dispute as to the mathematical accuracy of the estimated margins as reported in the Amended Final Determination, the court finds that Commerce's calculation of antidumping duty margins is in accordance with law and supported by substantial evidence. *See Lasko Metal Prods Inc.*, 43 F.3d at 1446; *NTN Bearing Corp.*, 74 F.3d at 1208.

II. *Commerce's final affirmative critical circumstances determination is in accordance with law and supported by substantial evidence*

Title 19 U.S.C. § 1673d(a)(3) governs Commerce's final critical circumstances determinations.[25] This provision requires that, where Commerce makes an affirmative final antidumping determination and the presence of critical circumstances is alleged under 19 U.S.C. § 1673b(e),[26] Commerce's final determination "shall also contain a finding" of whether *either* (1) there is a history of dumping and material injury by reason of dumped imports, *or* (2) the person by whom,

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[25] The critical circumstances statute was promulgated "to provide prompt relief to domestic industries suffering from large volumes of, or a surge over a short period of, imports" and was designed to serve as a deterrent to "exporters whose merchandise is subject to an investigation from circumventing the intent of the law by increasing their exports to the United States during the period between initiation of an investigation and a preliminary determination by [Commerce]." H.R. REP. NO. 96–317, 96th Cong., 1st Sess. at 63 (1979); *see Coal. for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 23 CIT 88, 112 n.38, 44 F. Supp. 2d 229, 252 n.38 (1999) (quoting S. REP. NO. 103–412, 103d Cong., 2d Sess., at 38 (1994) ("This provision is 'designed to address situations where imports have surged as a result of the initiation of an antidumping or countervailing duty investigation, as exporters and importers seek to increase shipments of the merchandise subject to investigation into the importing country before an antidumping or countervailing duty order is imposed.' ").

[26] Title 19 U.S.C. § 1673b(e)(1) provides:

> If a petitioner alleges critical circumstances in its original petition, or by amendment at any time more than 20 days before the date of a final determination by the administering authority, then the administering authority shall promptly (at any time after the initiation of the investigation under this part) determine, on the basis of the information available to it at that time, whether there is a reasonable basis to believe or suspect that—
>
> (A) (i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or

or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there would be material injury by reason of such sales, *and* (3) there have been massive imports of the subject merchandise over a relatively short period. *See* 19 U.S.C. § 1673d(a)(3)(A)–(B); 19 C.F.R. § 351.206(h).[27] An affirmative critical circumstances determination permits the retroactive imposition of antidumping duties "on merchandise entered up to 90 days before the imposition of provisional measures." 19 C.F.R. § 351. 206(a); *see also* 19 U.S.C. § 1673d(c)(4)(A)–(B).[28]

Commerce has developed certain practices in determining importer knowledge of dumping and material injury. With respect to importer knowledge of sales at less than fair value, Commerce "normally considers margins of 25 percent or more for [export price] sales sufficient to impute knowledge of dumping" to the importers

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(ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales, and

(B) there have been massive imports of the subject merchandise over a relatively short period.

19 U.S.C. § 1673b(e)(1)(A)–(B).

[27] Commerce's massive imports regulation provides in relevant part:

(1) In determining whether imports of the subject merchandise have been massive under [19 U.S.C. §§ 1671d(a)(2)(B) or 1673d(a)(3)(B)], the Secretary normally will examine:

(i) The volume and value of the imports;

(ii) Seasonal trends; and

(iii) The share of domestic consumption accounted for by the imports.

(2) In general, unless the imports during the "relatively short period" . . . have increased by at least 15 percent over the imports during an immediately preceding period of comparable duration, the Secretary will not consider the imports massive.

19 C.F.R. § 351.206(h).

[28] This provision states:

If the determination of the administering authority under [19 U.S.C. § 1673d(a)(3)] is affirmative, then the administering authority shall—

(A) in cases where the preliminary determinations by the administering authority under [19 U.S.C. § 1673b(b), relating to dumping and (e)(1), relating to critical circumstances] were both affirmative, continue the retroactive suspension of liquidation and the posting of a cash deposit, bond, or other security previously ordered under [19 U.S.C. § 1673b(e)(2)];

(B) in cases where the preliminary determination by the administering authority under [19 U.S.C. § 1673b(b)] was affirmative, but the preliminary determination under [19 U.S.C. § 1673b(e)(1)] was negative, shall modify any suspension of liquidation and security requirement previously ordered under [19 U.S.C. § 1673b(d)] to apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date which is 90 days before the date on which suspension of liquidation was first ordered . . . .

19 U.S.C. § 1673d(c)(4)(A)–(B).

who purchase the merchandise at issue from foreign exporters. Prelim. Determination, 66 Fed. Reg. at 24,106 (citing Certain Small Diameter Carbon & Alloy Steel Seamless Standard, Line & Pressure Pipe from the Czech Rep., 65 Fed. Reg. 33,803 (ITA May 25, 2000) (prelim. determination of critical circumstances)). In other words, in cases where, as here, export price is calculated by reference to sales made to unaffiliated purchasers in the United States, and Commerce determines that the antidumping duty margin with respect to those sales is 25% or more, Commerce "imputes"[29] knowledge of dumping to the importer.

With respect to knowledge of material injury by reason of such less than fair value sales, Commerce normally looks to the ITC's preliminary injury determination. "If [in its preliminary determination] the ITC finds a reasonable indication of present material injury to the relevant U.S. industry, the Department will determine that a reasonable basis exists to impute importer knowledge that there was likely to be material injury by reason of dumped imports." Prelim. Determination, 66 Fed. Reg. at 24,106. *See, e.g.*, Certain Automotive Replacement Glass Windshields From the P.R.C., 66 Fed. Reg. 48,233, 48,238 (ITA Sept. 19, 2001) (prelim. determination); Certain Cut-to-Length Carbon Steel Plate From the P.R.C., 62 Fed. Reg. 61,964, 61,967 (ITA Nov. 20, 1997) (final determination).

In the Final Determination, Commerce determined that critical circumstances existed with respect to Zhejiang, High Hope, Kunshan, and the PRC-wide entity. Final Determination, 66 Fed. Reg. at 50,610. After the correction of certain ministerial errors, Zhejiang, High Hope, Kunshan, and the PRC-wide entity received antidumping duty margins in excess of 25%, i.e., 25.88%, 45.46%, 49.60%, and 183.80%, respectively. *See* Am. Final Determination, 66 Fed. Reg. at 63,672. With respect to critical circumstances, Commerce stated:

> [Title 19 U.S.C. § 1673d(a)(3)] provides for a determination of critical circumstances to be based on three elements. First, there is evidence of the knowledge of dumping. This is demonstrated by the fact that Zhejiang, Kunshan, High Hope, and the PRC-wide entity all have dumping margins of over 25 percent. Second, there is evidence of knowledge of material injury (here

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[29] While Commerce states that the 25% or more rule results in the imputation of knowledge that the exporter was selling the merchandise at issue at less than its fair value, the "knew or should have known" language is often used to impose upon a person a duty of inquiry. *See, e.g., Hauk v. First Nat. Bank of St. Charles*, 680 S.W.2d 771, 775 (Mo. App. E.D. 1984) ("The . . . term ["should have known"] signifies a duty upon a party to inquire whereas the [the term "had reason to know"] does not impose such a duty."); *Chernick v. United States*, 372 F.2d 492, 496 (Ct. Cl. 1967) ("The test of what an official in charge of accepting bids 'should' have known must be that of reasonableness, i.e., whether under the facts and circumstances of the case there were any factors which reasonably should have raised the presumption of error in the mind of the contracting officer . . . .").

> indicated by the preliminary finding of material injury by the International Trade Commission). Finally, there is evidence of massive imports of subject merchandise by Zhejiang, Kunshan, High Hope, and the PRC-wide entity within a relatively short period.

Decision Mem., Pub. R. Doc. 216 at 9 (citing Final Affirmative and Negative Determinations of Critical Circumstances Mem. of 9/26/01, Conf. R. Doc. 76, Attach. 1). In the antidumping duty order, Commerce stated:

> In accordance with [19 U.S.C. § 1673e(a)(1)], the Department will direct Customs[30] to assess, upon further advice by the Department, antidumping duties equal to the amount by which the normal value of the subject merchandise exceeds the U.S. price of the subject merchandise for all relevant entries of honey from the PRC. These antidumping duties will be assessed on all unliquidated entries of honey from the PRC entered, or withdrawn from warehouse, for consumption on or after May 11, 2001, the date on which the Department published its notice of preliminary determination for this investigation in the Federal Register, except for subject merchandise exported by Kunshan, High Hope, Zhejiang, or [unnamed companies comprising the PRC-wide entity]. For merchandise exported by Kunshan, High Hope, Zhejiang, or by [unnamed companies comprising the PRC-wide entity], we are directing [Customs] to assess antidumping duties on all unliquidated entries of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after February 10, 2001, the date 90 days prior to the date of publication of the preliminary determination in the Federal Register . . . in accordance with the critical circumstances finding in the final determination.

Am. Final Determination, 66 Fed. Reg. at 63,672 (citation omitted).[31]

Plaintiffs challenge Commerce's practice of imputing knowledge of dumping to importers "based entirely on the fact that the final dumping margin for certain respondents was 25% or greater." Pls.' Mem. at 17. Plaintiffs assert that Commerce's practice is "arbitrary and unreasonable" in the NME context where that importer had "(1)

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[30] Effective March 1, 2003, the United States Customs Service was renamed the Bureau of Customs and Border Protection of the United States Department of Homeland Security. *See* Reorganization Plan Modification for the Dep't of Homeland Security, H.R. DOC. 108–32, at 4 (2003).

[31] The liquidation of any unliquidated entries of honey from the PRC, which were entered on or after February 10, 2001, and May 11, 2001, has been enjoined pursuant to the court's order of March 10, 2003, pending final court decision, pursuant to 19 U.S.C. § 1516a(e). *See* Court Order (Mar. 10, 2003).

no knowledge of the surrogate values Commerce intend[ed] to use for its margin calculation and (2) no control over which surrogate values [would] ultimately be used." *Id.* at 21–22 (citation omitted). In support of their position Plaintiffs cite *ICC Industries, Inc. v. United States*, 10 CIT 181, 632 F. Supp. 36 (1986), *aff'd* 812 F.2d 694 (Fed. Cir. 1987).[32] The trial court in *ICC Industries, Inc.* upheld Commerce's practice of imputing knowledge to importers in the PRC context where the importers "should have known the price [which was 22% below the price of comparable merchandise from a market economy country] was 'too good to be true.' " Pls.' Mem. at 19 (quoting *ICC Indus., Inc.*, 10 CIT at 185). Plaintiffs distinguish the instant case from *ICC Industries, Inc.* asserting that it is unreasonable for Commerce to impute knowledge of dumping in circumstances where, as here, the Suspension Agreement was in effect, and, as Plaintiffs argue, "the only *knowledge* importers had at the time of importation was that they were purchasing Chinese honey at prices

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[32] The court in *ICC Industries, Inc. v. United States*, 10 CIT 181, 632 F. Supp. 36, *aff'd* 812 F.2d 694 (Fed. Cir. 1987) applied the pre-URAA version of 19 U.S.C. § 1673d(a)(3). At that time, 19 U.S.C. § 1673d(a)(3)(A)(ii) did not require, as it does now, a finding that the importer knew or should have known "that . . . there would be material injury by reason of . . . sales [at less than fair value]." *Compare* 19 U.S.C. § 1673d(a)(3)(A)(ii) (2000) *with* 19 U.S.C. § 1673d(a)(3)(A)(ii) (1982); *see* H.R. REP. NO. 103–826(I), at 50 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 3822. *See also Coal. for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs.*, 23 CIT at 112 n.39, 44 F. Supp. 2d at 252 n.39 (citing 19 U.S.C. § 1673d(a)(3) (1988)) ("Under the pre-URAA practice, critical circumstances existed if Commerce found massive imports of the subject merchandise over a relatively short period of time prior to the suspension of liquidation and (1) there is either a history of dumping or (2) the importer knew or should have known that the exporter was selling the merchandise at less than fair value. . . . Commerce did not require the 'likelihood of material injury' prong.").

Moreover, at the time Commerce made its final affirmative critical circumstances determination in Potassium Permanganate From the P.R.C., 48 Fed. Reg. 57,347 (ITA Dec. 29, 1983), the decision reviewed in *ICC Industries, Inc.*, the 25% or more rule did not exist. The 25% or more rule first appears in Commerce precedent in 1984—the year after Potassium Permanganate From the P.R.C. was decided. *See, e.g.*, Pads for Woodwind Instrument Keys From Italy, 49 Fed. Reg. 28,295, 28,297 (ITA July 11, 1984) (final determination) (weighted-average margin of 1.16% not sufficiently large to raise presumption of knowledge of dumping); Carbon Steel Wire Rod From Spain, 49 Fed. Reg. 38,173, 38,175–76 (ITA Sept. 27, 1984) (final determination) (importer knew or should have known of dumped imports where margins calculated on the basis of questionnaire responses sufficiently large; weighted-average margin of 34.05% found to be sufficient); Carbon Steel Wire Rod From Arg., 49 Fed. Reg. 38,170, 38,173 (ITA Sept. 27, 1984) (final determination) (weighted-average margin of 119.11 sufficient to impute knowledge); Circular Welded Carbon Steel Pipes & Tubes From Thailand, 51 Fed. Reg. 3384, 3385 (ITA Jan. 27, 1986) (final determination) ("We normally consider margins of 25 percent or more to constitute constructive knowledge of dumping."); Welded Carbon Steel API Line Pipe From Taiwan, 51 Fed. Reg. 8865, 8866 (final determination) (ITA Mar. 14, 1986) (noting 25% or more rule); Certain In-Shell Pistachios From Iran, 51 Fed. Reg. 18,919, 18,921 (ITA May 23, 1986) (final determination) (margins of 25% or more constitute constructive knowledge of dumping). Commerce applied this rule in a case involving merchandise from the PRC as long ago as 1991. *See* Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the P.R.C., 56 Fed. Reg. 241, 243 (ITA Jan. 3, 1991) (final determination) (citing Tapered Roller Bearings & Parts Thereof, Finished or Unfinished, From Italy, 52 Fed. Reg. 24,198 (June 29, 1987) (final determination)).

that had been *officially sanctioned* by the Department of Commerce." *Id.* at 22 (emphasis in original). Thus, Plaintiffs contend that Commerce's finding that importers knew or should have known of sales at less than fair value is unsupported by substantial evidence and otherwise not in accordance with law.

Plaintiffs further contend that Commerce's determination that importers knew or should have known that there would be material injury by reason of subject imports is unsupported by substantial evidence and otherwise contrary to law. Plaintiffs argue that "given the restrictions and purpose of the Honey Suspension Agreement . . . it is wholly unreasonable to conclude that importers could have known imports of PRC honey were capable of causing 'material injury' as defined by the statute." Pls.' Mem. at 24 n.2. Specifically, Plaintiffs assert that "importers had no reason to believe or suspect that the [ITC] could determine that any increases in the volume of honey imports subject to this quota restriction were 'significant.' " *Id.* at 24–25 (quoting 19 U.S.C. § 1677(7)(C)(i)). Likewise, due to price restrictions contained in the Suspension Agreement, Plaintiffs argue that importers had no reason to suspect that the ITC could find price underselling, suppression, or depression. *Id.* at 25.

The Government asserts that Commerce properly determined that critical circumstances existed and that the Suspension Agreement was not relevant to that determination. The Government acknowledges that the statute does not explicitly provide for the method by which Commerce is to evaluate the level of an importer's knowledge of dumping or material injury, and urges that the practices it has developed are reasonable and should be accorded deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Def.'s Resp. at 34 (citing *Coal. for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs.*, 23 CIT at 113 n.40, 44 F. Supp. 2d at 252 n.40). Citing Commerce's "substantial discretion," in determining importers' knowledge of dumping, the Government argues that "[a]ll that is required is that 'the evidence in the administrative record could have reasonably led to [Commerce's] conclusion that the importers . . . knew or should have known that the imports were being sold at less than fair value during the period that the dumping investigation was proceeding.' " *Id.* at 30 (quoting *ICC Indus., Inc.*, 812 F.2d at 698 (ellipsis as in original)). With respect to knowledge of material injury, the Government points out that "the ITC . . . determined that imports of Chinese honey were a present cause of material injury . . . pursuant to the material injury factors specified in [19 U.S.C. § 1677(7)(B)]," and notes that Plaintiffs do not challenge the validity of that finding. *Id.* at 37 (citing 65 Fed. Reg. 69,573; Pls.' Mem. at 24 n.2). The Government asserts that it was reasonable to impute knowledge of material injury to the importers. *Id.* at 36.

Neither the statute nor the SAA instructs Commerce how to determine whether an importer knew or should have known of dumping or material injury. In the absence of such guidance on this issue, Commerce has interpreted this standard in the course of its antidumping determinations. *See, e.g.*, determinations cited *infra* nn.35, 36. Where a statute is silent or ambiguous with respect to the issue in question, the court must first determine whether Commerce's interpretation is a permissible, or reasonable, one. *See Chevron*, 467 U.S. at 843; *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001). The court finds Commerce's construction of 19 U.S.C. § 1673d(a)(3)(A)(ii), with respect to whether an importer knew or should have known of dumping and material injury, to be reasonable.

With respect to knowledge of dumping, Commerce has interpreted 19 U.S.C. § 1673d(a)(3)(A)(ii) to mean that where an antidumping duty margin is found to be 25% or more the importer knew or should have known that the exporter was selling the subject merchandise at less than fair value. Commerce's rationale is that a margin of that magnitude is sufficiently high that a reasonable importer knew, or should have discovered (upon reasonable inquiry), that it was purchasing the subject imports at less than fair value. *See* Carbon Steel Wire Rod From Arg., 49 Fed. Reg. at 38,171 ("It is the Department's position that this test is met where margins calculated on the basis of responses to the Department's questionnaire are sufficiently large that the importer knew or should have known that prices for sales to the United States (as adjusted according to the antidumping law) were significantly below home market sales prices.").

The court finds this interpretation to be a reasonable construction of the knowledge of dumping prong of 19 U.S.C. § 1673d(a)(3)(A)(ii) in the NME context. First, this court and our reviewing court have recognized that importers of merchandise from NME countries are not outside the ambit of the critical circumstances provision simply because importers cannot know, with certainty, what surrogate data Commerce might use to calculate normal value.[33] *ICC Indus., Inc.*, 10 CIT at 185; *ICC Indus., Inc.*, 812 F.2d at 698 ("While the uncertainty of not knowing which country will be chosen by the ITA as the surrogate country is seemingly unfair to an importer of goods from NME countries, this is but one criticism of the statute and is not enough to exempt the importers from the reach of the statute."). Sec-

[33] The court notes that Plaintiffs' argument that Commerce's application of the 25% or more rule is unreasonable in the NME context where an importer (1) had no knowledge of the surrogate values Commerce would use for its margin calculation, and (2) had no control over which surrogate values would ultimately be used, Pls.' Mem. at 22, does not take into account that surrogate values are just that—surrogates for the producers' actual costs of production. The importers had a business relationship with the honey exporters and were thus in a position to make the proper inquiries concerning their suppliers' costs of production.

ond, although the 25% or more rule was not reviewed in *ICC Industries, Inc.*, the Court of Appeals for the Federal Circuit did consider, and uphold, Commerce's reasoning in determining that the importer knew or should have known that the sales of the merchandise in issue were made at less than fair value. Commerce had found that the importers knew that the prices at which they had purchased potassium permanganate from the PRC were "competitive," and that "the unit price of potassium permanganate was 22% less than that imported from Spain and 40% less than the price of the domestic product." *See ICC Indus., Inc.*, 812 F.2d at 698. The Court of Appeals for the Federal Circuit stated that "[t]his level of underselling . . . is sufficient to support the ITA's conclusion that these importers should have known that they were importing potassium permanganate at [less than fair value]." *Id.* at 699. The 25% or more rule adheres to, and is a reasonable extension of, that rationale. The magnitude of the margin, i.e., 25%, is sufficiently large so as to justify concluding that any person in the business of importing honey knew or should have known that the price paid for the product was disproportionately low. This being the case, the court finds Commerce's interpretation of the knew or should have known standard with respect to importer knowledge of dumping to be reasonable.[34]

With respect to importer knowledge that there would be material injury by reason of such less than fair value sales, Commerce has developed a practice of finding the requisite knowledge where the ITC has made an affirmative preliminary injury determination. *See, e.g.*, Commerce determinations cited *infra* n.36. In 1994, Congress amended the critical circumstances statute to require that Commerce find not only that an importer knew or should have known of less than fair value sales of the merchandise at issue, but also that such importer knew or should have known "that there would be material injury by reason of such [less than fair value] sales." 19 U.S.C. § 1673d(a)(3)(A)(ii). *See* H.R. REP. NO. 103–826(I), at 50, *reprinted in* 1994 U.S.C.C.A.N. at 3822. In Brake Drums and Brake Rotors From China, 62 Fed. Reg. 9160 (ITA Feb. 28, 1997) (final determination), Commerce explained the manner in which it would arrive at its knowledge of material injury determination in the following way:

> Pursuant to the URAA . . . the statute now includes a provision requiring the Department to determine, when relying upon [19 U.S.C. § 1673d(a)(3)(A)(ii) in its critical circumstances analysis] . . . , whether the importer knew or should have known that

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[34] The existence of the Suspension Agreement does not compel a different finding. As discussed *supra*, the Suspension Agreement was not an agreement to eliminate dumping, but rather an agreement to restrict the volume of imports. As such, Plaintiffs' argument that the existence of the Suspension Agreement detracts from the reasonableness of Commerce's determination that the importers here knew or should have known of dumping is misplaced.

> there would be material injury by reason of the less than fair value sales. In this respect, the preliminary finding of the . . . ITC . . . is instructive . . . . [T]he Department has determined that a preliminary ITC finding of a reasonable indication of present material injury to the U.S. industry, when coupled with massive imports and a high rate of dumping by a given exporter . . . permits the conclusion that importers of the subject merchandise from such exporters knew or should have known that such imports would cause injury to the domestic industry.

Id. at 9164.

Commerce's approach is reasonable. In a preliminary injury determination, the ITC determines, "based upon the information available to it at the time of the preliminary determination, whether there is a reasonable indication that a domestic industry is materially injured . . . by reason of the allegedly unfairly traded imports." ITC Preliminary Determination at 3 (citing 19 U.S.C. § 1673b(a)(1)). In making its preliminary determination, the ITC considers the volume of subject imports, their effect on prices for the domestic like product, and their impact on the producers of the domestic like product. 19 U.S.C. § 1677(7)(B)(i); ITC Prelim. Determination at 12. In its investigation of honey from the PRC, the ITC preliminarily concluded that the volume, price effects (including price suppression and depression), and impact of imports of the Subject Merchandise were significant. *See* ITC Preliminary Determination at 15–18. The ITC's findings with respect to these factors are unchallenged. *See* Pls.' Mem. at 24 n.2.

In addition, Plaintiffs do not challenge Commerce's massive imports determination, made pursuant to 19 C.F.R. § 351.206(h). According to a comparison of monthly shipment data supplied by the PRC exporters, Commerce found that "imports of honey from High Hope and Zhejiang showed post-filing increases of at least 15 percent" between October 2000 and February 2001 (the post-filing period), as compared to May 2000 through September 2000 (the pre-filing period). *See* Prelim. Determination, 66 Fed. Reg. at 24,107. When combined with the importer's actual knowledge of massive imports, and Commerce's finding of antidumping duty margins of 25% or more, an affirmative preliminary determination by the ITC that there is a reasonable indication of material injury by reason of allegedly dumped imports of the Subject Merchandise supplies sufficient reason for Commerce to charge the importer with the duty of inquiry with respect thereto.

The existence of the Suspension Agreement does not alter the court's analysis. Although, as Plaintiffs correctly note, the Suspension Agreement's declared purpose was to "prevent[ ] the suppression or undercutting of price levels of the domestic product," Suspension Agreement, 66 Fed. Reg. at 42,522; Pls.' Mem. at 24, Plaintiffs

incorrectly conclude that an exporter's alleged compliance with the quota restrictions and the reference price negates the reasonableness of Commerce's finding that an importer knew or should have known that material injury would result from dumped imports of the Subject Merchandise. This is especially true when one considers that Commerce determines whether a suspension agreement will prevent the suppression or undercutting of domestic prices in deciding whether or not to enter into a suspension agreement with an NME country, *see* 19 U.S.C. § 1673c(*l*), whereas the ITC is charged with determining material injury. The two determinations involve distinct analyses conducted by different agencies; Plaintiffs' argument that the existence of the Suspension Agreement renders Commerce's finding of knowledge of material injury unreasonable lacks merit. Thus, Commerce's methodology with respect to a finding that the importer knew or should have known of material injury is a reasonable interpretation of the statute.

Having determined that Commerce's interpretation of the knew or should have known standard in 19 U.S.C. § 1673d(a)(3)(A)(ii), made in the context of an antidumping investigation, is reasonable, the court must next determine whether it is deserving of some level of deference. The Court of Appeals for the Federal Circuit has held that "Commerce's antidumping determinations are 'adjudication[s] that produce . . . rulings for which deference [under *Chevron*] is claimed.' " *Pesquera Mares*, 266 F.3d at 1382 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)). Under *Chevron*, this court defers to statutory interpretations articulated by Commerce during its antidumping proceedings. *Id.* at 1382. Such pronouncements are considered to be precedential. *Id.* at 1381–82 ("Commerce routinely considers the legal interpretations announced in its prior antidumping and countervailing duty determinations to be precedential. . . . So too does the Court of International Trade and this court.") (citations omitted). Accordingly, the court finds *Chevron* deference appropriate here.

The longstanding status of Commerce's interpretations further argues in favor of deferring to them. *See Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1575 (Fed. Cir. 1994) (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978)) ("[T]he longstanding status of Commerce's practice provides a . . . rationale for deferring to the agency's interpretation."); *see also Am. Silicon Techs. v. United States*, 334 F.3d 1033, 1038 (Fed. Cir. 2003) (citing *Koyo Seiko Co.*, 36 F.3d at 1570, 1575) (sustaining "as reasonable Commerce's well established practice of basing interest expenses and income on fully consolidated financial statements."). It has long been Commerce's practice to impute knowledge of dumping, for purposes of determining whether critical circumstances exist, where Commerce finds an-

tidumping duty margins of 25% or more.[35] Indeed, evidence of this practice is present in Commerce determinations dating as far back as 1984. *See, e.g.*, Commerce determinations cited *supra* n.32. In addition, Congress' silence on the matter, despite legislative amendment of 19 U.S.C. § 1673d(a)(3)(A) in 1994—a decade after Commerce instituted its practice of imputing knowledge of dumping under the 25% or more rule—is significant. Moreover, as discussed *supra*, for years Commerce has, in the course of antidumping investigations, imputed knowledge of material injury by reason of sales at less than fair value, where the ITC makes an affirmative preliminary determination of material injury.[36] Thus, (1) having determined that Commerce's interpretation of 19 U.S.C. § 1673d(a)(3)(A)(ii) with respect to the knew or should have known standard in both the dumping and material injury contexts is reasonable, (2) the interpretation having been made in the context of an antidumping determination, and (3) in light of the longstanding status of Commerce's interpretation, Congress having been afforded an opportunity to address this interpretation and having failed to do so, the court sustains Commerce's interpretation of the knew or should have known standard in 19 U.S.C. § 1673d(a)(3)(A)(ii).[37] *See Pesquera Mares*, 266 F.3d at 1381–82.

As noted, Plaintiffs do not challenge Commerce's massive imports determination, nor do they argue that Commerce miscalculated the antidumping duty margins Commerce found to be in excess of 25%. Further, it is undisputed that the ITC made an affirmative preliminary injury determination, the merits of which are unchallenged. Thus, in light of the court's finding with respect to Commerce's con-

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[35] *See, e.g.*, Commerce determinations cited *supra* n.32; Certain Cut-to-Length Carbon Steel Plate From The P.R.C., 62 Fed. Reg. 31,972, 31,978 (ITA June 11, 1997) (prelim. determination) ("In determining whether there is a reasonable basis to believe or suspect that an importer knew or should have known that the exporter was selling the plate at less than fair value, the Department normally considers margins of 15 percent or more sufficient to impute knowledge of dumping for constructed export price (CEP) sales, and margins of 25 percent or more for export price (EP) sales."); Steel Concrete Reinforcing Bars From the P.R.C. & Pol., 65 Fed. Reg. 54,228, 54,229 (ITA Sept. 7, 2000) (prelim. critical circumstances determinations) ("[T]he Department's normal practice is to consider margins of 25 percent or more sufficient to impute knowledge of dumping."); Certain Cold-Rolled Carbon Steel Flat Products From Taiwan, 67 Fed. Reg. 62,104, 62,105 (ITA Oct. 3, 2002) (final determination) (declining to impute knowledge where margins were less than 25% "threshold" to impute knowledge).

[36] *See, e.g.*, Brake Drums & Brake Rotors From China, 62 Fed. Reg. at 9164; Certain Cut-to-Length Carbon Steel Plate From the P.R.C., 62 Fed. Reg. at 61,967; Certain Automotive Replacement Glass Windshields From the P.R.C., 66 Fed. Reg. at 48,238–39.

[37] The court further notes that Commerce's interpretations of the knew or should have known standard are precisely the sort that Congress endowed Commerce with the authority to make in light of its expertise in administering the antidumping laws. *See Coal. for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs.*, 23 CIT at 113 n.40, 44 F. Supp. 2d at 252 n.40 (citing *Chevron*, 467 U.S. at 843) ("The URAA and SAA are silent as to how Commerce should make a finding of knowledge of material injury. Therefore, Commerce is afforded reasonable discretion in formulating a methodology.").

struction of 19 U.S.C. § 1673d(a)(3)(A)(ii), the court finds that Commerce's final affirmative critical circumstances determination is in accordance with law and supported by substantial evidence.

III. *Commerce's valuation of raw honey is neither in accordance with law nor supported by substantial evidence*

Among the factors of production valued by Commerce was raw honey. In valuing raw honey, Commerce "used an average of the highest and lowest price for raw honey given in [an article published in The Tribune of India ("Tribune Article")], entitled, 'Apiculture, a major foreign exchange earner.' " Prelim. Determination, 66 Fed. Reg. at 24,106. In the Final Determination, Commerce continued to value honey using information contained in the Tribune Article:

> The raw honey price data from *The Tribune of India* is the best available surrogate value for the following reasons: 1) it is the most contemporaneous, dated May 1, 2000; 2) the broad-based data is specific to Indian raw honey prices (i.e., generally Indian honey, like PRC raw honey, has a high moisture content); and 3) it is quality agricultural data. We do not find that the prices offered by petitioners and respondents offer more accurate or representative alternatives.

Decision Mem., Pub. R. Doc. 216 at 21; *see The Tribune of India* (May 1, 2000), Pub. R. Doc. 219, App. IX. In deciding to use the Tribune Article, Commerce rejected a study published by the Agriculture and Processed Food Products Export Development Authority ("APEDA Study"), finding that "the values in . . . the APEDA study submitted by respondents . . . suffer from inherent weaknesses not present in the prices reflected in *The Tribune of India*." Decision Mem., Pub. R. Doc. 216 at 21. In particular, Commerce stated that it was

> unpersuaded that the APEDA study . . . provides a more accurate representation of Indian raw honey prices than does *The Tribune of India*. The APEDA study is a feasibility study which projects possible future revenues for Indian honey producers. The prices reflected in the study, therefore, are not actual market prices, but rather price projections or estimates. Although respondents are correct that the Department has used projections in the past, its preference is still to use actual prices whenever appropriate actual prices are available. Furthermore, the APEDA study appears to have been completed in 1999; thus, its price projections for 1999 are probably based on information gathered prior to 1999. Therefore, the APEDA study is not contemporaneous with the POI.

Id. at 21–22; *see also* APEDA Study, Pub. R. Doc. 114, Ex. 1. The Tribune Article listed the sale price of honey to be 25 to 45 rupees per kilogram, and Commerce determined the value of raw honey to be 35

rupees per kilogram. *See* Prelim. Analysis Mem., Conf. R. Docs. 47–49 at 2.

Plaintiffs take issue with Commerce's rejection of the APEDA Study entitled "A study on the Export potential for Indian Honey," which listed the average "value" of honey in India to be 25 rupees per kilogram. Pls.' Mem. at 26; APEDA Study, Pub. R. Doc. 114, Ex. 1, ¶3.1. Plaintiffs argue that the Tribune Article is not the best available information and that the reasons Commerce offered for rejecting the APEDA Study are speculative, for the following reasons: (1) Commerce assumed that the study contains *estimates* of prices instead of actual prices, *id.* at 28; and (2) Commerce stated that the information represented in the APEDA Study is " 'probably based on information gathered prior to 1999.' " *Id.* (quoting Decision Mem., Pub. R. Doc. 216 at 22). Plaintiffs assert that the APEDA data are superior to the data contained in the Tribune Article because the APEDA Study "demonstrates detailed and extensive research into the Indian honey industry," *id.* at 29, as opposed to the "offhand reference" as to the price of honey varying "from Rs 25 to Rs 45 per kg" contained in Tribune Article. *Id.* Plaintiffs further point out that the Tribune Article does not specify when the pricing data were compiled. *Id.* at 30.

It is well-established that Commerce enjoys wide discretion in valuing the factors of production. *See Nation Ford Chem. Co.*, 166 F.3d at 1377 (citing *Lasko Metal Prods. Inc.*, 43 F.3d at 1446) ("While § 1677b(c) provides guidelines to assist Commerce in [constructing foreign market value], this section also accords Commerce wide discretion in the valuation of factors of production in the application of those guidelines."). However, "[d]espite the broad latitude afforded Commerce and its substantial discretion in choosing the information it relies upon, the agency must act in a manner consistent with the underlying objective of 19 U.S.C. § 1677b(c)—to obtain the most accurate dumping margins possible." *Shandong Huarong Gen. Corp. v. United States*, 25 CIT ___ , ___ , 159 F. Supp. 2d 714, 719 (2001) (citing *Writing Instrument Mfrs. Ass'n v. United States*, 21 CIT 1185, 1192, 984 F. Supp. 629, 637 (1997)); *Shakeproof Assembly Components*, 268 F.3d at 1382 ("[T]he critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible."). To determine whether Commerce's selection of surrogate values furthers this statutory purpose, the court must determine whether "Commerce's choice of what constitutes the best available information evidences a rational and reasonable relationship to the factor of production it represents." *Shandong Huarong*, 159 F. Supp. 2d at 719 (citations omitted).

As between the source of data relating to the price of honey Commerce selected, and that offered by Plaintiffs, Commerce appears to have used the more reliable source. The Tribune Article addresses

the sale price of honey, whereas the table in the APEDA Study from which Plaintiffs identify the "average value of honey" appears in the context of a discussion concerning the development of a model for "doubl[ing] the number of bee colonies every 2 years," not determining the value of honey. *See The Tribune of India* (May 1, 2000), Pub. R. Doc. 219, App. IX, at 43 (stating that "[t]he sale price of honey by beekeepers in India varies from Rs 25 to Rs 45 per kg" and comparing that price range to prices charged in the United States and other countries); APEDA Study, Pub. R. Doc. 114, Ex. 1, tbl. 3.1; *id.* ¶3.1.1. The publication of the Tribune Article, dated May 1, 2000, coincides with the POI.[38] The APEDA Study, in contrast, bears the year 1999. *See generally* APEDA Study, Pub. R. Doc. 114, Ex. 1. Notwithstanding Plaintiffs' assertion that "there is no reason to assume that 'present-day' values contained in the study are from any period earlier than 1999," Pls.' Mem. at 28, the APEDA Study does not specifically mention any date later than 1998 for the material referenced therein. Thus, as Commerce noted in the Decision Memorandum, the information in the APEDA Study was not contemporaneous with Commerce's investigation. Moreover, the Tribune Article, published on *The India Tribune's* Web site, was publicly available, while Plaintiffs make no such argument with respect to the APEDA Study. *See* 19 C.F.R. § 351.408(c)(1) ("The Secretary normally will use publicly available information to value factors.").

Nonetheless, the results reached by applying the data from the Tribune Article are sufficiently incredible so as to call into question their reliability. Specifically, the weighted-average U.S. price of honey from the PRC was calculated as $857.77 for Zhejiang, $866.59 for Kunshan, and $805.32 for Inner Mongolia (per metric ton). *See* Final Analysis Mem., Conf. R. Doc. 74, App. XIX (Zhejiang); Conf. R. Doc. 73, App. IX (Kunshan); Conf. R. Doc. 75, App. IX (Inner Mongolia). In accordance with the Suspension Agreement,[39] the minimum price at which honey could be sold during the POI was equal to 92% of the weighted-average of the honey unit import val-

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[38] The record contains two identical versions of the Tribune Article which bear different dates – January 1, 2000 and May 1, 2000. In the Decision Memorandum, Commerce indicated that it considered the article bearing the date May 1, 2000. The court notes that both of these dates fall within the POI.

[39] As previously noted, Plaintiffs may not rely on compliance with the Suspension Agreement either (1) as evidence that their U.S. sales were not made at less than fair value or (2) as proof that they neither knew or should have known that the Subject Merchandise was being dumped, or that sales of the Subject Merchandise would result in material injury. Nonetheless, Plaintiffs' alleged compliance with the Suspension Agreement (which Commerce does not dispute) is a useful way to establish the facts upon which a substantial evidence determination can be made. In other words, while Plaintiffs' reliance on the Suspension Agreement as evidence to refute a dumping or critical circumstances determination may not be justified, the actual facts relating to U.S. sales price resulting from compliance with the Suspension Agreement can be used to determine if a finding is supported by substantial evidence.

ues from all other countries.[40] *See* Suspension Agreement, 60 Fed. Reg. at 42,524. Thus, taking Zhejiang's data as an example, the weighted-average of honey unit import values from all other countries during the POI would have been approximately $932.25 per metric ton. Using a price of 35 rupees per kilogram, however, Commerce calculated normal value for Zhejiang to be $1,001.99 per metric ton and the foreign unit price in U.S. dollars to be $1,067.72. *See* Final Analysis Mem., Conf. R. Doc. 74, App. VIII. Thus, the weighted-average of the honey unit import values from all other countries was approximately $69.74 less than Commerce's calculation of the normal value of honey sold by Zhejiang. Because raw honey is by far the most important factor of production, its valuation appears to be the most anomalous. As MOFTEC put it in a letter to Commerce, "This conclusion implies that the whole world was dumping honey during [the POI], which is irrational." Letter of MOFTEC to Commerce via facsimile of 9/21/01, Pub. R. Doc. 237 ¶2. While it is possible that the PRC is the worldwide high cost producer of honey, the very magnitude of the difference between Commerce's calculation of normal value and the weighted-average of honey unit import values from all other countries during the POI, calls into question Commerce's methodology and the evidence on which it relied. Indeed, this anomalous result indicates that Commerce's methodology was lacking, and thus not in accordance with law, and that its conclusion was not supported by substantial evidence.

On remand, Commerce shall revisit its decision to value raw honey at 35 rupees per kilogram. Commerce shall (1) determine whether the use of the Tribune Article results in the "valuation of [raw honey] . . . based on the best available information regarding the value[ ] of such factor[ ]," 19 U.S.C. § 1677b(c)(1), (2) should it find that it is, explain in detail how the use of 35 rupees per kilogram in determining normal value "evidences a rational and reasonable relationship to the factor of production it represents," *Shandong Huarong*, 159 F. Supp. 2d at 719, (3) no matter whether it continues to use the Tribune Article or other sources, fully and completely justify any sources of data as the "best available information" for the finding such data are used to support, and (4) should any resulting

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[40] It is clear that the Suspension Agreement was before Commerce during the course of the Second Investigation and thus may fairly be considered part of the record. *See Floral Trade Council v. United States*, 13 CIT 242, 244, 709 F. Supp. 229, 231 (1989) (holding documents from earlier investigations that become "sufficiently connected to the current investigation [may] be considered to be before the agency for purposes of the decision at issue."). At the administrative level, Commerce addressed Plaintiffs' arguments concerning the relevance of the Suspension Agreement with respect to such matters as, e.g., Commerce's critical circumstances determination. *See, e.g.*, Decision Mem., Pub. R. Doc. 216 at 4 (cooperation of PRC producers/exporters), 7 (critical circumstances); Final Determination, 66 Fed. Reg. at 50,610 (adopting by reference the Decision Memorandum). Likewise, the issue was argued before this court in the parties' briefs, *see, e.g.*, Pls.' Mem. at 4; Def.'s Mem. at 20, and at oral argument.

calculation of normal value of honey from the PRC exceed that of the weighted-average of the honey unit import values from all other countries during the POI, explain in detail how this furthers the goal of estimating antidumping duty margins as accurately as possible. *See Lasko Metal Prods. Inc.*, 43 F.3d at 1446. To the extent Commerce's findings on remand alter its determinations with respect to the calculation of antidumping duty margins or critical circumstances, Commerce shall amend such determinations accordingly.

CONCLUSION

Based on the foregoing, this matter is remanded to Commerce for further consideration in conformity with this opinion. Such remand determination is due within ninety days of the date of this opinion, comments are due thirty days thereafter, and replies to such comments eleven days from their filing.

SLIP OP. 03–169

BEFORE: RICHARD K. EATON, JUDGE

FUYAO GLASS INDUSTRY GROUP CO., LTD., GREENVILLE GLASS INDUSTRIES, INC., SHENZHEN BENXUN AUTOMOTIVE GLASS CO., LTD., TCG INTERNATIONAL, INC., CHANGCHUN PILKINGTON SAFETY GLASS CO., LTD., GUILIN PILKINGTON SAFETY GLASS CO., LTD., WUHAN YAOHUA PILKINGTON SAFETY GLASS CO., LTD., AND XINYI AUTOMOTIVE GLASS (SHENZHEN) CO., LTD., PLAINTIFFS, V. UNITED STATES, DEFENDANT, AND PPG INDUSTRIES, INC., SAFELITE GLASS CORPORATION, AND VIRACON/CURVLITE, A SUBSIDIARY OF APOGEE ENTERPRISES, INC., DEF.-INTERVENORS.

CONSOL. COURT NO. 02–00282

[Commerce's Final Determination on windshields from the P.R.C., sustained in part and remanded in part]

Decided: December 18, 2003

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*Bruce M. Mitchell, Jeffrey S. Grimson,* and *Mark E. Pardo*), for plaintiffs Fuyao Glass Industry Group Co., Ltd., and Greenville Glass Industries, Inc.

Garvey, Schubert & Barer (*William E. Perry* and *John C. Kalitka*), for plaintiffs Shenzhen Benxun Automotive Glass Co., Ltd., and TCG International, Inc.

Pepper Hamilton, LLP (*Gregory C. Dorris*), for plaintiffs Changchun Pilkington Safety Glass Co., Ltd., Guilin Pilkington Safety Glass Co., Ltd., and Wuhan Yaohua Pilkington Safety Glass Co., Ltd.

White & Case (*William J. Clinton* and *Adams C. Lee*), for plaintiff Xinyi Automotive Glass (Shenzhen) Co., Ltd.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*), for defendant United States.

Stewart & Stewart (*Terence P. Stewart*, *Eric P. Salonen*, and *Sarah V. Stewart*), for defendant-intervenors PPG Industries, Inc., Safelite Glass Corporation, and Viracon/Curvlite, a subsidiary of Apogee Enterprises, Inc.

OPINION AND ORDER

EATON, *Judge*: This matter is before the court, in this consolidated action, on motions for judgment upon the agency record filed by plaintiffs Fuyao Glass Industry Group Co., Ltd., and Greenville Glass Industries, Inc. (collectively, "Fuyao"), Xinyi Automotive Glass (Shenzen) Co., Ltd. ("Xinyi"), Changchun Pilkington Safety Glass Co., Ltd., Guilin Pilkington Safety Glass Co., Ltd., and Wuhan Yaohua Pilkington Safety Glass Co., Ltd. (collectively, "the Changchun Plaintiffs"), and defendant-intervenors PPG Industries, Inc., Safelite Glass Corporation, and Viracon/Curvlite, a subsidiary of Apogee Enterprises, Inc. (collectively, "PPG"). By their motions the parties contest certain aspects of the United States Department of Commerce's ("Commerce") final determination concerning the antidumping duty order covering automotive replacement glass windshields ("Windshields") from the People's Republic of China ("PRC").[1] *See* Certain Automotive Replacement Glass Windshields From The P.R.C., 67 Fed. Reg. 6482 (ITA Feb. 12, 2002) (final determination) ("Final Determination"), *amended* by Certain Automotive Replacement Glass Windshields from the P.R.C., 67 Fed. Reg. 11,670 (ITA Mar. 15, 2002) ("Am. Final Determination"). The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). For the following reasons this matter is remanded to Commerce with instructions to conduct further proceedings in conformity with this opinion.[2]

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); *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting 19 U.S.C.

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[1] All plaintiffs, as well as defendant-intervenors PPG, have filed memoranda in support of their motions for judgment upon the agency record. *See* Fuyao's Mem. Supp. Mot. J. Agency R. ("Fuyao Mem."); Xinyi's Mem. Supp. Mot. J. Agency R. ("Xinyi Mem."); Changchun's Mem. Supp. Mot. J. Agency R. ("Changchun Mem."); and PPG's Mem. Supp. Mot. J. Agency R. ("PPG Mem."). The Government filed a consolidated response to all ("Gov't Brief").

[2] For information regarding the float glass production process, see http://ajzonca.tripod.com/glassprocess.html (last visited Dec. 16, 2003).

§ 1516a(b)(1)(B)(i) (2000)). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Id.* (citing *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). "In reviewing the Department's construction of a statute it administers, [the court defers] to the agency's reasonable interpretation of the antidumping statutes if not contrary to an unambiguous legislative intent as expressed in the words of the statute." *Id.* at 1374–75 (citing *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881–82 (Fed. Cir. 1998)); *see also Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001) ("[W]e conclude . . . that statutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*.") (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Furthermore, "[a]s long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd* 810 F.2d 1137 (Fed. Cir. 1987) (citing *Chevron*, 467 U.S. at 843; *Abbott v. Donovan*, 6 CIT 92, 97, 570 F. Supp. 41, 46–47 (1983)).

BACKGROUND

Commerce initiated its investigation of the Windshields from the PRC in March 2001, in response to a petition filed by PPG. *See* Certain Automotive Replacement Glass Windshields From the P.R.C., 66 Fed. Reg. 48,233 (ITA Sept. 19, 2001) (prelim. determination) ("Prelim. Determination"). The period of investigation for the subject merchandise was July 1, 2000, through December 31, 2000. *See* Final Determination, 67 Fed. Reg. at 6483. As in previous investigations, Commerce treated the PRC as a nonmarket economy ("NME") country.[3] *See id.* In investigating imports from NME countries, Commerce is directed, under certain circumstances, to value the factors of production based on surrogate data from an appropriate market

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[3] A "nonmarket economy" country is defined as "any foreign country that the administering authority 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). "Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority." 19 U.S.C. § 1677(18)(C)(i).

economy country or countries.[4] *See* 19 U.S.C. § 1677b(c)(1). For PRC cases, Commerce has often selected India as the surrogate country of comparable economic development if it is a significant producer of comparable merchandise. *See* Prelim. Determination, 66 Fed. Reg. at 48,238. In this case, Commerce selected India as the surrogate country for the PRC because Commerce found it to be a significant producer of Windshields. *See id*.

On April 17, 2001, the United States International Trade Commission ("ITC") issued its affirmative preliminary determination that there existed a reasonable indication that an industry in the United States was materially injured by reason of imports of the subject merchandise from the PRC. *See* Automotive Replacement Glass Windshields From China, 66 Fed. Reg. 20,682 (ITC Apr. 24, 2001) (prelim. determination). Commerce then sent antidumping questionnaires to a number of known producers of the subject merchandise,[5] responses to which were timely filed. Because these producers were numerous, Commerce selected Fuyao and Xinyi as mandatory respondents,[6] as they were the two largest cooperative exporters, accounting for the majority of all exports of Windshields from the PRC during the period of investigation.[7]

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[4] In valuing factors of production for merchandise exported from an NME country, when appropriate, Commerce is directed to use "the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(1). To the extent possible, Commerce is directed to select market economy countries that (1) are at a level of economic development comparable to that of the NME country; and (2) are significant producers of comparable merchandise. 19 U.S.C. § 1677b(c)(4). *See* Prelim. Determination, 66 Fed. Reg. at 48,238.

[5] Those producers were Fuyao; Xinyi; the Changchun Plaintiffs; Benxun; Dongguan Kongwan Automobile Glass; Guandong Lunjiao Autoglass Co.; Jieyang Jiantong Automobile Glass Co., Ltd.; Shanghai Yanfeng Automotive Trim Co.; Shanghai Fu Hua Glass Co., Ltd.; Tianjin Riban Glass Co., Ltd.; Luoyang Float Glass Group Import & Export Corp.; Hebei Tong Yong Glass Industry Limited Co.; Yantai Yanhua Glass Products Co., Ltd.; and Hangzhou Safety Glass Co., Ltd. Commerce also identified for the Embassy of the PRC a large number of other potential producers/exporters designated in PPG's petition for which Commerce did not have addresses, and notified the PRC government that it was responsible for ensuring that volume and value information for those companies was provided to Commerce. *See* Prelim. Determination, 66 Fed. Reg. at 48,233.

[6] Fuyao and Xinyi were selected by Commerce for full investigation. While the Changchun Plaintiffs cooperated by timely filing responses to Commerce's questionnaires, Commerce did not conduct a full investigation of these companies. All other producers received the PRC-wide rate (the "PRC-wide entity").

[7] The Changchun Plaintiffs' final antidumping duty margins are based on the final antidumping duty margins, as amended, of mandatory respondents Fuyao and Xinyi, both of which are challenging Commerce's Final Determination and Amended Final Determination in this action. *See* 19 U.S.C. § 1673d(c)(5). Should Fuyao and/or Xinyi be successful in reducing their respective antidumping duty margins, the Changchun Plaintiffs seek to have their respective antidumping duty margins recalculated accordingly. *See* Changchun Mem. at 3.

Commerce published the preliminary results of its investigation on September 19, 2001. It determined that certain Windshields from the PRC were being, or were likely to be, sold in the United States at less than fair value. Relying on information submitted by Fuyao, Xinyi, and the Changchun Plaintiffs, Commerce found that each company demonstrated an absence of government control, both in law and in fact.[8] *See* Prelim. Determination, 66 Fed. Reg. at 48,236. Therefore, Commerce granted separate antidumping duty deposit rates to each company and issued an antidumping duty order pursuant to which Fuyao and Xinyi received company-specific antidumping duty margins of 9.79% and .05%,[9] respectively. *See id.* at 48,242. The Changchun Plaintiffs were each assigned an "all others" antidumping duty margin[10] equal to the weighted average of all the calculated margins (in this case, Fuyao's margin of 9.79% and Xinyi's margin of .05%), excluding any zero or *de minimis* margins (Xinyi's margin of .05%). *Id.* at 48,242; *see also Serampore Indus. Pvt. Ltd. v. United States*, 12 CIT 825, 826, 696 F. Supp. 665, 667 (1988) ("Commerce indicates [that] it is a long standing practice to exclude firms that receive zero or *de minimis* margins."). Thus, the Changchun Plaintiffs' antidumping duty margin was 9.79%, i.e., the same as Fuyao's antidumping duty margin, since Xinyi's *de minimis* margin was excluded from the weighted average. *Id.*

On September 21, 2001, Fuyao and PPG timely filed allegations that Commerce had made ministerial errors in its Preliminary Determination. *See* Automotive Replacement Glass From the P.R.C., 66 Fed. Reg. 53,776, 53,776 (ITA Oct. 24, 2001) (am. prelim. determination). After reviewing the allegations, Commerce corrected several

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[8] In an NME situation, it is Commerce's policy to assign all exporters of the subject merchandise a single antidumping duty rate, unless an exporter can demonstrate that it is sufficiently independent of government control so as to be entitled to a separate rate. Commerce's test for whether a company is eligible for a separate rate focuses on control over investment, pricing, and the output decision-making process at the individual firm. *See* Prelim. Determination, 66 Fed. Reg. at 48,235. For a complete discussion of the *de jure* and *de facto* factors Commerce considers in such determinations, see Certain Cut-to-Length Carbon Steel Plate from Ukraine, 62 Fed. Reg. 61,754, 61,758–59 (ITA Nov. 19, 1997) (final determination).

[9] This rate is considered *de minimis*. A weighted-average dumping rate is *de minimis* if Commerce determines that it is less than 2% *ad valorem*. *See* 19 U.S.C. § 1673b(b)(3).

[10] The Changchun Plaintiffs submitted responses to Commerce's questionnaire seeking volume and value of U.S. sales information, but were not selected to be investigated. Thus, they were assigned the "all others" antidumping duty margin based on the margins calculated for those producers/exporters that were selected for investigation. *See* Prelim. Determination, 66 Fed. Reg. at 48,241. Those exporters who failed to respond to Commerce's initial questionnaire were assigned the PRC-wide margin in accordance with Commerce's long-standing practice. *See Sigma Corp. v. United States*, 117 F.3d 1401, 1411 (Fed. Cir. 1997).

ministerial errors and reduced Fuyao's margin to 3.04%. *See id.* at 53,778.

In November 2001, Commerce conducted sales and factors of production verifications for Fuyao and Xinyi. *See* Final Determination, 67 Fed. Reg. at 6483–84. Based on its findings at verification and its analysis of comments received, Commerce made adjustments to the methodology used to calculate the final antidumping duty margins for Fuyao and Xinyi and made changes to the surrogate country values. *See id.* at 6484. Final antidumping duty margins were calculated as follows: 9.67% for Fuyao; 3.70% for Xinyi; 8.22% for the Changchun Plaintiffs; and 124.50% for the PRC-wide entity. *See id.*

On February 14, 2002, Fuyao, Xinyi, and PPG timely filed allegations that Commerce made ministerial errors in its Final Determination. *See* Am. Final Determination, 67 Fed. Reg. at 11,670. After reviewing the allegations, Commerce revised the final determination of the antidumping duty margins for Fuyao, Xinyi, and the Changchun Plaintiffs as follows: Fuyao, 11.80%; Xinyi, 3.71%; and the Changchun Plaintiffs, 9.84%. *See id.* at 11,673. The antidumping duty margin for the PRC-wide entity remained unchanged at 124.50%. *See id.*

In this action, Fuyao, Xinyi, and the Changchun Plaintiffs, as well as PPG, challenge certain aspects of Commerce's Amended Final Determination regarding the antidumping duty margins assigned to Fuyao and Xinyi. In particular, Fuyao challenges six aspects of Commerce's Final Determination; Xinyi joins Fuyao on the first three: (1) whether Commerce erred in disregarding Fuyao's and Xinyi's market economy purchases of float glass; (2) whether Commerce's treatment of water as a direct material resulted in double counting; and (3) whether Commerce's exclusion of the cost of "stores and spare parts" in its calculation of the factory overhead ratio resulted in double counting. Fuyao alone further challenges 1) whether Commerce erred in excluding the "St. Gobain" financial data from its calculation of the surrogate profit ratio; 2) whether Commerce improperly excluded St. Gobain's "purchase of traded goods" from its calculation of the selling, general, and administrative expenses ("SG&A") ratio; and 3) whether Commerce incorrectly rejected Fuyao's actual market prices paid for ocean freight in favor of a surrogate value. For its part, PPG challenges Commerce's methodology for calculating ocean freight, its selection of a surrogate value for electricity, and its methodology for calculating SG&A, factory overhead ("FOH"), and profit.

DISCUSSION

I. *Commerce's Determination With Regard to Market Economy Purchases of Float Glass*[11]

A. *Commerce's Decision to Avoid Subsidized Prices*

First, Fuyao challenges Commerce's finding that substantial evidence on the record provided Commerce with a reason to believe or suspect that prices paid by Fuyao for the factor of production "float glass" from the market economy countries of Korea, Thailand, and Indonesia may have been distorted by broadly available subsidies in those countries. *See* Prelim. Determination, 66 Fed. Reg. at 48,238. Fuyao argues that the legislative history Commerce relied upon in disregarding Fuyao's float glass purchases is not applicable to market economy purchases. *See* Fuyao Mem. at 10–11.

Fuyao begins by stating that "there is no dispute that [Fuyao] made 'market economy purchases' of float glass. That is to say, Fuyao purchased float glass from suppliers located in market economy countries . . . and paid for these purchases in a market economy currency." Fuyao Mem. at 7. Fuyao further states that "[i]t is also undisputed that Commerce has a long-standing policy in NME cases of using such market economy purchases to value a respondent's inputs in lieu of resorting to a surrogate value." *Id.* (citing 19 C.F.R. § 351.408(c)(1) (2000)). Fuyao argues that

> [d]espite this recognized distinction between the use of surrogate values and actual market economy prices, Commerce disregarded Fuyao's market economy purchases of float glass by claiming that the price of these purchases may have been distorted by subsidies. As authority for this decision, Commerce stated that "[t]he legislative history and recent Department determinations support the principal [sic] that we should disregard prices we have reason to believe or suspect are distorted by subsidies."

Id. at 9 (bracketing in original) (citing Issues and Decision Mem. for the Final Results of Antidumping Investigation of Automotive Replacement Glass Windshields From the P.R.C., Conf. R. Doc. 119 at 10, *reprinted in* 67 Fed Reg. 6482 ("Issues and Decision Mem.").

With respect to its decision to disregard prices that it believes or suspects to be distorted by subsidies, Commerce states:

> In the underlying investigation, Commerce was guided by Congress's instruction in the legislative history of the Omnibus Trade and Competitiveness Act of 1988, to avoid using prices in

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[11] Xinyi also disputes Commerce's determination with regard to this issue. Because Xinyi's arguments are substantially the same as Fuyao's, they are not addressed separately in the court's analysis.

> valuing factors that Commerce has reason to believe or suspect may be distorted by subsidies.

Gov't Brief at 22.

The legislative history relied upon by Commerce concerns the use of surrogate values for factors of production in NME cases, pursuant to 19 U.S.C. § 1677b(c)(4).[12] The legislative history states in relevant part:

> The factors [of production for the merchandise subject to investigation] would be valued from the best available evidence in a market economy country (or countries) that is at a comparable level of economic development as the country subject to investigation and is a significant producer of the comparable merchandise. . . . In valuing such factors, *Commerce shall avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices.*

Omnibus Trade and Competitiveness Act of 1988, Conference Report to Accompany H.R.3, H.R. Rep. No. 576, 100th Cong., 2nd Sess., at 590–91 (1988) ("Conf. Rep.") (emphasis added).

Fuyao contends that Congress's directive to Commerce to avoid using prices believed or suspected to be dumped or subsidized applies to surrogate prices only. Thus, Fuyao argues, since the values at issue here are based on market economy purchases, and "market economy purchases are not used pursuant to the surrogate value methodology," these market economy purchases are not limited by the Conference Report's counsel relating to surrogate values. Fuyao Mem. at 13. Fuyao states:

> In sum, the legislative history that Commerce relied upon discusses guidelines for the selection of surrogate values. These criteria were never intended to restrict Commerce's use of actual market economy purchase prices, which the courts have repeatedly stated provide a far more accurate calculation of normal value.

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[12] Title 19 U.S.C. § 1677b(c)(4) states:

> The administering authority, in valuing factors of production under paragraph (1) [i.e., with respect to surrogate values], shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—
>
> (A) at a level of economic development comparable to that of the nonmarket economy country, and
>
> (B) significant producers of comparable merchandise.

19 U.S.C. § 1677b(c)(4)(A)–(B).

Id.

On this point, Commerce claims that

> [c]ontrary to [Fuyao's] argument, a distinction between a market economy purchase price and a surrogate price to value factors in a NME case does not lead to a finding that Congress's instruction to avoid subsidized prices is not applicable to the market economy purchase values.

Gov't Brief at 23.

Fuyao further relies on *Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442 (Fed. Cir. 1994), and *Timken Co. v. United States*, 26 CIT ___ , 201 F. Supp. 2d 1316 (2002), for the proposition that surrogate value provisions of 19 U.S.C. § 1677b(c)(4) are not applicable to purchases from market economy suppliers. It argues:

> [In *Lasko*], the appellate court found that Commerce could use some surrogate values pursuant to the nonmarket economy methodology [described in Section 19 U.S.C. § 1677b(c)(4) (selected based on the criteria discussed in the statute and the legislative history)] and use some market economy purchases pursuant to the "normal" market economy provision for calculating constructed value. This court decision confirms that market economy purchases are *not* governed by the restrictions applicable to surrogate value selections, which means that they should not be disregarded even if there is reason to believe suspect that they may be subsidized.
>
> [In *Timken*,] Timken claimed in part that Commerce was required [by 19 U.S.C. § 1677b(c)(4)] to use surrogate values if possible and "[n]owhere in its final determination does [Commerce] explain that it was not 'possible' to use Indian or other surrogate values according to the expressed statutory requirements. . . . This Court rejected Timken's argument, stating that it "disagrees with Timken that Commerce is required to value [factors of production] pursuant to § 1677[b](c)(4) prior to resorting to a PRC trading company's import prices paid to a market-economy supplier to value material costs for . . . inputs."

Fuyao Mem. at 12–13 (internal citations omitted) (emphasis in original).

Fuyao's reliance on *Lasko* and *Timken* is misplaced. Although both the *Lasko* and *Timken* courts state that the surrogate value provisions of 19 U.S.C. § 1677b(c)(4) do not apply to purchases from market economy suppliers, this does not, in turn, mean that Congress's *instructions* regarding those guidelines (i.e., that Commerce "shall avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices," Conf. Rep. at 590) cannot be used by Commerce when constructing its methodology with respect to

market economy purchases. Indeed, Commerce is fully justified in relying on those instructions to establish the reasonableness of its methodology in an NME situation. "[T]he goals of accuracy, fairness, and predictability should apply whether a country's economy is market or nonmarket oriented." *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 931, 941, 806 F. Supp. 1008, 1018 (1992). These goals would also be pertinent whenever market values are involved. As the Court explained in *China National Machinery Imp. & Exp. Corp. v. United States*, 27 CIT ___ , ___ , 264 F. Supp. 2d 1229, 1237–38 (2003),

> [i]t is true . . . that the "reason to believe or suspect" standard articulated in the House Report explicitly refers only to a selection among surrogate prices, as opposed to a choice between surrogate and market values. . . . However, if Commerce had "reason to believe or suspect" that [the subject market economy purchases] were subsidized, Commerce may employ surrogate values where it determines that they are the best information under the statute.

Id. (emphasis omitted); *see also Peer Bearing Co. v. United States*, 27 CIT ___ , ___ , slip op. 03–160 at 13 (Dec. 12, 2003) ("[W]hen Commerce has reason to believe or suspect that a market-economy supplier's prices are subsidized, Commerce may reject market prices paid to the supplier in favor of surrogate prices for its calculation of [normal value].").

Furthermore, this Court and the Court of Appeals for the Federal Circuit have repeatedly upheld Commerce's broad discretion in valuing factors of production. *See Lasko*, 43 F.3d at 1446; *see also Sigma*, 117 F.3d at 1405 ("Commerce . . . has broad authority to interpret the antidumping statute. . . ."). In valuing such factors, "the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping duty margins as accurately as possible." *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001). Moreover, "the statute grants to Commerce broad discretion to determine the 'best available information' in a reasonable manner on a case-by-case basis." *Timken*, 26 CIT at ___ , 201 F. Supp. 2d at 1321 (citing *Lasko*, 43 F.3d at 1446 (noting that the statute "simply does not say—anywhere—that the factors of production must be ascertained in a single fashion."). Because "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843–44. Finally, it is settled that "statutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial

deference under *Chevron*." *Pesquera Mares*, 266 F.3d at 1382; *see also Chevron*, 467 U.S. at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). In light of Commerce's broad discretion in selecting values for factors of production, its statutory directive to determine antidumping duty margins as accurately as possible, and the deference that its statutory interpretations are to be afforded under *Pesquera Mares*, the court finds that Commerce's decision to avoid subsidized prices is reasonable and, accordingly, defers to it. *China National Machinery* is again instructive:

> [G]iven that the overarching purpose of the antidumping and countervailing duty law is to counteract dumping and subsidies, the court cannot conclude that Congress would condone the use of any value where there is "reason to believe or suspect" that it reflects dumping or subsidies. . . . [I]f Commerce had "reason to believe or suspect" that the [market purchases plaintiff made in this case] were subsidized, Commerce may employ surrogate values where it determines that they are the best information under the statute.

China Nat'l Mach., 264 F. Supp. 2d at 1238.

B. *Commerce's Reliance on the "Reason to Believe or Suspect" Standard*

Fuyao further argues that, even if the statute allows Commerce to avoid subsidized values, Commerce's determination to reject certain purchases of float glass was improper because substantial evidence does not support its conclusion that there was reason to believe or suspect Fuyao's purchases were, in fact, subsidized.[13] Fuyao Mem. at 14. Substantial evidence is relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co.*, 305 U.S. at 229. It is "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

In its Final Determination, Commerce concluded that "this particular and objective evidence (that all exporters from these countries can benefit from these broadly available subsidies) supports a

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[13] "Normally, to construct [normal value] for the final product, Commerce uses actual market prices which an NME producer pays for the input from a market economy country since actual prices are the best approximation of the input's value." *China Nat'l Mach.*, 264 F. Supp. 2d at 1232 (citing 19 C.F.R. § 351.408(c)(1)).

reason to believe or suspect that prices of the inputs purchased from these countries are subsidized."[14] Issues and Decision Mem. at 12.

Commerce's use of the "reason to believe or suspect" standard is based on the legislative history for 19 U.S.C. § 1677b(c)(4): "Commerce "shall avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices." Conf. Rep. at 590. Regarding interpretation of the "reason to believe or suspect" standard, this Court has said:

> In attempting to define a similar phrase, "reasonable grounds to believe or suspect," which appears in 19 U.S.C. § 1677b(b)(1) (1999), this Court observed that "in order for reasonable suspicion to exist there must be 'a particularized and objective basis for suspecting' the existence of certain proscribed behavior, taking into account the totality of the circumstances, the whole picture." Therefore, the "reason to believe or suspect" standard at issue here must be predicated on particular, specific, and objective evidence.

China Nat'l Mach., 264 F. Supp. 2d at 1239 (internal citations omitted).

Thus, "merging the two standards [the "reason to believe or suspect" standard used by Commerce with this Court's "substantial evidence" standard of review] . . . the court will accordingly affirm Commerce's actions if, given the entire record as a whole, there is substantial, specific, and objective evidence which could reasonably be interpreted to support a suspicion that the prices [Fuyao] paid to its market economy supplier were distorted." *Id.* at 1240. "[T]his court may not reweigh the evidence or substitute its own judgment for that of the agency. . . . [T]he agency is presumed to have considered all of the evidence in the record, and the burden is on the plaintiff to prove otherwise." *Id.* (internal citations omitted).

Commerce relies on evidence placed on the record by PPG to support its conclusion that there is "reason to believe or suspect" that

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[14] In developing its methodology for selecting values for factors of production in NME situations, Commerce appears to have established a higher standard than would necessarily be required. "The legislative history and recent Department determinations support the principal [sic] that we should disregard prices we have reason to believe or suspect *are* distorted by subsidies." Issues and Decision Mem. at 10 (emphasis added). When reaching its findings with respect to subsidization, Commerce stated that the evidence supports the conclusion: (1) that "it is reasonable to infer that all exports to all countries *are* subsidized," *Id.* at 11, and (2) that there is "particular and objective evidence to support a reason to believe or suspect that prices of the inputs from that country *are* subsidized." *Id.* The legislative history relied upon to establish the reasonableness of its methodology, however, instructs Commerce to avoid prices "which it has reason to believe or suspect *may* . . . be subsidized." Conf. Rep. at 590 (emphasis added.) Commerce apparently has concluded it should be held to this higher standard, and there is nothing to indicate that this decision is unreasonable. That being the case, the court's analysis will be in accordance with the standard evident in Commerce's selected methodology.

prices from Korea, Thailand, and Indonesia were subsidized. The evidence concerning Korea includes various countervailing duty determinations stemming from subsidy programs in Korea; an excerpt from the U.S. Trade Representative's 2001 National Trade Estimate Report on Foreign Trade Barriers ("NTE Report") concerning Korea's export subsidy practices; excerpts from the World Trade Organization ("WTO") Trade Policy Review for Korea; and PPG's analysis of the foregoing evidence, purporting to show that prices for float glass imported into the PRC from Korea "are likely" subsidized. *See* Petitioners' Fact Submission Accompanying Petitioners' Factors Data, Conf. R. Doc. 92.

For Thailand, Commerce cites the foregoing documentation (albeit with respect to Thailand, not Korea), as well as news articles concerning a projected oversupply of glass in Thailand and tariff increases by Thailand's trading partners; a copy of an antidumping investigation in New Zealand concerning float glass from Thailand; reports downloaded from the Thailand Board of Investment ("BOI") Web site concerning incentives that are provided to BOI Promoted Companies; a report referring to existing preferential tax arrangements for glass makers; and WTO documents showing that South Africa and Australia maintain antidumping duties on imports of float glass from Thailand.

For Indonesia, the evidence of subsidies includes four non-industry specific countervailable export subsidies; an excerpt from the NTE Report for Indonesia; excerpts from the 1998 WTO Trade Policy Review for dealing with Indonesian export subsidy practices; and notifications by Thailand of duties in place for float glass from Indonesia.

In the Issues and Decision Memorandum, Commerce stated:

> We found that, where the facts developed in U.S. or third-country CVD findings include subsidies that appear to be used generally (in particular, broadly available, non-industry specific export subsidies), it is reasonable to infer that all exports to all markets from the investigated country are subsidized. As we argued [previously] in the [tapered roller bearings] proceedings,[15] these prior CVD findings may provide the basis for the Department to also consider that it has particular and objective evidence to support a reason to believe or suspect that prices of the inputs from that country are subsidized.

Issues and Decision Mem. at 11. Thus, Commerce insists that the record evidence supports two findings: (1) that all exports from Korea, Thailand, and Indonesia are subsidized, and (2) that in particu-

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[15] The tapered roller bearings proceedings were appealed in *China National Machinery Import & Export Corp. v. United States*, 27 CIT ____, ____, 264 F. Supp. 2d 1229, 1237–38 (2003).

lar, all exports of float glass from these countries are subsidized.[16] Apparently, Commerce believes that either finding supports its decision to resort to the use of surrogate values.

The court is not convinced that the various determinations and reports cited by Commerce support either conclusion. First, none of the more than 80 countervailing duty determinations cited by Commerce concerning Korean subsidies involved float glass, the product at issue in this case, nor for that matter did any of the countervailing duty determinations involve glass of any kind. Petitioners' Factors Data, Conf. R. Doc. 92, Ex. 1. *See, e.g., Luoyang Bearing Factory v. United States*, 27 CIT ___ , ___ , 259 F. Supp. 2d 1357, 1364 (2003) (emphasis in original) (remanding on the grounds that, *inter alia*, "the various countervailing duty determinations relied upon by Commerce *do not* include the hot-rolled bearing quality steel bar, the steel product at issue in this case."). The WTO report for Korea indicates only that "Korea has aggressively promoted exports though a variety of policy tools," but does not indicate which exporters benefit from such tools. *Id.* Ex. 2. Similarly, the NTE Report discusses several export loan and credit programs, but does not indicate which sectors, producers, or products are eligible for such aid. *Id.* Ex. 3. This evidence, therefore, supports neither Commerce's conclusion that all Korean exports are subsidized, nor its conclusion that float glass exports in particular are subsidized.

In like manner, none of the more than 170 countervailing duty determinations cited by Commerce for Thailand concern any kind of glass. Petitioners' Factors Data, Conf. R. Doc. 92, Ex. 5. As to the other documentation for Thailand, the NTE Report indicates only that "Thailand's programs to support trade in certain manufactured products . . . may constitute export subsidies." *Id.* Ex. 6. Likewise, the WTO report for Thailand lists several financing schemes for exporters, but does not provide information as to restrictions on or qualifications for receiving such assistance. *Id.* Ex. 7. The antidumping duty investigation in New Zealand concludes that "some of the goods under investigation from Indonesia are being dumped, but the volume of dumped imports from Indonesia is negligible." *Id.* Ex. 9. As to the Thailand BOI incentives, they are available for several "priority areas" such as agriculture and public utilities, as well as for "tar-

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[16] In its Final Determination, Commerce established a higher standard (i.e., that it should disregard prices it has reason to believe or suspect *are* distorted by subsidies) than that contemplated in the legislative history (that Commerce should disregard prices that *may be* subsidized). *See supra* n.14. In its brief, Commerce appears to recognize this, arguing that it "is not, in fact, determining from this evidence that the prices *are* subsidized as it would in a countervailing duty investigation, but rather that the information indicates that the prices *may be* subsidized." Gov't Brief at 32 (emphasis added). However, the Government may not now abandon the standard it adopted in the Final Determination for a lesser one.

geted industries." However, none of the targeted industries listed appear to include the manufacture of float glass. *Id.* Ex. 14.

Finally, a report entitled, "Thailand: Construction Plans for $120,000,000 Glass Plant, Siam Cement Group (Thailand)" states that "existing preferential tax arrangements for glass makers are such that they must export 50% of their production output and, as a result[,] there is a product shortage." *Id.* Ex. 15. The report is dated 1995. The period of review for this investigation, however, is July 1, 2000, through December 31, 2000, and there is nothing to indicate that these tax arrangements were still in place at the time of this investigation. As with Korea, this evidence supports neither of Commerce's conclusions.

As to Indonesia, one of the countervailing duty determinations cited by Commerce concerns extruded rubber thread, and all of the others concern apparel and textiles (luggage, handbags, gloves, and the like). Not one of the determinations concerns float glass. Moreover, most of the final determinations indicate that the investigation was terminated, or that the subsidy program at issue was not used by the producer under investigation. *Id.* Ex. 24. The NTE Report for Indonesia indicates that the export subsidies for "special exporters" (a term which is not defined) lapsed in 1999. *Id.* Ex. 25. Finally, the WTO report for Indonesia, which reviews exports subsidies and other promotion policies in that country, was completed in 1999, one year before the period of review for this investigation. *Id.* Ex. 17. Therefore, for Indonesia, too, the evidence supports neither of Commerce's findings.

In accordance with the standards established by its methodology, Commerce "must demonstrate particular, specific, and objective evidence to uphold its reason to believe or suspect that the prices [the plaintiff] paid the supplier for the inputs were subsidized." *China Nat'l Mach.*, 264 F. Supp. 2d at 1243. Here, none of the record evidence for Korea, Thailand, or Indonesia indicates whether the subsidy programs cited by Commerce are available to all exporters, or to float glass producers in particular, in the supplier countries. For example, evidence placed on the record by PPG regarding a Thai subsidy indicates that "each company must apply to the Board of Investment for a Certificate of Promotion (license), which specifies goods to be produced, production and export requirements, and benefits allowed. These license(s) are granted at the discretion of the Board. . . . " *Id.* Ex. 5. A similar Indonesian subsidy is also discretionary: "To whom and at what interest rates such [working capital export] credits are granted is at the discretion of the lending institution." *Id.* Ex. 24 (citing Certain Textile Mill Prods. and Apparel From Indonesia, 49 Fed. Reg. 49,672, 49,674 (ITA Dec. 21, 1984) (prelim. determination)). Moreover, much of the evidence is outdated or simply inapplicable to the float glass industry (e.g., over 200 countervailing duty determinations for Korea and Thailand concerning

products other than float glass). This case is similar to *China National Machinery*, in which the court noted that Commerce failed to provide information as to whether the subsidy program

> is offered across the board to all [producers] in the country, to those of a certain size, to those which manufacture a certain product or set of products, to those in a specific geographical area or so on . . . [or as to] who could benefit from the program or whether the companies may choose not to participate (for example, because the program comes with certain obligations).

China Nat'l Mach., 264 F. Supp. 2d at 1241 (ordering Commerce, upon remand, to review and augment the administrative record and to explain its determinations).

The legislative history, which Commerce relies upon as a basis for the reasonableness of its methodology, indicates that Congress "[did] not intend for Commerce to conduct a formal investigation to ensure that such prices are not dumped or subsidized, but rather intend[ed] that Commerce base its decision on information generally available to it at that time." Conf. Rep. at 590–91. Nonetheless, using the standard Commerce has established, it must "point to particular and specific evidence" from which it would be reasonable to infer that subsidies were available to the float glass industry in Korea, Thailand, and Indonesia, and that "particular and specific evidence" supports a reason to believe or suspect that the float glass purchased by Fuyao was subsidized. *Luoyang Bearing Factory*, 259 F. Supp. 2d at 1364. Thus, on remand, Commerce shall revisit this issue and, if it continues to find that (1) all exports from Korea, Thailand, and Indonesia are subsidized, or (2) that, in particular, exports of float glass from these countries are subsidized, it must provide specific and objective evidence to support these findings. Submission of such evidence "is consistent with the remedial, not punitive, purpose of the antidumping duty laws." *China Nat'l Mach.*, 264 F. Supp. 2d at 1242.

In addition, in reaching its findings Commerce must take into account Fuyao's claim that "every non-specific export subsidy program cited by [PPG] was found by Commerce either to be not in use or to confer only a *de minimis* benefit."[17] *See* Fuyao Mem. at 6. Fuyao further states that "[a]lthough Commerce did not dispute [Fuyao's] findings," *id.*, regarding the *de minimis* nature of the subsidy programs, it nonetheless determined that there was reason to believe or suspect that Fuyao's purchase prices from Korea, Thailand and In-

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[17] The *de minimis* doctrine is applicable to all countervailing duty cases. *See Carlisle Tire & Rubber Co. v. United States*, 1 CIT 352, 354, 517 F. Supp. 704, 706 (1981). A weighted-average antidumping duty margin is *de minimis* if Commerce determines that it is less than 2% *ad valorem*. *See* 19 U.S.C. § 1673b(b)(3). Because "a *de minimis* benefit is, by definition, of no significance whatever," *Carlisle Tire & Rubber*, 1 CIT at 354, 517 F. Supp. at 706, companies with *de minimis* dumping margins are considered to have a dumping margin of zero.

donesia were subsidized. For its part, Commerce maintains that "the level of subsidization in a CVD finding on a certain product and certain exporters, whether de minimis or not, is irrelevant." Gov't Brief at 36 (citing Issues and Decision Mem. at 12). While Commerce may adopt any reasonable methodology to effect the purposes of the statute, it must articulate its reasons for the choices it makes. On remand, Commerce shall fully and completely explain why it would be reasonable to resort to surrogate values, rather than actual amounts paid, where any subsidization—even *de minimis* subsidization—is present. In particular, Commerce shall explain how, if a subsidy is found to be *de minimis*, that subsidy would nevertheless rise to the level of a distortion[18] in prices that would justify Commerce's decision to depart from actual input prices. *See China Nat'l Mach.*, 264 F. Supp. 2d at 1241.

C. *Commerce's Determinations With Regard to Water as a Direct Input and "Stores and Spare Parts"*

1. *Water as a Direct Input*

Based on its observations during the verification process, Commerce determined that "[i]t is clear from the production process for windshields that water usage is significant and vital for cleaning the windshields prior to the 'sandwiching' of PVB [polyvinyl butyrl] in between the two panes of glass." Issues and Decision Mem. at 59. Citing past determinations in which it had assigned a separate surrogate value for water where its use was significant, Commerce assigned separate surrogate values for Fuyao's and Xinyi's water usage. *Id.*; *see also* Sebacic Acid From the P.R.C., 65 Fed. Reg. 49,537 (ITA Aug. 14, 2000) (final results); *see also* Freshwater Crawfish Tail Meat from the P.R.C., 66 Fed. Reg. 20,634 (ITA Apr. 24, 2001) (final results) and accompanying Issues and Decision Mem. at Comment 7 (valuing water as a factor of production because it is used in large quantities and for more than incidental purposes).

Fuyao argues that Commerce's decision to value water as a separate factor of production, rather than as part of factory overhead, was in error, since the financial statement of the Indian company Commerce chose as the surrogate, Saint-Gobain Sekurit ("St. Gobain"),[19] "must include water in its factory overhead. . . . There is no record evidence to support a finding that the St. Gobain financial statement does not include a cost for water. Therefore, it is only reasonable to accept that water was not separated out from St. Gobain's overhead costs." Fuyao Mem. at 30–31. Fuyao argues that

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[18] "The legislative history and recent Department determinations support the principal [sic] that we should disregard prices we have reason to believe or suspect are *distorted by subsidies*." Issues and Decision Mem. at 10 (emphasis added).

[19] No party disputes the use of St. Gobain as a source of surrogate values.

> [t]o avoid double counting, when water is already included in factory overhead, the Department has a long-standing practice of either 1) not adding a separate value for water, or 2) excluding water costs from factory overhead. . . . [T]he record in this case indicates that the Saint Gobain annual report includes water in its factory overhead costs. Commerce has failed to provide a reasonable explanation of where it believes the St. Gobain financial [statement] includes water costs if they are not part of factory overhead.

Id. at 31–32.

Commerce responds that there was no potential to double-count water, because it "valued the overhead using only the line-items 'depreciation', 'stores and spares consumed', and 'repairs and maintenance' from St. Gobain's annual report. None of these line items would include the input water." Gov't Brief at 47 (internal citation omitted). Commerce explained:

> "Depreciation" is defined as "the accounting process of allocating the cost of tangible assets to expense in a systematic and rational manner to those periods expected to benefit from the use of these assets." Also, Commerce has explained in other cases that the "stores and spare parts consumed" line-item in an Indian financial statement generally includes indirect materials, and not direct materials. And "repairs" are defined as "expenditures made to maintain plant assets in operating condition. . . . Replacement of minor parts, lubricating and adjusting of equipment, repainting, and cleaning are examples of maintenance charges that occur regularly and are treated as ordinary operating expenses.

Id. (internal citations omitted).

Although the court finds it reasonable that water would not be included under "depreciation" or "repairs" as defined, the same cannot be said for the line item "stores and spare parts." Commerce argues that the "stores and spare parts" line item "generally includes indirect materials, and not direct materials," and that, since water is a direct material, it would not be included under this line item. Gov't Brief at 47. This reasoning, however, does not constitute substantial evidence that water is not already included in factory overhead. First, the amount allocated to "stores and spare parts" is sufficiently large to accommodate a significant input such as water.[20] Second, only "stores and spare parts" could arguably include water, since it is improbable that water would be included under "depreciation" or "repairs" as those line items have been defined.

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[20] The line item "stores and spare parts" constitutes over one-quarter (26%) of total factory overhead.

In constructing normal value, "Commerce must capture all of the costs of production no matter how characterized." *Yantai Oriental Juice Co. v. United States*, 27 CIT ___ , ___ , slip op. 03–150 at 14 (Nov. 20, 2003). Since Fuyao is correct that there is no evidence that the St. Gobain financial statement did *not* capture water as part of factory overhead, Commerce is directed, on remand, to demonstrate that its decision to value water as a separate factor of production, rather than as part of factory overhead, does not result in impermissible double counting.

2. *"Stores and Spare Parts"*[21]

Next, Fuyao objects to Commerce's inclusion of "stores and spare parts" in factory overhead. Fuyao argues that, since the St. Gobain financial statement's line item "Cost of Materials Consumed" accounted only for the two main raw materials, float glass and PVB, "it is obvious from the St. Gobain financial statements that other raw materials [such as mirror buttons, antenna wires, nails, and screws] are included in 'stores and spare parts.' " Fuyao Mem. at 40–41. Fuyao argues:

> When calculating the factory overhead ratio, the Department divided Saint Gobain's overhead costs (Depreciation + Stores and Spare Parts + Repairs and Maintenance) by Total Material Costs (Materials + Energy + Labor). . . . However, . . . the overhead costs included other raw materials while the cost of materials only included the cots [sic] for PVB and float glass. Accordingly, the Department divided an *inflated* total overhead cost (inclusive of other raw materials) by an *understated* total cost of materials (exclusive of the other raw materials), resulting in an artificially higher factory overhead ratio.

Id. at 41 (emphasis in original).

In the Issues and Decision Memorandum, Commerce stated that "[w]hile [Fuyao] does demonstrate that the direct material costs in direct materials only includes float glass and PVB, there is no evidence on the record that these other direct materials are included under stores and spare parts." Issues and Decision Mem. at 55. Here again, Commerce argues that overhead represents the indirect manufacturing costs that a company incurs, and that "the 'stores and spare parts consumed' line item on a financial statement is included as a miscellaneous part of overhead, and generally includes indirect materials, and not direct materials consumed in the production process." Gov't Brief at 65 (internal citation omitted). Thus, Commerce argues that the additional materials used to make the

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[21] Xinyi also disputes Commerce's determination with regard to this issue. Because Xinyi's arguments are substantially the same as Fuyao's, they are not addressed separately in the court's analysis.

Windshields could not be included in "stores and spare parts," since that line item contains only indirect materials, not direct materials such as the additional materials at issue here.

In support of its argument, Fuyao cites several cases in which Commerce determined that raw materials, not included in direct materials, were part of factory overhead. In Certain Preserved Mushrooms from the P.R.C., 63 Fed. Reg. 72,255, 72,265 (Dec. 31, 1998) (final determination), Commerce concluded that since the raw materials used in the production of canned mushrooms, such as salt, water, chlorine, and ascorbic acid, were not included under "raw materials" along with the two *main* raw materials (mushroom growing costs and cans), "we are including the valuation of all factors other than mushrooms and containers in factory overhead." *Id.* Commerce has cited Mushrooms from the P.R.C. for this reasoning in other cases as well:

> [I]n Mushrooms from the PRC, we found that the factory overhead ratio calculated using the surrogate's financial statement appeared to include the costs for several raw materials included in the category "consumables." Because these materials were already included as part of factory overhead, in that case the Department did not value these materials separately, thereby avoiding double-counting.

Solid Agricultural Grade Ammonium Nitrate from Ukraine, 66 Fed. Reg. 38,632 (July 25, 2001) (final determination) (Issues and Decision Mem. at Comment 6).

With respect to the St. Gobain financial statement, Fuyao argues that because the additional materials are not included under "raw materials" along with float glass and PVB film, the only rational place for these materials to be included is within factory overhead, under the line item stores and spare parts. *See* Fuyao Mem. at 40–41. As with its arguments with respect to water as a direct input *supra*, Commerce argues that the stores and spare parts line item on a financial statement "generally includes *indirect* materials, and not direct materials consumed in the production process." Gov't Brief at 65 (citing Indus. Nitrocellulose From the P.R.C., 62 Fed. Reg. 65,667, 65,671–72 (ITA Dec. 15, 1997) (final results) (emphasis added)). Thus, Commerce argues that it was reasonable for it to conclude that the "stores and spare parts consumed" line item included only indirect materials, "consistent with its normal practice." Gov't Brief at 65. Having thus concluded, Commerce argues that its decision to include "stores and spare parts" in its calculation of factory overhead was also reasonable. *Id.* at 67.

By this argument, Commerce acknowledges that the additional materials used in the production of the Windshields are in fact direct materials. The record supports the finding that only float glass and PVB film—and none of the additional direct materials, such as mir-

ror buttons, antenna wires, nails, or screws—are included under "raw materials." It is therefore reasonable to conclude that the additional raw material expenses are included elsewhere in the St. Gobain financial statement.

Here, Commerce has simply failed to demonstrate that the St. Gobain financial statement did not capture all of the factors of production; i.e., that these financials did not, in fact, represent the entire cost of producing the product and that therefore they must be added in. It is not sufficient for Commerce to conclude, without more, that since the stores and spare parts line item generally includes indirect materials, it may not *also* include the additional direct materials at issue here. This is particularly the case given Commerce's history of inconsistent application of this reasoning. Accordingly, Commerce is instructed, upon remand, to provide an explanation as to where these additional materials are valued in St. Gobain's financial statement, if they are not part of stores and spare parts.

D. *Commerce's Determination With Regard to the St. Gobain Profit Figures*

Title 19 U.S.C. § 1677b(c)(1) directs Commerce to "determine the normal value of the subject merchandise on the basis of the value of the factors of production . . . to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *Id.* To calculate the profit ratio[22] in this case, Commerce included only positive profit figures, disregarding any negative profit figures. Thus, Commerce disregarded the financial data from the Indian surrogate, St. Gobain, since that company had a negative profit, and instead used the financial data from another surrogate, Asahi India Safety Glass, Ltd. ("Asahi").

In doing so, Commerce relied upon language contained in the Statement of Administrative Action, accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–826(I), at 839–40 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4175 ("SAA").[23] The SAA states: "Unlike current practice, under section 1677b(e)(2)(A) [relating to calculating constructed value], in most cases Commerce would use profitable sales as the basis for calculating profit for purposes of constructed value." *Id.* at 840.

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[22] The profit ratio is determined by dividing profit by cost of production or manufacture ("COP"). The value for profit is arrived at by multiplying the profit ratio by the sum of the cost of manufacture and SG&A expenses. *See* Titanium Sponge From the Russian Federation, 64 Fed. Reg. 1599, 1601 (ITA Jan. 11, 1999) (final results).

[23] The SAA is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d) (2000).

Fuyao objects to Commerce's reliance on language from the SAA on the grounds that it applies only to the new provisions under the URAA for calculating constructed value ("CV") in market economy cases, and that this methodology is "solely . . . the 'preferred' CV profit methodology codified under 19 U.S.C. § 1677b(e)(2)(A)."[24] Fuyao Mem. at 27. Because China is an NME country, however, Fuyao argues that Commerce's methodology in the instant case is "completely irrelevant to this proceeding since the profit ratio is not being calculated using [Fuyao's] own home market sales," but rather the sales of the Indian surrogate(s). *Id.*

Because the statute refers only to "an amount" for profit and is silent with respect to how it should be calculated, the court will review Commerce's interpretation for reasonableness. *See, e.g., Rhodia, Inc. v. United States*, 26 CIT ___ , ___ , 240 F. Supp. 2d 1247, 1252 (2002) ("Because the statute is ambiguous, we review Commerce's interpretation to determine whether it is reasonable.").

This Court has noted that "Commerce has been excluding zero profits in market economy cases since 1997 . . . and slowly began to apply this methodology to nonmarket economies." *Rhodia*, 27 CIT at ___ , 240 F. Supp. 2d at 1253. The court in *Rhodia* explained:

> In making [a] profit calculation, the SAA allows Commerce to "ignore sales that it disregards as a basis for normal value, such as those disregarded because they are made at below-cost prices." As the SAA explains, "in most cases Commerce would use profitable sales as the basis for calculating profit for purposes of constructed value." Furthermore, "sales at a loss are consistently rejected, both as a basis for normal value (19 U.S.C. § 1677b(b)) and as a basis for constructed value. (19 U.S.C. § 1677b(e))."

Id. at 1254 (internal citations omitted).

In Certain Fresh Cut Flowers From Ecuador, 64 Fed. Reg. 18,878 (ITA Apr. 16, 1999) (prelim. results) ("Flowers From Ecuador"), Commerce disregarded the financial statements of producers that incurred losses in order to derive an "element of profit" as contem-

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[24] When calculating CV for imported merchandise, where actual data is available, 19 U.S.C. § 1677b(e)(2)(A) directs Commerce to use:

> (1) the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of business; [or]
>
> (2) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country. . . .

19 U.S.C. § 1677b(e)(2)(A).

plated by the SAA. This determination—that the SAA clearly contemplates that normal value includes an element of profit—was applied again in Silicomanganese from Brazil, 62 Fed. Reg. 37,869 (July 15, 1997) (final results). There, Commerce stated that "[t]he presumption that normal value includes an element of profit is so strong that the post-URAA statute directs us to use one above-cost home market sale as the basis for normal value, even if hundreds of other sales have below-cost prices." *Id.* at 37,877.

In Steel Concrete Reinforcing Bars From the P.R.C., 66 Fed. Reg. 33,522 (ITA June 22, 2001) (final determination), Commerce explained that it found it appropriate to extend the practice of excluding losses in the calculation of profit for market economy producers to nonmarket economy producers. In the Issues and Decision Memorandum accompanying that determination, Commerce stated:

> Although in some past cases we have averaged in a loss as zero profit, we believe a better approach is found in [Flowers From Ecuador], which disregards financial statements showing a loss for purposes of calculating the profit component of constructed value under Section 773(e)(2) of the Act in market economy cases. *The same principles applied in* Flowers From Ecuador *are reasonably applied in a nonmarket economy case.*

Issues and Decision Mem. at Comment 8 (emphasis added).

Based on the foregoing, the court finds reasonable Commerce's interpretation of the term "profit" to include only positive amounts. The court agrees with the reasoning in *Rhodia*, that sales made below cost may be disregarded when calculating profit:

> Because negative losses are often rejected and ignored for normal value, based on the clear expression of legislative intent contained within the SAA, Commerce's decision to exclude them from the profit ratio is a reasonable extension of this policy.

Rhodia, 240 F. Supp. 2d at 1254; *see also Pesquera Mares*, 266 F.3d at 1382 ("[S]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*."); *Chevron*, 467 U.S. at 844 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

Having concluded that Commerce was reasonable in including only positive profits in its calculations, the court turns to Fuyao's next two claims. Noting that "Commerce believes that the calculation of profit ratios in NME cases should be guided by the principles established under the CV profit provisions," Fuyao advances two alternative arguments based on the language of 19 U.S.C.

§ 1677b(e)(2)(B).[25] Fuyao Mem. at 28. Fuyao first argues that the third alternative method for determining the CV, found in 19 U.S.C. § 1677b(e)(2)(B)(iii), which permits Commerce to calculate CV profit "based on any other reasonable method," does not require that profit be calculated only on sales "in the ordinary course of trade." Fuyao Mem. at 28. Fuyao states:

> This [ordinary course of trade] criterion is specified for the second alternative CV profit method, but it is not required of the first or third alternative methods. Thus, this [third] provision does not support Commerce's decision to disregard the St. Gobain's profit figure on the assumption that the sales are outside the ordinary course of trade.

Id.

Fuyao is correct that Commerce is not statutorily required to use only sales made in the ordinary course of trade in its calculations. Because the court has determined that Commerce's decision to disregard negative profit amounts was a reasonable interpretation of the language of the statute in light of the language of the SAA, however, it necessarily follows that Fuyao's argument must fail.

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[25] Title 19 U.S.C. § 1677b(e)(2) states that the constructed value of imported merchandise shall be an amount equal to the sum of:

> (A) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
>
> (B) [i]f actual data are not available with respect to the amounts described in subparagraph (A), then [the CV of imported merchandise shall include amounts equal to]—
>
> > (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
> >
> > (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
> >
> > (iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise. . . .

19 U.S.C. § 1677b(e)(2)(A)–(B).

Fuyao next argues that under this third alternative method for calculating the CV profit, the amount of such profit "may not exceed the amount normally realized" by other producers and exporters. Fuyao Mem. at 28 (citing 19 U.S.C. § 1677b(e)(2)(B)(iii)). Thus, Fuyao reasons that because the Asahi profit was the highest profit amount of any Indian company on the record, as Commerce acknowledges, "the use of the Asahi profit figure alone would be in direct violation of the statute's guidelines." *Id.*

As previously noted, the court defers to Commerce's reasonable interpretation of the term "profit" as used in 19 U.S.C. § 1677b(e)(2)(A). The court is not convinced, however, that in developing its methodology Commerce took fully into consideration the direction in 19 U.S.C. § 1677b(e)(2)(B)(iii), that the constructed value of imported merchandise

> shall be a sum equal to the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, *except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers* (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise. . . .

19 U.S.C. § 1677b(e)(2)(B)(iii) (emphasis added).

On remand, Commerce shall fully explain how its chosen methodology complies with the statute. In particular, Commerce shall explain why, given that the Asahi profit amount was the highest profit amount of any Indian company on the record, the use of the Asahi profit figure alone complies with the statute's provisions.

E. *Commerce's Determination With Regard to the "Purchase of Traded Goods" in the Denominator for the SG&A Ratio*

1. *Fuyao*

"Traded goods" are products that are purchased and then resold by a company. *See Timken Co. v. United States*, 23 CIT ___ , ___ , 59 F. Supp. 2d 1371, 1379 (1999). Here, Commerce calculated Fuyao's normal value

> by totaling the sums of COM [cost of manufacture], overhead, profit and packing, and SG&A. In calculating SG&A, Commerce included, *inter alia*, manufacturing, administrative, and selling expenses less energy and labor costs. Because the record of this review lacked adequate information regarding whether the traded goods purchased by St. Gobain affected the cost of

> manufacture, Commerce properly excluded St. Gobain's "purchase of traded goods" from the SG&A ratio.[26]

Gov't Brief at 67 (internal citations omitted).

At the administrative level, Fuyao acknowledged that the costs associated with the purchase of these goods should not be included in the denominator for the factory overhead ratio because "the purchase of traded goods is not relevant to St. Gobain's *production* operations." Fuyao Mem. at 33 (emphasis in original). However, Fuyao reasoned that

> the purchase and resale of traded goods generates *selling and administrative* expenses that have already been included in the numerator of the SG&A calculation. Therefore, Commerce would overstate the SG&A ratio if it failed to include the cost of acquiring these traded goods as part of the SG&A denominator.

Id. (emphasis added). With respect to these expenses, Fuyao states:

> [U]sing selling and administrative expenses that the record indicates include expenses for the purchase and resale of traded goods as part of the SG&A ratio numerator without including the acquisition cost of these same traded goods in the denominator plainly distorts the resulting SG&A ratio.

Id. at 34.

For its part, Commerce maintains that

> [a]lthough [Fuyao] seemingly acknowledges Commerce's above-cited conclusion [that St. Gobain's financial statements do not provide evidence as to the location of expenses associated with the purchase of traded goods], [Fuyao] repeatedly argues that "record evidence supports the conclusion" that costs associated with the purchase of traded goods are part of St. Gobain's reported SG&A amount. . . . However, Commerce cannot find, nor has [Fuyao] specifically pointed to[,] any such "record evidence."

Gov't Brief at 68.

Fuyao disputes Commerce's conclusion that there is no evidence that the selling and administrative expenses associated with "purchase of traded goods" are included in the SG&A expenses listed in the St. Gobain financial statement. Fuyao states:

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[26] SG&A are the general expenses related to the cost of manufacturing. *Magnesium Corp. of Am. v. United States*, 20 CIT 1092, 1104, 938 F. Supp. 885, 898 (1996). SG&A includes labor, materials, factory overhead, and energy costs. *See FMC Corp. v. United States*, 27 CIT ____, ____, slip. op. 03–15 at 4 (Feb. 11, 2003). The SG&A ratio is multiplied by the cost of manufacture in order to obtain the amount of SG&A expenses. *See* Titanium Sponge From the Russian Federation, 64 Fed. Reg. at 1601.

> Nowhere does Commerce allege that the purchase and resale of traded goods does *not* incur selling and administrative costs. Thus, Commerce implicitly acknowledges that the selling and administrative expenses related to the purchase and resale of traded goods must be included in the financial statement *somewhere*. Since there is no indication that these other selling and administrative expenses have been separately reported in the financial statement (*e.g.*, a separate line item described as "administrative expenses for traded goods"), record evidence supports the conclusion that expenses related to the purchase and resale of traded goods are part of the company's reported SG&A amount.

Fuyao Mem. at 34 (emphasis in original).

This Court has consistently rejected determinations by Commerce that include the costs related to the purchase and resale of traded goods in the denominator of the SG&A ratio when Commerce could not show how expenses related to these goods affected production of the subject merchandise. *See, e.g.*, *Rhodia*, 185 F. Supp. 2d at 1357 (granting Commerce's request for a voluntary remand to remove expenses related to traded goods from the denominator for the calculation of the overhead ratio); *see also Timken*, 23 CIT at ___, 59 F. Supp. 2d at 1379 (remanding to Commerce to exclude purchases of traded goods from SG&A, since it "failed to demonstrate how these already manufactured goods constitute a material cost incurred in manufacturing the subject merchandise."); *Luoyang Bearing Factory v. United States*, 26 CIT ___, ___, 240 F. Supp. 2d 1268, 1305 (remanding to Commerce to "exclude 'consumption of traded goods' from Commerce's overhead, SG & A and profit rate calculations and to recalculate the dumping margins accordingly. . . ."). In like manner, any amount of selling and administrative costs related to such goods should be excluded from the ratio's numerator.

Here, both Commerce and Fuyao acknowledge that there is insufficient evidence to determine where expenses associated with the purchase of traded goods are accounted for in St. Gobain's financial statement. *See* Fuyao Mem. at 34; Gov't Brief at 67. On remand, Commerce shall correct the calculation of the SG&A ratio by either (1) eliminating expenses relating to the purchase of traded goods from the numerator, (2) including costs relating to the purchase of traded goods in the denominator, or (3) developing some other reasonable method for taking traded goods into account.

2. *PPG*

PPG complains that Commerce's calculations of the SG&A, FOH, and profit values were flawed by using ratios derived from the actual

costs found in the financial statements of two Indian producers[27] and applied "to the values assigned to the Chinese respondents' Factors of Production (FOP). . . ." PPG Mem. at 4. PPG's argument is essentially one of apples and oranges. That is, PPG insists that the values must be distorted if they purport to accurately represent the values for SG&A, FOH, and profit since they are calculated using ratios derived from the Indian producers' actual experience that were applied to FOP values for float glass and PVB developed by Commerce. In order to correct this distortion

> [i]n the underlying investigation, [PPG] had proposed a methodology that would have permitted [Commerce] to calculate values for overhead, SG&A[,] and profit by allocating the Indian producer's overhead and SG&A expenses to the consumption of its two key raw materials – float glass and PVB. This approach would have produced fixed, quantity-based rates for FOH and SG&A in terms of dollars per square meter of float glass and PVB consumed. [Commerce] could have then applied those rates to the Chinese producers' consumption of float glass and PVB.

Id. at 39–40. Commerce declined to adopt this approach reasoning:

> Petitioners' proposed methodology would only factor in the raw material usage of float glass and PVB. While the Department recognizes that these two inputs constitute the majority of the raw materials consumed to manufacture [W]indshields, other direct inputs cannot be ignored. Direct inputs other than float glass and PVB are almost always included in [W]indshields (ink, mirror buttons, etc). The Department finds it is better to calculate ratios based on all direct costs, as opposed to Petitioners' methodology, which takes into account only quantities of float glass and PVB.

Issues and Decision Mem. at 38–39

Having failed to convince Commerce to adopt its proposed methodology in the underlying investigation, PPG, for the first time, proposes another approach:

> [PPG does] not contest the use of the Indian producer's annual report as the starting point to derive values for FOH, SG&A and profit, or even using ratios. What Plaintiffs contest is [Commerce's] failure to adjust the ratios to account for certain identifiable differences [which it claims it has identified, between the actual experience of the Indian producers and the values for the factors of production developed by Commerce].

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[27] The two Indian producers were St. Gobain and Asahi. The former's financials were used to calculate SG&A and FOH; the latter's were used to calculate profit.

> Considering the FOP values selected by [Commerce], a more representative ratio that still would have reflected the Indian producer's actual FOH and SG&A experience, as mandated by the statute . . . [Under PPG's new proposal] the numerator for the ratio, which comes from the [St. Gobain] annual report, continues to reflect the actual FOH and SG&A experience of the surrogate Indian producer during the period covered by the report. The denominator is adjusted to account for identifiable differences in materials, energy and labor in the values selected by [Commerce] for the Chinese FOP.

PPG Mem. at 37–38.

PPG believes that it is entitled to present this methodology to the court, without having advanced it to Commerce at the administrative level because Commerce, in rejecting its proposed methodology in the underlying investigation, did not adequately address its distortion argument. PPG Mem. at 42 ("While [Commerce] provided an explanation for why it did not use the methodology proposed by Plaintiffs, nowhere does [Commerce] address the *underlying issue* of the distortions caused by using cost-based ratios for FOH, SG&A and profit, even though the question was plainly raised by Plaintiffs.") (emphasis in original).

The situation here is similar to *Timken Co. v. United States*, 25 CIT ___, ___, 166 F. Supp. 2d 608, 625 (2001), where the Court said:

> "Commerce attempted to capture in its rate calculation the surrogate company's experience in incurring overhead and SG&A expenses," and created a reasonable internally consistent ratio that does not violate the boundaries set by 19 U.S.C. § 1677b(c) (1994). The fact that one of the actual parameters is likely to be higher while the other one is likely to be lower than the corresponding data derived from the records of [the subject producer] means that neither Commerce's methodology shall be deprived of this Court's deference, nor does it constitute sufficient grounds for the Court to uphold Timken's suggestion as a more palatable alternative.

Id. (citing *Am. Spring Wire Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984)); *Am. Spring Wire*, 8 CIT at 22, 590 F. Supp. at 1276 ("The court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo* . . . .' " (internal citations omitted)).

While having some attraction for its apparent consistency, PPG's argument must fail. First, while complaining of Commerce's methodology, PPG has failed to demonstrate that applying the ratios to the Indian producer's actual costs will provide a more accurate picture

than applying the ratio to the FOPs found by Commerce. This is particularly relevant because the goal is to establish the costs for each individual Chinese company. The FOPs established by Commerce are designed to be surrogates for these costs. Thus, it is difficult to see how PPG's applying the ratios to St. Gobain's and Asahi's actual costs would be a more accurate reflection of these values. In addition, by failing to offer their methodology to Commerce at the administrative level, PPG cannot raise it for the first time here. "The exhaustion doctrine requires a party to presents its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court." *Fabrique de Fer de Charleroi S.A. v. United States*, 25 CIT ___ , ___ , 155 F. Supp. 2d 801, 805 (2001) (citing *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946)); *Unemployment Comp. Comm'n of Alaska*, 329 U.S. at 155 ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.").

As in *Timken*, PPG has simply not demonstrated that its proposed resolution is any more accurate than the usual method used by Commerce. That being the case, the court defers to Commerce's selection of methodology.

F. *Commerce's Determination With Regard to Ocean Freight Averages*

Fuyao used both NME and market economy freight carriers to ship its Windshields to the United States. In order to allow Commerce to use the cost of the market economy freight carriers even when Fuyao used NME carriers, Fuyao calculated a weighted-average freight cost to each U.S. delivery destination using only those market economy shipments that approximated the NME carrier shipments by region, state, city, or zip code. *See* Fuyao Mem. at 35.

Commerce, however, decided to use these weighted-average prices only when the average market economy price exactly matched the zip code of the NME shipment destination. Where the zip codes did not match, Commerce used a surrogate value for shipments to that area. *See* Issues and Decision Mem. at 45.

Fuyao argues that Commerce should apply the freight rates Fuyao paid to market economy shippers to all of Fuyao's NME shippers, regardless of destination. *See* Fuyao Mem. at 37. Fuyao argues that under *Shakeproof*, the actual price paid for any input is the best available information to value that factor of production. *See Shakeproof*, 268 F.3d at 1382 ("Where we can determine that a [non-market economy] producer's input prices are market determined, accuracy, fairness, and predictability are enhanced by using those

prices.") (citing *Lasko*, 43 F.3d at 1446). Fuyao further argues that in *Peer Bearing Co. v. United States*, 25 CIT ___ , 182 F. Supp. 2d 1285 (2001), the court determined that Commerce acted reasonably in "utilizing actual prices paid in market economy currencies to market economy suppliers to value the entire FOP" and that Commerce "has applied this practice consistently in recent years." *Id.* at 1314, 1312.

Commerce has broad authority to interpret the antidumping statute. *Sigma*, 117 F.3d at 1405. "The critical question is whether the methodology used by Commerce . . . establishes antidumping duty margins as accurately as possible." *Shakeproof*, 268 F.3d at 1382. Here, Commerce chose not to use Fuyao's market economy freight costs to value NME carrier shipments because those shipments to non-matching zip codes did not reflect the distance involved in the shipment. Because distance affects the cost of freight, Commerce determined that using freight purchases that were not based on distance would result in inaccurate values for the freight costs. *See* Gov't Brief at 40 ("The fact that distance affects the cost of freight is also evidenced by actual freight providers' rate schedules which are set by distance and weight.") (citing FOP Valuation Mem. for Final Determination, Pub. R. Doc. 282).

Fuyao relies on past Commerce determinations to support its argument that Commerce utilizes market economy carrier rates for all ocean freight shipments. *See, e.g.*, Heavy Forged Hand Tools From the P.R.C., 67 Fed. Reg. 57,789, 57,792 (ITA Sept. 12, 2002) (final results); *see also* Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the P.R.C., 66 Fed. Reg. 35,937, 35,940 (ITA July 10, 2001) (prelim. results) ("[W]hen some or all of a specific company's ocean freight was provided directly by market economy companies . . . we used the reported market economy ocean freight values for all U.S. sales made by that company."). The cases Fuyao cites, however, do not address the issue of valuing NME carrier destinations with different market carrier destination rates.[28] For example, record evidence indicates that price variances occur when shipping from a port to different zip codes within a state. *See* FOP Valuation Mem. for Final Determination, Conf. Rec. Doc. 121. Therefore, Commerce's decision to value carrier shipments by destination-specific values was reasonable, given that ocean freight costs are in-

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[28] Rather, Fuyao argues that

> [i]n no other case has the Department required that the surrogate ocean freight match "exactly" the NME destination. On the contrary, the surrogate ocean freight rates are averages or rough approximates because the Department generally uses an average surrogate rate for the East Coast and the West Coast. If the Department is concerned about an exact match in terms of *destination*, specificity and contemporaneity, [Fuyao's] significant market-economy shipment rates are unquestionably far superior in all respects than the surrogate used by the Department.

Fuyao Mem. at 39 (emphasis in original).

fluenced by distance. *See, e.g.*, *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 23 CIT ___ , ___ , 59 F. Supp. 2d 1354, 1358 (1999) ("Whether Commerce's use of imported prices to value an entire factor of production is reasonable is inextricably linked to whether the methodology promotes accuracy.") (internal citation omitted).

For its part, PPG does not challenge Commerce's decision to use surrogate values for NME ocean freight. Rather, PPG argues that Commerce used the wrong shipping rate in its calculations with respect to Fuyao. Specifically, PPG contends that instead of using the Maersk Sealand ocean freight rates that were contemporaneous with the period of investigation, Commerce erred by using a rate from a 1997 Federal Maritime Commission report. *See* PPG Mem. at 8.

However, the values urged by PPG appear to have been tainted by the inclusion of charges for "PRC Arbitraries." *See* Petitioners' Surrogate Data, Pub. R. Doc. 332, Ex. 19. These "PRC Arbitraries" appear to be non-market shippers who transport cargo for a portion of the trip from Fuzhao, China to the United States. *See id.* As such, a part of each rate quoted by Maersk Sealand represents shipping performed by a non-market provider at non-market rates. As a result, Commerce had sound reason for preferring the Federal Maritime Commission rates to those proposed by PPG. *See Nation Ford Chem. Co. v. United States*, 21 CIT 1371, 1374, 985 F. Supp. 133, 135 (1997) (Commerce should "avoid surrogate values tainted by nonmarket forces.").

G. *Commerce's Determination With Regard to the Surrogate Value of Electricity*

PPG argues that Commerce should have used, as a surrogate value, the average electricity rate from the financials of three producers[29] of Windshields, rather than the aggregate country-wide rate that Commerce alternatively employed. PPG claims that use of these rates "that are more specific to the industry in the surrogate country actually producing the subject merchandise will yield more accurate dumping margins than will country-wide aggregate rates that reflect usage by a range of industries, most of which are completely unrelated to the subject merchandise." PPG Mem. at 27. As an initial matter PPG makes no showing tending to suggest that electric rates are somehow industry-specific in India. In addition, as PPG concedes, it is normal practice for Commerce to use the country-wide electricity rate as a surrogate. *See* PPG Mem. at 25 ("[Commerce] has typically used country-wide values to value energy

[29] PPG notes that St. Gobain, Asahi, and a third producer, Atul Glass Industries Ltd., accounted for nearly 70% of the total Indian auto glass market. PPG Mem. at 27.

inputs such as electricity in NME cases. . . ."). PPG claims, however, that the situation here is similar to that in Certain Preserved Mushrooms from the P.R.C., 65 Fed. Reg. 66,703 (ITA Nov. 7, 2000) (prelim. results of first new shipper review and first antidumping duty administrative review), where Commerce used the average rate of electricity costs of mushroom producers. In the Preliminary Results Valuation Memorandum, Commerce said:

> We have selected the average rate of the above-named mushroom producers rather than the Aggregate Methodology rate because the former rate is specific to the industry producing the subject merchandise and more contemporaneous to the POR than the Aggregate Methodology rate, which relies on data from 1995 through 1997. Based on our knowledge of the Indian preserved mushroom industry through our conduct of the concurrent antidumping proceeding on preserved mushrooms from India, we have determined that there are 12 known producers of preserved mushrooms in India. The four companies for which we calculated an electricity rate thus account for a substantial segment of the industry. Further, preserved mushrooms production occurs in only a few areas in India. This situation differs from that in other recent cases in which the Aggregate Methodology was applied, where the size and *location* of the Indian industry was not known to the same extent.

Prelim. Results Valuation Mem., Pub R. Doc. 259 at 8 (emphasis added).

Commerce, however, distinguished the situation here from that in Certain Preserved Mushrooms. "The Department established a practice of using a simple average of country-wide Indian state electricity rates as a surrogate value for Chinese electricity rates unless a party has shown that a company can be located only in a specific state. . . ." Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the P.R.C., 63 Fed. Reg. 63,842, 63,856 (ITA Nov. 17, 1998) (final results) ("Tapered Roller Bearings") (citing Manganese Metal From the P.R.C., 63 Fed. Reg. 12,440, 12,446 (ITA Mar. 13, 1998) (final results); Polyvinyl Alcohol From the P.R.C., 61 Fed. Reg. 14,057, 14,062 (ITA Mar. 29, 1996) (final determination); Sulfanilic Acid From the P.R.C., 62 Fed. Reg. 25,917, 25,919 (ITA May 12, 1997) (prelim. results); and Chrome-Plated Lug Nuts From the P.R.C., 63 Fed. Reg. 31,719, 31,722 (ITA June 10, 1998) (prelim. results). In Tapered Roller Bearings, Commerce noted:

> Electricity prices are subject to a number of influences specific to the location of the plant. These include: local market conditions, state intervention, methods of transmission, distribution of power generation and privatization. *Simply put, there are more variables to consider and weigh than the location of the industry because of the nature of the electricity industry in India.*

> Thus, it is fair and reasonable to use a simple average for large industries in all Indian states as a surrogate value for electricity rates.

63 Fed. Reg. at 63,856–57.

The court agrees that PPG has failed to show a compelling reason for Commerce to have deviated from its usual practice of using the country-wide electricity rate. This is particularly the case because, unlike Certain Preserved Mushrooms, there is no evidence that Indian float glass producers are concentrated in one geographical area. Thus, because Commerce used its usual methodology, and because there is no evidence to suggest that the experience of the Indian glass producers was somehow unique with respect to electricity, or that their actual costs should be preferred over the country-wide cost, Commerce's decision is sustained.

CONCLUSION

On remand, Commerce shall revisit the evidence cited for its various findings and satisfy its obligations with specific reference to the evidence it claims supports its conclusions and adequate explanations of its findings based on this evidence. The ITC shall also address the record evidence which "fairly detracts" from the weight of the evidence supporting the ITC's determination. Remand results are due within ninety days of the date of this opinion, comments are due thirty days thereafter, and replies to such comments eleven days from their filing.

Slip Op. 03–170

USEC INC. and UNITED STATES ENRICHMENT CORPORATION, PLAINTIFFS, v. UNITED STATES, DEFENDANT.

Before: Pogue, Wallach, and Eaton, Judges

Court No. 02–00112; and Court Nos. 02–00113, 02–00114 and
Consol. Court Nos. 02–00219; 02–00221, 02–00227, 02–00229, and 02–00233

[Motions for permission for interlocutory appeal pursuant to 28 U.S.C. § 1292(d) granted.]

Decided: December 22, 2003

Fried, Frank, Harris, Shriver & Jacobson (*David E. Birenbaum, Jay R. Kraemer, Mark Fajfar*) for Plaintiffs and Defendant-Intervenors Urenco Limited, Urenco Deutschland GmbH, Urenco Nederland B.V., Urenco (Capenhurst) Ltd., and Urenco, Inc.; *Weil, Gotshal & Manges, LLP* (*Stuart M. Rosen, Gregory Husisian, Jennifer J.*

Rhodes) for Plaintiffs and Defendant-Intervenors Eurodif S.A., COGEMA, and COGEMA, Inc.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, *Stephen C. Tosini*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *David R. Mason*, Senior Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant United States.

Steptoe & Johnson LLP (*Sheldon E. Hochberg, Richard O. Cunningham, Eric C. Emerson*) for Defendant-Intervenors and Plaintiffs USEC Inc. and United States Enrichment Corporation.

Shaw Pittman LLP (*Stephan E. Becker, Nancy A. Fischer, Sanjay J. Mullick, Joshua D. Fitzhugh*) for Plaintiff-Intervenors Ad Hoc Utilities Group.

Opinion and Order

Pogue, Judge: In two prior opinions, this Court decided four issues that critically affect the future of this litigation. The parties now seek permission for an immediate interlocutory appeal of the Court's decisions. *See* 28 U.S.C. § 1292(d) (2000). For the following reasons, we will grant the parties' requests.

Background

The Court's two prior opinions in this matter arose from fifteen actions, consolidated under nine[1] court numbers, all challenging aspects of the final affirmative antidumping and countervailing duty determinations of the Department of Commerce ("the Department" or "Commerce") with regard to low enriched uranium ("low enriched uranium" or "LEU") from France, Germany, the Netherlands, and the United Kingdom[2] or the related final injury determination of the International Trade Commission ("ITC").[3] This Court remanded aspects of the Department's determinations in *USEC Inc. v. United*

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[1] Only eight of those court numbers are contained in the heading of this order. Court Nos. 02–00220 and 02–00236, consolidated as Court No. 02–00220, involve specific issues which await resolution of the "general" issues presented here for certification. *See* Scheduling Order (Aug. 2, 2002); *see also infra* n.3.

[2] The determinations challenged in the original actions were *Low Enriched Uranium from France*, 67 Fed. Reg. 6,680 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination of sales at less than fair value and antidumping duty order); *Low Enriched Uranium from France*, 66 Fed. Reg. 65,877 (Dep't Commerce Dec. 21, 2001) (notice of final determination of sales at less than fair value) ("*LEU from France*"); *Low Enriched Uranium from France*, 67 Fed. Reg. 6,689 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination and notice of countervailing duty order); *Low Enriched Uranium from France*, 66 Fed. Reg. 65,901 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determination); *Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 67 Fed. Reg. 6,688 (Dep't Commerce Feb. 13, 2002) (notice of amended final determinations and notice of countervailing duty orders); *Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 66 Fed. Reg. 65,903 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determinations).

[3] *Low Enriched Uranium From France, Germany, the Netherlands, and the United Kingdom*, 67 Fed. Reg. 6,050 (ITC Feb. 8, 2002). The parties' challenges to the ITC's determinations are consolidated as Court No. 02–00220.

States, 27 CIT ___, 259 F. Supp. 2d 1310 (2003) ("*USEC I*").[4] In *USEC Inc. v. United States*, 27 CIT ___, 281 F. Supp. 2d 1334 (2003) ("*USEC II*"), the Court reviewed the remand results, affirming-in-part and reversing-in-part the Department's remand determination.[5]

No party requests a further remand of the general issues decided by the Court in *USEC I* and *USEC II*. Rather, the parties now seek a statement pursuant to 28 U.S.C. § 1292(d) permitting immediate appeal.[6]

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[4] In the Court's original Scheduling Order for this matter, we decided, and the parties agreed, to address initially "general issues" affecting the Department's threshold determinations, to be followed later by issues which are not general, such as "challenges to the Department of Commerce's calculation results and methods." Scheduling Order at 5 (Aug. 2, 2002). The cases in which these "general issues" were before the Court were assigned to the current panel. *See* USCIT R. 77(e)(2) ("An action may be assigned to a three-judge panel . . . when the chief judge finds that the action raises an issue . . . [that] has broad or significant implications in the administration or interpretation of the law."). Familiarity with the Court's prior opinions is presumed.

[5] In reviewing the agency record in either an antidumping or countervailing duty case, "the [C]ourt [of International Trade] *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) (emphasis added). *See also* 28 U.S.C. § 1585 ("The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States."). Under these statutes, this Court has both the authority and the duty to make this final determination after remand. To hold otherwise would be both inconsistent with the statute and destructive of the need for finality in litigation before the Court. *Cf. Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F.3d 1379 (Fed. Cir. 2003) (holding that the CIT abused its discretion by "interposing its own [factual] determinations" rather than remanding to the ITC for further fact-finding, where fact-finding was committed to the agency by statute).

[6] In their motions, the parties do not entirely agree on the proposed statement of the issues for appeal. The United States states the issue as:

> Whether the United States Department of Commerce's determination that the foreign enricher is the appropriate respondent, in antidumping duty proceedings, for determining export price and constructed export price of Low Enriched Uranium imported pursuant to enrichment transactions is supported by substantial evidence and otherwise in accordance with law.

Def.'s Mot. Stat. Pursuant to 28 U.S.C. § 1292(d)(1) at 3.

Plaintiffs and Defendant-Intervenors EURODIF S.A.Compagnie Generale Des Matieres Nucleaires and COGEMA, Inc. (collectively, "COGEMA"), USEC Inc. and the United States Enrichment Corporation (collectively, "USEC"), and Intervenor the Ad Hoc Utilities Group ("AHUG") state the issues as the Court's decisions on the general issues regarding:

> 1. The Department of Commerce's determination that the antidumping duty petitions and the countervailing duty petitions leading to the contested determinations were filed on behalf of the U.S. low enriched uranium ("LEU") industry;
>
> 2. The Department of Commerce's determination that the antidumping duty law is applicable to LEU delivered pursuant to enrichment transactions; and
>
> 3. The Department of Commerce's determination that the countervailing duty law is applicable to LEU delivered pursuant to enrichment transactions, and that a countervailable subsidy determination can be based on finding that prices paid pursuant to enrichment transactions have been for more than adequate remuneration.

COGEMA's, USEC's, and AHUG's Mot. Issuance Interlocutory Order at 2.

Jurisdiction lies under 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2000).

The Issues

In *USEC I* and *USEC II*, the Court determined that the key general issues decided by the Department in this matter involved the initial applicability of the Department's "tolling" regulation, 19 C.F.R. § 351.401(h).[7] Specifically, the Court decided the following four issues:

1. On the record here, the Department's decision that theenrichment of uranium feedstock pursuant to "SWU"[8] contracts constitutes a sale, rather than a subcontracting (or "tolling") arrangement, is unsupported by substantial evidence;
2. On the record here, the Department's decision not to applyits tolling regulation to determine whether the Intervenors (the "utilities," also the "Ad Hoc Utilities Group" or "AHUG"), rather than the "enrichers," should be designated as producers of LEU is not in accordance with law;
3. On the record here, the Department's reasons for declining to apply the tolling regulation in the context of its industry support determination, and thus, its application of a different definition of "producer" from that used in establishing export or constructed export price are reasonable and therefore in accordance with law; and
4. On the record here, the Department's interpretation that the statutory countervailing duty provisions reach subsidies that help to defray the costs of manufacturing imports of LEU is reasonable, and accordingly, the Department's determination that the purchase of enrichment for more than adequate remuneration may constitute a countervailable subsidy is in accordance with law.

We now consider the parties' motions.

We attempt to resolve this disagreement by stating our view of the issues decided by the Court. *See infra* pp. 5–6.

In addition, the government's "Motion for a Statement Pursuant to 28 U.S.C. § 1292(d)(1)" contains a proposed order certifying a question for appeal. Def.'s Mot. Stat. Pursuant to 28 U.S.C. § 1292(d)(1). Conversely, the government, in replying to COGEMA's, USEC's, and AHUG's Motion also "request[s] that the Court decline to certify any issues for interlocutory appeal." Def.'s Resp. to Pl.'s Mot. Issuance Interlocutory Order at 3. The government's filings do not explain this discrepancy.

[7] Title 19 C.F.R. § 351.401(h) states that Commerce "will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product." 19 C.F.R. § 351.401(h).

[8] A SWU contract is a contract for a "separative work unit," a measurement of the amount of energy or effort required to separate a given quantity of feed uranium into LEU and depleted uranium at specified assays. *USEC I*, 27 CIT at ____, 259 F. Supp. 2d at 1314; *LEU from France*, 66 Fed. Reg. at 65,884. Under a SWU contract, a utility purchases separative work units and delivers a quantity of feed uranium to the enricher. *USEC I*, 27 CIT at ____, 259 F. Supp. 2d 1310, 1314.

Discussion

Title 28 U.S.C. § 1292(d) permits interlocutory appeals, but only where "a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and [where] an immediate appeal . . . may materially advance the ultimate termination of the litigation." *Id.* The instant case meets each part of this statutory three-prong test.

First, general issues one and two involve controlling questions of law because, absent further remand, these two issues effectively terminate the country-specific antidumping cases at issue here. Conversely, the decisions on general issues three and four involve controlling questions of law because those decisions permit cases to proceed that would otherwise have been remanded or concluded. Moreover, further proceedings in this Court will not moot these issues, and an incorrect disposition of these issues will require reversal of a final judgment based thereon. See 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3930, at 423–24 (2d ed. 1996) ("There is no doubt that a question is 'controlling' if its incorrect disposition would require reversal of a final judgment . . . .").

Second, this is a case of first impression, in an area where the law is complex, and there is undeniably a substantial difference of opinion on each question.

Third, an immediate appeal may materially advance the ultimate termination of this litigation. The four issues decided by the Court define the scope and effect of the remaining questions which may be raised in the underlying fifteen actions, and which remain to be considered. Consequently, the Court's decision on these four issues sets the course for any further proceedings. Absent an immediate appeal, the parties and this Court will spend substantial resources and time on the remaining proceedings before a final appealable judgment can be made. On the other hand, an immediate appeal will significantly expedite proceedings by clarifying the course of the proceedings and enabling the parties and the Court to allocate resources efficiently. Accordingly, the Court finds that the three-prong test set forth in 28 U.S.C. § 1292(d) is satisfied here.

Conclusion

In the circumstances present here, an immediate interlocutory appeal will best serve the interests of all parties and of the judiciary. Therefore, the Court will certify, for intermediate interlocutory appeal, the Court's decision on the four general issues decided in *USEC I* and *USEC II*.

THEREFORE, this action having been duly submitted for decision, and the Court, after due deliberation having rendered a decision upon the issues identified, and no party having sought further remand of the Court's decision, and the Court having determined

that these issues involve controlling questions of law with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from this Court's decision may materially advance the ultimate termination of this litigation; now, in conformity with that decision, it is hereby

ORDERED that

1. On the record here, the Department's decision that theenrichment of uranium feedstock pursuant to SWU contracts constitutes a sale, rather than a subcontracting (or "tolling") arrangement, is unsupported by substantial evidence;
2. On the record here, the Department's decision not toapply its tolling regulation to determine whether the intervenors (the "utilities," also the "Ad Hoc Utilities Group" or "AHUG"), rather than the "enrichers," should be designated as producers of LEU is not in accordance with law;
3. On the record here, the Department's reasons fordeclining to apply the tolling regulation in the context of its industry support determination, and thus, its application of a different definition of "producer" from that used in establishing export or constructed export price are reasonable and therefore in accordance with law; and
4. On the record here, the Department's interpretation thatthe statutory countervailing duty provisions reach subsidies that help to defray the costs of manufacturing imports of LEU is reasonable, and, accordingly, the Department's determination that the purchase of enrichment for more than adequate remuneration may constitute a countervailable subsidy is in accordance with law; and it is further

ORDERED that the Court finds, pursuant to 28 U.S.C. § 1292(d), that the Court's decision on the four issues stated above involve controlling questions of law with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from the Court's decision may materially advance the ultimate termination of this litigation; and it is further

ORDERED that 28 U.S.C. § 1292(d) hereby permits appeal of these issues.