U.S. Customs and Border Protection

Slip Op. 13–74

GOLD EAST PAPER (JIANGSU) CO., LTD.; NINGBO ZHONGHUA PAPER CO., LTD. and GLOBAL PAPER SOLUTIONS Plaintiffs, v. UNITED STATES, Defendant, and APPLETON COATED LLC, et al. Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 10–00371

[Commerce's determination is upheld in part and remanded in part.]

Dated: June 17, 2013

Daniel L. Porter, James P. Durling, Matthew P. McCullough and *Ross Bidlingmaier*, Curtis Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for plaintiff.

Alexander V. Sverdlov, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Stewart F. Delery*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Mykhaylo Gryzlov*, Senior Attorney, and *Melissa Brewer*, Office of Chief Counsel for Import Administration, U.S. Department of Commerce.

William A. Fennell, Wesley K. Caine and *Terence P. Stewart*, Stewart & Stewart, of Washington, D.C., and *Gilbert B. Kaplan*, *Daniel L. Schneiderman* and *Christopher T. Cloutier*, King & Spalding, of Washington D.C. for defendant-intervenors.

OPINION

Musgrave, Senior Judge:

Plaintiffs Gold East Paper (Jiangsu) Co., Ltd. ("Gold East"), Ningbo Zhonghua Paper Co., Ltd., and Global Paper Solutions ("GPS") (hereafter "Plaintiffs" or "APP-China") challenge the Department of Commerce's ("Commerce") final determination in the antidumping investigation of *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China*, 75 Fed. Reg. 59217 (Dept. Commerce, Sept. 27, 2010) Public Record Doc. ("PR") 360, *as amended by Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Amended Final Determination of Sales at Less than Fair Value and Antidumping Order*, 75 Fed. Reg. 70203 (Dept. Commerce, Nov. 17, 2010), PR 369 (collectively, "Final AD Order").

In their second amended complaint, plaintiffs press multiple causes of action, which are addressed below. Second Amended Complaint, dated December 19, 2012, and filed on January 10, 2013, ECF Doc. 114–1, at 9–12; *see also* Plaintiff's Reply Brief ("Pl's Reply") at 1 (identifying which arguments plaintiff is no longer pursuing). Plaintiffs move for judgment under Rule 56.2, challenging the Final AD Order in five sections of their brief. Respondent Plaintiffs' Brief in Support of Their Motion for Judgment on the Agency Record (Confidential) ("Pl's Br.") at 1–4.

Defendant-Intervenors Appleton Coated LLC, Newpage Corp., SAPPI Fine Paper North America, *et al* ("Appleton") cross-move for judgment under Rule 56.2, alleging that Commerce misclassified certain U.S. sales as Export Price transactions, not Constructed Export Price transactions due to the sales' locations and delivery terms. Appleton also claims that Commerce erred in determining the surrogate wage rate for purposes of its Non-Market Economy Normal Value calculations.

The government defends Commerce's findings generally, but does agree to a voluntary remand in order to review the computer programming and to make any changes required to correct any errors found. Due to the multitude of issues involved, the relevant facts are discussed with each issue separately.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). Commerce's final determination will be upheld unless it is found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous"). Commerce's interpretation will not be set aside unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778.

ANALYSIS

I. Commerce's Refusal to Use Market Economy Input Prices where Such Inputs did not Constitute More than 33 Percent of Plaintiffs' Purchases

In order to determine the proper antidumping margin, Commerce valued the raw material inputs used in the manufacture of the merchandise. Commerce decided not to use the market-economy ("ME") price paid for those inputs where ME purchases made up less than 33% of those inputs. Instead, Commerce used a price based on the weighted-average ME price plus a surrogate value for the non-market economy ("NME") purchases. Cmt. 18, Issues & Decision Memorandum ("I&D Memo") (Sept. 20, 2010) PR 353 at 46. The record shows that 32.9% of certain disputed inputs were ME purchases. Pl's Br. at 23 (chart).

Commerce does not expressly defend the decision, but does defend the 33% policy as an "objective benchmark" which provides "consistency and predictability" in Commerce's determinations. Defendant's Response to Plaintiffs' and Defendant-Intervenors' Separate Motions for Judgment Upon the Administrative Record ("Deft's Br.") at 44. Its brief summarizes the administrative history of the 33% policy and suggests that APP-China could have but failed to prove to Commerce that "case specific facts favor the application of a different threshold".[1] In the I&D Memo, Commerce cites to prior cases where it applied the 33% policy, but a review of those cases does not reveal how close to 33% the ME input purchases were. *See* I&D Memo at 46, n. 140–141.

Under Commerce's regulations, it will "normally" use prices paid by NME producers to ME suppliers to value factors of production in Normal Value calculations. *See* 19 C.F.R. § 351.408(c)(1). Commerce's policy implementing § 351.408(c)(1) is to use the ME purchase price to value the particular factor where the ME purchases are a "significant" or "meaningful" portion of the whole. *See Antidumping Methodologies: Market Economy Inputs, etc.*, 71 Fed. Reg. 61716, 61716–19 (Dep't Comm. Oct. 19, 2006). Under this policy, the ME inputs constitute a "significant" or "meaningful" portion where they make up more than 33% of purchases of the input. *Id*., 71 Fed. Reg. at 61717–18. Above the 33% threshold, Commerce will use the ME price to value the entire quantity of inputs. Below that threshold Com-

[1] *Id*. APP-China attempted unsuccessfully to prove to Commerce that the 33% "presumption" should be rebutted by emphasizing the *bona fides* of the market transactions, as well as the fact that Commerce had verified the accuracy of the prices involved. I&D Memo at 47.

merce will use a weighted average of the ME price for the ME portion and a surrogate value for the remainder as it did in this case.

The government argues that *Shakeproof Assembly Comp. Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376 (Fed. Cir. 2001), which predates Commerce's 33% policy, "upheld Commerce's determination that actual input prices will constitute the 'best information available' only if they are found in a 'meaningful' quantity." Deft's Br. at 48. That court stated:

> In determining the valuation of the factors of production, the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible. Commerce argues that the actual price paid for inputs imported from a market economy in meaningful quantities is the best available information and promotes accuracy in the dumping calculation. Commerce notes that the value of the factors of production for domestically purchased merchandise may be obtained by extrapolating the market economy import price only when a "meaningful" amount of merchandise is imported. Although we recognize that the level of a "meaningful" amount of imported merchandise must be determined on a case-by case basis, we are persuaded that the steel imported from the United Kingdom in this case constitutes a "meaningful" amount. The steel imported from the United Kingdom constitutes approximately one-third of all steel used . . . .

Shakeproof, 268 F.3d at 1382. In *Shakeproof*, Commerce argued that the ME data was more accurate that the surrogate data. *Id*. The *Shakeproof* court agreed.

> [W]here we can determine that a [non-market economy] producer's input prices are market determined, accuracy, fairness, and predictability are enhanced by using those prices. Therefore, using surrogate values when market-based values are available would, in fact, be contrary to the intent of the law.

Shakeproof, 268 F.3d at 1382, *quoting Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442, 1446. The court finds the reasons why Commerce sought to use the ME data in *Shakeproof* compellingly favor APP-China's position in this case.

The Oxford English Dictionary defines "meaningful" (as applied to data or its presentation), as "accurate and realistic; of practical

use."[2] Commerce's policy, delineated following the *Shakeproof* decision, defines 33% as a "meaningful" and "significant" amount. The court cannot understand why, in Commerce's view, purchases of 33% of an input are "meaningful", but purchases of 32.9% are not. There is no meaningful distinction for purposes of determining Normal Value between those two quantities. Commerce itself has said that the 33% rule was *not* a "rigid, 'bright line' threshold". *Antidumping Methodologies: Market Economy Inputs*, 71 Fed. Reg. at 61718.

The court finds that Commerce's refusal to value the classes of inputs using the ME price paid for 32.9% of those inputs, where it would have done so if APP-China had made ME purchases of 33% of the input, is unreasonable, arbitrary and capricious under the circumstances. This issue is therefore remanded to Commerce to recalculate the affected inputs using the ME prices paid rather than the weighted averages previously used and to recalculate the affected margins accordingly.

II. Commerce's Refusal to Recognize Market Economy Purchases of Inputs from Thailand and Korea

Plaintiffs challenge Commerce's refusal to recognize APP-China's raw material imports from Korea and Thailand as *bona fide* market economy purchases, or to utilize their prices to value the raw material input. Commerce made this decision because it believed that such inputs may themselves have been sold with the benefit of subsidies. Deft's Br. at 16. Plaintiffs claim that this refusal is contrary to this court's precedent, citing *Fuyao Glass Indus. Group Co. v. United States*, 29 CIT 109 (2005) and *Sichuan Changong Elec. Co. v. United States*, 30 CIT 1481, 460 F.Supp. 2d 1338 (2006).

Under 19 U.S.C. § 1677b(c)(1) and 19 C.F.R. § 351.408(c)(1), Commerce normally will use the price paid to a market-economy producer to value a factor in valuing products exported from a NME such as the PRC. *Fuyao Glass* and *Sichuan Changong* both questioned Commerce's refusal to use raw material values from Korea and Thailand due to Commerce's suspicions that those prices were tainted by possible export subsidies.

In *Fuyao Glass*, the court identified three factors to determine whether Commerce had a proper evidentiary basis to believe or suspect that the prices may have been subsidized. On remand, the court ordered Commerce to justify the refusal to accept the raw material prices by demonstrating:

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[2] Oxford English Dictionary, Third Edition, 2001, found at *http://www.oed.com/view/Entry/115468?redirectedFrom=meaningful#eid*, last viewed on May 15, 2013.

> by specific and objective evidence that (1) subsidies of the industry in question existed in the supplier countries during the period of investigation; (2) the supplier in question is a member of the subsidized industry or otherwise could have taken advantage of any available subsidies; and (3) it would have been unnatural for a supplier to not have taken advantage of such subsidies.[3]

In *Sichuan Changhong* the court considered Commerce's finding that Korean and Thai inputs may have been subsidized and ordered Commerce to make findings under the *Fuyao Glass* criteria. *Sichuan Changhong*, 460 F.Supp. 2d at 1350–51. Upon remand, Commerce reopened the record and provided relevant evidence of the alleged subsidy programs.[4]

In this case, APP-China argued that Commerce must cite evidence establishing that the particular inputs were subsidized in fact. Commerce disagreed.

> [Commerce] is not required to conduct a formal investigation with respect to multiple countries to ensure that prices are subsidized. Rather, it is sufficient if [Commerce] has "substantial, specific, and objective evidence in support of its *suspicion* that the prices are distorted." *See China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 293 F. Supp. 2d 1334, 1339 (CIT 2003) (emphasis in original); H.R. Conf. Rep. No. 100–576, at 590 [(1988), *reprinted in* 1988 U.S. Code, Cong., Admin. News 1547, 1623]. APP-China's suggestion that [Commerce] cannot rely upon its finding in other proceedings and is instead required to conduct a full blown reinvestigation of export subsidies in Thailand and Korea in the context of this antidumping duty investigation is unsupported and would [be] unadministrable, particularly in light of the statutory deadlines for completing antidumping investigations. Therefore, [Commerce] is instructed by Congress to base its decision on information that is available to it at the time it is making its determination.

Cmt. 17, I&D Memo at 44–45 (footnotes omitted).

Commerce tries to distinguish *Fuyao Glass* because there the court focused on Commerce's statement that it had found that prices were,

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[3] *Fuyao Glass*, 29 CIT at 114. After remand, Commerce chose to use the contested ME input prices from Korea and Indonesia rather than reopen the record to establish evidence for its suspicion that the ME prices were subsidized. *See Final Results of Redetermination Pursuant to Court Remand* (Dept. Commerce June 9, 2005), ECF 122 in Ct. No. 02–00282 at 14.

[4] See *Redetermination on Remand* (Dept. Commerce Feb. 12, 2007), ECF 104 in Ct. No. 04–00265 at 14–23.

rather than may have been, subsidized in the countries in question.[5] The court does not find Commerce's argument persuasive. The concerns raised in *Fuyao Glass* and echoed in *Sichuan Changong* resonate in this case. Although Commerce need not perform "a formal investigation" whether prices are subsidized, there must be some positive evidence on the record to permit the court to evaluate whether Commerce's decision is supported by substantial evidence. As the record currently stands, there is insufficient evidence to support Commerce's refusal to use the Thai and Korean price data. Therefore, under the *Fuyao Glass* and *Sichuan Changhong* precedent, the court orders Commerce on remand to reopen the record and make particularized findings in support of its decision to ignore the Thai and Korean price data (specifically referring to the three criteria from *Fuyao Glass*), or to reverse its decision not to use such price data and to recalculate the margin accordingly.

III. Commerce's Use of Non-Market Economy Methodology

Gold East argued at Commerce that it was a Chinese "MOE" ("market oriented enterprise"), and that the agency should therefore not have applied NME methodology to calculate Normal Value. Gold East's Request for MOE Treatment (Jan. 21, 2010) at 1–2, PR 107. Gold East also submitted unsolicited information purporting to allow Commerce to apply ME Normal Value methodology. Market Oriented (MOE) Questionnaire Responses, PR 244; Gold East Case Brief at 80, PR 333.

Commerce rejected Gold East's positions. The agency stated in the I&D Memo:

> The antidumping statute and [Commerce's] regulations are silent with respect to the term "MOE." Neither the statute nor the regulations compel the agency to treat some constituents of the NME industry as MOEs while treating others as NME entities. To date, [Commerce] has not adopted any MOE exception to the application of the NME methodology in any proceeding involving an NME country.

[5] Deft's Br. at 36. *Sichuan Changhong* adopted the *Fuyao Glass* criteria, but did not discern whether Commerce used "mandatory" language. This may be a case of a distinction without a difference. In the *Fuyao Glass* remand results, Commerce ignored the difference between the terms. *See Final Results of Redetermination Pursuant to Court Remand*, ECF 122 in Ct. No. 02–00282, at 7. ("[Commerce] reiterates that, regardless of whether it has used 'are' or 'may be,' [Commerce's] focus has always been on whether there is a 'reason to believe or suspect' that prices for inputs from these countries may be subsidized. . . .")

I&D Memo at 30–31. Plaintiffs claim that Commerce should have granted Gold East MOE treatment because it had earlier stated in the Federal Register that it might "grant an individual respondent in China market-economy treatment." *See Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprises*, 72 Fed. Reg. 60649, 60650 (Dept. of Commerce, Oct. 25, 2007). The government counters that "Commerce considered APP-China's request to be considered for market-economy treatment, and determined that the 'available information' did not allow it to calculate normal value under market economy principles." Deft's Br. at 23, *citing* I&D Memo at 5–10.

> Commerce followed its normal practice to determine whether APP-China's margin should be calculated using a market-economy methodology. APP-China's argument rests on the bald assertion that Commerce should have created a new methodology even though it already has a reasonable methodology in place. There is no reason to create this requirement.

Deft's Br. at 28. The court agrees that APP-China's demand that Commerce treat it as an MOE or that it should have used ME methodology was premature, and Commerce's determination on this issue is reasonable.

IV. Targeted Dumping Issues

Commerce concluded that APP-China engaged in "targeted dumping", *i.e.*, that it sold its merchandise at export prices that differed significantly among purchasers.[6] APP-China argues that Commerce incorrectly found targeted dumping, and unlawfully applied the targeted dumping remedy to all of its sales.

a. Withdrawn Targeted Dumping Regulation

APP-China's first argument is that Commerce failed to follow a portion of its targeted dumping regulation found at 19 C.F.R. § 351.414(f) (2007), which Commerce withdrew in 2008. Pl's Br. at 27; *see also* Cmt. 3, I&D Memo at 21–24, *citing Withdrawal of Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74930 (Dec. 10, 2008) ("*Withdrawal Notice*"). The withdrawn regulation provided in part that where Commerce

[6] Under 19 U.S.C. § 1677f-1(d)(1)(B), Commerce may find "targeted dumping" where there is a pattern of export prices that differs significantly among purchasers, regions, or periods of time. In those circumstances, Commerce may determine whether merchandise is being sold at LTFV by comparing weighted average to individual transaction prices, but only if Commerce explains why the differences cannot be accounted for by using an average-to-average or transaction-to-transaction method.

found targeted dumping, it would "normally" "limit the application of the average-to-transaction method to those sales that constitute targeted dumping". 19 C.F.R. § 351.414(f)(2) ("Limiting Rule"). APP-China argues that Commerce did not comply with Administrative Procedure Act's ("APA"), 5 U.S.C. § 500, *et seq*., notice and comment requirements in withdrawing the Limiting Rule, and the withdrawal was ineffective because it did not fall within the exceptions to the APA's notice and comment requirements. Pl's Br. at 27.

Commerce argues that the withdrawal sufficiently complied with the APA because two earlier notices had requested comments on related issues. Deft's Br. at 48–9, *citing Targeted Dumping in Antidumping Investigations*, 72 Fed. Reg. 60651 (Oct. 25, 2007) ("*First Comment Request*"), and *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations*, 73 Fed. Reg. 26371 (May 9, 2008) ("*Second Comment Request*").

The APA requires notice of proposed rulemaking (including withdrawal of regulations) to be published in the Federal Register and to include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). This notice must be "sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rule making." *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985) (citations omitted). The APA provides that prior publication of notice and comment shall not be required:

> when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b)(B). The good cause exception is to "be narrowly construed and only reluctantly countenanced." *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

The *Withdrawal Notice* and the two *Comment Requests* curiously do not make reference to each other even though they were all issued within a single year on related topics. The two *Comment Requests* discuss the methodologies that Commerce will use to determine whether targeted dumping has occurred, while the Limiting Rule restricts Commerce's ability to impose the targeting remedy across all sales. Therefore, the court finds that the *First* and *Second Comment Requests* failed to provide interested parties with the adequate notice and comment before Commerce withdrew the Limiting Rule.

Although Commerce gave no notice before it withdrew the Limiting

Rule, Commerce argues that the *Withdrawal Notice* should be deemed adequate under the APA because it provided for post-publication comments. Deft's Br. at 51. However, the APA requires otherwise. Section 553 provides "that notice and an opportunity for comment are to precede rulemaking." *See Air Transport Ass'n of America v. Dept. of Transp*., 900 F. 2d 369 (D.C. Cir. 1990) *remanded*, 498 U.S. 1077, 111 S.Ct. 944, 112 L.Ed.2d 1033 (1991), *vacated as moot*, 933 F.2d 1043 (D.C.Cir. 1991) (rejecting FAA's contention that its response to comments after promulgation of rule cured any non-compliance with section 553).

The government cites *Federal Express Corp. v. Mineta*, 373 F.3d 112 (D.C. Cir. 2004), where the agency issued four rules seriatim over the course of less than a year, but only requested comments after each rule was issued. That case does not support Commerce's actions here. In *Federal Express*, there was an urgency to the rules, which affected airlines' compensation for losses suffered as a consequence of the shutdown of U.S. airspace following the attacks of September 11, 2001. The affected parties commented on each version of the rules. Furthermore, "the agency [] made a 'compelling showing,' that it provided 'a meaningful opportunity to comment' before the Fourth Final Rule became effective". *Federal Express*, 373 F.3d at 120. In this case, there was no urgency to Commerce's withdrawal of the Limiting Rule, and Commerce did not make any further statements regarding the Limiting Rule in response to any comments it received from the *Withdrawal Notice*.

Commerce argued in the *Withdrawal Notice* that the withdrawal did not require notice and comment under the "good cause" exception. In the *Withdrawal Notice*, Commerce cites three "good cause" reasons to ignore the APA notice and comment requirements in withdrawing the Limiting Rule.

> These provisions were intended to clarify when [Commerce] would use the average-to-transaction comparison method in antidumping duty investigations. As the provisions were promulgated without the benefit of any experience on the issue of targeted dumping, [Commerce] may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping. . . . Given the above, sections 19 CFR 351.414(f), (g), and 351.301(d)(5) would act to deny relief to domestic industries suffering material injury from unfairly traded imports. This effect is contrary to [Commerce's] intention in promulgating the provisions, and inconsistent with [Commerce's] statutory mandate to provide relief to domestic industries materially injured by unfairly traded imports. Be-

> cause the provisions are applicable to ongoing antidumping investigations, and because the application of the provisions can act to deny relief to domestic industries suffering material injury from unfairly traded imports, immediate revocation is necessary to ensure the proper and efficient operation of the antidumping law and to provide the relief intended by Congress.

Withdrawal Notice, 73 Fed. Reg. at 74931. The *Withdrawal Notice* claims that notice and comment was not required because it was "contrary to the public interest." [7] Citing *National Customs Brokers and Forwarders Assn. of America v. United States*, 59 F.3d 1219 (Fed. Cir. 1995) ("*NCBFAA*"), the government argues that Commerce was justified in the immediate withdrawal of the Limiting Rule. "Immediate withdrawal of the regulation was . . . necessary to allow domestic industries to take advantage of their statutory remedies." Deft's Br. at 56. However, in *NCBFAA* Congress changed the law and Customs acted expeditiously to implement the new requirements via an interim regulation. In this case, Commerce withdrew the Limiting Rule with immediate effect, in order to "implement" a statute that had been in place for 14 years. *Cf. Levesque v. Block*, 723 F.2d 175, 185 (1st Cir. 1983) (generalized interest in fiscal savings or other efficiencies insufficient support for public interest exception).

The court finds that none of Commerce's reasons in support of immediate revocation (without prior notice and comment) rise to the level required. That Commerce improvidently enacted rules without adequate experience of how they would work, that the rules apply to ongoing investigations, and the rules could deny relief to domestic industries, do not rise to the level required for it to avoid the APA's requirements. Indeed, those justifications could apply to *almost any* rule promulgated by the agency.

This situation is closely analogous to that found in *Citibank, Federal Sav. Bank v. FDIC*, 836 F.Supp. 3 (D.C. D.C. 1993), where the FDIC withdrew without providing notice or comment a rule regarding disposition of reserves held by FDIC on behalf of member banks. Several years later, Citibank sued to have the rule enforced, and the court agreed.

> Notice which fails to alert the public to significant policy changes violates the APA's notice and comment provisions. *See Natural Resources Defense Council, Inc. v. Hodel*, 618 F.Supp. 848 (E.D. Cal. 1985). Therefore, this court holds that because

[7] Deft's Br. at 58. In its brief, Commerce abandons the claimed ground of impracticability cited by the Withdrawal Notice in support of the immediate withdrawal of the Limiting Rule. Deft's Br. at 58, n.9.

> the FDIC did not comply with the relevant provisions of the APA when it purported to repeal 12 C.F.R. § 385.8(b), the repeal of that regulation was invalid. Consequently, 12 C.F.R. § 385.8(b) was still in force at the time of the merger of Citibank-Ill and Citibank-D.C. into Citibank-Cal.

Citibank, 836 F.Supp. at 7. Because Commerce failed to provide notice and comment before withdrawing the Limiting Rule, and the agency failed to provide adequate cause to qualify under the exceptions to the notice and comment requirements, the court finds that the repeal of the regulation was invalid, and the Limiting Rule is still in force. Commerce's decision to apply the targeted dumping remedy to all of APP-China's sales failed to comply with applicable law.

Commerce must, on remand, reconsider its application of the targeted dumping remedy under the Limiting Rule. Assuming the finding of targeted dumping remains positive after reconsideration of the other issues addressed in this opinion, Commerce must limit application of the targeted dumping remedy to the targeted sales, or provide an adequate explanation why the situation is not a "normal" one before applying the remedy to all APP-China sales.

b. Targeted Dumping Testing

APP-China argues that Commerce's test for targeted dumping was unsupported by substantial evidence. "Commerce created a test so complex that Commerce itself failed to apply its own test correctly." Pl's Br. at 40. APP-China alleges that Commerce incorrectly applied the test derived from the decision in *Mid Continental Nail Corp. v. United States*, 712 F.Supp. 2d 1370, 1377–78 (CIT 2010) ("*Nails* test"). In the first part of the *Nails* test, Commerce analyzed averages of prices, rather than individual prices, and calculated an average price and a standard deviation based on customer specific average prices.

APP-China argues that this violates 19 U.S.C. § 1677f-1(d)(1)(B)(i), because the statute distinguishes between "export prices" and "weighted average export prices", and Commerce used an average where the statute references only "export prices". *See e.g.*, 19 U.S.C. § 1677a(a). Commerce should be required to analyze targeted dumping using individual transaction prices rather than averages. Pl's Br. at 41. APP-China alleges that "the prices to the alleged target did *not* pass the first part of the [Commerce] test when using actual prices rather than constructed averages." *Id*. at 42 (emphasis in original).

Commerce responds that it applied the *Nails* methodology accurately by using weighted average prices. Deft's Br. at 69. In the

Second Comment Request, Commerce explained the *Nails* test. In the first step of the test, "[t]he calculation of the standard deviation value would be done product by product . . . using period of investigation[]-wide average prices (weighted by sales value) for each allegedly targeted customer and each distinct non-targeted customer." *Second Comment Request*, 73 Fed. Reg. at 26372.

The court agrees that Commerce correctly applied this portion of the *Nails* test, as described in the *Second Comment Request*. The statute does not require otherwise, despite plaintiffs' statutory construction arguments. Therefore, the court upholds this portion of Commerce's determination as within its discretion in interpreting the statue involved.

c. Programming Errors

Under the second part of the *Nails* test, Commerce found "significant" price discrepancies whenever a non-targeted customer had higher-than-average prices. APP-China argues that Commerce's computer code did not correctly compare the average price to the next-higher average price to a non-targeted customer as required by the *Nails* test. Pl's Br. at 45, *citing* I&D Memo at 22. Instead, the program searched for the lowest weighted average price to a non-targeted customer with a larger than average price gap. Because Commerce actually never compared the alleged targeted price to the "next higher" price, as it was supposed to, APP-China argues that Commerce incorrectly identified targeted dumping in 8 of 8 examples used to justify the targeted dumping finding. Pl's Br. at 46.

APP-China next alleges that Commerce failed to determine the average price gap for the entire group of non-targeted customers. Pl's Br. at 47–8. This is a critical part of determining whether the targeted price gap represented an aberration. Instead, Commerce determined the average price gap for only customers with higher average prices. This approach increased the size of the price gap significantly and switched the result of the test from negative to positive. *Id*. According to APP-China, Commerce also ignored data from non-targeted customers with average prices below the price to the alleged targeted customer. Pl's Br. at 49. Commerce used data from all the non-targeted customers during the first step in its targeting analysis – the "pattern" test. But Commerce excluded lower-priced non-targeted customers in analyzing whether the prices differed significantly. Finally, APP-China argues that Commerce used methodologies derived from a small sample, and then applied the results to the entire data

set. Commerce used data relating to shipments of only 1,005 metric tons (out of 53,809 MT total shipped). Pl's Br. at 50, citing its Complete Output exhibit.

> Commerce thus impermissibly stacked the deck. For those CONNUMs that passed its 'pattern' test, it then looked for *any* instance in which the non-targeted customer had an average price *higher* enough above the average price to the alleged targeted customer to be larger than the *smaller* price gap calculated for a subset of those non-targeted customers. Commerce has not provided any justification for a test so distorted and so designed to achieve the desired outcome– finding some isolated examples of transactions that pass the tests.

Pl's Br. at 51 (emphasis in original, citation omitted).

Appleton argues that the program contains another error "that artificially enhanced the 'gap' between targeted and non-targeted prices so as to make targeting more difficult to find." Appleton Supplemental Brief, ECF Doc. 80 at 6.

Commerce requests a voluntary remand to "examine the calculation program, and if appropriate, to correct the alleged errors and reconsider the finding that export prices differed significantly among purchasers." Deft's Br. at 75.

The court agrees with the parties and remands to Commerce with instructions to review each of the computer programming issues identified above, to recalculate the margins after correcting any errors found, or to explain why it believes the errors do not exist. *See SKF USA, Inc. v. United States*, 254 Fed.3d 1022, 1027–31 (Fed. Cir. 2001) (explaining circumstances where voluntary remand requests will be granted).

V. Double-Counted Rebate

APP-China argues that Commerce erred in double-counting a rebate in the calculation of its net U.S. price. Plaintiffs contend that its revised U.S. sales database included data for the "Program for Growth" rebate twice. Commerce responds that APP-China's submissions did not adequately demonstrate that APP-China was entitled to the adjustment. Deft's Br. at 85. Appleton argues that APP-China based its "double-count" claim on tardy information which was unreliable. Appleton's Resp. Br. at 55–56.

APP-China presented rebate information in two documents, one of which was an untranslated document which Commerce could not read. Deft's Br. at 86. Commerce denied the requested adjustment

because it could not determine how the rebate amount was calculated. The court agrees with Commerce that administrative exhaustion principles apply in this instance. *Gerber Food (Yunnan) Co. v. United States*, 601 F.Supp. 2d 1370, 1379 (CIT 2009). APP-China could have submitted the information to Commerce in a more timely, accurate and legible manner. The court finds that APP-China failed to meet its burden to show that it was entitled to an adjustment before Commerce, and this aspect of Commerce's decision is supported by substantial evidence.

VI. Export Price vs. Constructed Export Price Analysis

APP-China classified its sales as export price ("EP") transactions, which Commerce accepted. 19 U.S.C. § 1677a(a). According to Appleton, because some of the goods were delivered in the U.S. on a DDP (delivered duty-paid) or DDU (delivered duty-unpaid) basis, the sales should have been found to have been made in the U.S. Appleton Br. at 5, 13. If the sales were made in the U.S., they should have been classified as Constructed Export Price ("CEP") transactions and downward adjustments to the CEP prices made under 19 U.S.C. § 1677a(d). 19 U.S.C. § 1677a(b). In response to these arguments, Commerce held that:

> the record evidence supports continuing to treat the sales at issue as EP transactions. Specifically, for these sales, APP-China (GEHK) [Gold East's Hong Kong affiliate ("GEHK")] is identified as the seller of the merchandise and invoiced the U.S. customer prior to the date of importation. GPS [APP-China's U.S. importing affiliate] did not take title to the products, nor is it identified as the seller of the merchandise on the commercial invoice. [Footnote noting GPS's limited role omitted.]
>
> Accordingly, record evidence indicates that [GEHK] is the seller of the subject merchandise in these transactions, and that the sale took place outside the United States, before the date of importation, when [GEHK] invoiced the U.S. customer.[8]

The government defends Commerce's decision by arguing that the date of the invoice (which establishes the price and quantity) is critical under the terms of the statute and its regulations, especially where that date is prior to the date of importation. Deft's Br. at 89, *citing* 19 C.F.R. § 351.401(i). But an invoice date prior to import may

[8] I&D Memo at 35 (footnotes omitted). GEHK is described as "an offshore trading company that [Gold East] uses as an invoicing party for its export sales." Pub. Gold East Section A Response (Dec. 23, 2009), PR 77 at 17.

indicate *either* an EP or CEP sale for purposes of 19 U.S.C. § 1677a, because both EP and CEP sales can be made prior to importation.

The parties argue that the decisions in *AK Steel*, *Corus Staal* and *Nucor* should settle the issue of whether the sale of the goods was made inside or outside the U.S. But while those decisions are instructive, the factors driving each of those cases differ from this case. In *AK Steel Corp. v. United States*, 226 F.3d 1361 (Fed. Cir. 2000), our appellate court stated that:

> [t]he question at the root of this appeal is whether a sale to a U.S. purchaser can be properly classified as a sale by the producer/exporter, and thus an EP sale, even if the sales contract is between the U.S. purchaser and a U.S. affiliate of the producer/exporter and is executed in the United States. Appellees argue that it can, if the role of the U.S. affiliate is sufficiently minor that the sale passes the PQ Test. The domestic producers argue that the plain language of the statute prevents such a classification. We agree with the domestic producers.

AK Steel, 226 F.3d at 1368. However, the holding in *A.K. Steel* that the first unaffiliated sale is a CEP sale when it is made by an exporter's U.S. affiliate does not resolve the issue here. Unlike in *AK Steel*, Commerce decided that GPS, the U.S. importer, did not make the sales in question. I&D Memo at 35. Rather, Commerce found the sales were made by GEHK, Gold East's affiliate.

In *Corus Staal BV v. United States*, 502 F.3d 1370 (Fed. Cir. 2007), the exporter argued the sales were EP because they were made prior to importation, but Commerce found they were CEP sales made after importation because the orders were filled from U.S. stock. *Corus Staal*, 502 F.3d at 1376. The case turned on whether the sale predated importation and the court agreed with Commerce that it did not. *Corus Staal*, 502 F.3d at 1377. *Corus Staal* 's holding was controlled by the statute because if the sale was made after importation then it could not be an EP sale. 19 U.S.C. § 1677a(a) (EP sales are made "before the date of importation"). *Corus Staal*'s holding as a result does not resolve the issues in this case.

Nucor Corp. v. United States, 612 F.Supp. 2d 1264, 1275 (CIT 2009), upheld Commerce's finding of an offshore sale where title transferred to the U.S. buyers overseas, among other factors. Commerce disagreed with an allegation that title transferred in the U.S. *Id*. "[T]he sales agreement was signed in Turkey by [exporter] personnel, the invoice was issued by an entity in Turkey (*i.e*., the producer/exporter) to an entity in the United States (*i.e*., the U.S. customer), and it was

concluded outside the United States." *Id.*, *quoting* Decision Memo at 66–67. The court agreed with Commerce that the sales should be classified as EP because they occurred outside the U.S. *Id*. at 1282–83. Unfortunately, as with *Corus Staal*, the structure of the transactions in *Nucor* differed significantly from those in this case.

Moreover, the record evidence provides only a limited indication where the sale occurred under the statute and caselaw. Commerce cited the following facts in its determination:

- GEHK invoiced the unaffiliated U.S. customer prior to importation;
- GEHK was the seller of the subject merchandise;
- GPS never took title to the merchandise;
- GPS was not identified as the seller on the commercial invoice;
- Delivery terms were DDU or DDP in the U.S.;
- The date of sale was the GEHK invoice date, since that invoice set "the material terms of sale".

I&D Memo at 35. The record reveals that in these transactions, payment was made by overseas customers directly to GEHK or the U.S. affiliate GPS (which forwarded payment to GEHK). *See* Attachment 1 to Appleton Reply Br. (sales flow charts). It appears that GEHK was not the producer or exporter of the merchandise, which shipped directly from Gold East to customers in the U.S. *Id.* GEHK also purchased raw materials which were sent directly to Gold East. *Id*. But there is no discussion of contract terms regarding passage of title or risk of loss, other than the use by the parties of DDP and DDU terms. *Cf. Nucor*, 612 F. Supp.2d at 1273–1275 (discussing factors relevant to determination of locus of sale). Also absent from the record is a discussion of where and by whom the negotiations for the sales were held. There is no mention of whether there was an overall sales agreement covering the sales in question, and if so, where it was made. Commerce does not discuss the importance of the fact that payments went from the U.S. customers to GEHK. While Commerce found that the sales were not made by GPS, that does not necessarily mean that the sales were not made in the U.S. due to other factors.

Even if the record fully supported Commerce's determination that the sales were made outside the U.S., that factor is not dispositive of the EP/CEP classification, because the statute also distinguishes between sales made by the producer and those made by another party on behalf of the producer. Under 19 U.S.C. § 1677a, an EP sale is the first sale (or agreement to sell) "by the producer or exporter of the subject merchandise" outside the United States to an unaffiliated

purchaser in the U.S. 19 U.S.C. § 1677a(a). A CEP sale is the first sale (or agreement to sell) in the U.S. "by or for the account of the producer or exporter . . . *or by a seller affiliated with the producer or exporter* " to an unaffiliated purchaser in the U.S. 19 U.S.C. § 1677a(b) (emphasis added). In this case, the first sale was made by an affiliated seller (GEHK) which was not the producer/exporter.[9] Under the statute, if GEHK was the seller but not the producer or exporter of the merchandise in question, the sale cannot be an EP sale. By the same token, however, if the sale was made outside the U.S., it cannot be a CEP sale. 19 U.S.C. § 1677a(b).

This structural distinction is discussed in *AK Steel*. There, the fact that the affiliate was deemed the seller was critical to the court's conclusion that the sale could not be deemed an EP sale. As stated in *AK Steel*, "a sale made by a U.S. affiliate *or another party other than the producer or exporter* cannot be an EP sale." *AK Steel*, 226 F.3d at 1374 (emphasis added).

> [T]he statute also distinguishes the categories based on the participation of an affiliate as the seller. The definition of CEP includes sales made by either the producer/exporter or "by a seller affiliated with the producer or exporter." 19 U.S.C. § 1677a(b). EP sales, on the other hand can only be made by the producer or exporter of the merchandise. *See* 19 U.S.C. § 1677a(a). Consequently, while a sale made by a producer or exporter could be either EP or CEP, one made by a U.S. affiliate can only be CEP. Limiting affiliate sales to CEP flows logically from the geographical restriction of the EP definition, as a sale executed in the United States by a U.S. affiliate of the producer or exporter to a U.S. purchaser could not be a sale "outside the United States." The location of the sale and the identity of the seller are critical to distinguishing between the two categories.

AK Steel, 226 F.3d at 1370–71. The Statement of Administrative Action also distinguishes between sales by the seller and sales for the account of the producer. The latter are classified as being CEP sales without reference to the location of the sale. *Statement of Administrative Action accompanying Uruguay Round Agreements Act (URAA)*, Pub. L. No. 103–465, tit. II, 108 Stat. 4809, H.R. Doc. No. 103–316 at 823 (1994) ("SAA"). It states,

> If, before or after the time of importation, the first sale to an unaffiliated person is made by (or for the account of) the pro-

[9] *Id*. There is no indication in the record that Commerce decided to collapse the various affiliates of Gold East, including GEHK, for purposes of the EP/CEP analysis. *Cf. AK Steel*, 226 F.3d at 1365 (Commerce analyzed collapsed companies).

> ducer or exporter or by a seller in the United States who is affiliated with the producer or exporter, then Commerce will base its calculation on constructed export price . . . .

Id. at 822–23. The SAA thus classifies as CEP sales those made "for the account of" the producer *or* those made by the producer's affiliate in the U.S.

The statute, through § 1677a(d), provides for downward adjustments in CEP prices to account for the presumed additional costs attributable to sales by affiliates, but the downward adjustment is not restricted to only U.S. affiliates. Commerce's analysis failed to recognize the incongruity of classifying as EP sales that were made by the affiliate GEHK. Therefore, Commerce's finding that the sales were EP sales is not in accordance with law and is unsupported by substantial evidence on the record.

In addition, there is significant evidence on the record that conflicts with Commerce's finding that the sales were not made in the U.S, including the DDP and DDU nature of some transactions. Coupled with the relative paucity of record information about several factors relevant to the finding of the location of the sale, and the limited discussion of this issue in the I&D Memo, the court finds that the determination that the sales were made outside the U.S. is unsupported by substantial evidence. This issue is remanded to Commerce with instructions to reopen the question of whether the sales were EP or CEP. Commerce shall review the record to determine if there is further evidence of where the sales were made. Commerce shall also provide a fuller analysis of why the sales should be deemed EP or CEP, including a discussion of how the fact that the sales were made by an affiliate should affect that determination.

VII. Surrogate Wage Rate Analysis

Appleton argues that Commerce used a flawed methodology to determine the surrogate wage rate for the People's Republic of China. Appleton Br. at 6. Commerce initially used a traditional regression methodology in the *Preliminary Determination*. When that methodology was overturned in *Dorbest v. United States*, 604 F.3d 1363, 1371 (Fed. Cir. 2010), Commerce used a so-called "bookend" methodology for the *Final Determination*.

> [Commerce] used the highest- and lowest-income countries identified in the list of potential surrogate countries as 'bookends,' for purposes of determining the full list of economically comparable countries for calculation of the labor rate. Next, [Commerce] identified all countries that fell within the range of the

> 'bookends,' based on the World Bank's reported 2008 country-specific [Gross National Income "GNI"] per capita. This resulted in 43 countries, ranging from India with USD 1,040 GNI per capita to Peru with USD 3,990 GNI per capita.

I&D Memo, Comment 30 at 65, PR 353. Commerce found 23 countries with significant exports of comparable merchandise between 2007 and 2009. *Id*. at 66. Commerce further refined the list by identifying 15 countries with the necessary wage data. *Id*. at 67–68.

Commerce, according to Appleton, used "a broad average rate developed from earnings for all workers in all industries in multiple countries whose only demonstrated comparability to China was country-level per capita income." Appleton Br. at 14. Commerce rejected Appleton's insistence that it use only data from an Indian paper company's financial statements because "wage data from a single country does not constitute the best available information for purposes of valuing the labor input due to the variability that exists between wages and GNI." Cmt. 30, I&D Memo at 68. "[Commerce] has a longstanding and predictable practice of selecting economically comparable countries on the basis of absolute GNI, and nothing in Petitioners' submissions undermines the reasonableness of that practice." *Id*. at 65.

The bookends approach has subsequently been invalidated and been replaced with one which looks to wages in the primary surrogate country. Appleton Reply at 10, *citing Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36902, 36093 (Dep't Comm. June 21, 2011). The government argues that the court should not impose the new primary surrogate methodology because the *Antidumping Methodologies* announcement by its terms was not made retroactive. Deft's Br. at 92, n. 16, *citing Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 815 F.Supp. 2d 1342, 1359–60 n. 23 (CIT 2012).

The court agrees with the holding in *Grobest*, where the court upheld Commerce's decision to use averaged data rather than specific data.

> In this case, Commerce had industry-specific data for one country, Bangladesh. With industry-specific data for only one country, Commerce was faced with making a choice between specificity and accounting for wage rate variance by averaging data from as many countries as possible. It chose the latter. A reasonable mind could determine that Commerce chose the best available information [citing *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011); and

> *Shandong Rongxin Imp. & Exp. Co. v. United States*, 774 F. Supp. 2d 1307, 1314 (CIT 2011)], and the court will not upset Commerce's reasonable choice.

Grobest, 815 F.Supp. 2d at 1360. For similar reasons, the court declines Appleton's invitation to overturn Commerce's reasonable decision to use the then-applicable "bookends" approach. As stated by the government, "Appleton's argument is nothing more than an invitation for the court to substitute its judgment regarding the best surrogate data source for that of Commerce." Deft's Br. at 94.

Appleton also argues that Commerce erred in its selection of countries used in the "bookends" approach because it did not choose countries bracketed equally around China's data. But the countries selected had gross national incomes both above and below that of China, unlike the situation in *Dorbest*, where the court remanded for reconsideration because Commerce selected bookend countries that all had GNIs below that of China. *Dorbest Ltd. v. United States*, 755 F.Supp. 2d 1291, 1298 (CIT 2011). The court has reviewed the record and finds that this aspect of Commerce's decision was reasonable under the circumstances.

CONCLUSION

Based upon the record developed before Commerce and upon the papers and proceedings before this court, for the reasons set forth above, the court remands this action to Commerce for action consistent with this opinion. Commerce shall prepare a preliminary analysis of the issues and submit it to the parties no later than 90 days from the date of this opinion. Within 30 days of the preliminary analysis, the parties shall be permitted to file comments with Commerce. Commerce shall then have another 60 days to complete a final redetermination which will be filed with the court no later than Monday, December 16, 2013. The parties shall have thirty days thereafter to file comments on the remand in this court.

SO ORDERED.

Dated: June 17, 2013
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 13–75

MERIDIAN PRODUCTS, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00018

[Scope ruling is remanded to Commerce for consideration of recent Commerce precedent.]

Dated: June 17, 2013

Daniel Cannistra and *Richard Peter Massony*, Crowell & Moring LLP, of Washington, D.C., for plaintiff.

Tara Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Joanna Theiss*, Office of Chief Counsel for Import Administration, U.S. Department of Commerce.

MEMORANDUM OPINION AND ORDER

Musgrave, Senior Judge:

Plaintiff Meridian Products ("plaintiff") moves for remand of this action to the U.S. Department of Commerce ("Commerce") in order for the agency to "apply its new test for finished goods excluded from the scope" of *Aluminum Extrusions from the People's Republic of China*, 76 Fed. Reg. 30650 (Dept. Commerce May 26, 2011) ("AD Order") and *Aluminum Extrusions from the People's Republic of China*, 76 Fed. Reg. 30653 (Dept. Commerce May 26, 2011) ("CVD Order", collectively, "the Orders"). Plaintiff's Memorandum of Points and Authorities in Support of Motion for Remand ("Pl's Br.) at 1. The government opposes the motion, characterizing it as "premature and incomplete". Defendant's Opposition to Plaintiff's Motion for Remand ("Deft's Opp.") at 5. For the reasons discussed below, the court remands this action to Commerce for determination whether the product involved here remains within the scope of the Orders under Commerce's new tests for the scope of finished goods under said Orders.

Meridian requested a ruling that its trim kits were outside the scope of the Orders on November 13, 2012. On December 18, 2012, Commerce determined that the trim kits fell within the scope of the Orders. *See Final Scope Ruling on Refrigerator/Freezer Trim Kits*, A570–967, C-570–968, (Dec. 18, 2012) ("Scope Ruling"). Commerce determined in the Scope Ruling that the Meridian trim kits did not meet the Orders' scope exclusion for "finished goods". *Id*. at 12.

Plaintiff contends that Commerce should have but failed to apply a new test for finished goods under the Orders, which it finalized in

Final Scope Ruling on Side Mount Valve Controls, A-570–967, C-570–968 (Oct. 26, 2012) ("Valves Ruling"). Plaintiff also cites to two cases before the court which Commerce agreed to remand for consideration of the Orders' finished goods exclusion. *See* Final Results of Redetermination Pursuant to Court Remand, *Rowley Co. v. United States*, Ct. No. 12–00055 (Feb. 28, 2013) ("Drapery Case"), and Consent Remand Order, *Valeo, Inc. v. United States*, Ct. No. 12–00381 (Feb. 13, 2013) ("Auto Parts Case"). Plaintiff argues that Commerce failed to apply the Valves Ruling test to its scope request, even though the Valves Ruling was issued before its scope request was filed. Plaintiff argues that a remand would promote fairness and judicial efficiency because it would permit the agency to rectify any mistake it may have made without undue expenditure of judicial resources.

The government argues that the original scope ruling correctly interpreted the scope exclusion and prior scope rulings, but fails to address the substance of whether the Valves Ruling should apply to Meridian's trim kits. The government argues that plaintiff should be required to substantively challenge Commerce's scope determination through a motion for summary judgment.

The court has reviewed the facts in the record, those in the Valves Ruling as well as the Drapery and Auto Parts Cases and the arguments of counsel. In the Scope Ruling, Commerce reviewed six prior finished goods scope rulings, but did not consider the Valves Ruling. Commerce could have and perhaps should have made reference to the Valves Ruling when deciding the Scope Ruling here. The court notes that a remand is sometimes needed if an intervening event may affect the validity of the agency action. *See Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C.Cir.1993).

Although government counsel has stated to the court that Commerce does not believe the rationale of the Valves Ruling, Drapery or Auto Parts Cases apply to plaintiff's merchandise, the court cannot review that determination based solely on counsel's statement when it is tasked with reviewing the agency's action on the record made before the agency. *See Jinan Yipin Corp., Ltd. v. United States*, 800 F.Supp. 2d 1226, 1266 (CIT 2011) ("[A]n agency's action may be upheld, if at all, only on the grounds articulated by the agency itself."); *see also Hiep Thanh Seafood Joint Stock Co. v. United States*, 752 F.Supp. 2d 1330, 1335 (CIT 2010) (court may not affirm Commerce's conclusions based on determinations not found in the record below) and cases cited therein.

Without remand at this stage the court would on a summary judgment motion be left to consider whether Commerce would have agreed with plaintiff that the new finished goods analysis would

exclude the trim kits from the Orders' scope. Without having Commerce's official stand on this issue, the court could be required to remand the case after full briefing so that the agency could opine on the record. The delay and expense necessary to litigate this issue in that manner would, in the court's opinion, frustrate the "just, speedy and inexpensive determination" of this action. CIT Rule 1. Therefore, a remand to Commerce is preferable to permit the agency to formally declare whether the trim kits satisfy the revised standard for the finished goods scope exclusion from the Orders.

It is therefore ORDERED:

1. That this action is hereby remanded to Commerce for reconsideration of the finished goods scope exclusion of the Orders with regard to plaintiff's trim kits;
2. That Commerce shall reopen the record and permit plaintiff to submit arguments no later than 15 days after the date of this order as to why its trim kits satisfy the finished goods exclusion under the Valves Ruling and the remands in the Drapery and Auto Parts cases;
3. That Commerce shall submit its remand results no later than 60 days after the date of this order.

SO ORDERED.

Dated: June 17, 2013
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 13–76

ZHEJIANG NATIVE PRODUCE & ANIMAL BY-PRODUCTS IMPORT & EXPORT CORP., et al., Plaintiffs, v. UNITED STATES, Defendant, and THE AMERICAN HONEY PRODUCERS ASSOCIATION and THE SIOUX HONEY ASSOCIATION, Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 02–00057

[The United States Department of Commerce's Final Results of Redetermination are sustained.]

Dated: June 18, 2013

Ned H. Marshak, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, of New York, NY, argued for plaintiffs. With him on the brief were *Bruce M. Mitchell* and *Mark E. Pardo*.

Jane C. Dempsey, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, D.C., argued for defendant. With

her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Sapna Sharma*, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Washington, D.C.

Michael J. Coursey, Kelley Drye & Warren, LLP, of Washington, D.C., argued for defendant-intervenors. With him on the brief was *R. Alan Luberda*.

OPINION

Eaton, Judge:

Before the court are the Final Results of Redetermination (ECF Dkt. No. 114) ("Third Remand Results") issued pursuant to the court order in *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States,* 35 CIT __, Slip Op. 11–110 (Sept. 6, 2011) (*Zhejiang V*). At issue is the Department of Commerce's (the "Department" or "Commerce") "critical circumstances" determination in the investigation of Honey from the People's Republic of China ("PRC") covering the period of investigation ("POI") January 1, 2000 through June 30, 2000. Honey From the PRC, 66 Fed. Reg. 50,608, 50,610 (Dep't of Commerce Oct. 4, 2001) (notice of final determination of sales at less than fair value), *as amended by* Honey From the PRC, 66 Fed. Reg. 63,670 (Dep't of Commerce Dec. 10, 2001) (notice of amended final determination of sales at less than fair value and antidumping duty order) (collectively, the "Final Results").

In *Zhejiang V*, the court directed the Department to "use any analysis permitted by *Zhejiang IV* to complete its critical circumstances review, provided that it not use evidence prohibited by this opinion." *Zhejiang V*, 35 CIT at __, Slip Op. 11–110, at 24; *see Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States*, 34 CIT __, Slip Op. 10–30 (2010) (*Zhejiang IV*). In these Third Remand Results, Commerce finds that critical circumstances did *not* exist. Third Remand Results at 3.

Plaintiffs[1] assert that Commerce's critical circumstances determination is supported by substantial evidence and is in accordance with law, and that Commerce "clearly conformed to the Court's instructions" in *Zhejiang V*. Pls.' Resp. to Def.-Ints.' Cmts. Re: Third Remand Results 2 (ECF Dkt. No. 125) ("Pls.' Reply").

[1] Plaintiffs are Zhejiang Native Produce & Animal By-Products Import & Export Corp., Kunshan Foreign Trade Co., China (Tushu) Super Food Import & Export Corp., High Hope International Group Jiangsu Foodstuffs Import & Export Corp., National Honey Packers & Dealers Association, Alfred L. Wolff, Inc., C.M. Goettsche & Co., China Products North America, Inc., D.F. International (USA) Inc., Evergreen Coyle Group, Inc., Evergreen Produce, Inc., Pure Sweet Honey Farm, Inc., and Sunland International, Inc.

Defendant-intervenors,[2] however, urge that Commerce's "determination is not supported by substantial evidence or in accordance with law." Def.-Ints.' Cmts. to Third Remand Results 1–2 (ECF Dkt. No. 119) (Def.-Ints.' Cmts."). Therefore, they ask the court to "again remand the proceeding to Commerce [and] instruct[] the agency to determine, based on the record as [a] whole and without requiring proof of actual importer knowledge of dumping, whether substantial evidence supports imputing importer knowledge of dumping for purposes of an affirmative critical circumstances determination." Def.-Ints.' Cmts. 3.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006) and 19 U.S.C. §§ 1516a(a)(2)(A)(i)(II) and (B)(i) (2006). For the reasons set forth below, the Third Remand Results are sustained.

BACKGROUND

The facts of this case are fully set forth in the prior decisions in *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States*, 27 CIT 1827 (2003) (*Zhejiang I*), *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States*, 432 F.3d 1363 (Fed. Cir. 2005) (*Zhejiang II*), *Zhejiang IV*, 34 CIT __, Slip Op. 10–30, *Zhejiang V*, 35 CIT __, Slip Op. 11–110, and the court's Order of September 26, 2007 denying plaintiffs' USCIT Rule 60(b) motion for relief from judgment, Ct. Order at 14 (Sept. 26, 2007) (ECF Dkt. No. 78) ("Sept. 26 Order"). A brief restatement of the case follows to place this opinion within its broader context.

In 1994, Commerce initiated an unfair trade investigation of honey from the PRC. The investigation was subsequently halted when the Department entered into a suspension agreement with the PRC. Honey From the PRC, 60 Fed. Reg. 42,521 (Dep't of Commerce Aug. 16, 1995) (suspension of investigation) (the "Suspension Agreement"). The Suspension Agreement was in effect from August 16, 1995 through August 16, 2000. Honey From the PRC, 65 Fed. Reg. 46,426 (Dep't of Commerce July 28, 2000) (termination of suspended antidumping duty investigation).

In 2000, following the termination of the Suspension Agreement and at the urging of the domestic industry, Commerce initiated a second investigation. Honey From Argentina & the PRC, 65 Fed. Reg. 65,831 (Dep't of Commerce Nov. 2, 2000) (initiation of antidumping duty investigations) (the "Second Investigation"). During the Second Investigation, the petitioners alleged the existence of "critical circum-

[2] Defendant-intervenors are The American Honey Producers Association and The Sioux Honey Association (collectively, "defendant-intervenors").

stances" which, if determined to exist, would result in antidumping duties going into effect ninety days earlier than would be the case in the absence of "critical circumstances." *See* 19 U.S.C. § 1673b(e)(1) (2000); 19 C.F.R. § 351.206 (2002). Generally, Commerce will find the presence of critical circumstances if there is a surge of imports and if the importers know or can be charged with knowing (1) that the product is being dumped, and (2) that there would be material injury as result of the dumped sales. *See* 19 U.S.C. § 1673d(a)(3).

For the Second Investigation, Commerce identified the POI as January 1, 2000 through June 30, 2000, a period during which the Suspension Agreement was still in effect. The Department used this POI to determine (1) if plaintiffs were dumping their merchandise, and (2) if critical circumstances were present. *See* Honey From the PRC, 66 Fed. Reg. 24,101, 24,106 (Dep't of Commerce May 11, 2001) (notice of preliminary determination of sales at less than fair value).

After completing its Second Investigation, Commerce issued an affirmative finding of dumping and an affirmative finding of critical circumstances based on its "twenty-five percent" methodology. Final Results, 66 Fed. Reg. at 50,608, 63,671. Under this methodology, the Department considers dumping

> "margins of 25 percent or more for [export price] sales sufficient to impute knowledge of dumping" . . . . In other words, in cases where, as here, export price is calculated by reference to sales made to unaffiliated purchasers in the United States, and Commerce determines that the antidumping duty margin with respect to those sales is 25% or more, Commerce "imputes" knowledge of dumping to the importer

during the period leading up to the investigation. *Zhejiang I*, 27 CIT at 1842–43 (citation omitted). In the Final Results, Commerce found that "there is evidence of the knowledge of dumping . . . [that was] demonstrated by the fact that [plaintiffs] have dumping margins of over 25 percent." *Zhejiang I*, 27 CIT at 1843 (internal quotation marks and citation omitted). Based on this imputation of knowledge, the Department issued an affirmative critical circumstances determination.

Plaintiffs sought judicial review of the Final Results in this court, challenging (1) the Department's "calculation of antidumping duty margins"; (2) Commerce's critical circumstances determination based on the use of its twenty-five percent methodology to impute knowledge of dumping; and (3) "the reliability of certain sources" of surro-

gate valuation data. *Zhejiang I*, 27 CIT at 1831. The court held that the Suspension Agreement did not prevent Commerce from using its twenty-five percent methodology and remanded the case on the other questions. *Id.* at 1849–50, 1855–56 (holding that compliance with a suspension agreement designed to prevent the suppression of prices or price undercutting did not negate the use of Commerce's twenty-five percent methodology to impute knowledge of dumping in a critical circumstances determination because dumping and price suppression or undercutting are not the same thing). Consequently, the court sustained Commerce's affirmative critical circumstances determination. *Id.* at 1851. After remand, the court sustained the Department's determination that the honey had been dumped and dismissed the case. *See* Judgment (Aug. 26, 2004) (ECF Dkt. No. 47).

Plaintiffs appealed only the court's critical circumstances holding in *Zhejiang I* to the Federal Circuit, again arguing that the existence of the Suspension Agreement prevented the imputation of knowledge of dumping. The Federal Circuit reversed the court's critical circumstances decision, holding that plaintiffs' compliance with the Suspension Agreement precluded an imputation of knowledge of dumping using the Department's twenty-five percent methodology during the POI, and stating

> "[I]t strains credibility to suggest that Commerce could establish minimum prices for honey designed to 'prevent the *suppression or undercutting of price levels* of the United States honey products' and then determine that U.S. importers purchasing honey in accordance with these pricing guidelines should have known these sales would be found to be at *less than fair value*" [(i.e., were dumped)]. When all factors are considered, there is not substantial evidence to support the finding of critical circumstances.

Zhejiang II, 432 F.3d at 1368 (citation omitted) (emphasis added). Thus, the Court found that, in the context of a critical circumstances determination, price suppression and price undercutting, concepts normally associated with International Trade Commission ("ITC") injury determinations, can play some role in a finding related to knowledge of dumping.[3] The Court then remanded the case to this court for further proceedings in accordance with its decision. *Id.*

The court further remanded the matter to Commerce for reconsid-

[3] Dumping and sales at less than fair value *are* the same thing because sales at less than fair value indicate that dumping is occurring. *See* 19 U.S.C. § 1677b(a) (stating that in order to make an antidumping determination, Commerce must determine "whether subject merchandise is being, or is likely to be, sold at less than fair value.").

eration of the critical circumstances issue. *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States*, 30 CIT 725, 725–26 (2006) (*Zhejiang III*). Pursuant to the Federal Circuit ruling, the court instructed Commerce to further consider "its critical circumstances finding, provided that in no event shall Commerce impute to plaintiffs any knowledge prohibited by the [Federal Circuit]'s decision." *Id.*

After the Federal Circuit's decision in *Zhejiang II*, plaintiffs filed a motion for relief from judgment under USCIT Rule 60(b). Pls.' Mot. for Relief from J. (ECF Dkt. No. 69) ("Pls.' Relief Mot."). By their motion, plaintiffs sought to amend the judgment of the court in *Zhejiang I*, arguing that, in light of the Federal Circuit's reversal in *Zhejiang II*, the judgment should be "modified with instructions requiring the Department to recalculate the dumping margins for [plaintiffs] in compliance with the appellate court's finding that sales made in compliance with the terms of the Suspension Agreement were not made at less than fair value and with instructions to amend the Antidumping Duty Order accordingly." Pls.' Relief Mot. 2. In other words, in addition to the remand to the Department relating to Commerce's critical circumstances determination, plaintiffs also "ask[ed] the court to direct Commerce to make the additional finding that their sales made during the [POI] for the Second Investigation were not made at less than fair value [(i.e., dumped)] because of plaintiffs' compliance with the Suspension Agreement. In seeking this relief, plaintiffs hope[d] to eliminate the antidumping duties imposed by the antidumping duty order." Sept. 26 Order at 5 (citation omitted).

In making their case, plaintiffs contended that "the Federal Circuit not only held that the Suspension Agreement precluded the imputation of knowledge of dumping in the context of a critical circumstances finding, but also held 'that sales made in compliance with the terms of the Suspension Agreement were not made at less than fair value.'" Sept. 26 Order at 6–7 (quoting Pls.' Relief Mot. 2). Thus, for plaintiffs, the logical extension of the Federal Circuit's "suppression or undercutting of price levels" analysis was that they could not have been found to have dumped honey during the POI.

The court denied this motion, stating that plaintiffs' requested relief "would be a considerable expansion of the effect of the Federal Circuit's opinion, as it would wholly eliminate the basis for the antidumping duty order." Sept. 26 Order at 7. The court based its decision on two findings.

First, that the Federal Circuit's holding did "not reach the question of whether plaintiffs could be found to be dumping during the POI[,

but] held that a suspension agreement designed to prevent the suppression and undercutting of price levels prevented the imputation of knowledge of dumping to the [plaintiffs]" solely for purposes of finding critical circumstances. Sept. 26 Order at 9; *see also* Sept. 26 Order at 13 ("Price suppression and sales at less than fair value are just not the same thing.").

Second, "plaintiffs [were] not entitled to the relief they seek because they did not appeal the court's holding that substantial evidence supported a determination that their sales during the POI were made at less than fair value." Sept. 26 Order at 10–11 (citation omitted); *see also* Sept. 26 Order at 11 ("[W]hile they pursued the question of the imputation of knowledge with respect to critical circumstances in their appeal, plaintiffs did not appeal this court's holding that substantial evidence supported a finding of dumping during the POI.").

Plaintiffs appealed the denial of this motion to the Federal Circuit. The Federal Circuit dismissed the appeal, finding that it was interlocutory and therefore "simply an effort to obtain review of an issue in a pending trial court proceeding without waiting for the trial court to enter a final judgment in the case." *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. Grp. v. United States*, 339 F. App'x 992, 994 (Fed. Cir. 2009).

Following the remand ordered in *Zhejiang III*, Commerce filed its First Remand Results, finding that critical circumstances did *not* exist. Upon review of the First Remand Results, the court remanded once again, explaining that the Federal Circuit's decision in *Zhejiang II* did not prevent the Department from considering analyses other than the twenty-five percent methodology or time periods other than the POI in making its critical circumstances determination. *Zhejiang IV*, 34 CIT at __, Slip Op. 10–30, at 20 ("Commerce has the authority to exercise its discretion to apply any other reasonable method or look to any other reasonable time period in making its critical circumstances determination."). In addition, the court provided examples of other methodologies Commerce might have employed. *Id.* at __, Slip Op. 10–30, at 12 (citation omitted) ("Prior to its adoption of the 25 percent method, Commerce found that, with respect to respondents from non-market economies, it would use a case by case determination 'using all available information and drawing upon market conditions of the industry subject to the investigation' when imputing knowledge of less-than-fair value sales.").

Commerce then filed its Second Remand Results pursuant to *Zhejiang IV*, again using its twenty-five percent methodology, but using as the time period for its analysis the 190-day period between the initiation of the investigation and the issuance of the Preliminary

Results. *Zhejiang V*, 35 CIT at __, Slip-Op. 11–110, at 10–11 (citing Results of Redetermination Pursuant to Remand at 62–63 (Dep't of Commerce Dec. 8, 2010) (ECF Dkt. No. 95) ("Second Remand Results")). There, the Department found "that critical circumstances existed for Zhejiang . . . because [based on the twenty-five percent methodology] 'record evidence demonstrates that importers knew or should have known that the exporter was selling the subject merchandise at less than its fair value.'" *Id.* at __, Slip-Op. 11–110, at 3 (quoting Second Remand Results at 42). In *Zhejiang V*, the court once again remanded to Commerce, finding "that Commerce's critical circumstances determination is not supported by substantial evidence." *Id.* at __, Slip-Op. 11 110, at 24. In doing so, the court held that the Department's "application of the 25% methodology to the 190-day period beginning at the initiation of the less than fair value investigation through the Department's Preliminary Results is clearly authorized by *Zhejiang IV*." *Id.* at __, Slip-Op. 11–110, at 19. The court further held, however, that Commerce's critical circumstances determination "lacks the support of substantial evidence because (1) the initiation of the antidumping investigation cannot be said to have put plaintiff on notice that the prices set by the Suspension Agreement were dumped prices, and (2) the prices importers paid did not materially change from the period when the Suspension Agreement was in effect." *Id.* at __, Slip-Op. 11–110, at 19–20. The court then stated,

> as was shown in *Zhejiang IV*, Commerce had other evidentiary tools that it might have used to produce the substantial evidence needed to make its case. For instance, in Potassium Permanganate From the PRC, 48 Fed. Reg. 57,347 (Dec. 29, 1983) (final determination of sales at less than fair value) ("*Potassium Permanganate*"), Commerce found that the importers were *actually aware* of the pricing of the merchandise for non-Chinese sources, and were, therefore, "aware of the entire range of pricing in a marketplace where pricing was a major factor in determining sales." In *Nippon Steel Corp. v. United States*, 24 CIT 1158, 118 F. Supp. 2d 1366 (2000), this Court listed "numerous press reports [and] falling domestic prices resulting from rising imports" to support its determination.

Id. at __, Slip-Op. 11–110, at 23. Hence, the court invited Commerce to explore the use of the analysis found in *Potassium Permanganate* along with the kind of evidence presented in *Nippon Steel* as a means for determining the existence of critical circumstances. Accordingly, the court directed, "[o]n remand, the Department may use any analysis permitted by *Zhejiang IV* to complete its critical circumstances review, provided that it not use evidence prohibited by this opinion. In

addition, Commerce may, in its discretion, reopen the record." *Id.* at __, Slip-Op. 11–110, at 24.

The Department issued its preliminary Third Remand Results and received comments from both plaintiffs and defendant-intervenors. At the request of defendant-intervenors, Commerce also "re-open[ed] the record on a limited basis . . . to solicit information 'concerning importers' knowledge of prices of honey from all sources imported into the United States during the time period after August 16, 2000."[4] Third Remand Results at 5 (citation omitted).

On March 22, 2012, Commerce filed its Third Remand Results, finding that critical circumstances did *not* exist because the Department did "not find that importers knew or should have known that imports of subject merchandise . . . were at [less than fair value] prices." Third Remand Results at 3.

STANDARD OF REVIEW

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

DISCUSSION

I. Legal Framework

Under 19 U.S.C. § 1673d(a)(3), "critical circumstances" exist when

> (A) . . . the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there would be material injury by reason of such sales,
>
> ***and***
>
> (B) there have been massive imports of the subject merchandise over a relatively short period.

19 U.S.C. § 1673d(a)(3) (emphasis added).

If the criteria for critical circumstances are met, then antidumping duties go into effect ninety days earlier than the effective date of antidumping duties in the absence of critical circumstances. 19 C.F.R. § 351.206(a). While the statute specifies that this extension of antidumping duties is appropriate when importers "knew or should have

[4] After reopening the record, defendant-intervenors submitted new factual information, "including United States pricing data on honey, trade journal articles, and testimony from the investigation at the International Trade Commission," and plaintiffs submitted an affidavit from an importer. Third Remand Results at 6.

known" that the price was below fair value and would materially injure domestic industry, the statute does not specify how the presence of such knowledge should be determined. Therefore, Commerce has adopted a general practice of imputing knowledge (without requiring evidence of actual knowledge) when a calculated dumping margin for the POI is greater than twenty-five percent.

In the Final Results, "[t]he Department found evidence of massive imports of subject merchandise by [plaintiffs] within a relatively short period," thus fulfilling the second criterion for critical circumstances under 19 U.S.C. § 1673d(a)(3)(B). Third Remand Results at 17 n.5. The court sustained this finding and plaintiffs did not challenge this aspect of the Final Results. *Zhejiang I*, 27 CIT at 1849 ("Plaintiffs do not challenge Commerce's massive imports determinations."). Hence, the remaining issue is whether importers had or should have had knowledge that dumping was occurring, the first prong of 19 U.S.C. § 1673d(a)(3).

In the Third Remand Results, Commerce states that it normally employs its twenty-five percent methodology to impute knowledge, but that "the Court . . . made clear [in *Zhejiang V*] that any prices that were consistent with the suspension agreement prices cannot, alone, serve as substantial evidence that the relevant party knew or should have know[n] that the sales were at [less than fair value]." Third Remand Results at 18 (citing *Zhejiang V*, 35 CIT at __, Slip Op. 11–110, at 22–23). After reopening the record, "[t]he Department [did] not identif[y] any sales of subject merchandise on the record that [were] inconsistent with the suspension agreement prices." Third Remand Results at 18. For this reason, "consistent with the Court's opinion [in *Zhejiang V*], the Department . . . examined the record to determine if there [was] any other evidence demonstrating that the importers knew or should have known that the exporter was selling subject merchandise at [less than fair value]." Third Remand Results at 18. Because it failed to find such evidence, Commerce issued a negative critical circumstances determination. Third Remand Results at 33.

Defendant-intervenors challenge the Third Remand Results, and urge the court to remand the Results to Commerce once again. In support of their position, defendant-intervenors offer four arguments.

II. Proof of Actual Knowledge of Dumping

Defendant-intervenors first argue that Commerce "narrowly interpret[ed] the Court's remand instructions [in *Zhejiang V*] as requiring a finding that importers had *actual* knowledge of dumping of Chinese honey to reach an affirmative critical circumstances determination

and rendering impossible the imputation of knowledge of dumping." Def.-Ints.' Cmts. 5. Defendant-intervenors observe, however, that "actual knowledge of dumping is not a requirement for an affirmative critical circumstances finding." Def.-Ints.' Cmts. 10. Furthermore, defendant-intervenors urge that "the Court did not intend to require Commerce to demonstrate actual importer knowledge of *dumping*, but instead to require evidence of actual knowledge of *prices* and other information reasonably within the purview of importers from which knowledge of dumping could be imputed." Def.-Ints.' Cmts. 8.

Commerce, however, asserts that it did not adopt an "actual knowledge" requirement in the Third Remand Results. Def.'s Reply 15. Rather, the Department states that it first found that "the evidence does not demonstrate that U.S. importers had actual knowledge that honey from the PRC was priced at [less than fair value]." Third Remand Results at 27. It then further examined the record and found that the evidence did not support a determination that "importers knew *or should have known* that the exporter was selling subject merchandise at [less than fair value]." Third Remand Results at 17–18; Def.'s Reply 15 ("In addition to finding that the honey importers did not have actual knowledge of dumping, Commerce also 'examined the record to determine if there is any other evidence demonstrating that the importers . . . *should have known* that the exporter was selling the subject merchandise at [less than fair value].'") (quoting Third Remand Results at 18). For this reason, Commerce argues that it did not rely on an "actual knowledge" requirement to support its determination.

A review of the Final Results reveals that the Department did not rely solely upon an "actual knowledge of dumping" standard, despite defendant-intervenors' arguments to the contrary. Indeed, Commerce searched the record for any indication "that importers knew *or should have known* that imports of subject merchandise . . . were at [less than fair value] prices." Third Remand Results at 3 (emphasis added). As shall be seen, while the Department was able to find some evidence that importers were knowledgeable about the honey industry and pricing in general, absent from the record was evidence that they knew, or could be charged with knowing, that these prices were at less than fair value, rather than simply low. Therefore, the Department did not unlawfully impose an "actual knowledge of dumping" requirement on its critical circumstances analysis.

III. Alternative Methodologies for Imputing Knowledge

Defendant-intervenors also object to Commerce's treatment of the alternative methodologies noted by the court in *Zhejiang V*. *See Zhejiang V*, 35 CIT at __, Slip Op. 11–110, at 23 ("Commerce had other evidentiary tools that it might have used to produce the substantial evidence needed to make its case. For instance, in [*Potassium Permanganate*] . . . , Commerce found that the importers were *actually aware* of the pricing of the merchandise for non-Chinese sources, and were, therefore, 'aware of the entire range of pricing in a marketplace where pricing was a major factor in determining sales.' In *Nippon Steel Corp.* . . . , this Court listed 'numerous press reports [and] falling domestic prices resulting from rising imports' to support its determination.") (citations omitted).

Had the Department correctly employed the methodologies from *Potassium Permanganate* and *Nippon Steel*, defendant-intervenors insist that it would have identified record evidence to support a finding of importer knowledge. Def.-Ints.' Cmts. 6–7 (*Zhejiang V* "permit[s] Commerce to impute knowledge of dumping using the 25 percent test if supported by substantial evidence of the type that Commerce had relied upon and the Court had upheld in *Potassium Permanganate* and *Nippon Steel*. Such evidence includes broad knowledge of market prices for various sources of the allegedly dumped product and the presence of falling prices resulting from rising subject imports."). Consequently, defendant-intervenors believe that the evidence they have placed on the record, which they contend is the kind of evidence found in *Potassium Permanganate* and *Nippon Steel*, could have been used by Commerce on remand, in combination with the twenty-five percent methodology, to impute knowledge of sales of honey at less than fair value. Put another way, defendant-intervenors claim that knowledge of low prices together with margins determined to be twenty-five percent or more would be sufficient to impute knowledge that the honey was dumped.

In response, Commerce first asserts "that as a result of the passage of time and the changes made to the statute and Commerce's non-market economy analysis, the methodology used in *Potassium Permanganate* to find critical circumstances was no longer reasonable." Def.'s Reply 6; Third Remand Results at 20 ("The Department no longer considers the analysis used in *Potassium Permanganate* an appropriate framework for determining critical circumstances because export prices from a broad range of third countries may not be representative of normal value for a PRC product. In the nearly 30

years since the agency issued its determination in *Potassium Permanganate*, . . . the Department's [non-market economy] methodology have changed significantly.").

Specifically, in a non-market economy country situation, "the Department now determines the existence of dumping, and of critical circumstances, by comparing a product's U.S. prices to normal value calculated using factors of production from an economically comparable country, and not by comparing U.S. prices to the prices of that product from other countries exporting the product, *regardless of economic comparability*." Third Remand Results at 21 (emphasis added). That is, in *Potassium Permanganate*, the Department based its critical circumstances determination on a direct comparison of the price of the potassium permanganate from the PRC (a non-market economy country) to the price of potassium permanganate imported from Spain (a market economy country). *See* Third Remand Results at 21 n.8. Under the Department's critical circumstances methodology that is used today (i.e., the twenty-five percent methodology), surrogate prices for the factors of production are used to determine normal value and that value is compared to the U.S. price to determine a dumping margin. If the margin is twenty-five percent or more, this can result in a critical circumstances determination based on imputation of knowledge of dumping. Thus, for Commerce, because its critical circumstances methodology has matured to take into account actual evidence of dumping, the price comparisons found in *Potassium Permanganate* simply have no role in determining critical circumstances because they have no role in a less than fair value determination.

Nevertheless, based on the court's citation of earlier critical circumstances findings, the Department reopened the record and made the price comparisons defendant-intervenors sought. Third Remand Results at 23–32. To this end, in order "to comply with the Court's remand order, Commerce examined the evidence in light of *Potassium Permanganate* and *Nippon Steel* [and] found that even using these methodologies, substantial evidence did not support a finding that United States importers knew or should have known honey . . . from China was being sold at less than fair value." Def.'s Reply 6–7. As shall be seen, the Department reached its conclusion based on its finding that, although the importers were generally aware of honey prices, the level of awareness did not rise to the level found in these prior investigations.

Finally, the Department emphasized the court's statement in *Zhejiang V* "that a critical circumstances determination based solely on prices that are 'broadly the same' as those established under the

Suspension Agreement, even if taken from the period following the Suspension Agreement's termination, cannot be supported by substantial evidence." *Zhejiang V*, 35 CIT at __, Slip-Op. 11–110, at 22–23. Here, "the record demonstrates that U.S. importers stated that the Chinese government's quota licensing system kept prices at the same or higher levels than those at the time of the Suspension Agreement." Third Remand Results at 32. That is, the prices on the record for the period following the termination of the Suspension Agreement were the same as or higher than the prices established by the Suspension Agreement. Third Remand Results at 32. Therefore, the Department believes that its finding comported with the court's decision in *Zhejiang V*, which held that a critical circumstances determination would not be supported by substantial evidence if it were based on prices that were "broadly the same" as those in the Suspension Agreement. *Zhejiang V*, 35 CIT at __, Slip-Op. 11–110, at 22–23.

Based on the foregoing, the court finds that Commerce reasonably considered the alternative methodology used in the critical circumstances determination made in *Potassium Permanganate* and the kind of evidence found in *Nippon Steel* and determined that they did not lead to an affirmative critical circumstances determination in this case. First, Commerce has convincingly explained why the analysis performed in *Potassium Permanganate* is no longer a valid method of determining knowledge of sales having been made at less than fair value. *See* Third Remand Results at 21–22 ("[A] comparison of U.S. sales prices of subject merchandise from the country under investigation to sales prices of the same merchandise sold into the United States from other countries, . . . [can no longer] be a reliable indicator of whether or not sales of subject merchandise under investigation are being sold at [less than fair value]."). This is because the standard found in the statute is knowledge of dumping. Therefore, the critical circumstances determination in *Potassium Permanganate*, which was based on a direct comparison of the prices of the potassium permanganate from the PRC to the prices of potassium permanganate imported from Spain, would not be used today to establish that sales were made at less than fair value. Today, determinations of sales at less than fair value in a non-market economy country are derived from normal value, which is calculated using the factors of production from a surrogate country. *See* Third Remand Results at 21 n.8. Thus, the Department's former methodology based on a price comparison alone would reveal nothing of knowledge of dumping, while the methodology used today would.

Commerce's determination as to whether a critical circumstances methodology will result in valid results is entitled to deference. *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001) ("[S]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference."); *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994). Here, it is difficult to *see* how, under the facts of this case, Commerce's former price analysis would have been useful in making a determination that, according to the statute, must be based on an actual or imputed knowledge of dumping. 19 U.S.C. § 1673d(a)(3)(A); *see* Sept. 26 Order at 13 ("Price suppression and sales at less than fair value are just not the same thing.").

Moreover, as the review of evidence later in this opinion reveals, the Department reasonably attempted to use the "other evidentiary tools" identified by the court and by defendant-intervenors. In doing so, Commerce concluded that the evidence in this case would not have supported an affirmative critical circumstances determination, even if the *Potassium Permanganate* or *Nippon Steel* analyses were valid. The evidence only revealed that importers had a general knowledge of honey prices that were equal to or higher than those found in the Suspension Agreement. Third Remand Results at 27. Thus, the more particularized knowledge of prices found determinative in *Potassium Permanganate* is absent here.

Finally, the Department examined the record of prices during the 190-day period between the initiation of the investigation and the issuance of the Preliminary Results and found that all of the prices were "'broadly the same' as those established under the Suspension Agreement." Third Remand Results at 27 (citation omitted). As noted, the Federal Circuit has found that imputation of knowledge of dumping is incompatible with sales of merchandise that comply with the prices found in the Suspension Agreement. *Zhejiang II*, 432 F.3d at 1368 ("[I]t strains credibility to suggest that Commerce could establish minimum prices for honey designed to 'prevent the suppression or undercutting of price levels of the United States honey products' and then determine that U.S. importers purchasing honey in accordance with these pricing guidelines should have known these sales would be found to be at less than fair value.") (citation omitted). Therefore, in order to overcome the Federal Circuit's holding and make an affirmative critical circumstances finding, Commerce would have had to find evidence of actual knowledge of dumping or evidence from which knowledge of dumping could be imputed. Because the record did not contain this evidence, Commerce was unable to support with substantial evidence an affirmative critical circumstances de-

termination in light of the court's statement in *Zhejiang V* that "a critical circumstances determination based solely on prices that are 'broadly the same' as those established under the Suspension Agreement, even if taken from the period following the Suspension Agreement's termination, cannot be supported by substantial evidence." *Zhejiang V*, 35 CIT at __, Slip-Op. 11–110, at 22–23.

In summary, the court holds that the Department is correct that the methodologies found in *Potassium Permanganate* and *Nippon Steel* would not yield reliable indications of critical circumstances, and it did not err in its use of the methodologies found in *Potassium Permanganate* and *Nippon Steel*.

IV. Consideration of the Record Evidence as a Whole

In a related argument, the defendant-intervenors' next claim is that Commerce failed to consider the record evidence as a whole, as is required by the *Potassium Permanganate* methodology. If the Department had done so, defendant-intervenors claim, the record now contains information "that should lead to the conclusion that importers had sufficient knowledge of market pricing to be on notice that imports of honey from China during the 190-day period were likely to be dumped in light of the more than 25 percent dumping margins on such imports."[5] Def.-Ints.' Cmts. 18. Hence, the defendant-intervenors assert that new evidence they have placed on the record, including industry, non-industry, and government publications and findings, is of the type that was important in *Potassium Permanganate*, and supports the imputation of knowledge based on the twenty-five percent methodology. Therefore, "[b]ased on these facts, and the application of the 25 percent rule to imports during 190-day period, importers knew or should have known that the Chinese honey import prices were less than fair value." Def.-Ints.' Cmts. 19; Def.-Ints.' Cmts. 7 ("[T]he record now contains such substantial evidence to support Commerce's use of the 25 percent test . . . , including evidence of importer knowledge of pricing from various sources and a variety of

[5] In particular, defendant-intervenors argue that the twenty-five percent methodology can now be supported with substantial evidence of the type used in making the affirmative critical circumstances determination in *Potassium Permanganate*, including evidence

> that: (1) Argentina and China were the primary import sources for honey and there [was] a relatively small number of sources of honey; (2) U.S. importers were fully aware of honey prices from all major sources; (3) U.S. importers were aware of the Suspension Agreement's failure to prevent price depression, the Suspension Agreement's expiration, and of an imminent dumping case against Chinese honey imports; (4) Chinese honey prices were 24.5 percent less than honey from fairly-priced source countries during the 190-day period from the initiation to the preliminary determination; and (5) massive imports of Chinese honey occurred during the same period.

Def.-Ints.' Cmts. 18–19.

other evidence that should have led the importers to have reason to know that dumping was occurring.").

First, defendant-intervenors claim that record evidence demonstrates that importers were actually aware of market pricing of honey from the relevant source countries. Def.-Ints.' Cmts. 19–20, 24. According to these domestic producers, they placed evidence on the record which demonstrates that importers had actual knowledge of prices from which knowledge of dumping could be imputed. Specifically, they point to the widespread reporting of honey pricing in government and industry publications and newspaper articles. Def.-Ints.' Cmts. 20 ("The market knowledge came not only from their experience in importing from multiple sources, . . . it also came from the widespread publication of honey prices by the Agricultural Marketing Service . . . of the United States Department of Agriculture.").

Second, defendant-intervenors "submitted numerous newspaper articles, industry publications, and government publications which demonstrate that importers had knowledge of . . . specific differentials between such prices, decreasing prices of Chinese honey imports, and that the filing of a new dumping case was imminent." Def.-Ints.' Cmts. 31; *see also* Def.-Ints.' Cmts. 33–34 ("All of the mainstream news articles show that importers and the general public were well aware of the relative prices of honey from different sources; that Chinese honey was the cheapest source and was being dumped on the U.S. market; and that the filing of a new dumping case was imminent. It is thus unreasonable for Commerce to conclude that U.S. importers of honey did not know these facts as well.").

Third, defendant-intervenors contend that testimony before the ITC, ITC findings, and ITC staff reports demonstrate that importers had knowledge of honey market prices and underselling. In particular, defendant-intervenors state that "the importers themselves specifically testified at the preliminary staff conference of the ITC that they had such broad knowledge." Def.-Ints.' Cmts. 25. Furthermore, the ITC "concluded that the significant price effects and volume effects of imports of honey from China had a significant adverse impact on the domestic industry, leading to a finding that there was a reasonable indication of material injury by reason of the subject imports."[6] Def.-Ints.' Cmts. 27 (citation omitted).

[6] "Specifically, imports of honey from China were, on average, 23.2 percent below those from all other countries beside Argentina (which with China was then subject to an ongoing antidumping duty investigation) during the period Commerce has identified as relevant. This is higher than the 22 percent price difference (underselling margin) Commerce relied on in *Potassium Permanganate* to justify its critical circumstances finding." Def.-Ints.' Cmts. 31 (citations omitted).

In response, Commerce notes that, as a preliminary matter, "[o]f the total of eight non-industry newspaper articles placed on the record, five of these were published while the suspension agreement was still in effect. Therefore, the Department believes that[, in accordance with the Federal Circuit opinion in *Zhejiang II*,] these articles could not have alerted honey importers that the honey they were importing from the PRC was being sold for [less than fair value]." Third Remand Results at 30.

Next, Commerce disputes both the probative value and the sufficiency of the evidence highlighted by defendant-intervenors. That is, for Commerce, the material defendant-intervenors placed on the record neither demonstrates that plaintiffs had a detailed knowledge of honey pricing, nor that plaintiffs could be said to have either actual or imputed knowledge of dumping, even using the *Potassium Permanganate* methodology. This is especially true because the record evidence indicates that there were a large number of companies exporting honey into United States from at least seven countries, making it difficult to assume that honey importers could be charged with knowledge of pricing from all sources. Def.'s Reply 11; Third Remand Results at 24–25. This is in contrast to the "closely knit industry" in *Potassium Permanganate* where the product was only available from two countries other than the PRC, and therefore importers could be charged with being "acutely aware of pricing from *all* sources." Third Remand Results at 24; Third Remand Results at 23 ("[T]he agency found that the number of companies that produced and marketed potassium permanganate was limited to a single company in the United States (Carus Chemicals), a single company in Spain (Asturquimica), and several companies in the PRC.").

As to the content of the articles themselves, the Department agrees that "all of the newspaper articles, including those in both industry and non-industry publications, indicate that importers knew the general conditions in the U.S. honey market, and were aware that low-priced honey was being imported from other countries." Third Remand Results at 31. The Department notes that although the prices were low, they were equal to or higher than those found in the Suspension Agreement. Consequently, the Department found that the facts did not support defendant-intervenors' contentions.

Commerce also returns to its argument that evidence of knowledge of low-priced sales, or even of undercutting, may not be used to demonstrate actual knowledge or to impute knowledge of dumping, and thus that the *Potassium Permanganate* methodology is no longer an appropriate means of determining knowledge of or imputing knowledge of dumping. Therefore, "[w]hile these prices may indicate

an awareness of the pricing levels of PRC and Argentine honey imports, . . . the Department determines a dumping margin by calculating the difference between a producer's normal value and U.S. price, and *not* by calculating the difference in price between PRC goods and third country goods sold in the United States." Third Remand Results at 31.

As to the information from the ITC, Commerce notes that defendant-intervenors "state that the ITC determined that the prices and volumes of PRC honey imports had a significant negative impact on the U.S. honey industry and was a reasonable indication of material injury by reason of subject imports." Third Remand Results at 28. The Department reiterates, however, that evidence of low prices and high volume, or even of injury, are not evidence of sales at less than fair value. Third Remand Results at 31 ("[T]he Department does not agree with [defendant intervenors' contention that knowledge of low-priced imports generally, or of the specific prices of these imports, necessarily indicates the U.S. importers knew or should have known that honey from the PRC was being sold at [less than fair value].").

The court agrees with defendant that, taken as a whole, the record evidence indicates some awareness of pricing and other market factors among U.S. honey importers. It does not, however, demonstrate that importers had knowledge of sales at less than fair value during the relevant period, nor does the record contain evidence from which such knowledge could be imputed.

First, Commerce correctly disregarded the information placed on the record by the defendant-intervenors that was from the period when the Suspension Agreement was still in effect because this information cannot form the basis for the imputation of knowledge. *See Zhejiang II*, 432 F.3d at 1368 ("[I]t strains credibility to suggest that Commerce could establish minimum prices for honey designed to 'prevent the suppression or undercutting of price levels of the United States honey products' and then determine that U.S. importers purchasing honey in accordance with these pricing guidelines should have known these sales would be found to be at less than fair value.") (citation omitted).

Second, as noted, "in prior critical circumstances determinations [(i.e., those conducted prior to the adoption of the 25% methodology)], the Department had based its affirmative critical circumstances determination on the agency's finding that 'importers were actually aware of the pricing of the merchandise for non-Chinese sources, and were, therefore, aware of the entire range of pricing in a marketplace where pricing was a major factor in determining sales.'" Third Remand Results at 2–3 (quoting *Zhejiang V*, 35 CIT at __, Slip Op.

11–110, at 23). In *Potassium Permanganate*, for example, "the Department found that it was reasonable to rely on an *assumption* that U.S. importers were aware of prices from Spain, because the subject merchandise was produced and marketed by a limited number of companies from within a similarly limited number of countries." Third Remand Results at 24.

Here, as noted, the Department found that the evidence "demonstrates that United States importers were aware to some degree of world market prices of honey, but fails to conclusively establish that they were aware of the full range of prices. Specifically, the evidence establishes that at least seven countries—Argentina, Canada, Chile, Mexico, China, Uruguay, and Vietnam—exported honey to the United States, and that other sources of honey imports may exist." Def.'s Reply 11; Third Remand Results at 24.

A review of the evidence confirms that the Department correctly found that, in contrast to the "closely knit industry acutely aware of pricing from *all* sources" that was present in *Potassium Permanganate*, today's honey industry is composed of a large number of companies that conduct business in many countries, thereby reducing the possibility of awareness of "pricing from all sources." Third Remand Results at 24; Third Remand Results at 26–27 ("[W]hile U.S. importers were aware, to some degree, of world market prices of honey, the evidence does not conclusively demonstrate that they were aware of the full range of prices, as they were in *Potassium Permanganate*, because of the more numerous countries from which honey was, or could have been, exported to the United States."). In other words, in *Potassium Permanganate*, unlike in this case, there were so few exporters of potassium permanganate that it would be difficult to find that a U.S. importer of potassium permanganate was not intimately familiar with the pricing from the limited number of sources.

Next, the evidence that defendant-intervenors cite as showing actual knowledge of dumping or actual knowledge that plaintiffs' prices were below the domestic cost of production does not tend to prove their case. That is, defendant-intervenors rely on evidence (i.e., the newspaper articles, industry publications, and government publications) that demonstrates only that readers of this material would be made aware of general pricing conditions and other market factors, including the relatively low prices for Chinese honey, but not that such low prices were the result of sales at less than fair value. In addition, the evidence shows that plaintiffs were aware that these prices, while low, were equal to or greater than those found in the Suspension Agreement, prices which the Federal Circuit has found would preclude an imputation of knowledge of dumping. In like fash-

ion, the ITC evidence shows that low prices were causing injury, but says nothing about prices being at less than fair value.

Therefore, Commerce was reasonable in its conclusion that, taken as a whole, the evidence did not show that plaintiffs either had, or could be charged with having, knowledge that honey was being dumped by Chinese exporters during the 190-day period between the initiation of the investigation and the issuance of the Preliminary Results.

V. The Import Surge

The defendant-intervenors' final argument is that the massive increase in honey imports from the PRC, which Commerce found in its original affirmative critical circumstances determination, occurred in response to the initiation of the Second Investigation. Def.-Ints.' Cmts. 13–16. For this reason, defendant-intervenors assert that "[i]mporters must have had ample reason to believe that they were buying these imports at dumped prices at the time they made their decision to accelerate their imports, because if they didn't have such reason, they would have had no reason to rush in the imports, and the[re] would have been no surge." Def. Ints.' Cmts. 36. According to defendant-intervenors, "there was a substantial surge, which the importers obviously undertook because they knew or suspected that they were paying dumped [prices] for the imports." Def.-Ints.' Cmts. 36.

In response, Commerce notes that, under the statute, "the Department must base its affirmative critical circumstances determination on two *separate* findings—one with regard to importers' knowledge of [less than fair value] pricing and the other with regard to a surge of imports." Third Remand Results at 29. Here, "Commerce had already determined that a surge of imports over a relatively short period of time existed, thereby satisfying one of the two statutory requirements.[7] This finding, however, does not support nor does it satisfy the separate statutory requirement of establishing importer knowledge of dumping." Def.'s Reply 18. In other words, for Commerce, defendant-intervenors have conflated the two separate statutory requirements for a finding of critical circumstances, and have attempted to bootstrap the finding of a surge to necessarily require a finding that plaintiff knew or should have known that honey was being sold at less than fair value.

[7] In particular, in the Final Results, "[t]he Department found evidence of massive imports of subject merchandise by [plaintiffs] within a relatively short period," thus fulfilling the second criterion for critical circumstances under 19 U.S.C. § 1673d(a)(3)(B). Third Remand Results at 17 n.5.

That this is the case can be seen from plaintiffs' observations that there may be many reasons for a surge in imports, other than importer knowledge that dumping is occurring. *See* Pl.'s Br. 10 ("[P]erhaps the most rational reason why a company would purposely accelerate imports after an antidumping duty investigation is commenced would be to avoid the uncertainty which arises when merchandise is subject to 'suspension of liquidation,' as distinguished from a belief that the merchandise is actually dumped. An importer's liability for antidumping duty is only set in stone when its entries are liquidated, after an Annual Review is completed and after litigation is concluded, an event which may not take place for many years after entry."). Thus, while it may be that the importers increased their honey purchases in anticipation of the investigation, the surge alone does not amount to substantial evidence that they were aware, or should have been aware, that the honey was being dumped. For these reasons, Commerce's conclusion that a finding that there was a surge of honey imports does not necessarily result in the imputation of knowledge of dumping, is sustained.

CONCLUSION

For the foregoing reasons, Commerce's determination that critical circumstances did not exist because U.S. importers did not possess the requisite knowledge that exporters were selling the subject merchandise at less than fair value was supported by substantial evidence and made in accordance with law.

Accordingly, Commerce's Final Results of Redetermination are sustained.

Dated: June 18, 2013
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON