U.S. Customs and Border Protection

Slip Op. 10–83

ALLIED PACIFIC FOOD (DALIAN) CO. LTD., ALLIED PACIFIC (H.K.) CO., LTD., KING ROYAL INVESTMENTS, LTD., ALLIED PACIFIC AQUATIC PRODUCTS (ZHANJIANG) CO. LTD., AND ALLIED PACIFIC AQUATIC PRODUCTS (ZHONGSHAN) CO. LTD., Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 05–00056

[Affirming decision upon remand in which the United States Department of Commerce redetermined surrogate values for raw shrimp and labor in an antidumping investigation]

Dated: July 29, 2010

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Bruce M. Mitchell* and *Mark E. Pardo*) for plaintiffs Allied Pacific Food (Dalian) Co. Ltd., Allied Pacific (H.K.) Co., Ltd., King Royal Investments, Ltd., Allied Pacific Aquatic Products (Zhanjiang) Co. Ltd., and Allied Pacific Aquatic Products (Zhongshan) Co. Ltd.

Akin Gump Strauss Hauer & Feld LLP (*Warren E. Connelly*, *Lisa-Marie W. Ross*, and *Margaret C. Marsh*) for plaintiff Yelin Enterprise Co., Hong Kong.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*); *Mykhaylo A. Gryzlov*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

OPINION

Stanceu, Judge:

I. Introduction

This case arose from plaintiffs' contesting the final less-than-fair-value determination ("Final Determination") and amended final less-than-fair-value determination ("Amended Final Determination") that the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department"), issued in an antidumping duty investigation on certain frozen shrimp from the People's Republic of China ("China" or the "PRC"). *Allied Pacific Food (Dalian) Co. v. United States*, 32 CIT __, __, 587 F. Supp. 2d 1330,

1333–34 (2008) ("*Allied Pacific II*"). At issue in the litigation are the Department's surrogate values for two inputs–raw, head-on, shell-on shrimp and hours of labor–used in the production of the subject merchandise. *Id.* Before the court are the Final Results of Redetermination Pursuant to Court Remand (May 21, 2009) ("Second Remand Redetermination"), which Commerce issued in response to the court's order in *Allied Pacific II*, 32 CIT at __, 587 F. Supp. 2d at 1363. In *Allied Pacific II*, the court rejected, for various reasons, the Department's first redetermination upon remand. *Id.* at __, 587 F. Supp. 2d at 1362–63; *see* Final Results of Redetermination Pursuant to Ct. Remand (Oct. 27, 2006) ("First Remand Redetermination").

Plaintiffs Allied Pacific Food (Dalian) Co. Ltd., Allied Pacific (H.K.) Co., Ltd., King Royal Investments, Ltd., Allied Pacific Aquatic Products (Zhanjiang) Co. Ltd., and Allied Pacific Aquatic Products (Zhongshan) Co. Ltd. (collectively "Allied Pacific") and Yelin Enterprise Co., Hong Kong ("Yelin"), are Chinese producers of subject shrimp that were respondents in the antidumping duty investigation. Allied Pacific Summons 1; Yelin Summons 1. Both plaintiffs seek a third remand for redetermination of the surrogate values for raw shrimp. Allied Pacific's Comments in Resp. to the Dep't's Second Remand Determination 3 ("Allied Pacific Comments"); Comments of Yelin Enterprise Co., Hong Kong ("Yelin") on the Second Remand Determination of the Dep't of Commerce 3–4 ("Yelin Comments"). Neither plaintiff comments on the Department's redetermined labor rate. *See* Allied Pacific Comments; Yelin Comments.

The court affirms the Second Remand Redetermination. Rejecting plaintiffs' arguments for a third remand on the issue of surrogate values for raw shrimp, the court concludes that Commerce's redetermined values for this input comply with the court's order in *Allied Pacific II*, 32 CIT at __, 587 F. Supp. 2d at 1363, and are in accordance with law. The court affirms the Department's redetermined surrogate value for hours of labor because no party objects to that determination.

II. BACKGROUND

The background of this case is presented in the court's opinions in *Allied Pacific Food (Dalian) Co. v. United States*, 30 CIT 736, 738–51, 435 F. Supp. 2d 1295, 1298–1308 (2006) ("*Allied Pacific I*"), and *Allied Pacific II*, 32 CIT at __, 587 F. Supp. 2d at 1335–41, and is supplemented herein to recount developments occurring since *Allied Pacific II* was decided on December 22, 2008. In *Allied Pacific II*, the court rejected Commerce's redetermined surrogate values for the raw shrimp input and for the labor rate and ordered Commerce to rede-

termine these surrogate values. *Allied Pacific II*, 32 CIT at __, 587 F. Supp. 2d at 1362–63.

After the court's decision in *Allied Pacific II*, Commerce invited parties to submit for the record new information relevant to its determining a new surrogate value for labor. Second Remand Redetermination 14. On January 30, 2009, Allied Pacific submitted information on 2005 wage rates in India, the country Commerce chose during the investigation as the surrogate country for valuing all factors of production other than labor. *Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to Sec'y of Commerce* 2–3 (Jan. 30, 2009) (Second Remand Admin. R. Doc. No. 5) ("*Allied Pacific Labor Rate Submission*"). Allied Pacific's information came from a report produced by Centre for Social Research ("CSR") in New Delhi, India in collaboration with the United Nations Conference on Trade and Development. *Id.* at 2. Already on the record were country-wide labor rates published in Chapter 5B of the Yearbook of Labour Statistics for multiple countries issued by the International Labour Organization ("ILO"). *See* Second Remand Redetermination 14. Commerce did not obtain any other information for possible use in determining a surrogate value for labor. *See id.*

Commerce issued a draft remand redetermination on April 10, 2009. Second Remand Redetermination 3; *see Letter from U.S. Dep't of Commerce to Akin, Gump, Strauss, Hauer & Feld, LLP* (Apr. 10, 2009) (Second Remand Admin. R. Doc. No. 6) (providing Yelin with the draft of the second remand redetermination). On April 24, 2009, Allied Pacific and Yelin provided comments on the draft to the Department, addressing the raw shrimp issue but not the labor rate issue. *See* Second Remand Redetermination 3. In its Second Remand Redetermination, submitted to the court on May 21, 2009, Commerce calculated new surrogate values for shrimp using ranged data from the Indian shrimp producer Devi Seafoods, Ltd. ("Devi") and adopted a new surrogate labor rate of $0.05 per hour. *Id.* at 3. Commerce determined revised antidumping duty margins of 5.07% for Allied Pacific and 8.45% for Yelin. *Id.* at 37. In their comments to the court on the Remand Redetermination, plaintiffs again address only the issue of surrogate values for shrimp. *See* Allied Pacific Comments; Yelin Comments.

In response to a motion by plaintiffs, the court held oral argument on December 3, 2009. Order, Oct. 8, 2009; Pls.' Partial Consent Mot. for Oral Argument Regarding 2nd Remand Redetermination. Upon plaintiffs' motion made at oral argument, the court allowed a joint post-hearing submission by plaintiffs, which was filed on December 14, 2009 and a response of defendant, filed January 6, 2010. Pls.'

Post-Argument Comments ("Pls. Post-Argument Submission"); Def.'s Resp. to Pls.' Post Hearing Br. ("Def. Post-Argument Submission").

III. DISCUSSION

Under the applicable standard of review, the Department's Second Remand Redetermination must be held unlawful if found to be unsupported by substantial evidence on the record or otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (2000); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (stating that substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

A. Commerce's Choice of Surrogate Values for Raw, Head-On, Shell-On Shrimp Is Affirmed

Commerce used data on the cost of shrimp presented in the financial statement of an Indian producer, Nekkanti Seafoods Ltd. ("Nekkanti") to determine surrogate values for raw shrimp, not only in the investigation but also in the First Remand Redetermination. First Remand Redetermination 5–7; *Issues & Decision Mem. for the Antidumping Duty Investigation of Certain Frozen & Canned Warmwater Shrimp from the People's Republic of China* 12–16 (Nov. 29, 2004) ("*Decision Mem.*").[1] In *Allied Pacific II*, the court rejected the Department's finding in the First Remand Redetermination that the Nekkanti financial statement data were the best available information on the record for valuation of the raw shrimp input. *Allied Pacific II*, 32 CIT at __, 587 F. Supp. 2d at 1362.

In the Second Remand Redetermination, Commerce considered four alternative sets of data that were on the record of the investigation: data from the Seafood Exporters Association of India ("SEAI"), data from the Aquaculture Certification Council ("ACC"), and ranged, public versions of sets of data submitted by two respondents in the parallel antidumping investigation of shrimp from India, Devi and Nekkanti. Second Remand Redetermination 4. Commerce reiterated in the Second Remand Redetermination its five criteria for judging surrogate data, stating that it "prefers to use surrogate values that are publicly available, broad market averages, contemporaneous with the POI [*i.e.*, period of investigation], specific to the input in question,

[1] *See Notice of Am. Final Determination of Sales at Less Than Fair Value & Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the People's Republic of China*, 70 Fed. Reg. 5149 (Feb. 1, 2005) ("*Am. Final Determination & Order*"); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen & Canned Warmwater Shrimp From the People's Republic of China*, 69 Fed. Reg. 70,997 (Dec. 8, 2004) ("*Final Determination*").

and exclusive of taxes and exports." *Id.* at 7 (citation omitted). From among the four data sets, Commerce determined that the Devi ranged data were the best available information on the record. *Id.* at 6–7. Commerce concluded that the Devi ranged data were superior to the SEAI data because, among other reasons, the Devi ranged data were more specific to the input, *id.* at 8–12; that the ACC data "suffered from fundamental problems that called into question the representativeness and reliability of its prices"; and, because of issues pertaining to ranging, "that the Nekkanti ranged data were potentially less accurate than the Devi ranged data." *Id.* at 6. The court concludes that substantial record evidence supports all of these findings by the Department.

Commerce found in the First Remand Redetermination that the ACC's posting of prices was a one-time event and that the ACC was not organized for the purpose of, nor engaged in the practice of, posting such prices. First Remand Redetermination 29–31. On the question of the Department's rejection of the ACC data, the court previously held that "[s]ubstantial record evidence supports the findings that the ACC price data were not regularly posted in that posting of such prices was not a routine ACC function." *Allied Pacific II*, 32 CIT at __, 587 F. Supp. 2d at 1350. In the First Remand Redetermination, the Department relied on these findings in concluding that the ACC data were not sufficiently insulated from conflict of interest. *See id.* ("On remand, Commerce again identified insulation from conflict of interest as a reason for rejecting the ACC data, finding that some of the ACC members were respondents in the parallel Indian investigation and that the ACC prices were posted only after publication of the Preliminary Determination on June 16, 2004."). These findings, which are restated in the Second Remand Redetermination, support the Department's decision to consider the ACC data insufficiently reliable for use in determining a surrogate value for raw shrimp. *See* Second Remand Redetermination 12–13. As the court stated in *Allied Pacific II*, "[i]t is within the Department's discretion to give weight to these two findings in its evaluation of the various data sets." *Allied Pacific II*, 32 CIT at __, 587 F. Supp. 2d at 1350; *see* Second Remand Redetermination 12–13. Commerce's decision to reject the ACC data on grounds of insufficient reliability is based on findings supported by substantial record evidence and on adequate reasoning.

In support of its selection of the Devi ranged data over the Nekkanti ranged data, the Department cited the court's conclusion in *Allied Pacific II* that the Nekkanti ranged data, "'unlike [the] Devi ranged

data, do not include a unit price for each count size and are presented in a format indicating that the count sizes are ranged.'" Second Remand Redetermination 4 n.1 (quoting *Allied Pacific II*, 32 CIT at __, 587 F. Supp. 2d at 1349). The court concludes that Commerce, in the Second Remand Redetermination, relied on findings supported by substantial record evidence in concluding that the Devi ranged data are superior to the Nekkanti ranged data.

In choosing the Devi ranged data over the SEAI data, the Department placed substantial weight on its "specificity" factor, emphasizing the importance of data that may be correlated satisfactorily to the count sizes reported by Allied Pacific and Yelin. *See* Second Remand Redetermination 8–9, 22–23, 32. Commerce concluded, and the record amply supports, that "[t]he value of shrimp is highly dependent on the count-size (the larger shrimp is worth significantly more in the marketplace)." *Id.* at 8. Noting that the Devi ranged data list per-unit prices for individual sizes and that the SEAI data provide information only for count sizes ending in zero, *e.g.*, 20, 30, 40 pieces to the kilogram, etc., Commerce concluded that it could correlate the Devi ranged data more readily to the count sizes reported by Allied Pacific and Yelin. *Id.* at 8, 11. Commerce found, specifically, that the ranged Devi data corresponded to all of the count sizes reported by Allied Pacific and 30 of the 33 count sizes reported by Yelin. *Id.* at 23. Commerce reasoned that "the Devi ranged data are the only source that provides single data points for the bottom and top ranges of each count size[,] making the calculation of the surrogate value more accurate." *Id.* at 8. The Second Remand Redetermination provides as an example an Allied Pacific count size of "43/47" for which "the raw shrimp input had a lower range of 43 and an upper range of 47," adding that "[t]he Devi data list per-unit prices for individual sizes such as 43, 44, 45, 46, and 47." *Id.* Commerce explained that "in calculating the surrogate value for Allied's 43/47 count size, the Department need only include prices for specific count-sizes between 43–47" and that "[t]he same methodology applies for Yelin's count sizes." *Id.* Commerce viewed the SEAI data less favorably not only because the SEAI data are presented in count sizes rounded to tens, but also because the SEAI data list count sizes only up to 100 per kilogram. *Id.* at 23. Commerce considered the latter limitation significant because "Yelin and Allied both reported count sizes well beyond count sizes of 100 pieces per kilogram." *Id.* "For Yelin, for example, this would mean that for a total of 13 of its 33 count sizes, or 39% of count sizes, there would be no matching count size from SEAI." *Id.*

The court affirms, as supported by substantial record evidence, Commerce's finding that the Devi ranged data afford a more accurate correlation to the count sizes reported by Allied Pacific and Yelin than the SEAI data and thus are superior to the SEAI data in that respect. Although Commerce's using the Devi ranged data necessarily required some estimation, the SEAI data require substantially more estimating because they are less revealing with respect to count size and require extrapolation due to the lack of any information on count sizes exceeding 100. The record evidence supports Commerce's general conclusion that the SEAI data have significant shortcomings with respect to count size. It was permissible for Commerce to conclude, based on the record evidence, that these shortcomings would compromise the overall accuracy of the surrogate values determined for the specific count sizes reported by Allied Pacific and Yelin and that these shortcomings are largely avoided by use of the Devi ranged data.

Because the count size of shrimp is unquestionably an important consideration, Commerce reasonably placed more weight on its specificity criterion than on its four other criteria.[2] With respect to its "public availability" criterion, Commerce stated a finding that the SEAI data were not publicly available and that the Devi ranged data, in contrast, were made available to the public in the companion Indian antidumping proceeding. Second Remand Redetermination 9–10. The record supports the finding that the Devi ranged data were made publicly available, and there is some record evidence to support a finding that the SEAI data are not broadly available to the public. The record indicates, for example, that Commerce was unable to obtain copies of the SEAI circulars directly from SEAI. *See* Second Remand Redetermination 21, 25 (citing *Mem. from Program Manager, Office IX, to The File* 2 (June 28, 2004) (Admin. R. Doc. No. 510)); *Allied Pacific I*, 30 CIT at 747, 759–60, 435 F. Supp. 2d at 1305, 1315–16. Nevertheless, the record also establishes that the plaintiffs, at a time prior to the Department's inquiries to SEAI, were able to

[2] Commerce also indicated that Allied Pacific and Yelin reported using mostly white shrimp and that the Devi ranged data it used pertained to that species, while the SEAI data may have pertained to black tiger shrimp. Final Results of Redetermination Pursuant to Ct. Remand 9, 21 (May 21, 2009) ("Second Remand Redetermination"). The court does not find persuasive the Department's reasoning on the issue of the species of the shrimp. Commerce asserts that the value of shrimp depends on the species and that "[t]his is significant because the shrimp size is determined by the species, and shrimp size impacts the number of shrimp sold per kilogram." *Id.* at 9. Because the Department did not state a finding that the species of shrimp has a significant effect on price that would not be accounted for by its selection of count-sizespecific surrogate values, the Department has not explained adequately why it accorded significance to the question of the species reported in the SEAI data.

obtain the circulars from SEAI. *See Allied Pacific I*, 30 CIT at 744–45, 435 F. Supp. 2d 1303. In any event, the court sees no need to reach the question of whether substantial evidence supported a finding that the SEAI data are not publicly available or less publicly available than the Devi ranged data. Even if the two data sources were considered equally available to the public, the Department would be justified in giving more weight to the deficiencies it identified with respect to count size as presented in the SEAI circulars than to the issue of whether the SEAI data are publicly available. Commerce itself concluded that even had it been able to obtain directly from SEAI the documents it had sought, it still would choose the Devi ranged data over the SEAI data on grounds of accuracy. Second Remand Redetermination 22.

In applying its "broad market average" criterion, the Department acknowledged that the ranged Devi data pertained only to a single purchaser, unlike the SEAI and ACC data. *Id.* at 10. As a countervailing consideration, Commerce did not find the SEAI data to be sufficiently complete, observing that the SEAI data "lack any information regarding the volume, value and per-unit price of transactions considered in determining average prices" and that "the data could potentially be based upon a handful of transactions." *Id.* Commerce cited record information showing that Devi purchased a total of 255,068.5 kilograms of raw white shrimp at a value of 38,974,776 Indian rupees, which Commerce considered to be a sufficiently broad average when viewed against the SEAI data, with which Commerce found significant shortcomings. Second Remand Redetermination 11.

In discussing its contemporaneity criterion, Commerce noted that the Devi ranged data pertained to the period October 1, 2002 to September 30, 2003, which encompassed all of the period of investigation April 1, 2003 to September 30, 2003. *Id.* at 11. With respect to exclusivity from taxes, Commerce found, based on data submitted by Devi in the Indian investigation, that the prices in the ranged Devi ranged data included a 0.5% tax and, in response, adjusted the prices downward by 0.5%.[3] *Id*. at 31.

Upon considering the Department's analysis of the four data sets in its entirety, the court concludes that Commerce based its choice of the Devi ranged data on adequate findings, which were supported by substantial record evidence. Plaintiffs raise various arguments in support of the contrary position, maintaining that Commerce erred in not selecting instead the SEAI data or some combination of the SEAI

[3] Commerce explained that it could adjust the SEAI prices for Andhra Pradesh by the 0.5% rate set forth by Devi as the tax rate for that region but could not adjust the prices for Tamil Nadu as it did not have the tax rate for the region. Second Remand Redetermination 31.

and Devi ranged data. Allied Pacific Comments 4–24; Yelin Comments 18–26. Both make the general argument that substantial record evidence does not support Commerce's findings that the Devi ranged data are the best available information on the grounds of specificity, public availability, representativeness of a broad market average, contemporaneity, tax exclusiveness, and reliability. Allied Pacific Comments 4–24; Yelin Comments 4–26. However, plaintiffs' comment submissions fail to make the case that the choice of the Devi ranged data exceeded the discretion that Congress granted to Commerce for the choice of "the best available information" regarding the raw shrimp factor of production. *See* 19 U.S.C. § 1677b(c)(1) (2000). The record supports the findings essential to Commerce's choice of the Devi ranged data, in particular, Commerce's findings that the SEAI data suffer in comparison to the Devi ranged data with respect to count size as well as the presence of background information on volumes and per-unit prices from which Commerce could ascertain how the data were derived. Commerce justifiably placed considerable weight on those findings, which directly pertain to the accuracy and reliability of the resulting surrogate values. Commerce reasonably placed more importance on its factor of specificity to the input than on its other factors.

Both plaintiffs object that the per-unit prices in the Devi ranged data were ranged in such a way that the prices Devi reported exceeded the 10% deviation from actual values that is allowed by the Department's regulations and may have deviated by as much as 34% from the actual prices. Allied Pacific Comments 4–8; Yelin Comments 4–17. Plaintiffs base their objection on a pattern discernible in the Devi ranged data. Allied Pacific Comments 6; Yelin Comments 10. Describing this pattern in post-oral-argument briefing, they state that "the reported ranged per unit price . . . is either exactly equal to 110% of the result determined by dividing the ranged total quantity . . . into the ranged total value . . . (or else varies by no more than an additional 1 percentage point)." Pls. Post-Argument Submission 3. According to plaintiffs, "it is mathematically irrefutable that Devi's reported ranged per unit price, in 168 out of 177 reported instances, equaled ranged total quantity divided into ranged total value multiplied by 110%." *Id.* Plaintiffs conclude from this pattern that "substantial evidence does not support the Commerce Department's claim that Devi applied the Department's ranging regulation in 19 C.F.R. § 351.304(c)(1) in a manner that did not distort its publicly reported, ranged per unit prices by more than 10 percent from the actual per unit prices that Devi paid." *Id.* at 1. Plaintiffs add that "[t]he factual finding that a seemingly random ranging of +/- 10% from the actual

per unit price would virtually always result in the exact same per unit price as using a triple ranging methodology defies logic and common sense." *Id.* at 4. Plaintiffs posit that ranging of quantity and ranging of value, followed by ranging of the quotient by 10%, could produce per-unit prices that vary from the actual per-unit prices by as much as 34%. Allied Pacific Comments 5; Yelin Comments 9–10. Yelin gives as a hypothetical example a ranged purchased quantity of 91.7 kilograms for which the actual quantity could have been 102 kilograms, a value of 29,816 Indian rupees that could have been 27,105 Indian rupees prior to ranging, and a quotient that was ranged upward by 10%, resulting in a per-unit price 358 Indian rupees/kilogram, which is 34% higher than what could have been the actual per-unit price of 266 Indian rupees/kilogram. Yelin Comments 9–10.

Under § 351.304(c)(1) of the Department's regulations, Devi was required to submit "a summary of the bracketed [*i.e.*, business proprietary] information in sufficient detail to permit a reasonable understanding of the substance of the information." 19 C.F.R. § 351.304(c)(1) (2004). The regulation provides that "[g]enerally, numerical data will be considered adequately summarized if grouped or presented in terms of indices or figures within 10 percent of the actual figure." *Id.*

The underlying premise of plaintiffs' argument is that Devi failed to ensure that its ranged, per-unit values were within 10% of the actual per-unit figures. Commerce did not so find, and instead, on the basis of § 351.304(c)(1) and on the absence of any record evidence "that the Department found any errors with respect to Devi's ranged data in the companion Indian investigation," Second Remand Redetermination 32 n.7, Commerce concluded that "in the worst case 'doomsday' scenario, any ranged per-unit number could differ from the business proprietary number by no more than 10%." *Id.* at 32. Commerce reached that conclusion "[a]part from our initial concerns about the ranging of the data in the *Final Determination* and [the First Remand Redetermination], which the Court rejected." *Id.* at 7. In *Allied Pacific II*, the court rejected Commerce's finding in the First Remand Redetermination that the prices in the ranged Devi data may deviate from the actual data by much more than 10%. *Allied Pacific II*, 32 CIT at __, 587 F. Supp. 2d at 1348–49. Consistent with the court's conclusion in *Allied Pacific II*, Commerce now concludes that the per-unit prices in the ranged Devi data do not differ from the actual numbers by more than 10%. Second Remand Redetermination 32. Plaintiffs argue that Commerce reached this conclusion without relying on actual record evidence, relying instead solely on the existence of the regulation. Pls. Post-Argument Submission 3. In this they are not

entirely correct. The cover letter to the Devi ranged data is itself record evidence on the issue of whether Devi performed proper ranging of the per-unit values, stating that "[p]ursuant to 19 C.F.R. § 351.304(c)[,] we note that all business proprietary information contained in the business proprietary version of the response has been deleted or ranged +/- 10 percent in this public version of the response." *Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to Sec'y of Commerce* 1117 (Sept. 8, 2004) (Admin. R. Doc. No. 709) ("*Second Surrogate Value Submission*") (providing a copy of Devi's response to the Department's supplemental Section D questionnaire). Plaintiffs' argument is correct only to the extent that the record does not contain evidence conclusively establishing that Devi's ranged per-unit values did not exceed the actual values by more than 10%. But contrary to plaintiffs' argument, neither does the record establish that Devi failed to comply with the 10% maximum standard for ranging that § 351.304(c)(1) imposes on numerical data.

Plaintiffs also are correct that the Devi ranged data used by the Department to calculate the surrogate values for raw shrimp exhibited, with very few exceptions, the 110% pattern. But the mere fact that in almost all instances Devi presented per-unit values for its purchases of raw, head-on white shrimp that were an increase of ten percent over the quotient of the reported ranged quantity and value figures is not substantial evidence that the per-unit values failed to conform to the ranging standard. By any of a countless number of ranging methods, Devi could have ensured that the ranging it performed on the quantity and value elements resulted in per-unit quotients that achieved per-unit values within 10% of the actual figures. As an extreme example, Devi could have ranged both the value and quantity, either upward or downward, by the same percentage before raising the per-unit (Indian rupees/kilogram) quotient by 10%, thus barely achieving compliance with the 10% ranging requirement. Alternatively, Devi could have ensured that the ranging of the value and the quantity resulted in a per-unit quotient that was less than the actual per-unit quotient, such that increasing the quotient by 10% would always achieve compliance with a margin to spare.

Because the record lacks evidence establishing that Devi failed to comply with the regulatory requirement on ranging found in 19 C.F.R. § 351.304(c)(1), Commerce certainly was not *required* to reach the finding of noncompliance that plaintiffs advocate. Moreover, on the state of the record, which included Devi's certification of compliance with the ranging requirement, it was permissible for Commerce to rely on a presumption that Devi's submission of data in the parallel Indian investigation complied with that requirement. Commerce

quite reasonably could expect that Devi, like any party to an antidumping investigation, would have endeavored to comply with the ranging standard and would have had every incentive to do so. As would any such party, Devi would have risked adverse consequences in the parallel Indian investigation were its ranging to be impermissible–a fact that the business confidential version of the data, which necessarily would have been on the record in that investigation, readily would have revealed to Commerce in that other proceeding. On this record, which contains only the public version of the Devi data, the court must reject plaintiffs' comment objecting to the Department's use of the Devi data on grounds of alleged improper ranging.

Plaintiffs argue in the alternative that even if Devi's per-unit values did not exceed the actual values by more than 10%, that degree of inaccuracy is unacceptable and should not receive deference because Commerce, in a determination in another proceeding, upheld by the Court of International Trade, declined to use ranged data as facts otherwise available because of unreliability due to the ranging. Pls. Post-Argument Submission 8–9 (citing *Allegheny Ludlum Corp. v. United States*, 27 CIT 1461, 1467–68 (2003)). This argument is unpersuasive. Commerce's decision to use the Devi ranged data must be reviewed on the record of this remand proceeding, in which Commerce was required to compare the Devi ranged data with SEAI data. Neither set of data is ideal, but Commerce's findings pertaining to the inadequacies of the SEAI data when compared with the Devi ranged data are supported by substantial record evidence and must be upheld by the court. Commerce's reasons for rejecting ranged data in another proceeding, in a different context, do not support an argument that Commerce was not permitted to use ranged data here.

Yelin takes issue with the Department's conclusion that the Devi ranged data are superior to the Nekkanti ranged data, arguing that the court should remand the decision "with an instruction that the Department disregard both the Nekkanti ranged data and the Devi ranged data because it has failed to provide a reasoned explanation as to why Nekkanti's ranging process results in a greater deviation from its actual prices than does Devi's ranging process." Yelin Comments 17. According to Yelin, the Department need only have calculated a per-unit price from Nekkanti's ranged prices and quantities to bring the Nekkanti ranged data "to the exact same point and exact same extent of deviation as Devi's ranged data before Devi added the third ranging step to the product of dividing its ranged quantity into its ranged total amount paid." *Id.* at 16. The court finds no merit in this argument. First, as Yelin itself acknowledges, Nekkanti ranged its

count sizes while Devi did not. *See id.* Second, Nekkanti did not provide ranged per-unit prices. *Id.* Had the Department simply calculated per-unit prices from Nekkanti's ranged prices and quantities, as Yelin suggests it could have done, the quotients could not be presumed to be the equivalent, with respect to accuracy, of the per-unit prices in the Devi ranged per-unit data, which the Department permissibly found to be within ten percent of the actual figures.

Allied Pacific argues that a data set reflecting shrimp prices at different count sizes should show a consistent pattern of higher prices for lower count sizes (*i.e.*, larger shrimp) and highlights certain instances in which the Devi ranged data deviate from that pattern. Allied Pacific Comments 7–8, Attach. 2. The United States, in its response, states that Allied Pacific failed to exhaust its administrative remedies with respect to this claim and then, nonetheless, explains that many factors could have affected the price, including, *e.g.*, purchases made from different sources and through different commercial arrangements. Def.'s Resp. to Pls.' Remand Comments 24–25 ("Def. Resp."). Neither Allied Pacific nor Yelin appear to have raised this issue in their comments before Commerce. *See Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to Sec'y of Commerce* (Apr. 24, 2009) (Second Remand Admin. R. Doc. No. 11) ("*Allied Pacific Comments on Draft*"); *Letter from Akin Gump Strauss Hauer & Feld LLP to Sec'y of Commerce* (Apr. 24, 2009) (Second Remand Admin. R. Doc. No. 12) ("*Yelin Comments on Draft*"). Consequently, Commerce did not have the opportunity to respond to the argument in its Second Remand Redetermination.

Because Allied Pacific had the opportunity to raise, in comments to Commerce on the Second Remand Redetermination, its argument concerning anomalous pricing for count sizes but did not do so, the court does not have the benefit of a response to that argument in the Second Remand Redetermination. The question of exhaustion aside, the court is not convinced by the argument. Although count size unquestionably is important to the value of shrimp, the court lacks a basis on this record to conclude that Commerce was required to reject as invalid or unreliable a set of data in which, in some instances, higher per-kilogram count sizes are valued at amounts above those for certain lower count sizes.

Plaintiffs also challenge the Department's finding in the Second Remand Redetermination that the Devi ranged data represent a broad market average, emphasizing that the SEAI data represent prices for two regions while the Devi ranged data represent prices for a single company in a single region. Allied Pacific Comments 16–19; Yelin Comments 22–23. According to Allied Pacific, the Department's

citing of the lack of information as to the volume of transactions represented by the SEAI circulars relies on conjecture and is not a sound basis upon which to conclude that the Devi ranged data are superior. Allied Pacific Comments 16–17.

Commerce explained that in considering which data represent best a broad market average, "the ultimate goal is to find the most representative and reliable surrogate value source" and that the analysis is not limited to "purely geographical considerations." Second Remand Redetermination 27. Further, Commerce emphasized that it was unable to determine how SEAI prices were averaged, how many transactions the prices encompassed, or whether the data were subject to any scrutiny or review. *Id.* Comparing the SEAI data with Devi's ranged data, Commerce concluded that because Devi reported the total volume and value, Commerce could conclude with a degree of confidence that the data were representative. *Id.* at 27–28. The record evidence is sufficient to support Commerce's findings that the SEAI prices, when compared to the Devi ranged data, lack supporting data on total value and volume and have deficiencies with respect to count size. Those findings justify as reasonable the Department's choice of the Devi ranged data over the SEAI data, even though the SEAI data would appear to be a broader market average with respect to geography and numbers of producers in India.

With respect to the contemporaneity criterion, Allied Pacific objects that the Devi ranged data are overly inclusive because they cover the six months prior to the period of investigation as well as the period of investigation. Allied Pacific Comments 20; *see* Yelin Comments 23–24. Allied Pacific further argues that it is unclear whether Devi made purchases of white shrimp within the period of investigation and that there is a 50% chance that the white shrimp purchases occurred outside of the period of investigation. Allied Pacific Comments 20. Allied Pacific maintains that the SEAI data are perfectly contemporaneous with the period of investigation. *Id.* With regard to contemporaneity, Commerce found that the Devi ranged data are contemporaneous with the period of investigation as the data cover the period October 1, 2002 through September 30, 2003 and the period of investigation is April 1, 2003 through September 30, 2003. Second Remand Redetermination 11. Yelin notes that Commerce does not address the contemporaneity of the SEAI data. *See* Yelin Comments 23–24.

Plaintiffs are correct that the Devi ranged data are over-inclusive, as these data cover a period preceding the period of investigation as well as the period of investigation itself. Although not *perfectly* contemporaneous, the Devi ranged data overlapped the entire period of

investigation. The record also reveals that the SEAI data are incomplete due to missing circulars, and as a result some of the SEAI data do not cover the entire period of investigation. *See Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to Sec'y of Commerce* 7–8, 21–28 (May 21, 2004) (Admin. R. Doc. No. 267) ("*First Surrogate Value Submission*"). On the record considered as a whole, the court cannot conclude that Commerce exceeded its discretion in choosing the Devi ranged data even though those data pertained to a period extending to a time prior to the period of investigation.

Finally, Yelin comments that Commerce, although citing verification of Devi's data in the companion Indian investigation as a reason for concluding that the Devi data are reliable, did not actually verify the Devi data in ranged form; as a result, according to Yelin, "[t]his verification has no relevance to the accuracy or reliability of the ranged data, which could vary by as much as 34 percent from the actual prices." Yelin Comments 25. This argument fails because its premise is that the Devi ranged data did not comply with the Departments' ranging standard, a premise that is unsound for the reasons the court previously discussed.

In summary, Commerce's choice of the Devi ranged data is based on adequate findings supported by substantial record evidence and is within the Department's discretion afforded by 19 U.S.C. § 1677b(c). Commerce permissibly concluded that the ACC data lack critical indicia of reliability and that the SEAI data are inferior to the Devi ranged data in material respects important to the valuation of the specific raw shrimp input, most particularly count size and completeness. The court must affirm the Department's choice.

B. Commerce's Redetermination of the Surrogate Value for Labor Is Affirmed

In response to the court's order in *Allied Pacific II*, 32 CIT at __, 587 F. Supp. 2d at 1363, Commerce redetermined a surrogate value of $0.05 per hour for labor. Second Remand Redetermination 3. Commerce based its determination to apply this labor rate on its finding that the data supporting the rate were specific to the Indian seafood industry, unlike the other data set on the record, which Commerce found to pertain to labor rates across the various industries in India. *Id.* at 13–17. Substantial record evidence supports the Department's findings.

Neither of the plaintiffs commented on the redetermination of the surrogate value for labor before Commerce or in the submissions

subsequently made to the court. *See id.* at 37; Allied Pacific Comments; Yelin Comments. Under these circumstances, the court reasonably may infer that the parties concur in the Second Remand Redetermination. *See Wuhan Bee Healthy Co. v. United States* , 32 CIT __, __, Slip Op. 08–61, at 12 (May 29, 2008) ("Under such circumstances, Commerce 'may well be entitled to assume that the silent party has decided, on reflection, that it concurs in the agency's [remand results],' and the court will uphold the parties' concurrence." (quoting *AL Tech Specialty Steel Corp. v. United States*, 29 CIT 276, 285, 366 F. Supp. 2d 1236, 1245 (2005))).

In the Second Remand Redetermination, Commerce stated its disagreement with the court's holding that 19 C.F.R. § 351.408(c)(3) violates 19 U.S.C. § 1677b(c) but nonetheless redetermined the labor rate "without regard to 19 C.F.R. § 351.408(c)(3)," as required by *Allied Pacific II*, 32 CIT at __, 587 F. Supp. 2d at 1363. Second Remand Redetermination 13 & n.2, 16. Since the submission of the Second Remand Redetermination, the Court of Appeals for the Federal Circuit has resolved the issue raised by the Department's objection by holding that 19 C.F.R. § 351.408(c)(3) violates 19 U.S.C. § 1677b(c) insofar as it "improperly requires using data from both economically comparable and economically dissimilar countries, and it improperly uses data from both countries that produce comparable merchandise and countries that do not." *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1372 (Fed. Cir. 2010).

IV. CONCLUSION

The Department's redetermined surrogate value for the raw shrimp input complies with the court's remand order and is in accordance with law. The Department's redetermined surrogate value for labor is affirmed because no party objects to that determination. The court will enter judgment accordingly.

Dated: July 29, 2010
New York, New York

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

Slip Op. 10–84

GPX INTERNATIONAL TIRE CORPORATION AND HEBEI STARBRIGHT TIRE CO., LTD., Plaintiffs, and TIANJIN UNITED TIRE & RUBBER INTERNATIONAL CONSOLIDATED Plaintiff, v. UNITED STATES, Defendant, and BRIDGESTONE AMERICAS, INC., BRIDGESTONE AMERICAS TIRE OPERATIONS, LLC, TITAN TIRE CORPORATION, AND UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, Defendant-Intervenors.

Before: Jane A. Restani, Chief Judge
Consol. Court No. 08–00285

[Department of Commerce's redetermination results remanded for changes to its countervailing duty methodology to forego the imposition of the countervailing duty law on the nonmarket economy products at issue and to reconsider pursuant to its own request its antidumping duty determination in part.]

Dated: August 4, 2010

Winston & Strawn LLP (*Daniel L. Porter*, *James P. Durling*, *Matthew P. McCullough*, *Ross E. Bidlingmaier*, and *William H. Barringer*) for the plaintiffs.

Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP (*Francis J. Sailer*, *Andrew T. Schutz*, and *Mark E. Pardo*) and *Greenberg Traurig, LLP* (*Philippe M. Bruno* and *Rosa S. Jeong*) for the consolidated plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera*, *John J. Todor* and *Loren M. Preheim*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Matthew D. Walden* and *Daniel J. Calhoun*), of counsel, for the defendant.

King & Spalding, LLP (*Joseph W. Dorn*, *Christopher T. Cloutier*, *Daniel L. Schneiderman*, *J. Michael Taylor*, *Jeffrey M. Telep*, *Kevin M. Dinan*, and *Prentiss L. Smith*) for defendant-intervenors Bridgestone Americas, Inc. and Bridgestone Americas Tire Operations, LLC.

Stewart and Stewart (*Geert M. De Prest*, *Elizabeth A. Argenti*, *Elizabeth J. Drake*, *Eric P. Salonen*, *Terence P. Stewart*, *Wesley K. Caine*, and *William A. Fennell*) for defendant-intervenors Titan Tire Corporation and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC.

OPINION AND ORDER

Restani, Chief Judge:

Introduction

As the court has previously explained, these consolidated actions challenge the Department of Commerce's ("Commerce") final determinations rendered in concurrent antidumping duty ("AD") and countervailing duty ("CVD") investigations of certain pneumatic off-the-road ("OTR") tires from the People's Republic of China ("PRC").

Motions for judgment on the agency record were filed by GPX International Tire Corporation ("GPX") and Hebei Starbright Tire Co., Ltd. ("Starbright"), Titan Tire Corporation and the United Steel, Paper and Forestry, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (collectively, "Titan"), Bridgestone Americas, Inc. and Bridgestone America Tire Operations, LLC (collectively, "Bridgestone"), and Tianjin United Tire & Rubber International Co., Ltd. ("TUTRIC").

For the reasons stated below, the court finds that Commerce failed to comply with the court's remand instructions. Commerce must forego the imposition of the countervailing duty law on the nonmarket economy ("NME") products before the court because its actions on remand clearly demonstrate its inability, at this time, to use improved methodologies to determine whether, and to what degree double counting occurs when NME antidumping remedies are imposed on the same good, or to otherwise comply with the unfair trade statutes in this regard.

Additionally, GPX, Starbright, Titan, and Bridgestone have submitted motions for judgment on the agency record on other AD issues.[1] In its previous opinion, the court declined to rule on the merits of the AD issues raised in the parties' briefs to the extent that they did not relate to the CVD/NME AD coordination issue. *See GPX Int'l Tire Corp. v. United States*, 645 F. Supp. 2d 1231, 1235 n.1 (CIT 2009). For the reasons stated below, the court now denies the remainder of the motions of all parties relating to AD issues, except to the extent they are consistent with the Government's request for a voluntary remand on one issue, which request is granted. TUTRIC's motion for CVD treatment consistent with that of GPX and Starbright is granted.

BACKGROUND

The facts of this case have been well documented in the court's previous opinion. *See GPX*, 645 F. Supp. 2d at 1235 36. The court presumes familiarity with that decision, but briefly summarizes the facts relevant to this opinion.

[1] Many of these other AD issues involve requested fine-tuning adjustments to NME factors of production ("FOP") methodology. In contrast with its more exacting market economy ("ME") AD methodology, which would require several of these minute adjustments, *see generally* 19 U.S.C. § 1677b(a), Commerce's NME AD methodology, which depends on unverified surrogate information, is analogous to a broad stroke of a brush, *see generally* 19 U.S.C. § 1677b(c). Commerce relies on the publicly filed documents of surrogate producers, which are not required to participate in the investigation, in order to value FOP. 19 U.S.C. § 1677b(c)(1). This results in normal value ("NV") which is compared to the price for exports to the United States. 19 U.S.C. § 1677b(a). The difference is the dumping margin. *Id.*

In August 2007, Commerce initiated AD and CVD investigations for certain pneumatic OTR from the PRC. *See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Initiation of Countervailing Duty Investigation*, 72 Fed. Reg. 44,122 (Dep't Commerce Aug. 7, 2007); *Initiation of Antidumping Duty Investigation: Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, 72 Fed. Reg. 43,591 (Dep't Commerce Aug. 6, 2007). Commerce selected Starbright[2] and TUTRIC, Chinese producers/exporters of the subject merchandise, as two of the mandatory respondents for both investigations.[3] *See Final AD Determination*, 73 Fed. Reg. At 51,625; *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances* , 73 Fed. Reg. 40,480, 40,483 (Dep't Commerce July 15, 2008) ("*Final CVD Determination*"). In its final determinations, Commerce calculated CVD margins of 14% for Starbright, and 6.85% for TUTRIC, *Final CVD Determination*, 73 Fed. Reg. at 40,483, and also utilized NME methodologies to calculate AD margins of 29.93% for Starbright, and 8.44% for TUTRIC, *Final AD Determination*, 73 Fed. Reg. at 51,625.

In September 2008, GPX and Starbright filed complaints challenging both the CVD and AD determinations on various grounds. In October 2008, Titan and Bridgestone filed complaints contesting these determinations as well. TUTRIC, however, filed a complaint in November 2008, challenging only the CVD determination. The court consolidated these actions (Order (Jan. 16, 2009) (Docket No. 161)), and shortly thereafter, GPX and Starbright, Titan, Bridgestone, and TUTRIC filed motions for judgment on the agency record under USCIT Rule 56.2. Pursuant to court order, the motions for judgment on the agency record were divided into three key issues: (1) CVD applicability and NME AD coordination issues; (2) all other AD issues; and (3) all other CVD issues. (Order (Jan. 16, 2009) (Docket No. 162).)

In *GPX*, the court held "that Commerce is not barred by statutory language from applying the CVD law to imports from the PRC, but

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[2] GPX, a domestic importer of OTR tires, wholly owns the Chinese producer Starbright. (*See* Resp't Pls.' App. Tab 11, 3 4.)

[3] Other respondents included Guizhou Tyre Co., Ltd.("Guizhou") and Xuzhou Xugong Tyres Co., Ltd. ("Xugong"). *See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 73 Fed. Reg. 51,624, 51,625 (Dep't Commerce Sept. 4, 2008) ("*Final AD Determination*") Guizhou has not contested the Final AD Determination. Titan Tire Corporation and Bridgestone challenged Commerce's *Final AD Determination* as to Xugong's zero dumping margin in a separate action. *See Bridgestone Ams., Inc. v. United States*, Slip Op. 10–55, 2010 WL 1962889 (CIT May 14, 2010) (affirming results of the remand determination in their entirety).

that Commerce's . . . interpretation of the NME AD statute in relation to the CVD statute . . . was unreasonable." 645 F. Supp. 2d at 1234. In addition, the court concluded that Commerce's failure to address GPX and Starbright's request for market-oriented enterprise ("MOE") treatment and its adoption of a December 11, 2001, cutoff date for identifying and measuring subsidies in the PRC was arbitrary and unsupported by substantial evidence. *Id.* at 1243 50. The court remanded this matter to Commerce, instructing it to "adopt additional policies and procedures for its NME AD and CVD methodologies to account for the imposition of the CVD law to products from an NME country and avoid to the extent possible double counting of duties" if it "is to apply CVD remedies where it also utilizes NME AD methodology," *id.* at 1234 35, or to exercise its "discretion not to impose CVDs as long as it is using the NME AD methodology," *id.* at 1243. The court also instructed Commerce to "address GPX's request for MOE status," *id.* at 1246, and "to determine the existence of countervailable subsidies based on the specific facts for each subsidy," *id.* at 1250.

On remand, Commerce "decided to continue to impose CVD remedies on imports of certain new pneumatic [OTR tires] from the PRC, but . . . offset[] those CVDs against GPX/Starbright's calculated AD cash deposit rate." *Final Results of Redetermination Pursuant to Remand* 2 (Dep't Commerce Apr. 26, 2010) (Docket No. 292) ("*Remand Results*"). Commerce next considered each of the countervailable subsidies individually, *id.* at 20 40, rather than relying on a universal cut-off date, but determined that the CVD margins for Starbright and TUTRIC remained unchanged, *id.* at 59. Commerce also considered whether it should treat Starbright as an MOE, and ultimately decided that such treatment was inappropriate. *Id.* at 12 20. Commerce then offset Starbright's AD margin of 29.93% by its CVD margin of 14.00%, resulting in a cash deposit rate of 15.93%. *Id.* at 59. Commerce, however, did not make an offset to TUTRIC's AD margin because "TUTRIC did not include double remedies as a cause of action in its Complaint, request relief on that issue, or address the issue in any brief that it filed with the Court." *Id.* at 53. GPX and Starbright, TUTRIC, Bridgestone, and Titan object to these conclusions on various grounds. (*See* Resp't Pls.' Comments on Commerce's Final Redetermination Pursuant to Remand ("GPX's Comments"); TUTRIC's Comments Regarding the Department's First Remand Redetermination ("TUTRIC's Comments"); Bridgestone's Obj. Concerning Final Results of Redetermination Pursuant to Remand; (A) Obj. of Titan Tire Corp. to the Department of Commerce's Remand Redetermination, & (B) Titan's Reasons for Why this Court Should Not

Remand this Case Again.) Additionally, as noted in *GPX*, several AD and CVD issues, which were raised in the parties' original briefs, remain before the court. *See* 645 F. Supp. 2d at 1235 n.1.[4]

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will uphold Commerce's final determinations in AD and CVD investigations unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce's Offset of CVD Against NME AD

A. Starbright

During remand, Commerce considered itself to have only three options regarding the coordination of CVD and NME AD. *See Remand Results* at 8. Commerce identified those options as: (1) not to apply CVD law to the exports in this case; (2) apply the ME AD methodology to either Starbright or the PRC; or (3) offset CVD against NME AD cash deposit rate. *Id.* In selecting offset, Commerce reasoned that it was the least confusing option. *Id.* at 9. GPX and Starbright, and TUTRIC challenge this decision as unreasonable and not in accordance with the court's remand instructions. (GPX's Comments 1.) GPX and Starbright's claim has merit.

Although the court recognizes that "the exact effect of subsidies on price is difficult to measure," it also acknowledges that "[t]here is an assumption that CVD remedies equalize the competitive playing field, by raising the price of the good when it is exported into this country." *GPX*, 645 F. Supp. 2d at 1243 (citing *U.S.-China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties*, GAO-05–474, at 33 (June 2005), *available at* http://www.gao.gov/new.items/d05474.pdf). In NME-designated countries, however, Commerce also "compares a subsidy-free constructed normal value (essentially using information from surrogate countries) with the original subsidized export price to calculate the AD margin." *Id.* at 1241. Thus, any resulting NME AD margin in theory also captures the competitive advantage that subsidies may provide because the constructed NV is subsidy-free, and presumably higher than a subsidized NV, while the U.S. price presumably reflects in

[4] Because CVD remedies may not be imposed at all, it is unnecessary to address the additional CVD calculation issues.

some way the price-lowering benefits of the subsidies.[5] Thus, the margin is greater than it would be if subsidies were reflected on both sides of the comparison. These methodologies, therefore, when used concurrently, result in a high likelihood of double counting because they effectively counteract the same behavior twice. *See id.* at 1242. For this reason, the court held that Commerce may have the authority under the statutory scheme to apply CVD law and AD law simultaneously to products of a NME country, *id.* at 1240, but only if such an application included methodologies to safeguard against this substantial potential for double counting, *id.* at 1243, which does not occur when NV and U.S. price are calculated based on data from the same country the market economy approach.

In its remand order, the court presented Commerce with a choice between two alternatives. *See id.* at 1243. Commerce could either "reasonably . . . do all of its remedying though the NME AD statute, as it likely accounts for any competitive advantages the exporter received that are measurable," or it could "apply methodologies that make such parallel remedies reasonable." *Id.* In its remand redetermination, however, Commerce proposes guarding against double counting by merely offsetting CVD against NME AD after it uses its regular methodologies to calculate the CVD and NME AD margins. *Remand Results* at 9 10. The court notes that with this offset, the combination of the CVD margin and the NME AD cash deposit rate will always equal the unaltered NME AD margin. *See id.* at 59. This result, therefore, renders concurrent CVD and AD investigations unnecessary because the same remedial price adjustment can otherwise be obtained by merely conducting an NME AD investigation. As GPX and Starbright suggest, it is not reasonable to "force[] foreign parties to spend many months and large sums of money to go through an investigation, the end result of which is to calculate a CVD margin, but then to eliminate that CVD [margin] because it has been offset by some parallel investigation." (GPX's Comments 6.) Perhaps even more importantly, the offset that Commerce now advances is inconsistent with 19 U.S.C. § 1677a, which lists the specific offsets to export price and constructed export price that are permissible. *See* 19 U.S.C. § 1677a(c) (d). Accordingly, the court holds that the offset does

[5] NME AD law is intended to counteract whatever gives rise to the unfair aspects of a dumped U.S. price. 19 U.S.C. § 1677b(a). The broad NME AD margin would cover measurable benefits from a subsidy, which a CVD margin is intended to counteract. *See GPX*, 645 F. Supp. 2d at 1242. At the very least, therefore, the court can presume that the NME AD margin normally will be higher than the CVD margin. Perhaps in some future investigation, the unusual case will occur and Commerce will be afforded the opportunity to explainthe reasonableness of coordination given that particular set of facts. Under the facts of this case, however, the NME AD margin exceeds the CVD margin and presumably covers it.

not comply with the statute and is also unreasonable due to the expense associated with conducting an additional investigation that is essentially useless.

Despite the court's instruction that "[i]f there is a substantial potential for double counting, and it is too difficult for Commerce to determine whether, and to what degree double counting is occurring, Commerce should refrain from imposing CVDs on NME goods until it is prepared to address this problem through improved methodologies or new statutory tools," *GPX*, 645 F. Supp. 2d at 1243, Commerce stubbornly adheres to the position that it does not have discretion to do so. *Remand Results* at 43. Commerce maintains that it is statutorily required to apply CVD law if it determines that a country is providing a countervailable subsidy. *Id.* As the court has previously explained, this interpretation of 19 U.S.C. § 1671 is misguided. *GPX*, 645 F. Supp. 2d at 1240, 1243. Rather, *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986), "makes clear that Commerce need not apply CVD law to the same goods that are subject to NME AD calculations." *GPX*, 645 F. Supp. 2d at 1240. Commerce, therefore, is not statutorily required to apply CVD law under 19 U.S.C. § 1671.

In its remand redetermination, Commerce identified what it believed to be the only three procedural options remaining after *GPX*. *See Remand Results* at 8. There is no indication in the language used that this list was intended to be anything other than exhaustive. The court, therefore, accepts this list as a tacit admission that, at this time, it is too difficult for Commerce to determine, using improved methodologies, and in the absence of new statutory tools, whether and to what degree double counting is occurring. In accordance with the court's remand instructions, the only option remaining for Commerce is not to apply CVD law to Starbright's NME goods.[6] Accordingly, the court remands this matter to Commerce with instructions to forego the imposition of CVD law on Starbright's merchandise at issue.

B. TUTRIC

In its remand redetermination, Commerce concluded that TUTRIC was not entitled to an offset of its CVD against its NME AD cash

[6] The court's previous remand instructions should not be interpreted as establishing any particular standard or methodology. Rather, after considering the relevant statutory provisions, the Court determined that the two options afforded were the only two possibilities given these circumstances. *GPX*, 645 F. Supp. 2d at 1243. The court never provided Commerce the option to adopt an offsetting methodology on remand because as indicated in the text, such an ad hoc procedure is unlawful and ignores the underlying problem of double counting during the calculation of CVD and NME AD. *See id.*

deposit rate because it "did not include double remedies as a cause of action in its Complaint, request relief on that issue, or address the issue in any brief that it filed with the Court." *Remand Results* at 53 54. Thus, Commerce determined that TUTRIC's CVD and AD margins remained the same at 6.85% and 8.44% respectively. *See id.* at 59; *Final AD Determination*, 73 Fed. Reg. at 51,625. TUTRIC, however, claims that equity requires Commerce to apply the remand results adjusting for double counting to its NME AD margin as well, despite its failure to raise the issue in its complaint.[7] (*See* TUTRIC's Comments 8.) TUTRIC's claim has merit.

At the outset, the court observes that TUTRIC's complaint gives it jurisdiction over Commerce's CVD determination with regard to TUTRIC. Next, although TUTRIC chose not to raise the CVD/NME AD coordination issue before the court until recently, the record clearly demonstrates that TUTRIC, like GPX and Starbright, exhausted this issue on the agency level. (*See* App. Supp. Pl. TUTRIC's Rule 56.2 Mot. J. Upon Agency R. Tab 9.) This is a purely legal issue, and the court's earlier decision covered new ground. Strict exhaustion under these circumstances is not required. *See Former Employees of Quality Fabricating, Inc. v. U.S. Dep't of Labor*, 343 F. Supp. 2d 1272, 1285 (CIT 2004). Moreover, the court only need require administrative exhaustion "where appropriate." 28 U.S.C. § 2637(d). Furthermore, if exhaustion were strictly applied to the coordination issue, which TUTRIC did not raise previously, the court would address various CVD issues, perhaps requiring Commerce to recalculate CVD, which the court has found may not be applied here. Applying the court's decision evenhandedly, therefore, is the appropriate disposition. *See Carpenter Tech. Corp. v. United States*, 26 CIT 830, 837 38 (2002). Accordingly, Commerce must refrain from applying CVD remedies to TUTRIC's merchandise as well.[8]

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[7] Alternatively, in May 2010, TUTRIC filed a motion for leave to file an amended complaint containing a coordination allegation. (Consol. Pl. TUTRIC's Mot. Leave File Am. Compl.) This motion, however, was opposed by the Government, Titan, and Bridgestone. (*See* Def.'s Resp. Pl. TUTRIC's Mot. Leave Amend Compl.; Titan's Resp. "TUTRIC's Mot. Leave File Am. Compl."; Bridgestone's Opp'n TUTRIC's Mot. Leave File Am. Compl.) Amendment is unnecessary, as the relief sought is clear, and the Rules of this Court require no answer in this type of action. USCIT R. 7(a).

[8] TUTRIC's motion for leave to file an amended complaint, filed on May 11, 2010, is denied as moot. Similarly, Titan's motion to strike point two of TUTRIC's Comments, filed on May 19, 2010, is also denied as moot.

II. Remaining AD Issues

A. Market-Oriented Enterprise

In its final determination, Commerce declined to evaluate GPX and Starbright's request that Starbright be classified as a MOE for the purposes of the investigation solely on the basis that it "currently ha[s] no proceedings or standards in place to do so." *Issues and Decision Memorandum for the Antidumping Investigation of Certain Pneumatic Off-the-Road Tires from the People's Republic of China*, A-570–912, POR 10/01/2006 03/31/2007, at 153 (Dep't Commerce July 7, 2008) ("*Issues and Decision Memo*"), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E8–16156–1.pdf (last visited Aug. 2, 2010). In *GPX*, the court held that such a conclusion was arbitrary and capricious and unsupported by substantial evidence. 645 F. Supp. 2d at 1246. The court instructed Commerce to address this issue meaningfully. *Id.* Pursuant to the court's remand instructions, Commerce considered the merit of GPX and Starbright's request and concluded that MOE status was unwarranted because the evidence was insufficient to establish the reliability of Starbright's costs, as contemplated by 19 U.S.C. § 1677b(c)(1). *Remand Results* at 12 20. GPX and Starbright now claim that this determination was not supported by substantial evidence and was contrary to the remand instructions because Commerce's evaluation of the evidentiary record is flawed. (GPX's Comments 7, 10 15.) GPX and Starbright's claim lacks merit.

Under its NME AD methodology, Commerce calculates NV "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 containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1). Surrogate values from market economy countries are used as a reliable measure of these costs. *See id.* An MOE classification, however, would allow an NME-country respondent to be treated as if it were an ME-country respondent for the purposes of an AD investigation. *See Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise*, 72 Fed. Reg. 29,302, 29,302 03 (Dep't Commerce May 25, 2007). Although Commerce currently uses its NME AD methodology when investigating allegations of dumping from the PRC, it recently acknowledged the possibility of developing an MOE test, *Issues and Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Coated Free Sheet Paper from the People's Republic of China*, A-570–906, POI 04/01/06 09/30/06, at 9 10 (Dep't Commerce Oct. 17, 2007), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E7–21041–1.pdf (last visited

Aug. 2, 2010), and requested comment on the issue, *Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment*, 72 Fed. Reg. 60,649 (Dep't Commerce Oct. 25, 2007). Nevertheless, as Commerce had repeatedly maintained throughout this litigation, it has still yet to develop an MOE test. *See Remand Results* at 15.

Despite the lack of a test, it is clear that an NME-country respondent cannot be afforded ME AD methodologies under the statutory scheme if it cannot demonstrate that its price is derived from reliable costs. *See* 19 U.S.C. § 1677(18); *id.* § 1677b(c)(1). GPX and Starbright claim that the facts of this case render "Starbright a compelling candidate for MOE treatment" and identify the three "key facts" as: (1) an American company owns 100% of Starbright; (2) Starbright is overwhelmingly focused on external markets; and (3) Starbright is subject to a companion CVD. (Resp't Pls.' Mem. P. & A. Supp. Their Mot. J. Agency Rs. Vol 2: All Other Issues ("GPX's Br.") 21 23.) In its remand redetermination, Commerce considered each of these facts and concluded that none guaranteed the reliability of production costs that are required to calculate NV under 19 U.S.C. §1677b(a). *See Remand Results* at 17 19.

The court finds Commerce's conclusion to be reasonable and supported by substantial evidence, as none of the facts asserted by GPX and Starbright necessitate a conclusion that Starbright's price was derived from reliable costs.[9] Moreover, as the court noted in *GPX*, "some adjustments [may] be made on an industry or sector-wide basis" if an NME-country respondent can show that reliable prices exist within those market categories. 645 F. Supp. 2d at 1244 n.12 (citing World Trade Organization, Protocol on the Accession of the People's Republic of China, pt. I, § 15(d) (Nov. 23, 2001), WT/L/432, *available at* http://www.wto.org/english/theWTO_e/acc_e/completeacc_e.htm). GPX and Starbright have failed to make such a showing, and their motion with respect to MOE treatment is denied.

B. Indirect Selling Expenses

When calculating NV, Commerce decided not to allow an offset for the Indian surrogate producers' indirect selling expenses despite adjusting for Starbright's allegedly similar expenses in its U.S. sales

[9] In addition, GPX and Starbright argue that Commerce's failure to analyze whether Starbright's data can be used to calculate NV was in violation of the remand instructions. (GPX's Comments 7 9.) Contrary to this claim, Commerce was merely told to address the merits of Starbright's MOE request so the court could determine whether such treatment was required. *See GPX*, 645 F. Supp. 2d at 1245. To extent that the court's instructions suggest otherwise, that language was merely alerting Commerce to the possibly of using MOE treatment to guard against double counting. Commerce, however, declined to use MOE treatment in this way.

price calculation. *Issues and Decision Memo* at 149 50. GPX and Starbright claim that this decision was not supported by substantial evidence and was contrary to law because it resulted in an asymmetrical comparison that could "have the effect of artificially depressing the United States price below normal value." (GPX's Br. 4.) In support of this claim, GPX and Starbright cite to the Indian producers' financial statements, which they submitted during the AD investigation, for the propositions that the surrogate companies operated at a more advanced level of trade and that Commerce could have distinguished those companies' direct selling expenses from indirect selling expenses, excluding the latter from the surrogate value calculation. (*Id.* at 6 10.) This claim lacks merit.

In its final determination, Commerce explained that it would not allow a constructed export price ("CEP") offset or a circumstances of sales ("COS") adjustment in this investigation because Commerce "cannot accurately determine the specific indirect selling expenses incurred on sales reflected in the surrogate financial statements," despite GPX and Starbright's claims to the contrary. *Issues and Decision Memo* at 152. It is clear, pursuant to the plain language of the statute, that Commerce has the discretion to determine what other expenses will be included in its calculation of NV in an NME. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999). Typically, when using NME methodologies, NV includes "an amount for general expenses and profit plus . . . *other expenses*." 19 U.S.C. § 1677b(c)(1) (emphasis added). As the court has stated previously, Commerce has established a practice of calculating surrogate values based on broad information from public documents. *See GPX*, 645 F. Supp. 2d at 1245 46 n.14 ("When Commerce calculates surrogate values, the information used is not gathered in response to questions asked of mandatory respondents, but rather, Commerce relies on broad information from public documents, which is not broken down in a way that Commerce needs in order to make fine-tuned adjustments."); *see also, e.g.*, *Issues and Decision Memorandum for the Final Results in the 2002/2003 Administrative Review of Honey from the People's Republic of China*, A-570–863, AR 12/01/02 11/30/03, at 22 (Dep't Commerce June 27, 2005), *available at* http://ia.ita.doc.gov/frn/summary/prc/E5–3547–1.pdf (last visited Aug. 2, 2010); *Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Certain Ball Bearings and Parts Thereof from the People's Republic of China*, A-570–874, 7/1/01 12/31/01, at 17, 22 (Dep't Commerce Feb. 27, 2003),

available at http://ia.ita.doc.gov/frn/summary/prc/03–5300–1.pdf (last visited Aug. 2, 2010).[10]

GPX and Starbright's claim that they submitted other evidence Commerce might use is unavailing, as Commerce has no right to conduct verification of such evidence at surrogate (non-party) Indian businesses. Commerce's decision, therefore, to follow its longstanding practice and not make fine-tuning adjustments based on this unverified data is supported by substantial evidence and is not contrary to law. *See Issues and Decision Memo* at 152. Accordingly, GPX and Starbright's motion is denied in this regard.

C. Input Valuation

During its investigation, Commerce used a surrogate value for rod in the calculation of Starbright and TUTRIC's NV. *Issues and Decision Memo* at 143. Despite Bridgestone and Titan's claim that Commerce "should value wire using HTS 7217.30.30, HTS 7217.30.20, or 7217.30.10"[11] of the Indian tariff schedule, *id.* at 142, Commerce valued the input using HTS 7213.91.90[12] solely on the basis that "[n]othing on the record contradicts Starbright's and TUTRIC's" char-

[10] Commerce also maintains that it is statutorily prohibited from making such an offset. *See Issues and Decision Memo* at 149 152. The court, however, does not reach this issue; it merely holds, contrary to GPX and Starbright's contention, that 19 U.S.C. § 1677b(c)(1) does not require the offset.

[11] The relevant portion of Chapter 72, heading 7217 of the Indian Trade Classification (HS), reads:

7217			WIRE OF IRON OR NON-ALLOY STEEL
. . . .			
	721730		Plated or coated with other base metals:
		72173010	Of a thickness of 18 SWG and below
		72173020	Of a thickness above 18 SWG but up to 26 SWG
		72173030	Of a thickness above 26 SWG

[12] The relevant portion of Chapter 72, heading 7213 of the Indian Trade Classification (HS), reads:

7213			BARS AND RODS, HOT-ROLLED, IN IRREGULARLY WOUND COILS, OF IRON OR NON-ALLOY STEEL
. . . .			
	Other:		
	721391		Of circular cross-section measuring less than 14 mm in diameter:
	. . . .		
		72139190	Other

acterization of the input as a rod, *id.* at 143. Bridgestone and Titan now challenge this decision as not supported by substantial evidence because the record indicates that wire, as opposed to the much less costly rod, was used in the production of the subject merchandise. (Mem. Titan, *Qua* Pls., Supp. Their Mot. J. Upon Administrative R. (Addressing "All Other" Antidumping Issues) ("Titan's Br.") 24 26; Bridgestone's Br. Supp. Mot. J. on Agency R. on Antidumping Issues ("Bridgestone's Br.") 12 13.) In response, the Government has requested a voluntary remand to "reconsider and give further explanation for its decision." (Def.'s Mem. Opp'n Pls.' & Def.-Intervenor's Memoranda Regarding AD Issues Supp. Their Mots. J. Upon Agency Rs. ("Def.'s Br.") 59.) For the following reasons, this request is granted.

At the outset, the court notes that it is not required to grant a remand merely because the Government voluntarily requests it. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). Rather, in the interest of finality in these tripartite proceedings and administrative regularity the court possesses the discretion to deny such a request "if the agency's request is frivolous or in bad faith," but will typically grant such a remand "if the agency's concern is substantial and legitimate." *Id.* The court, therefore, will examine the legitimacy of this request.

Although Commerce is not bound by strict classification methodology when using the Harmonized Tariff Schedule to approximate the costs of various FOP in the antidumping context, *Gleason Indus. Prods. v. United States*, 559 F. Supp. 2d 1364, 1370 71 (CIT 2008), Commerce is required to "articulate in what way the surrogate value chosen relates to the factor input," *Dorbest Ltd. v. United States*, 462 F. Supp. 2d 1262, 1308 (CIT 2006). In making its final determination, Commerce relied on Starbright and TUTRIC's characterization of the input as "irregularly wound iron rod coils of circular cross-section measuring less than 14 mm in diameter; not electrode or cold heading quality; no indentations, ribs, grooves or other deformations," *Issues and Decision Memo* at 143 (internal quotation marks omitted), despite evidence on the record to the contrary, (*see, e.g.*, Public App. Supp. Def.'s Resp. Mots. J. Upon Agency R. Vol. Two ("Def.'s App. II") Tab 17 (characterizing the input as "steel wire"); Def.'s App. II Tab 22 Attach. (article supporting Bridgestone and Titan's proposition that wire, not rod, is used to manufacture tires)). This evidence renders Commerce's terse explanation, that "[n]othing on the record contradicts Starbright's and TUTRIC's statements," *Issues and Decision Memo* at 143, inadequate, *see Longkou Haimeng Machinery Co. v. United States*, 581 F. Supp. 2d 1344, 1363 (CIT 2008) (holding that

Commerce's brief explanation is inadequate and remand is appropriate when plaintiff cites mounting evidence on the record to the contrary). Accordingly, the court grants Commerce's request for a voluntary remand to reconsider or give further explanation for its decision.

D. Value Added Tax

In its final determination, Commerce decided to exclude respondents' unrefunded value added tax ("VAT") from its cost of production calculation. *See Issues and Decision Memo* at 21. Titan and Bridgestone now challenge that decision as not supported by substantial evidence, arguing that because VAT is typically added as part of the cost of production calculation for "constructed value" in an ME methodology, "[t]he same logic *necessarily* applies to NME producers and their 'constructed values.'" (Titan's Br. 16 17.) This claim lacks merit.

When calculating cost of production for the purposes of an NME AD investigation, Commerce assesses the FOP "based on the best available information regarding the values of such factors" in a surrogate ME country. 19 U.S.C. § 1677b(c)(1). Generally, Commerce's "normal methodology is to exclude income taxes or VAT from the [NME] antidumping calculations." *Issues and Decision Memo* at 21; *see also Issues and Decision Memorandum for the Final Results of Polyethylene Retail Carrier Bags from the People's Republic of China*, A-570–886, POR 8/1/05 7/31/06, at 4 5 (Dep't Commerce Mar. 10, 2008), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E8–5300–1.pdf (last visited Aug. 2, 2010). This practice has been upheld because, by definition, "the surrogate values used [in an NME AD investigation] are *independent* of the elements of the cost or pricing structures in China, any adjustment for Chinese VAT would be unwarranted."[13] *Bridgestone*, 636 F. Supp. 2d at 1357 (emphasis added). Thus, "the amount of unrefunded VAT is irrelevant to the normal value calculation." *Id.* ; *see also GPX*, 645 F. Supp. 2d at 1246 n.14. Titan and Bridgestone's contention, that the addition of VAT is required because "no Chinese producer, as a practical matter, in a hypothetical free-market China, could actually obtain the inputs

[13] Titan and Bridgestone argue that "the statute does not require Commerce to use only surrogate values for NME NV calculations." (Br. Titan Tire Corporation, *Qua* Pl., & United Steel Workers, *Qua* Pl.-Intervenor, Reply to Opp'n of United States, Def., and GPX and Starbright, *Qua* Def.-Intervenors, to Titan's Mot. J. Upon Agency R. as to "Other Antidumping Issues" 4 (emphasis removed).) While true that as part of its accorded deference, Commerce is not required always to use surrogate country values if it has reliable home country data for certain inputs, *Shakeproof Assembly Components Div. of Ill. Tool Works v. United States*, 268 F.3d 1376, 1381 (Fed. Cir. 2001), *Bridgestone Ams., Inc. v. United States*, 636 F. Supp. 2d 1347, 1357 (CIT 2009), make it clear that Commerce is not required to include a NME producers' unrefunded VAT where it uses only surrogate FOP data.

without paying the applicable tax"(Titan's Br. 18), is unavailing, *see supra* note 1.

The court, therefore, concludes that Commerce's decision not to include VAT was supported by substantial evidence and not contrary to law. Accordingly, Titan and Bridgestone's motions are denied in this regard.

E. Overhead Expenses

During its AD investigation, Commerce allowed the respondents to exclude amounts of non-production related energy, which included some energy from factory overhead, from the energy related FOP in China under 19 U.S.C. § 1677b(c)(3), despite, for the purposes of calculating the surrogate overhead ratio, using financial statements that treated all Indian company energy consumption as a direct production expense. *Issues and Decision Memo* at 56 59. Titan and Bridgestone claim that this practice resulted in an understated NV that is not supported by substantial evidence and is contrary to law. (Titan's Br. 19 24.) Titan and Bridgestone propose that Commerce could have accomplished a more accurate calculation by either adjusting the surrogate financial ratios or requiring the respondents to include the full amount of their energy consumption in the China FOP. (*Id.* at 22) These claims lack merit.

Regarding Titan and Bridgestone's first proposal, that Commerce split the Indian producers' energy consumption between production and non-production for the calculation of the surrogate financial ratios, the court notes that Commerce has established a clear practice of not making this type of expense adjustment. *See Notice of Final Determination of Sales at Less than Fair Value; Polyvinyl Alcohol from the People's Republic of China*, 61 Fed. Reg. 14,057, 14,060 (Dep't Commerce Mar. 29 1996); *Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Certain Activated Carbon from the People's Republic of China*, A-570–904, at 16 17 (Dep't Commerce Feb. 23, 2007), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E7–3693–1.pdf (last visited Aug. 2, 2010). "Rather, once Commerce establishes that the surrogate produces identical or comparable merchandise, closely approximating the nonmarket economy producer's experience, Commerce merely uses the surrogate producer's data." *Rhodia, Inc. v. United States*, 240 F. Supp. 2d 1247, 1250 (CIT 2002). The Court of International Trade has upheld this practice, explaining that "Commerce is neither required to duplicate the exact production experience of the Chinese manufacturers nor undergo an item-by-item analysis in calculating

factory overhead." *Id.* (internal quotation marks and citations omitted). Moreover, the Federal Circuit has observed that "Commerce [has] broad discretion in valuing the factors of production on which factory overhead is based." *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1372 (Fed. Cir. 1999).

Titan and Bridgestone interpret *Rhodia* as "impl[ying] that normal practice must give way when evidence compels appropriate adjustments." (Titan's Br. 21.) In support of this understanding, they cite examples of Commerce's restating expenses in surrogate financial statements to avoid double counting. (*Id.* at 22 23.) These instances are distinguishable, however, because they do not involve overhead, and double counting was more easily determined. Nevertheless, even if this understanding of *Rhodia* were correct, Titan and Bridgestone have failed to demonstrate that the record evidence in this case is so different from the norm that Commerce must deviate from its practice. Titan and Bridgestone's statement that "the record permit[s] an appropriate correction" is unsupported and conclusory. (*Id.* at 22.) In fact, they admit that the Indian financial statements "did not distinguish between direct energy and overhead energy, so as to make it possible for Commerce to calculate an accurate surrogate overhead ratio." (*Id.* at 8.) Titan and Bridgestone's contention, therefore, that Commerce is required to adjust "the surrogate ratio by splitting the surrogate companies' energy consumption between 'production' and 'non-production' so as to parallel the respondent's reporting" is unavailing. (*Id.* at 22.)

Equally unavailing is Titan and Bridgestone's second proposal, that "manifest incongruity" dictates that Commerce "require the respondents to include in their calculations both their 'production' and 'non-production' energy" to determine the quantities reported for FOP. (Titan's Br. 8, 22.) When valuing factory overhead under an NME AD methodology, "Commerce need not use perfectly conforming information, only comparable information." *Rhodia*, 240 F. Supp. 2d at 1250 51 (internal quotation marks and citation omitted). Furthermore, the Federal Circuit has acknowledged Commerce's "broad statutory mandate" when valuing NME overhead, explaining that "[a]s factory overhead is composed of many different elements, the cost for individual items may depend largely on the accounting method used by the particular factory." *Magnesium*, 166 F.3d at 1372.

Indeed, these difficulties are illustrated by the facts of this case. Titan and Bridgestone assume that incongruity existed in Commerce's calculation because the Indian financial statements "did not distinguish between energy consumed for (a) production and (b) non-production." (Titan's Br. 20). Nevertheless, Titan and Bridgestone

cannot state with any certainty that this surrogate value included any non-production energy because the Indian producers' accounting methods are ambiguous. (*See id.* at 8 (stating that "all of the Indian financial statements used to calculate the overhead ratio included only *a single line item* for energy consumed by the company in question usually entitled 'Fuel and Energy'")); *see also Issues and Decision Memo* at 58 (acknowledging that "the surrogate-company ratios *may contain* energy consumed for factory overhead" (emphasis added) (citation omitted)). It is for this very reason that Commerce is afforded such broad discretion when valuing NME overhead. *See Magnesium*, 166 F.3d at 1372. Commerce's decision, therefore, not to require the respondents to include non-production energy in their reported FOP was well within its discretion.[14]

The court concludes that Commerce's decision not to make an adjustment to the surrogate financial ratio or to require the respondents to restate the amount of energy in their FOP was reasonable under the law and supported by substantial evidence. Accordingly, Titan and Bridgestone's motions are denied in this regard.

F. Zeroing

In its final determination, Commerce decided not to zero[15] respondent's fair value sales. *See Issues and Decision Memo* at 76 77. Bridgestone claimed in its brief that Commerce's decision to offset positive dumping margins with negative dumping margins in calculating its weighted-average dumping margin was contrary to law because zeroing is required under 19 U.S.C. § 1677(35)(A).[16] (Bridgestone's Br.

[14] Titan and Bridgestone also contend that 19 U.S.C. § 1677b(c)(3) compels the respondents to include the factory overhead, which was otherwise excluded as non-production energy, as a necessary FOP. (*See* Titan's Br. 24.) Such a categorical inclusion, however, is inappropriate due to the aforementioned ambiguous nature of the term "factory overhead." *See Magnesium*, 166 F.3d at 1372. Rather, this determination is more appropriately left to Commerce. *See id.*

[15] Zeroing is a practice in which Commerce gives the sales margins of merchandise sold at or above fair value prices an assumed value of zero. *See Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1345 46 (Fed. Cir. 2005). With zeroing, Commerce only takes into account those sales margins of merchandise sold at less than fair value prices to calculate the final weighted-average dumping margin. *See id.* Offsetting, conversely, is "the practice whereby Commerce, when calculating the numerator in the weighted-average dumping equation, offsets sales made at less than fair value with fair value sales." *U.S. Steel Corp. v. United States*, 637 F. Supp. 2d 1199, 1204 n.4 (CIT 2009).

[16] Bridgestone also argues that Commerce failed to address this issue in its Final AD Determination and requests a remand so Commerce can make an initial determination. (Bridgestone's Br. 6.) Commerce explained, however, that it would follow its normal methodology of not zeroing "when using average-to-average comparisons for non-targeted sales in investigations." *Issues and Decision Memo* at 76 77. In addition, Commerce has made it clear that it no longer zeros negative margins. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final*

7.) In May 2009, however, Bridgestone filed a stipulation of partial dismissal, pursuant to USCIT Rules 1, 41(a)(1)(B), and 56.2, dismissing "Count I of [its] complaint (pertaining to zeroing)" (Stipulation of Partial Dismissal, May 28, 2009 (Docket No. 223)), and the court an Order of Partial Dismissal (May 29, 2009) (Docket No. 224). In May 2010, the court asked the parties (1) to advise whether any of the separate antidumping issues raised in their briefs were abandoned and (2) to provide citations to any important legal developments that have occurred since briefing. (Letter Filed by Court, May 18, 2010 (Docket No. 303).) Bridgestone responded, informing the court that it "continues to rely on its filed briefs with regard to the 'separate' antidumping issues, which it has not abandoned," yet proceeded to advise the court on legal developments concerning the first issue raised in its brief, zeroing. (Bridgestone's Resp. to May 18, 2010 Letter from the Court, June 4, 2010, at 2 ("Bridgestone's Letter") (Docket No. 316).) In light of this unclear signaling from Bridgestone, the court will address the issue raised in Bridgestone's original brief. Bridgestone's claim lacks merit.

Under 19 U.S.C. § 1677(35)(A), "[t]he term 'dumping margin' means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). Although, at one point, Commerce interpreted § 1677(35)(A) as allowing for only positive dumping margins, it has since announced that it would no longer zero negative margins in antidumping investigations involving comparisons of "average-to-average" prices. *Zeroing Modification*, 71 Fed. Reg. at 77,722. The Federal Circuit, in reviewing Commerce's zeroing practice, has held that zeroing is permissible under the language of 19 U.S.C. § 1677(35)(A), *see Corus Staal*, 395 F.3d at 1347, but has also made clear that such a practice is not required, *see Timken Co. v. United States*, 354 F.3d 1334, 1341 42 (Fed. Cir. 2004) ("[W]e are reluctant to find . . . that Congress expressly intended to require zeroing. . . . Accordingly, we conclude that Congress's use of the word exceeds does not unambiguously require that dumping margins be positive numbers."). Commerce's decision not to use zeroing in this investigation, therefore, was a permissible interpretation of 19 U.S.C. §

Modification, 71 Fed. Reg. 77,722, 77,722 (Dep't Commerce Dec. 27, 2006) ("*Zeroing Modification*"). A remand, therefore, is unnecessary.

1677(35)(A).[17] Accordingly, Bridgestone's motion for judgment on the agency record is denied in this regard.[18]

CONCLUSION

For all the foregoing reasons, the court remands the matter for Commerce to forego the imposition of CVDs on the merchandise at issue and to reconsider or give further explanation for its decision to use an Indian surrogate value for rod in its investigation. Accordingly, the parties' motions for judgment on the agency record are otherwise denied.

Commerce shall file its remand determination with the court within thirty days of this date. GPX and Starbright, TUTRIC, Bridgestone, and Titan have eleven days thereafter to file objections, and the Government will have seven days thereafter to file its response. [19]

Dated: This 4th day of August, 2010.
New York, New York.

/*s*/ *Jane A. Restani*
JANE A. RESTANI
CHIEF JUDGE

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[17] In this investigation, Commerce followed a practice of offsetting respondent's sales made at less than fair value with their fair value sales. In two recent decisions, the Court of International Trade held that the practice of offsetting is permissible under 19 U.S.C. § 1677. *See Searing Indus. v. United States*, 662 F. Supp. 2d 1327, 1335 36 (CIT 2009); *U.S. Steel Corp.*, 637 F. Supp. 2d at 1213. The court notes that one of these cases is currently on appeal. For this reason, Bridgestone asks the court to preserve this issue. (*See* Bridgestone's Letter 2.) Bridgestone challenges the permissibility of offsetting under the statute only insofar as its allowance is inconsistent with Bridgestone's contention that the statutory language requires zeroing. As *Timken* makes clear, however, this issue already has been clearly decided. A stay, therefore, is unnecessary.

[18] Bridgestone also argues that portions of the statute would be rendered meaningless if offsets are permitted because "Commerce would get the same result whether it compared weighted-average normal values to weighted-average U.S. prices or to individual U.S. transaction prices." (Bridgestone's Br. 9 10.) Even if this statement were correct, this concern does not compel the court to conclude that zeroing is required under 19 U.S.C. § 1677(35)(A). Rather, as the Federal Circuit has made clear, zeroing is not required. *See Timken*, 354 F.3d at 1341 42.

[19] In correspondence dated June 4, 2010, TUTRIC informed the court of recent case law finding the labor valuation regulation, 19 C.F.R. § 351.408(c)(3), used in this AD investigation invalid. This issue, however, was never raised before the court and cannot be raised now.