Slip Op. 08–15

ROYAL THAI GOVERNMENT, SAHAVIRYA INDUSTRIES PUBLIC COMPANY LIMITED, Plaintiffs, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, Defendant- Intervenor.

Before: Richard W. Goldberg
Senior Judge
Consol. Court No. 02–00026

[Commerce's remand results are sustained.]

Date: January 31, 2008.

Vinson & Elkins, LLP (*Kenneth J. Pierce*, *Robert E. DeFrancesco*, and *Victor S. Mroczka*) for Plaintiffs the Royal Thai Government and Sahaviriya Steel Industries Public Company Limited.

Jeffrey S. Bucholtz, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Claudia Burke* and *David S. Silverbrand*); *Mykhaylo A. Gryzlov*, International Attorney-Advisor, Office of the Chief Counsel for the Import Administration, United States Department of Commerce for Defendant United States.

Skadden Arps Slate Meagher & Flom LLP (*John J. Mangan*) for Defendant-Intervenor United States Steel Corporation.

OPINION

Goldberg, Senior Judge: This matter is before the Court following a court-ordered remand. *See Royal Thai Gov't v. United States*, 31 CIT ___ , 502 F. Supp. 2d 1334 (2007). In *Royal Thai*, the Court ordered Commerce to reconcile its inconsistent treatment of the Thai 10% "Normal" tariff rate. For the reasons stated below, this Court sustains Commerce's remand determination.

I. *BACKGROUND*

The procedural history of this case is set forth at length in *Royal Thai*, familiarity with which is presumed. *Id.* Briefly, the relevant facts are as follows: after Commerce determined that the Thai duty exemption programs provided a subsidy to the Thai steel sector,

Commerce still had to calculate the amount of benefit these programs provided in order to impose the appropriate countervailing duties. Initially, Commerce determined that a 1% "Reduced" tariff rate would have applied to imports of steel slab absent the duty exemption programs, and imposed countervailing duties based on this rate. This Court remanded Commerce's initial determination because the agency utilized the 1% "Reduced" tariff rate as its benefit calculation benchmark without considering whether this rate was itself a countervailable subsidy.

On remand, Commerce found that it could not analyze the countervailability of the 1% "Reduced" tariff rate under its normal methodology because the agency lacked information regarding the tariff rate applicable to steel slab in its absence. Adopting an alternative methodology, Commerce found that the 1% "Reduced" tariff rate was specific to the steel sector and rejected this rate as its benefit calculation benchmark on this basis. In deciding to apply its alternative methodology, Commerce found that the 10% "Normal" tariff rate was not an appropriate benchmark for analyzing the countervailability of the 1% "Reduced" tariff because this rate was inapplicable to imports of steel slab. Despite this rejection, Commerce adopted the 10% "Normal" tariff rate as its benchmark for calculating the benefit accruing from the duty exemption programs. This disparate treatment of the 10% "Normal" tariff rate was unsupported and arbitrary. Accordingly, this Court remanded the case again and instructed Commerce to make one of three findings regarding the 10% "Normal" tariff rate: (1) that the 10% "Normal" tariff is a meaningful benchmark for benefit calculation; (2) that the 10% "Normal" tariff rate is not a meaningful benchmark for benefit calculation; or (3) that steel slab is distinct from other products because its 10% "Normal" tariff rate is a meaningful benchmark, but the 10% "Normal" rate for other products is not similarly meaningful.

In its remand determination, Commerce made the second of the three permitted findings.[1] Utilizing its alternative methodology, Commerce found the 1% "Reduced" tariff rate specific to the steel industry. Despite this specificity finding, Commerce found that it could not establish the countervailability of the 1% "Reduced" tariff rate

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[1] This Court provided Commerce further instruction on the second permitted finding, explaining that

> If Commerce makes [this finding], then Commerce must prove the existence of a subsidy without reference to the "Normal" tariff rates. If, under this second finding, it cannot prove the existence of a benefit, then it cannot prove that the "Reduced" rate is a countervailable subsidy, and it must use the 1% tariff rate as a benchmark to calculate the countervailable subsidy that SSI received through its import duty exemption programs."

Royal Thai, 31 CIT at ____ , 502 F. Supp. 2d at 1344.

because it could not prove that the rate also provided a benefit or a financial contribution. As a result, Commerce adopted the 1% "Reduced" tariff rate as its benefit calculation benchmark, and determined that the duty exemption programs yielded net subsidy rates of 0.58 and 0.07 percent. The Royal Thai Government ("RTG") and Sahavirya Industries Public Company, Limited ("SSG") now challenge Commerce's rejection of the 10% "Normal" tariff rate. United States Steel Corporation ("U.S. Steel") challenges Commerce's use of the 1% "Reduced" tariff rate as its benefit calculation benchmark.

II. *JURISDICTION AND STANDARD OF REVIEW*

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c). This Court must sustain any determination, finding, or conclusion made by Commerce in its remand determination unless it is "unsupported by substantial evidence, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i)(2000). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986).

III. *DISCUSSION*

Commerce can impose countervailing duties on foreign products that are imported, sold, or likely to be sold in the United States, if a foreign government has directly or indirectly subsidized its manufacture, production, or export. *See* 19 U.S.C. § 1671(a); *accord Allegheny Ludlum Corp. v. United States*, 24 CIT 452, 112 F. Supp. 2d 1141 (2000). These duties are intended "to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments." *British Steel PLC v. United States*, 20 CIT 663, 699, 929 F. Supp. 426, 445 (1996) (*citing Zenith Radio Corp. v. United States*, 437 U.S. 443, 456 (1978)). To achieve this goal, Commerce must attempt to approximate the amount of benefit provided by an alleged subsidy. Before it can make this calculation, Commerce must establish a benefit calculation benchmark, or more precisely, determine what tariff rate would have applied absent the alleged subsidy. Once this benchmark is established, Commerce will have a reference point from which it can determine the amount of benefit that has been conferred. However, Commerce must also determine that its proposed benchmark is not itself a countervailable subsidy. *AL Tech Specialty Steel Corp. v. United States*, 29 CIT ___ , ___ , 366 F. Supp. 2d 1236, 1237 n.3 (2005). To determine countervailability, Commerce normally con-

ducts a specificity analysis because an alleged subsidy is only countervailable if specific to an industry or group of users. Commerce's typical specificity methodology examines the relative benefits accruing from an alleged subsidy in order to determine its distribution. However, to apply its relative benefit methodology, Commerce must be able to determine what tariff rate would have applied in the absence of the proposed benchmark.

A. Commerce's Specificity Analysis

RTS and SSI argue that Commerce erred in rejecting the 10% "Normal" tariff rate and, in turn, its preferred methodology. If Commerce could have relied on the 10% "Normal" tariff rate as an alternative tariff rate, it clearly could have applied its relative benefit methodology. This Court, however, finds that Commerce's decision to reject this rate and apply alternative methodology is supported by substantial evidence. Generally, Commerce is granted broad discretion in its administration of the countervailing duty laws. *See Ceramica Regiomontana, S.A.*, 10 CIT at 404–405, 636 F. Supp. at 966. However, Commerce is still required to "either conform itself to its prior decisions or explain the reasons for its departure." *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1206, 704 F. Supp. 1075, 1088 (1988). Here, Commerce adequately explained its rationale for deviating from its past methodology. Commerce first rejected the 10% "Normal" tariff rate because it found "[u]nder the Thai tariff system, the term 'Normal' rate is a misnomer, [as] Thai 'Normal' rates are not usually applied in assessing duties upon imports under the vast majority of the HTS categories. . . . ' " *Results of Redetermination on Remand Pursuant to Royal Thai Government, et al. v. United States*, Slip Op. 04–91 (Ct. Int'l Trade July 27, 2004) (May 4, 2007), at 18–19. After rejecting the 10% "Normal" rate, Commerce found it necessary to adopt an alternative methodology because it lacked the tariff rate information required to conduct its standard analysis. This Court finds Commerce's explanation a wholly reasonable basis for its deviation from past agency practice, and accordingly, Commerce's decision is supported by substantial evidence.

B. Commerce's Use of the 1% "Reduced" Tariff Rate as a Benchmark

U.S. Steel argues that Commerce's finding that the 1% "Reduced" tariff rate is specific required Commerce to automatically discard this rate as a benchmark. However, the Court has repeatedly rejected U.S. Steel's argument noting "[t]here are multiple statutory criteria for establishing the existence of a countervailable subsidy. The absence of any one of those criteria is sufficient to prove non-countervailability . . . ." *Royal Thai Gov't v. United States*, 30 CIT at ____ , 441 F. Supp. 2d 1350 at 1366 n.16 (2006). Within context of this action, this Court instructed Commerce that "under a finding of specificity alone, Commerce may not . . . discard the 1% reduced rate as a benchmark. Commerce must prove that the 1% reduced

rate is a countervailable subsidy and do so without reference to the rejected 'Normal' rates." *Royal Thai*, 31 CIT at ___ , 502 F. Supp. 2d at 1343. In following these instructions, Commerce did not err in refusing to reject the 1% "Reduced" tariff rate as its benefit calculation benchmark.

U.S. Steel also argues that Commerce erred in concluding that it could not establish the countervailability of the 1% "Reduced" tariff rate. To establish that an alleged subsidy is countervailable, Commerce must prove the existence of three elements: (1) financial contribution; (2) benefit conferred; and (3) specificity. 19 U.S.C. §§ 1677 (5)(A),(5)(D),(5)(E). In this action, Commerce concluded that it could not establish countervailability because it lacked information regarding applicable alternative tariff rates, and without this information it could not demonstrate that a benefit or financial contribution had accrued to the Thai steel sector. According to U.S. Steel, this conclusion was in error because evidence demonstrated a 5% "Alternative" tariff rate would have applied to steel slab in the absence of the 1% "Reduced" tariff rate. Commerce, however, specifically found the 5% "Alternative" tariff rate inapplicable. Commerce's remand determination explains that while Thai Ministry of Finance Notifications indicate that a 5% "Alternative" tariff rate has applied to steel slab imports in the past, the agency chose to avoid the "speculative nature of attempting 'to predict at a later point in time whether slab would have reverted back to a semi-finished product or would have still been categorized in the "Reduced" rate schedule as a primary product.' " *Results of Redetermination on Remand Pursuant to Royal Thai Government, et al. v. United States*, Slip Op. 07–119 (Ct. Int'l Trade Aug. 6, 2007) (Oct. 5, 2007), at 8–9 (*quoting Verification Report*, at 5.). Commerce's explanation makes clear that determining an alternative tariff rate for steel slab imports under the Thai tariff nomenclature is particularly complicated in light of the fact that both the rate and classification of products are subject to frequent change. In the end, Commerce concluded that it lacked sufficient information to establish any alternative tariff rate, and that it could not establish the countervailability of the 1% "Reduced" tariff rate. Commerce's finding that the 1% "Reduced" tariff rate is an appropriate benefit calculation benchmark is supported by substantial evidence.

IV. *CONCLUSION*

In light of the foregoing, the Court sustains the *Remand Determination* because it is in accordance with law and supported by substantial evidence. Judgment shall be entered accordingly.

Slip Op. 08–16

CHINA PROCESSED FOOD IMPORT & EXPORT COMPANY, Plaintiff, v. **UNITED STATES**, Defendant and **COALITION FOR FAIR PRESERVED MUSHROOM TRADE**, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 04–00503

[Denying plaintiff's motion for judgment upon the agency record and dismissing action]

Dated: January 31, 2008

Trade Pacific PLLC (*Robert G. Gosselink*) for plaintiff China Processed Food Import & Export Company.

Jeffrey S. Bucholtz, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Richard P. Schroeder*); *Quentin M. Baird*, *Philip J. Curtin*, and *Jonathan M. Zielinski*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Kelley Drye Collier Shannon (*Michael J. Coursey* and *Adam H. Gordon*) for defendant-intervenor Coalition for Fair Preserved Mushroom Trade.

OPINION

Stanceu, Judge: China Processed Food Import & Export Company ("plaintiff" or "COFCO") challenges the final administrative determination ("Final Results") that the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department") issued in the fourth administrative review of an antidumping duty order entered on certain preserved mushrooms ("subject merchandise") from the People's Republic of China ("China" or the "PRC"). *See Certain Preserved Mushrooms From the People's Republic of China: Final Results of Sixth Antidumping Duty New Shipper Review and Final Results and Partial Rescission of the Fourth Antidumping Duty Admin. Review*, 69 Fed. Reg. 54,635 (Sept. 9, 2004) ("*Final Results*"). Plaintiff moves pursuant to USCIT Rule 56.2 for judgment upon the agency record, arguing that the Final Results were unlawful because Commerce abused its discretion and acted unfairly in applying to COFCO retroactively a change in the methodology for determining the normal value of COFCO's subject merchandise. Plaintiff, however, does not challenge the new methodology on the merits.

Under the new methodology, which Commerce applied in the fourth administrative review but not in the antidumping duty investigation or in a previous administrative review of the antidumping duty order, Commerce treated COFCO and its affiliated producers and exporters as a single entity. When determining the normal value of COFCO's exports of subject merchandise, Commerce used not only

data on the factors of production associated with the actual producer of the merchandise that COFCO exported to the United States, but also factors-of-production data of an affiliated producer that did not produce that merchandise. Coalition for Fair Preserved Mushroom Trade, the petitioner in the antidumping duty investigation resulting in the antidumping duty order ("petitioner") and the party that advocated use of the new methodology in the fourth administrative review, sought and was granted defendant-intervenor status but did not further participate in this litigation. *See id.* at 54,635 n.3. Because plaintiff, in moving for judgment upon the agency record, did not challenge on the merits the method by which Commerce calculated the normal value of COFCO's merchandise in the fourth administrative review, and because Commerce did not exceed its discretion in deciding not to continue following the method by which it determined such normal value prior to the fourth administrative review, the court denies plaintiff's motion for judgment upon the agency record and, pursuant to USCIT Rule 56.2(b), dismisses this action.

I. BACKGROUND

A. The Investigation and the First, Second, and Third Administrative Reviews

Commerce issued an antidumping duty order on the subject merchandise in 1999. *Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Preserved Mushrooms From the People's Republic of China*, 64 Fed. Reg. 8308 (Feb. 19, 1999) ("*Order*"). COFCO, an exporter of the subject merchandise in China, purchased the subject merchandise that it exported to the United States during the period of investigation from two mushroom producers with which it was affiliated, Zishan Cannery Canned Food Factory (now known as Fujian Zishan Group Co., Ltd. ("Fujian Zishan")) and COFCO (Longhai) Food, Inc. ("Longhai"). Mem. of P. & A. in Supp. of COFCO's Mot. for J. upon the Agency R. 2 ("COFCO's Mem. of P. & A."). Commerce determined in the investigation that the subject merchandise COFCO exported to the United States was sold at less than fair value and applied to that merchandise an antidumping duty margin of 121.47 percent. *Order*, 64 Fed. Reg. at 8310. In the final less-than-fair-value determination that concluded the antidumping duty investigation, Commerce identified various affiliates of COFCO but did not, in discussing its calculation of the normal value of COFCO's merchandise or its determination of an antidumping duty margin for COFCO, discuss whether COFCO and any of its affiliates should be treated as a single entity. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from the People's Republic*

of China, 63 Fed. Reg. 72,255, 72,255–56, 72,258 (Dec. 31, 1998)[1] ; *Notice of Prelim. Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Preserved Mushrooms From the People's Republic of China*, 63 Fed. Reg. 41,794, 41,796, 41,799–800 (Aug. 5, 1998).

After issuance of the antidumping duty order, COFCO stopped purchasing subject merchandise from Fujian Zishan and Longhai, producers that processed, but did not grow, mushrooms, and began to purchase solely from another mushroom producer with which it was affiliated, Fujian Yu Xing Fruit & Vegetable Foodstuff Development Co. ("Yu Xing"), a producer that did grow mushrooms. COFCO's Mem. of P. & A. 3; *Certain Preserved Mushrooms From the People's Republic of China: Prelim. Results of Sixth New Shipper Review and Prelim. Results and Partial Rescission of Fourth Antidumping Duty Admin. Review*, 69 Fed. Reg. 10,410, 10,413 (Mar. 5, 2004) ("*Prelim. Results*"). "COFCO believed that the primary reason for its 127.47 [*sic*] percent antidumping margin was that Fujian Zishan's and [Longhai's] production processes did not take advantage of vertical integration, and that the production costs and normal values calculated by Commerce were higher than they otherwise might have been had Fujian Zishan and [Longhai] grown mushrooms instead of purchasing them." COFCO's Mem. of P. & A. 3.

In the first administrative review, Commerce calculated the normal value of COFCO's merchandise based on the factors-of-production data reported by COFCO's sole producer, Yu Xing, for the period August 5, 1998 through January 31, 2000. *See Prelim. Results of First New Shipper Review and First Antidumping Duty Admin. Review: Certain Preserved Mushrooms From the People's Republic of China*, 65 Fed. Reg. 66,703, 66,706–07 (Nov. 7, 2000) (identifying Yu Xing as COFCO's supplier). Commerce considered and rejected petitioner's objection that Yu Xing's factors-of-production data were unreliable. *See Issues and Decision Mem. for the Antidumping Duty Admin. and New Shipper Reviews on Certain Preserved Mushrooms from the People's Republic of China – Aug. 5, 1998, through Jan. 31, 2000* at 1–2, 18–19 (May 31, 2001). Commerce determined an antidumping duty margin of 0.00 percent for entries of subject merchandise exported by COFCO during the period of August 5, 1998 through January 31, 2000. *See Final Results of First New Shipper Review and First Antidumping Duty Admin. Review: Certain Preserved Mushrooms From the People's Republic of China*, 66 Fed. Reg.

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[1] Commerce identified China National Cereals, Oils, & Foodstuffs Import & Export Corp. as COFCO's owner. It also identified Xiamen Jiahua Import & Export Trading Co., Ltd. ("Xiamen Jiahua") as COFCO's affiliated exporter and Xiamen Special Economic Trade Group Cereals, Oils, & Foodstuffs Import & Export Company as Xiamen Jiahua's owner. *Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from the People's Republic of China*, 63 Fed. Reg. 72,255, 72,255–56 (Dec. 31, 1998).

31,204, 31,205 (June 11, 2001). From the published decision concluding the first administrative review, it does not appear that either petitioner or Commerce considered the possibility of the Department's collecting and using data from COFCO's other affiliates in determining the normal value of COFCO's merchandise. *See id.* at 31,204–06.

Commerce conducted two additional administrative reviews of the antidumping duty order before the administrative review at issue in this case. However, upon petitioner's request, the second and third administrative reviews were rescinded with respect to COFCO. *Certain Preserved Mushrooms From the People's Republic of China: Prelim. Results of New Shipper Review and Prelim. Results and Partial Rescission of Second Antidumping Duty Admin. Review*, 67 Fed. Reg. 10,128, 10,129 (Mar. 6, 2002) (covering the period February 1, 2000 through January 31, 2001); *Certain Preserved Mushrooms from the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Admin. Review*, 67 Fed. Reg. 53,914, 53,914 (Aug. 20, 2002) (covering the period February 1, 2001 through January 31, 2002). Accordingly, the assessment rate for entries of COFCO's merchandise made during those time periods remained at 0.00 percent, the rate determined in the first administrative review.

B. The Fourth Administrative Review

Commerce conducted the administrative review at issue here, *i.e.*, the fourth administrative review, for entries of subject merchandise made by COFCO, among others, during the period February 1, 2002 through January 31, 2003 ("period of review" or "POR"). *Prelim. Results*, 69 Fed. Reg. at 10,412. During the fourth administrative review, in response to the Department's requests for information, COFCO reported that Yu Xing, its affiliated producer, supplied all subject merchandise that COFCO exported to the United States during the period of review, and COFCO provided Yu Xing's factors-of-production data. *See, e.g., Letter from White & Case to Sec'y of Commerce* A16–A17, D1–D15, Exs. D1–D6 (May 30, 2003) (responding to the Department's questionnaire) (Admin. R. Doc. No. 41). Petitioner commented that Commerce should require COFCO to submit a full response to Section A of the Department's questionnaire for each of its affiliates, including companies other than Yu Xing, to determine which companies affiliated with COFCO should submit factors-of-production data. *Letter from Collier Shannon Scott to Sec'y of Commerce* 7–10 (July 17, 2003) (commenting on COFCO's questionnaire response) (Admin. R. Doc. No. 56). Commerce sent COFCO supplemental questionnaires.

In response to three supplemental questionnaires, COFCO provided Commerce with information on companies that Commerce potentially could find to be affiliated with COFCO and also provided factors-of-production data for certain of those companies. *Letter from White & Case to Sec'y of Commerce* (Sept. 10, 2003) (responding to

the first supplemental questionnaire) (Admin. R. Doc. No. 96); *Letter from White & Case to Sec'y of Commerce* (Nov. 10, 2003) (responding to the second supplemental questionnaire) (Admin. R. Doc. No. 127) ("*Second Supplemental Resp*."); *Letter from White & Case to Sec'y of Commerce* (Dec. 8, 2003) (responding to the third supplemental questionnaire) (Admin. R. Doc. No. 132). Petitioner urged Commerce to treat as a single entity COFCO's affiliated producers and exporters and to calculate normal value based on a weighted average of the factors-of-production data pertaining to producers of subject merchandise with which COFCO was affiliated. *Letter from Collier Shannon Scott to Sec'y of Commerce* (Sept. 30, 2003) (commenting on COFCO's first supplemental response) (Admin. R. Doc. No. 109); *see also Letter from Collier Shannon Scott to Sec'y of Commerce* (Feb. 2, 2004) (commenting on COFCO's fourth supplemental response) (Admin. R. Doc. No. 157).

Commerce met with counsel for petitioner and COFCO during December 2003 and January 2004 to determine whether to require additional producers affiliated with COFCO to report factors-of-production data. *See Mem. to the File* (Dec. 22, 2003) (Admin. R. Doc. No. 137); *Mem. to the File* (Dec. 22, 2003) (Admin. R. Doc. No. 138); *Mem. to the File* (Jan. 7, 2004) (Admin. R. Doc. No. 145). Commerce subsequently issued a fourth supplemental questionnaire to COFCO in which Commerce "addressed [COFCO's] affiliations with other companies that sold and/or produced preserved mushrooms during the POR and requested COFCO to provide factors of production data for those companies." *Prelim. Results*, 69 Fed. Reg. at 10,411; *see Letter from Sec'y of Commerce to White & Case* 1–12 (Jan. 7, 2004) (Admin. R. Doc. No. 146) ("*Fourth Supplemental Questionnaire*"). Specifically, Commerce asked that COFCO provide factors-of-production data for two additional producers, Fujian Zishan and COFCO (Zhangzhou) Food Industrial Co., Ltd. ("Zhangzhou"). *Fourth Supplemental Questionnaire* at 1, 11–12. COFCO responded in January and February 2004, providing requested information for both Fujian Zishan and Zhangzhou. *Prelim. Results*, 69 Fed. Reg. at 10,411; *Letter from White & Case to Sec'y of Commerce* (Jan. 26, 2004) (Admin. R. Doc. No. 156) ("*Fourth Supplemental Resp. Part I*"); *Letter from White & Case to Sec'y of Commerce* (Feb. 9, 2004) (Admin. R. Doc. No. 167) ("*Fourth Supplemental Resp. Part II*").

Commerce issued a preliminary determination in the fourth administrative review ("Preliminary Results") in which Commerce concluded that COFCO was affiliated with three producers – Yu Xing, Fujian Zishan, and Zhangzhou – and two other exporters – China National Cereals, Oils, & Foodstuffs Import & Export Corp. ("China National") and Xiamen Jiahua Import & Export Trading Co., Ltd. ("Xiamen Jiahua") – through common ownership and common control. *Prelim. Results*, 69 Fed. Reg. at 10,413. Commerce cited COFCO's "significant ownership share in Yu Xing" and identified

China National as COFCO's parent company and the entity through which COFCO is affiliated with producers Fujian Zishan and Zhangzhou and exporter Xiamen Jiahua. *Id*. Commerce further concluded that the three affiliated producers should be treated as a single entity. *Id*. at 10,413–14. Because Zhangzhou did not produce processed mushrooms in the same container sizes as those sold by COFCO in the United States, Commerce did not use Zhangzhou's factors-of-production data in determining the normal value of COFCO's merchandise. However, for identical sizes of canned mushrooms produced by Yu Xing and Fujian Zishan, Commerce weight-averaged the factors of production reported by Fujian Zishan with those of Yu Xing. *See 4th Admin. Review of the Antidumping Duty Order on Certain Preserved Mushrooms from the People's Republic of China: Calculation Mem. for the Prelim. Results for China Processed Food Import & Export Co. ("COFCO")* at 2–3 (Mar. 1, 2004) (Admin. R. Doc. No. 192) ("*COFCO Calculation Mem.*"); *see also Prelim. Results*, 69 Fed. Reg. at 10,420. Commerce used this approach even though all of the merchandise exported by COFCO during the period of review was produced by Yu Xing, not Fujian Zishan. Commerce preliminarily determined a margin of 87.47 percent for COFCO. *Prelim. Results*, 69 Fed. Reg. at 10,422.

Upon issuing the Preliminary Results, Commerce sent COFCO another supplemental questionnaire. *See Letter from Sec'y of Commerce to White & Case* (Mar. 5, 2004) (setting forth the fifth supplemental questionnaire) (Admin. R. Doc. No. 193). COFCO responded, providing additional data concerning its affiliates. *Letter from White & Case to Sec'y of Commerce* (Mar. 31, 2004) (responding to the fifth supplemental questionnaire) (Admin. R. Doc. No. 209).

In the Final Results, Commerce affirmed its determination to treat COFCO and the three producers – Yu Xing, Fujian Zishan, and Zhangzhou – as a single entity and also added two exporters to that entity – China National and Xiamen Jiahua. *Final Results*, 69 Fed. Reg. at 54,639. Commerce determined a margin of 3.92 percent for COFCO. *Id*. at 54,641. As it had in the Preliminary Results, Commerce used factors-of-production data of both Yu Xing and Fujian Zishan in determining the normal value of COFCO's merchandise. However, Commerce changed its method for calculating COFCO's normal value from that used in the Preliminary Results. Agreeing with a comment of COFCO, Commerce first calculated the normal value for each product based on the factors of production at each separate facility and then averaged the normal values by applying a weighting factor based on the total production quantity of each product. *Issues and Decision Mem. for the Final Results of the Antidumping Duty New Shipper and Admin. Reviews on Certain Preserved Mushrooms from the People's Republic of China – Feb. 1, 2002, through Jan. 31, 2003*, Comment 2 ("*Decision Mem.*").

On October 8, 2004, COFCO filed a summons and complaint contesting the Final Results. *See* Compl. ¶¶ 12–15. Plaintiff moves pursuant to USCIT Rule 56.2 for judgment upon the agency record. *See* Pl.'s Rule 56.2 Mot. for J. upon the Agency R. 1–2; COFCO's Mem. of P. & A. 1.

II. DISCUSSION

The court has jurisdiction over COFCO's cause of action pursuant to 28 U.S.C. § 1581(c). 28 U.S.C. § 1581(c) (2000); *see also* Compl. 1. COFCO timely brought suit pursuant to 19 U.S.C § 1516a(a)(2)(A)(i) to contest the Final Results. 19 U.S.C § 1516a(a)(2)(A) (2000). COFCO has standing to do so because it is an exporter of the subject merchandise that participated in the administrative review proceeding before Commerce. *Id*.; *see* Compl. 1–2. The court reviews the Final Results according to 19 U.S.C. § 1516a(b)(1)(B)(i), which requires the court to "hold unlawful any determination, finding, or conclusion found . . . in an action brought under [19 U.S.C. § 1516a(a)(2)], to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).

Plaintiff's challenge to the Final Results arose from the Department's application in the fourth administrative review, but not in the investigation or in a prior administrative review, of a procedure to which Commerce has referred as "collapsing." Although plaintiff's complaint set forth two claims related to the application of the "collapsing" methodology, plaintiff, in its motion for judgment upon the agency record, limited its arguments to the second claim. *See* Compl. ¶¶ 12–15; COFCO's Mem. of P. & A. 1 & n.1. Below, the court first describes the Department's "collapsing" regulation, 19 C.F.R. § 351.401(f), to provide the necessary background for the discussion of plaintiff's claims. *See* 19 C.F.R. § 351.401(f) (2004). The court then addresses the consequences of plaintiff's abandonment of its first claim, which claim had challenged certain factual findings and determinations supporting the application of the Department's "collapsing" methodology. Finally, the court addresses plaintiff's second claim, which claim is the basis for plaintiff's motion for judgment upon the agency record.

Under the procedure set forth in the Department's regulations, Commerce in some circumstances will "collapse" a producer of subject merchandise and producers affiliated with that producer, *i.e.*, treat the producer and its affiliated producers as a single entity, in an antidumping duty investigation or review. *See id*. § 351.401(f)(1). Specifically, under 19 C.F.R. § 351.401(f)(1), "the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes

that there is a significant potential for the manipulation of price or production." *Id*. The Department's regulation on collapsing further provides that:

> [i]n identifying a significant potential for the manipulation of price or production, the factors the Secretary may consider include:
>
> (i) The level of common ownership;
>
> (ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and
>
> (iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

Id. § 351.401(f)(2). In the fourth administrative review, Commerce "collapsed" COFCO with Chinese producers, and also with Chinese exporters, of the subject merchandise. *Final Results*, 69 Fed. Reg. at 54,639. Commerce determined COFCO to be affiliated with these other producers and exporters, a determination that COFCO did not contest in the administrative review and does not challenge before the court. *See id*. In making the determination that COFCO and the various producers and other exporters were affiliated for purposes of the antidumping laws, Commerce applied criteria set forth in 19 U.S.C. § 1677(33) (2000).[2] *See id*.; *Prelim. Results*, 69 Fed. Reg. at 10,413–14.

The regulation on collapsing does not expressly limit the use of the collapsing methodology to antidumping cases involving merchandise from market economy countries. In fact, Commerce has applied the collapsing regulation to merchandise from nonmarket economy countries even though the method for determining normal value in a nonmarket economy country is substantially different from the

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[2] In relevant part, 19 U.S.C. § 1677(33) defines "affiliated persons," stating that

> [t]he following persons shall be considered to be "affiliated" or "affiliated persons":
>
> . . . .
>
> (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.
>
> (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
>
> (G) Any person who controls any other person and such other person.

19 U.S.C. § 1677(33)(E)–(G) (2000). The section further provides that "[f]or purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." *Id*. § 1677(33).

method applied to merchandise from a market economy country. *See*, *e.g.*, *Hontex Enters., Inc. v. United States*, 27 CIT 272, 288–97, 248 F. Supp. 2d 1323, 1337–44 (2003) (comparing the application of the collapsing methodology in market and nonmarket economy cases). If the subject merchandise is produced in and exported from a country that Commerce considers to be a nonmarket economy country, such as China, Commerce usually calculates the normal value of the subject merchandise according to a factors-of-production method specified by statute. *See* 19 U.S.C. § 1677b(c)(1) (2000). Under this method, the Department identifies and quantifies the factors of production[3] utilized in producing the subject merchandise. *Id*. § 1677b(c)(1), (3)–(4). The Department then determines values for these factors based on the best available information pertaining to a market economy country that is at a level of economic development comparable to that of the nonmarket economy country and that is a significant producer of either the subject merchandise or comparable merchandise.[4] *See id.* § 1677b(c)(4). Specifically, the statute provides that where the subject merchandise is exported from a nonmarket economy country and Commerce finds (as it did in this case) that available information does not permit normal value to be determined according to the usual method as provided in 19 U.S.C. § 1677b(a), "the administering authority shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *Id*. § 1677b(c)(1). Unless Commerce finds that available information is inadequate for doing so (a finding Commerce did not make in this case), Commerce is to value the factors of production based on the best available information regarding the values of such factors in the surrogate country or countries that Commerce chooses (i.e., in this case, India). *See id*. § 1677b(c)(1)–(2); *Prelim. Results*, 69 Fed. Reg. at 10,420.

In the fourth administrative review, Commerce invoked its collapsing authority under 19 C.F.R. § 351.401(f) in determining the normal value of COFCO's exports of subject merchandise according to factor-of-production data pertaining to two Chinese mushroom producers, Yu Xing and Fujian Zishan. *See Prelim. Results*, 69 Fed. Reg. at 10,413–14, 10,420; *COFCO Calculation Mem.* 2–3. Com-

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[3] As specified by the statute, the non-exhaustive list of factors of production subject to valuation includes the hours of labor required to produce the merchandise, the quantities of raw materials used, the amount of energy and other utilities consumed in the production process, and any representative capital cost, including depreciation. 19 U.S.C. § 1677b(c)(3) (2000).

[4] In the fourth administrative review, Commerce chose India as the "surrogate" market economy country for purposes of valuing the factors of production. *Prelim. Results*, 69 Fed. Reg. at 10,420.

merce did so even though COFCO reported (and Commerce found) that all subject merchandise that COFCO exported to the United States market during the period of review was produced by Yu Xing. *See Prelim. Results*, 69 Fed. Reg. at 10,413; *Decision Mem.* at 11–12. More broadly, Commerce applied its collapsing method in the Final Results in deciding to treat COFCO and its two affiliated exporters, China National and Xiamen Jiahua, and producers Yu Xing, Fujian Zishan, and Zhangzhou, as a single entity, subjecting COFCO and the companies affiliated with COFCO to COFCO's antidumping duty rate. *Final Results*, 69 Fed. Reg. at 54,639, 54,641.

Upon applying the criteria of 19 C.F.R. § 351.401(f), Commerce concluded that "the first and second collapsing criteria are met here because [Yu Xing, Fujian Zishan, and Zhangzhou] are affiliated . . . and all have production facilities for producing similar or identical products that would not require substantial retooling in order to restructure manufacturing priorities . . . ." *Prelim. Results*, 69 Fed. Reg. at 10,414 (citing *Fourth Supplemental Resp. Part II*). Commerce concluded that "the third collapsing criterion is met in this case because a significant potential for manipulation of price or production exists among [Yu Xing, Fujian Zishan, and Zhangzhou]" due to common ownership, common control through a common member of the board of directors and a general manager shared by two of the companies, and operations found to be "sufficiently intertwined." *Id*. at 10,413–14. On the issue of "sufficiently intertwined" operations, Commerce found that "COFCO has shifted its source of supply among these affiliates." *Id*. at 10,414. Commerce explained that it used Fujian Zishan's factors-of-production data during the investigation to determine COFCO's dumping margin and "that during the POR Fujian Zishan supplied preserved mushrooms to Xiamen Jiahua, and Yu Xing supplied preserved mushrooms to COFCO . . . ." *Id*. (citing *Fourth Supplemental Resp. Part II*, Ex. 1 and *Second Supplemental Resp.* at 4). In the Final Results, Commerce affirmed its conclusions regarding collapsing of the affiliated producers and included the two affiliated exporters in the collapsed entity. "We note that our rationale for collapsing, *i.e.*, to prevent manipulation of price and/or production, applies to both producers and exporters, if the facts indicate that producers of like merchandise are affiliated as a result of their mutual relationship with an exporter." *Final Results*, 69 Fed. Reg. at 54,639.

In its complaint, plaintiff alleges as its first claim that "[t]he Department's findings, determinations, and conclusion that Yu Xing, Fujian Zishan, and [Zhangzhou] had production facilities for producing similar or identical products that would not require substantial retooling in order to restructure manufacturing priorities, were not supported by substantial evidence and/or otherwise not in accordance with law." Compl. ¶ 13. As stated previously, COFCO expressly declined to pursue this claim in moving for judgment upon

the agency record, stating in its memorandum in support of its motion that it "has dropped one of the issues previously identified" and that "[t]he Rule 56.2(c) statement therefore supersedes the Statement of Claims filed earlier." COFCO's Mem. of P. & A. 1 n.1. Because plaintiff did not include its first claim in its motion for judgment upon the agency record, that claim is not before the court.

The Court of International Trade previously has addressed the general issue of whether Commerce may determine normal value according to 19 U.S.C. § 1677b(c)(1) on the basis of the value of factors of production that pertained to an affiliated producer that did not actually produce the subject merchandise exported to the United States but that Commerce collapsed with the actual producer. *See Anshan Iron & Steel Co. v. United States*, 27 CIT 1234, 1254 (2003) (concluding that no language in the statute supports the proposition that Commerce must exclude from the calculation of normal value the factors of production of non-exporting subsidiaries that manufactured the subject merchandise during the period of investigation). The Department's method of determining the normal value of COFCO's merchandise in the fourth administrative review appears to be similar to the method that was at issue in *Anshan Iron & Steel Co*. *See id.* at 1254–55. However, the court will not address the issue of whether the Department's method of determining normal value on the record of this case was consistent with 19 U.S.C. § 1677b(c) and related provisions because COFCO has not raised this issue in moving for judgment upon the agency record. COFCO's memorandum in support of its motion makes plain that COFCO is not challenging on the merits the method by which Commerce calculated the normal value of its merchandise. *See* COFCO's Mem. of P. & A. 1 & n.1.

Under USCIT Rule 56.2(c), a party moving for judgment upon the agency record must state in its brief the issues of law presented together with the reasons for contesting or supporting the administrative determination. USCIT R. 56.2(c). Nowhere in plaintiff's memorandum in support of its motion for judgment upon the agency record does the court find any argument by plaintiff that the Department's method of determining normal value in the fourth administrative review was impermissible according to 19 U.S.C. § 1677b(c) and related provisions of the antidumping laws. In abandoning the first claim set forth in its complaint, COFCO signifies that it is no longer challenging the Department's finding, pursuant to 19 C.F.R. § 351.401(f), that Yu Xing and Fujian Zishan had production facilities for producing similar or identical products that would not require substantial retooling in order to restructure manufacturing priorities, a finding that was a basis for the Department's decision to determine normal value based on factors-of-production data of both Yu Xing and Fujian Zishan.

COFCO confined its Rule 56.2 motion to the second claim in its complaint, which is that "[t]he Department's decision to implement a

new normal value calculation methodology that created dumping margins for merchandise that already had entered the United States when Plaintiff China Processed had relied on the Department's previous methodology in order to avoid just such an outcome is unreasonable, inequitable, an abuse of discretion, and not in accordance with law." Compl. ¶ 15. COFCO pursues this claim in seeking relief under Rule 56.2, arguing that Commerce, in applying retroactively a new methodology for calculating normal value, unfairly penalized COFCO, which had detrimentally relied on the old methodology to avoid selling subject merchandise in the United States at less than fair value. COFCO's Mem. of P. & A. 10. Relying on *Shikoku Chemicals Corp. v. United States*, 16 CIT 382, 795 F. Supp. 417 (1992), and *IPSCO, Inc. v. United States*, 12 CIT 359, 687 F. Supp. 614 (1988), COFCO argues that it was unfair of Commerce to change its methodology for calculating normal value when the facts had not changed and when COFCO had relied on the old methodology, *i.e.*, a methodology that did not employ collapsing, in exporting subject merchandise to the United States. COFCO's Mem. of P. & A. 10–11, 15.

As relief, COFCO seeks a court order remanding the Final Results to Commerce "with instructions (1) to calculate the normal value of COFCO's sales of subject merchandise during the fourth administrative review period using only the factor data of Yu Xing, and (2) to implement only prospectively its new methodology." *Id*. at 15. By seeking relief under which the court would direct Commerce to implement the collapsing methodology "only prospectively," COFCO suggests that it views as lawful the method by which Commerce determined normal value, *i.e.*, by using factors-of-production data of both Yu Xing and Fujian Zishan even though only Yu Xing produced the subject merchandise that COFCO exported to the United States market during the period of review. *See id.*; *see also* Reply Br. in Further Supp. of COFCO's Mot. for J. upon the Agency R. 1 ("reiterating at the outset that COFCO is not challenging Commerce's affiliation determination in the underlying proceeding. Nor is COFCO challenging Commerce's authority to collapse COFCO and its affiliated producers in future administrative reviews for purposes of calculating the appropriate antidumping duty margin.") ("COFCO's Reply"). COFCO objects only to what it characterizes as a retroactive application of a new methodology that, if applied prospectively, would have been acceptable. COFCO's Mem. of P. & A. 15. According to plaintiff, "in the face of years of acceptance of [the Department's] prior approach, Commerce may not implement a new methodological change retroactively." *Id*. at 14. When applied in the fourth administrative review, the collapsing procedure was, according to COFCO, unfair because COFCO, desiring to avoid selling merchandise in the United States at less than fair value, had relied on the Department's previous methodology, which did not use the collapsing procedure. *Id*. at 11–15. Rather than raise a substantive objection to the new method-

ology, COFCO's remaining claim takes issue only with the Department's decision to discontinue using the old, non-collapsing methodology.

COFCO's characterization of the change in the Department's method as "retroactive" does not, by itself, convince the court that Commerce abused its discretion or otherwise acted contrary to law in deciding to discontinue using its previous method. Antidumping duties are administered according to a retrospective, remedial duty assessment system. The Court of International Trade has observed previously that "[t]he absence of certainty regarding the dumping margins and final assessment of antidumping duties is a characteristic of the retrospective system of administrative reviews designed by Congress." *Abitibi-Consol. Inc. v. United States*, 30 CIT ___, ___, 437 F. Supp. 2d 1352, 1361 (2006). Retroactivity is inherent in this system in that the Department's determinations made during the administrative review necessarily apply to merchandise previously exported from the producing country and entered into the United States. Even if COFCO relied to its detriment on the continuation of the method applied in the investigation and the first administrative review (as it claims), that reliance is not, by itself, sufficient to entitle COFCO to relief that would reverse the Department's decision in the fourth administrative review to depart from that method, under the retrospective statutory scheme. Commerce invoked its collapsing procedure in the fourth administrative review after making certain findings of fact that it did not make on the record of the investigation or the record of the first administrative review and did not have occasion to make in the second and third administrative reviews, which did not include a review of COFCO's sales. Commerce proceeded with its collapsing analysis, invoking a procedure that it had established previously by regulation, on the basis of those findings of fact and on the basis of conclusions of law, which findings and conclusions COFCO has declined to challenge in moving for judgment upon the agency record.

The court disagrees with plaintiff's argument that the court, based on guidance drawn from the holding of the Court of International Trade in *Shikoku*, should conclude that Commerce abused its discretion and acted unreasonably by deciding to depart from a methodology that it had employed previously and on which COFCO had relied. *See* COFCO's Mem. of P. & A. 13–15; *Shikoku*, 16 CIT 382, 795 F. Supp. 417. The court concludes that the facts and circumstances of *Shikoku* differ in material respects from those giving rise to this case.

In *Shikoku*, Commerce established a dumping margin of 9.66 percent for the plaintiffs' sales of dichloro isocyanurates ("DCA") in the first administrative review of an antidumping duty order on cyanuric acid and its chlorinated derivatives, DCA and trichloro isocyanuric acid, from Japan. 16 CIT at 383, 795 F. Supp. at 418. For

plaintiffs' sales of DCA, Commerce determined a *de minimis*[5] margin in the second administrative review and assigned margins of zero for the third and fourth administrative reviews. *Id*. As discussed in *Shikoku*, the Department's regulations, 19 C.F.R. § 353.25(b)(1) (1991), allowed Commerce to revoke the "antidumping duty order if the subject merchandise ha[d] not been sold at less than foreign market value for three years subsequent to the publication of the order." *Id*. at 384 n.4, 795 F. Supp. at 418 n.4. In the fifth and sixth administrative reviews, however, Commerce changed the methodology that it had used in the investigation and in the first four administrative reviews in calculating a deduction from home market value for certain expenses that plaintiff *Shikoku* incurred when repackaging DCA from a granular form suitable for export to a form suitable for home market sale. *Id*. at 383–84, 795 F. Supp. at 418. Commerce determined antidumping duty margins of 0.81 and 0.91 percent for plaintiffs' sales of DCA in the fifth and sixth administrative reviews, respectively, and refused plaintiffs' request to revoke the antidumping duty order as to DCA. *Id*. By changing its methodology, Commerce attempted to eliminate from the calculation of the repackaging deduction certain labor expenses that were directly attributable to making tablets and to tablet repackaging, recognizing that plaintiffs exported chlorinated derivative products to the United States only in granular, not tablet, form. *Id*. at 384–86, 795 F. Supp. at 418–20. The plaintiffs in *Shikoku* argued that the new methodology was rife with inconsistencies and errors and did not result in a more accurate calculation of the repackaging deduction than the previous method. *Id*. They argued, further, that they had been unfairly penalized because Commerce applied the new methodology retroactively in spite of their reliance on the old methodology. *Id*. at 386–88, 795 F. Supp. at 420–22.

The Court of International Trade in *Shikoku* explained that the government had not clearly demonstrated that the new methodology was an improvement over the old but that "it appears that expenses of making tablets were significant so it is likely that there was a marginal increase in accuracy." *Id*. at 386, 795 F. Supp. at 420. The Court also found that plaintiffs had demonstrated their reliance on the old methodology by adjusting their pricing accordingly. *Id*. The Court reasoned that "[i]t [wa]s simply too late to mandate another three years of administrative reviews because of a last minute 'improvement' in Commerce's methodology" and that "[p]laintiffs' reliance, the unchanged fact pattern, and the lack of discovery of significant error lead the court to conclude that Commerce did not have

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[5] In administrative reviews conducted under 19 U.S.C. § 1675(a), "the Secretary will treat as *de minimis* any weighted-average dumping margin or countervailable subsidy rate that is less than 0.5 percent *ad valorem*, or the equivalent specific rate." 19 C.F.R. § 351.106(c)(1) (2004).

adequate reasons for its last minute change in methodology." *Id*. at 388, 795 F. Supp. at 422. The Court concluded that "Commerce abused its discretion and acted unreasonably in changing its . . . methodology . . . in the latest reviews, thereby preventing [Shikoku] from qualifying for consideration for revocation." *Id*. at 388–89, 795 F. Supp. at 422.

COFCO, unlike the plaintiffs in *Shikoku*, declined to challenge on the merits a new methodology employed by the Department. This is significant because the reasoning in *Shikoku* depended in part on the Court's conclusions, reached based on plaintiffs' having challenged the new methodology on the merits, that the government had not clearly demonstrated that the new methodology was an improvement and that the new methodology yielded what appeared to be only a marginal increase in accuracy over the old methodology, concerning which no significant error had been discovered. In this case, the court declines to reach a conclusion on the issue of the relative merits of the old and new methodologies because plaintiff decided not to make this issue the basis of its motion for judgment upon the agency record.

Moreover, COFCO did not have a basis for reliance equivalent to that found to exist in *Shikoku*, in which the previous methodology had been used, without change, in the investigation and in each of the first four administrative reviews. In *Shikoku*, after assigning plaintiffs zero margins in the third and fourth administrative reviews, Commerce assigned plaintiffs margins above the *de minimis* level in the fifth and sixth administrative reviews after making the change in methodology. In contrast, prior to the fourth administrative review at issue in this case, Commerce calculated margins for COFCO only in the investigation and in the first administrative review. As discussed previously, Commerce rescinded the second and third administrative reviews as to COFCO upon the withdrawal of petitioner's requests. COFCO could have, but did not, request review of its sales in the second and third administrative reviews. In *Shikoku*, Commerce employed a last-minute change after an investigation and four administrative reviews, which change likely (although not definitely) produced a marginal increase in accuracy and had the result of precluding the opportunity for revocation of the antidumping duty order. A similar basis for reliance does not exist in this case.

COFCO also cites *IPSCO* in support of its argument that retroactive application of the Department's new methodology was not fair in this case, where the facts had not changed and where COFCO had relied on the old methodology. *See* 12 CIT at 378 n.27, 687 F. Supp. at 631 n.27. The plaintiffs in *IPSCO* claimed that the Department's use of certain new methodologies in a countervailing duty investigation unfairly altered plaintiffs' countervailing duty liabilities retroactively. *Id*. The new methodologies at issue postdated the grants that

resulted in the countervailing duty investigation and were set forth in an appendix ("Subsidies Appendix") that was not the subject of notice-and-comment rule making. *Id*. at 378 & n.27, 687 F. Supp. at 630–31, 631 n.27. The *IPSCO* plaintiffs claimed prejudicial reliance on the old methodologies, under which, they alleged, they would not have incurred countervailing duty liability. *Id*. at 378 n.27, 687 F. Supp. at 631 n.27. They argued that retroactive application of the new methodologies, given their reliance, was impermissible unless such application produced benefits outweighing the resulting prejudice. *Id*.

The holding in *IPSCO* does not convince the court that COFCO is entitled to relief on the record of this case. The Court of International Trade held in *IPSCO* that one aspect of the new methodologies established by the Subsidies Appendix, the use of a fifteen-year period for the allocation of benefits from grants, was a legislative rule that was not adopted following the notice-and-comment procedures that were required by the Administrative Procedure Act ("APA"), but that other aspects of the Subsidies Appendix were exempt from the APA notice-and-comment requirements because they were interpretive rules. *Id*. at 373–78, 687 F. Supp. at 626–31. The Court rejected the plaintiffs' retroactivity argument in a footnote, concluding that the plaintiffs failed to demonstrate actual prejudicial reliance on the old methodologies that were in use prior to the Department's issuance of the Subsidies Appendix. *Id*. at 378 n.27, 687 F. Supp. at 631 n.27. The Court of International Trade in *IPSCO* did not further consider the plaintiffs' retroactivity claim and thus did not, in formulating its holdings in the case, decide the question of whether the change in methodology would have been impermissible on retroactivity grounds had prejudicial reliance been demonstrated.

In support of its motion for judgment upon the agency record, plaintiff also cites *Fujian Machinery and Equipment Import & Export Corp. v. United States*, 25 CIT 1150, 1169–70, 178 F. Supp. 2d 1305, 1327 (2001), and *Slater Steels Corporation v. United States*, 28 CIT 340, 345, 316 F. Supp. 2d 1368, 1374 (2004), for the principle that an agency discarding one methodology in favor of another must state clearly the grounds for its departure from prior norms. COFCO's Mem. of P. & A. 11. However, plaintiff, in its memorandum in support of its Rule 56.2 motion, does not set forth an argument that Commerce, in the Final Results, failed to state its reasons for applying in the fourth administrative review a collapsing analysis that it did not apply previously to COFCO and its affiliates. Only in its reply brief, when attempting to refute defendant's argument that *Shikoku* is inapposite to this case, did plaintiff argue that Commerce failed to explain "its implied conclusion that the methodological change in the underlying proceeding was either necessary or better" and that Commerce, in citing a potential for manipulation of price or production, "has cited no specific facts or record evidence that actual

manipulation of price or production occurred." COFCO's Reply 3–4 (entitling the section in its reply brief containing the above-quoted statement as "The Court's Holding in *Shikoku Chem. Corp. v. United States* is Applicable to the Present Case"). The court does not construe the quoted language as an attempt, impermissible or otherwise, to raise in a reply brief a new substantive argument. In the same reply brief, plaintiff stated explicitly that it was declining to raise the substantive argument discussed previously, "reiterating at the outset that COFCO is not challenging Commerce's affiliation determination in the underlying proceeding. Nor is COFCO challenging Commerce's authority to collapse COFCO and its affiliated producers in future administrative reviews for purposes of calculating the appropriate antidumping duty margin." *Id*. at 1. Moreover, as also discussed previously, plaintiff abandoned its claim in the complaint challenging the Department's finding that Yu Xing, Fujian Zishan, and Zhangzhou had production facilities for producing similar or identical products that would not require substantial retooling in order to restructure manufacturing priorities. *See* COFCO's Mem. of P. & A. 1 & n.1.

Later, in a supplemental brief responding to a question of the court concerning the issue of notice for a change in methodology, plaintiff characterized as "hollow" the Department's explanation that collapsing was applied in the fourth administrative review to prevent manipulation of price or production, when "the collapsing regulation and the case-specific facts relevant to a finding of affiliation among COFCO's related producers had not changed since the underlying investigation[.]" China Processed Food Import and Export Company's Resp. to the Ct.'s May 11, 2006 Questions 7 ("COFCO's Resp. to the Ct.'s Questions"). Here again, plaintiff confined its terse argument to the issues of its reliance on the old methodology and the timing of the change rather than to the question of whether the new methodology, regardless of when implemented, was in accordance with the statute. "Without any explicit recognition or warning that the standard for collapsing had been changed, or any attempt to distinguish or reject apparently inconsistent precedent, Commerce applied its collapsing regulation to COFCO's affiliated producers in the underlying proceeding when it had never done so before." *Id*.

In its brief responding to the court's questions, plaintiff also cited *United States v. Midwest Oil Company*, 236 U.S. 459 (1915), for the principles that parties are justified in relying on the law in conducting their business and that repeated actions of the government can define the meaning and applicability of a particular statute or power. COFCO's Resp. to the Ct.'s Questions 4, 10. The Supreme Court in *Midwest Oil Company* affirmed the power of the President, acting without express statutory authority, to withdraw public land that otherwise would have been open to private acquisition, based on a long-standing practice under which numerous executive orders had

effected similar withdrawals. 236 U.S. at 469–74, 483. The analysis of the practice addressed in *Midwest Oil Company* – one that "date[d] from an early period in the history of the government," occurred over "eighty years," and involved hundreds of orders – does not support, even remotely, a conclusion that COFCO, in the particular context of this case, may obtain relief on an expectation that Commerce would not make a change in the methodology it employed in the investigation and the first administrative review. 236 U.S. at 469 (internal quotation marks and citations omitted).

In the same brief, plaintiff argues that the Department's departure from its earlier methodology was unfair, contrary to the principle, addressed in *Melamine Chemicals, Inc. v. United States*, 732 F.2d 924, 933 (Fed. Cir. 1984), and cited in *Budd Company v. United States*, 14 CIT 595, 602, 746 F. Supp. 1093, 1099 (1990), that Commerce has a duty to enforce the antidumping laws fairly. COFCO's Resp. to the Ct.'s Questions 13–14. In the portion of the opinion in *Melamine Chemicals* to which plaintiff directs the court's attention, the Court of Appeals for the Federal Circuit held that Commerce acted within its statutory authority in promulgating and applying a regulation under which Commerce disregarded antidumping margins caused solely by volatile and temporary exchange rate fluctuations and allowed a 90-day lag period for currency conversion that afforded an exporter a reasonable time period to adjust its prices to such fluctuations. 732 F.2d at 930–34. The holding in *Melamine Chemicals*, which turned on the breadth of Commerce's discretion in implementing the antidumping duty laws rather than limitations on Commerce's authority to make changes in its methodologies, rested on factual circumstances and issues of law dissimilar to those of this case. *Melamine Chemicals* does not support a conclusion that principles of fairness required Commerce to continue to use its earlier methodology during the fourth administrative review.

Nor is *Budd Company* instructive on the resolution of the question presented by COFCO's sole claim in this case. *See* 14 CIT 595, 746 F. Supp. 1093. In *Budd Company*, the Court of International Trade considered a circumstance-of-sale adjustment that Commerce made in an amended less-than-fair-value determination to account for extreme exchange rate fluctuations. *See id.* at 600–07, 746 F. Supp. at 1097–1103. Stating the principle that "fairness is the touchstone of Commerce's duty in enforcing the antidumping laws[,]" the Court explained that "courts will not sanction Commerce's use of circumstance of sale adjustments if to do so would bring about results which appear to be entirely absurd and unfair." *See id.* at 602, 746 F. Supp. at 1099 (internal quotation marks and citations omitted). The Court nonetheless held that the Department's use of the circumstance-of-sale adjustment in the determination was reasonable and not a violation of the APA's required procedures for notice and public comment. *See id.* at 600–07, 746 F. Supp. at 1097–1103.

Although stating the general principle of fairness in the administration of the antidumping laws that plaintiff has cited, *Budd Company* does not lend support to plaintiff's specific argument in this case.

III. CONCLUSION

For the reasons discussed above, the court rejects plaintiff's claim that Commerce acted unfairly and abused its discretion in deciding to depart from a method of determining normal value on which plaintiff asserts that it relied. The court therefore will deny plaintiff's motion for judgment upon the agency record. Under the authority of USCIT R. 56.2(b), the court will enter judgment dismissing this action. *See* USCIT R. 56.2(b) (allowing the court, in ruling on a motion for judgment upon the agency record, to enter judgment in favor of an opposing party).

SLIP OP. 08–17

TROPICANA PRODUCTS, INC., Plaintiff, and LOUIS DREYFUS CITRUS, INC., and FISCHER S/A AGROINDUSTRIA, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and A. DUDA & SONS, INC., CITRUS WORLD, INC., FLORIDA CITRUS MUTUAL, SOUTHERN GARDENS CITRUS PROCESSING CORP., and THE COCA-COLA COMPANY, Defendant-Intervenors.

Before: Jane A. Restani, Chief Judge
Court No. 06–00109
Public Version

[Defendant United States' determination on remand of material injury by reason of subject imports affirmed.]

Dated: February 5, 2008

Neville Peterson, LLP (*John M. Peterson*, *Catherine C. Chen*, *George W. Thompson*, and *Michael K. Tomenga*) for the plaintiff.

Vinson & Elkins, LLP (*Christopher A. Dunn* and *Valerie S. Ellis*) for the plaintiff-intervenor Louis Dreyfus Citrus, Inc.

Kalik Lewin (*Robert G. Kalik* and *Brenna S. Lenchak*) for the plaintiff-intervenor Fischer S/A Agroindustria.

Jeffrey S. Bucholtz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael J. Dierberg*) for the defendant.

James M. Lyons, General Counsel, U.S. International Trade Commission (*David A.J. Goldfine* and *Andrea C. Casson*) for the defendant.

Barnes, Richardson & Colburn (*Stephen W. Brophy*) for the defendant-intervenors

A. Duda & Sons, Inc., Citrus World, Inc., Florida Citrus Mutual, and Southern Gardens Citrus Processing Corp.

Crowell & Moring, LLP (*Jeffrey L. Snyder* and *Alexander H. Schaefer*) for the defendant-intervenor the Coca-Cola Company.

OPINION

Restani, Chief Judge: This matter arises from plaintiff Tropicana Products, Inc.'s ("Tropicana") challenge to the International Trade Commission's ("Commission") affirmative material injury determination with respect to certain orange juice from Brazil. After two remand orders by the court for the Commission to reconsider and explain its determination, *see Tropicana Products, Inc. v. United States*, 484 F. Supp. 2d 1330, 1353–54 (CIT 2007) ("*Tropicana I*"); *Tropicana Products, Inc. v. United States*, Slip Op. 07–141, 2007 WL 2717874, at *13 (CIT 2007) ("*Tropicana II*"), the Commission again issued an affirmative determination, *Certain Orange Juice From Brazil*, USITC Pub. 3958, Inv. No. 731–TA–1089 (Oct. 2007) ("*Second Remand Determination*"). In the *Second Remand Determination*, the Commission addressed the court's concerns and supported its conclusions with substantial evidence. The court will therefore affirm the Commission's determination.

BACKGROUND

This matter began in December 2004, when several domestic producers of certain orange juice petitioned the Commission and the Department of Commerce ("Commerce"), alleging material injury or threat of material injury by reason of imports of certain orange juice from Brazil. *See Tropicana I*, 484 F. Supp. 2d at 1332–33. Following Commerce's investigation and determination that certain orange juice from Brazil was being sold at less than fair value ("LTFV"), *see Certain Orange Juice From Brazil*, 71 Fed. Reg. 2,183 (Dep't Commerce Jan. 13, 2006) (notice of final determination of sales at less than fair value and affirmative final determination of critical circumstances), the Commission issued an affirmative material injury determination on the basis of data from crop years ("CY") 2001/02 through 2004/05. *See Certain Orange Juice From Brazil*, USITC Pub. 3838, Inv. No. 731–TA–1089 (Mar. 2006) ("*Original Determination*").

Tropicana challenged the Commission's determination, and the court remanded the decision with instructions for the Commission to reconsider "the full effects of a shortage in the supply of domestic round oranges, and how that affects the Commission's volume and price effects analysis[;]" "the opposition to the petition by a large portion of the domestic industry; whether, if prices were adjusted to account for the LTFV margin, non-subject imports would displace subject imports; and its price suppression analysis." *Tropicana I*, 484 F.

Supp. 2d at 1353. "Given the relatedness of the issues," the court asked the Commission to "consider the totality of the evidence anew." *Id*.

On the first remand, the Commission reconsidered each issue and maintained its affirmative material injury determination.[1] *Certain Orange Juice From Brazil*, USITC Pub. 3930, Inv. No. 731–TA–1089 (June 2007) ("*First Remand Determination*"). Tropicana challenged the Commission's determination, and the court again remanded for the Commission to explain "its conclusions as to the inverse correlation between subject imports and domestic production," and to conduct a sufficient analysis under *Bratsk Aluminium Smelter v. United States*, 444 F.3d 1369 (Fed. Cir. 2006). *Tropicana II*, at *13. The court noted that " 'in any remand,' " the Commission considers " 'the entire record in light of any new findings' it has made." *Id.* at *13 n.11 (quoting *First Remand Determination*, at *15–16).

On the second remand, the Commission addressed the issues raised in *Tropicana II* and again reached an affirmative material injury determination. *See Second Remand Determination*, at *1. Subject to its updated findings and explanations, the Commission also adopted the views expressed in the *Original Determination* and *First Remand Determination. Id*. Tropicana contests the Commission's determination, arguing that the Commission's analysis is erroneous and unsupported by record evidence.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000). The court will uphold the Commission's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000).

DISCUSSION

As stated in *Tropicana I* and *II*, to reach an affirmative determination, the Commission must find a " 'present material injury or a threat thereof,' " and "causation of such harm by reason of subject imports." *Tropicana I*, 484 F. Supp. 2d at 1333 (quoting *Hynix Semiconductor, Inc. v. United States*, 431 F. Supp. 2d 1302, 1306 (CIT 2006)); *see also Tropicana II*, at *5. The Commission must consider: "(I) the volume of imports of the subject merchandise, (II) the effect of imports of that merchandise on prices . . . for domestic like products, and (III) the impact of imports of such merchandise on domestic producers of domestic like products, but only in the context of pro-

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[1] In each determination, three Commissioners reached affirmative determinations, and three Commissioners reached negative determinations. *See Second Remand Determination*, at *1 n.2, n.3. Under 19 U.S.C. § 1677(11), a tie vote is deemed an affirmative determination. 19 U.S.C. §1677(11) (2000).

duction operations within the United States," 19 U.S.C. § 1677(7)(B)(i), and "must analyze contradictory evidence or evidence from which conflicting inferences could be drawn, to ensure that the subject imports are causing the injury," *Taiwan Semiconductor Indus. Ass'n v. ITC*, 266 F.3d 1339, 1345 (Fed. Cir. 2001) (citations and quotation marks omitted). The Commission must show that the harm is "not inconsequential, immaterial, or unimportant," 19 U.S.C. § 1677(7)(A), and that there is a "causal — not merely temporal — connection between the [subject imports] and the material injury," *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997).

I. Inverse Correlation Between Domestic Production and Subject Imports

In *Tropicana II*, the court noted that data provided in a footnote in the *First Remand Determination* failed to support the Commission's finding that, " '[t]o the extent there is an inverse correlation between domestic production and subject imports, . . . the magnitude of any such correlation is questionable on this record [because] [s]ubject import volumes were virtually identical in two crop years when domestic production levels varied substantially.' " *Tropicana II*, at *6–7 (quoting *First Remand Determination*, at *8–9 n.47). The court stated that it "is uncertain how the Commission obtained its data regarding domestic production," and remanded for the Commission to reconsider the apparent inverse correlation between subject imports and domestic production levels. *Tropicana II*, at *7–8.

In the *Second Remand Determination*, the Commission explained that, in the footnote in question, it had "inadvertently referenced data concerning domestic *orange production* rather than the data it had otherwise relied upon elsewhere in its determination concerning domestic *orange juice production*."[2] *Second Remand Determination*, at *2. Using the correct data,[3] the Commission again found that

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[2] The Commission also noted that:

> [T]he same point is true even when domestic production is measured by the volume of oranges, a measure which makes some sense given that respondents' arguments focus on the alleged shortages in domestic orange juice production due to diminished orange crops. Despite substantial fluctuations in orange crop levels in crop years 2002/03 and 2004/05, subject imports were virtually identical in those two crop years. In crop year 2002/03, the Florida orange crop totaled 203.0 million boxes, while subject imports totaled 227.3 million gallons SSE. In crop year 2004/05, the Florida orange crop totaled 149.6 million boxes, while subject imports totaled 231.7 million gallons SSE. . . . In other words, regardless of whether domestic orange juice production or domestic orange production is examined, the end result is the same: subject imports were at virtually consistent levels in two crop years, while domestic production of oranges and orange juice varied substantially.

Second Remand Determination, at *2 n.5.

[3] The Commission stated that:

> Throughout the first remand determination, as in the original determination, the Commis-

"subject import volumes were virtually identical in two crop years when domestic orange juice production varied substantially, thereby attenuating the magnitude of any inverse correlation between domestic production and subject imports." *Id*. The Commission concluded that, to the extent that there existed an apparent inverse correlation as noted by the court, such correlation was outweighed by other evidence on the record indicating that "the volume of subject imports was significant, and injurious to the domestic industry, throughout the POI [period of investigation]." *Id*. at *3.

In support of its conclusion, the Commission pointed to evidence on the record showing that "increases in subject imports were [not] solely or even primarily the result of declines in domestic production, because there were other factors in play." *Id*. The Commission noted that, "notwithstanding any inverse relationship between subject imports and domestic production, the record reflects a more significant, . . . positive[ ] correlation among subject imports, subject merchandise inventory, and Brazilian production of orange juice." *Id.*; *see also First Remand Determination*, at *12–13 (citing *Original Determination* (Confidential), at Tables VII–5, C–3). The Commission explained that "this positive correlation strongly suggests that . . . subject imports were [not] merely 'pulled' into the market to offset a domestic supply shortfall." *Second Remand Determination*, at *3. In addition, the Commission noted "ample evidence in the record demonstrating that the volume of subject imports entering the U.S. market in the final crop year after the hurricanes . . . was higher than necessary to meet residual demand and limited the ability of domestic producers to sell their total available supply, inclusive of inventories, in the domestic market." *Id.*; *see also First Remand Determination*, at *13–14; *Original Determination*, at Table IV–6.

Although the Commission could have provided more discussion of the possible causes of the apparent inverse correlation between subject import volume and domestic production as raised in *Tropicana I* and *II*, the court finds that the Commission's explanation is sufficient, and the determination is supported by substantial evidence on the record. While the court could draw a different conclusion from the evidence presented, " 'the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.' " *Al-*

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sion found that domestic production of certain orange juice fell from 1.43 billion gallons SSE in crop year 2001/02 to 1.25 billion gallons SSE in crop year 2002/03, increased to 1.47 billion gallons SSE in crop year 2003/04, and dropped to 1.01 billion gallons SSE in crop year 2004/05. . . . The Commission intended to reference this domestic orange juice production data in footnote 47 just as it did in all other instances in which it discussed production data.

Second Remand Determination, at *2. These numbers are the same as those noted by the court in *Tropicana I* and *II*. *See*, *e.g.*, *Tropicana II* at *7–8.

legheny Ludlum Corp. v. United States, 475 F. Supp. 2d 1370, 1374 (CIT 2006) (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). Accordingly, the Commission's conclusion on this issue is affirmed.

II. Non-Subject Imports

In *Tropicana II*, the court also instructed the Commission to reconsider its finding that non-subject imports were " 'not a significant factor in the U.S. market,' " pursuant to the requirements of *Gerald Metals*, 132 F.3d at 720, and *Bratsk*, 444 F.3d 1369, 1373. *Tropicana II*, at *8–9, 13 (quoting *First Remand Determination*, at *18). The court found that, although the Commission performed both steps of the *Bratsk* analysis in the *First Remand Determination*, as required by *Tropicana I*, the Commission "did not base its conclusion of insignificance on substantial evidence." *Tropicana II*, at *11. The court stated in *Tropicana II* that it "cannot accept the Commission's conclusion that the volume of non-subject imports comprising only a slightly smaller percentage of apparent consumption and as much as 40.8% in the first year of the POI of all imports is insignificant," based on the evidence provided in the *First Remand Determination*. *Id.* (citing *First Remand Determination*, at Table I–5). The court again remanded for the Commission to "examine whether non-subject imports would replace subject imports if prices of subject imports reflected fair value." *Id*. at *12.

In the *Second Remand Determination*, the Commission "examined non-subject imports, both individually and collectively, from the only non-subject Brazilian producer (*i.e.*, Citrovita) and the three primary non-subject country suppliers (*i.e.*, Belize, Costa Rica, and Mexico)," and concluded that non-subject imports would not have replaced subject imports during the period of investigation. *Second Remand Determination*, at *4, 7.

With respect to the non-subject Brazilian producer, the Commission found that Citrovita "[[ ]][4] orange juice to the United States [[ ]] during the POI," indicating that it "made a strategic decision to [[ ]] exporting orange juice to the United States while it was subject to an antidumping duty order in another [unrelated] investigation." *Second Remand Determination* (Confidential), at *6–7. The Commission found that "[t]here is no reason to conclude . . . that Citrovita would have exported significant quantities to the United States even after revocation of that order." *Second Remand Determination*, at *4. Based on Citrovita's projected capacity utilization rates and exports to the United States in crop years 2005/06 and 2006/07,[5] the Com-

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[4] Confidential information is denoted by double brackets throughout this opinion.

[5] The Commission found that:

At several times during the POI . . . Citrovita reported capacity utilization rates exceed-

mission concluded that Citrovita's projected exports "will continue to be devoted [[ ]] for European and Asian markets." *Second Remand Determination* (Confidential), at *7. For these reasons, the Commission found that non-subject imports from Citrovita would not have substantially replaced subject imports in the U.S. market.

With respect to non-subject imports from Belize, Costa Rica, and Mexico, the Commission also found that "either individually or collectively[,] [the non-subject imports] could not have, and therefore would not have, replaced subject imports had the subject imports been fairly traded." *Second Remand Determination*, at *5. The Commission found that, "[i]n crop year 2004/05, total exports from Belize were 25,900 metric tons or 36.1 million gallons SSE," and "non-subject imports from Belize into the U.S. market were 30.4 million gallons SSE," *id.*, meaning that "any additional non-subject imports from Belize diverted to the U.S. market from other export markets could have replaced only 2.5 percent of Brazilian subject imports." *Id.* Similarly, the Commission found that "even [if] producers in Costa Rica could have shifted all of their non-U.S. exports to the United States in 2004/05, this would represent only an additional 26.5 million gallons SSE in non-subject imports from Costa Rica into the U.S. market," meaning that "any additional non-subject imports from Costa Rica . . . could have replaced only 11.4 percent of Brazilian subject imports." *Id.* The Commission determined that a shift of non-subject imports from Mexico into the U.S. market could represent "only an additional 41.1 million gallons SSE," or "17.7 percent of Brazilian subject imports in the U.S. market." *Id.* at *6. The Commission noted that "Mexican producers have limited ability to increase exports to the United States," due to fluctuations in production and increased demand in Mexico. *Id.* Accordingly, the Commission found that "non-subject imports from Belize, Costa Rica, and Mexico could not have replaced subject imports in the U.S. market," because "any additional non-subject imports from Belize, Costa Rica, and Mexico diverted from other export markets to the U.S. market could have replaced only 31.5 percent of Brazilian subject imports." *Id.*

In conjunction with its findings and explanation set forth in the *First Remand Determination*, the Commission has provided substantial evidence in support of its finding that non-subject imports would not likely replace the subject imports' market share in the U.S. market if subject imports were eliminated, as required under *Bratsk*.

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ing [[ ]] percent, indicating that it did not possess [[ ]], even without exporting [[ ]] orange juice to the United States. Likewise, Citrovita has projected [[ ]] percent capacity utilization rates in crop years 2005/06 and 2006/07 while also projecting [[ ]] exports to the United States in those two crop years.

Second Remand Determination (Confidential), at *7.

The Commission's findings with respect to non-subject imports are therefore affirmed.

III. Shortfall in the Supply of Domestic Round Oranges

In *Tropicana I*, the court instructed the Commission to reconsider the effects of the shortfall in the supply of domestic round oranges, including the Commission's findings on residual demand and the price effects of subject imports. *See Tropicana I*, 484 F. Supp. 2d at 1344, 1346. The court did not reexamine these issues in *Tropicana II*, due to its finding of significant flaws in other areas of the Commission's analysis. *See Tropicana II*, at *4.

A. Residual Demand

In *Tropicana I*, the court criticized the Commission's finding that " 'Brazilian subject imports increasingly exceeded residual demand,' " without actually calculating the level of residual demand. *Tropicana I*, 484 F. Supp. 2d at 1344 (quoting *Original Determination*, at *19). The court also instructed the Commission to examine "whether the domestic industry was importing certain orange juice from Brazil to maintain a certain level of inventories in order to deal with volatility in domestic production." *Id.* at 1345.

In the *First Remand Determination*, the Commission defined residual demand as "the difference between demand . . . and production plus available inventories."[6] *First Remand Determination*, at *3. The Commission rejected Plaintiff-Intervenor Louis Dreyfus' proposed method for treating the unused stock in inventory as a "cushion" left untouched by the domestic industry, which the Commission found erroneous because the domestic industry views inventory exceeding twenty weeks of supply as a liability. *Id.* at *5. Finding that the domestic industry "needs to have only 12 weeks available at the start of the crop year to carry the processors from October to January," the Commission designated twelve weeks from the beginning-of-period ("BOP") inventory as the amount needed as a reserve and considered any excess inventory as available for sale during the year. *Id.* at *5, 7–8.

Using these definitions, the Commission calculated the residual demand for each year of the POI by adding the amount of each year's domestic production to the BOP inventory available for sale, then subtracting the domestic consumption during that year. The results are as follows:

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[6] The Commission rejected Plaintiff-Intervenor Louis Dreyfus' proposed definition of available inventories as " 'the sum of domestic production for [one] year and the change in domestic inventory levels, whether positive or negative,' " finding that "this analysis understates by a significant amount the volume of domestic juice that is available in any given crop year to satisfy domestic consumption" and "overstates the amount of subject imports necessary to meet the residual demand." *First Remand Determination*, at *5 (quoting *Tropicana I*, 484 F. Supp. 2d at 1344 n.22).

Crop Year	Domestic Production	BOP Inventory	Assume 12 Weeks Inventory Not Available for Sale	BOP Inventory Available for Sale	Domestic Production Plus Available Inventory	Domestic Consumption	Residual Demand
2001/02	1,432,162	698,464	333,683	364,781	1,796,943	1,445,959	−350,984
2002/03	1,246,761	692,163	328,260	363,903	1,610,664	1,422,460	−188,204
2003/04	1,471,334	704,509	330,651	373,858	1,845,192	1,432,822	−412,370
2004/05	1,006,642	842,139	345,642	496,497	1,503,139	1,497,781	−5,358

Id. at *7. Based on these figures, the Commission determined that "the domestic industry had more than adequate inventory to satisfy domestic consumption during the final crop year . . . and more than adequate carryover stocks for the following crop year," and concluded that "there was no residual demand . . . needed to be met by subject imports at any time during the period." *Id.*

The court finds that the Commission applied a reasonable methodology for calculating residual demand. To determine residual demand, the Commission relied on data generated by the Department of Agriculture, which applied a similar methodology to calculate the U.S. production, supply, and distribution of certain orange juice from crop years 1989/90 through 2004/05.[7] *See id.* (citing *Original Determination*, at Table IV–6). In the Commission's determination, the BOP inventory figures represent the amount of orange juice unused in one year and available for use in the next year. *Id.*; *see also Original Determination*, at Table IV–6. The Commission reasonably considered all sources of end-of-year inventory in calculating the available supply for the next year, and did not unreasonably refuse to consider any portion of the inventory, including subject imports, as somehow unavailable for consumption.[8] Although subject imports are clearly not part of domestic production, subject imports that were brought into the U.S. during the crop year and were not completely consumed during that year would have become part of the domestic industry's inventory, and were therefore reasonably included in the BOP inventory figure for the following year.

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[7] The chart begins by looking at the BOP, which is presumably the unused amount of orange juice carried over from the previous year, for the first baseline year of CY 1989/90. *Original Determination*, at Table IV–6. The BOP is then added to domestic production and total imports to arrive at the total supply. *Id.* Exports and domestic consumption are subtracted from this amount, and the resulting figure is the ending stock, which is then used as the BOP inventory for the following year. *Id.*

[8] Tropicana argued that the Commission should not have included subject imports in the BOP inventory figures, given the premise that domestic products were sufficient to satisfy domestic demand. (*See* Pl.'s Objections to Comm'n's Remand Det., at 9, *Tropicana II*.)

In addition, the Commission's use of a twelve week reserve is supported by substantial evidence. The Commission decided to use a twelve week minimum based on the testimony of the domestic industry's economist, which stated that the industry needs only twelve weeks of inventory at the start of the crop year to ensure supply until the harvest of Hamlin oranges in January, although the industry "prefers" sixteen to twenty weeks. *First Remand Determination*, at *6. Other witnesses did not rebut this claim. *Id.* Further, although the record shows that the domestic industry never allowed BOP inventories to fall below 14.4 weeks of supply during the POI,[9] the record also shows that subject imports exceeded residual demand during the POI, even when assuming that twenty weeks of the BOP inventories were not available for sale.[10]

Accordingly, the court will affirm the Commission's calculation of residual demand as a "reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions." *Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 966 (CIT 1986).

B. Price Effect of Subject Imports

In *Tropicana I*, the court also instructed the Commission to reexamine its finding that subject imports significantly suppressed domestic prices. In particular, the court questioned "why the Commission attributed a cost-price squeeze experienced by the domestic industry to the volume of Brazilian imports entering the U.S. without examining how demand factors, such as the limited increase in domestic consumption of orange juice during the POI, may have prevented the domestic industry from raising prices." *Tropicana I*, 484 F. Supp. 2d at 1346. In addition, the court instructed the Commission to "consider how the low level of subject imports held in inven-

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[9] The Commission noted that "beginning-of-period inventory levels increased from 14.4 weeks in crop year 2001/02 to 17.7 weeks in 2002/03, then dropped slightly to 16.2 weeks in 2003/04 before rising to 24.9 weeks at the beginning of the last crop year (2004/05) covered by the POI." *First Remand Determination*, at *6.

[10] The Commission produced the following table calculating residual demand after assuming that twenty weeks of the BOP inventories were not available for sale:

Crop Year	Domestic Production	BOP Inventory	Assume 20 Weeks Inventory Not Available for Sale	BOP Inventory Available for Sale	Domestic Production Plus Available Inventory	Domestic Consumption	Residual Demand	Subject Imports
2001/02	1,432,162	698,464	556,138	142,326	1,574,488	1,445,959	−128,529	109,728
2002/03	1,246,761	692,163	547,100	145,063	1,391,824	1,422,460	30,636	227,280
2003/04	1,471,334	704,509	551,085	153,424	1,624,758	1,432,822	−191,936	154,203
2004/05	1,006,642	842,139	576,070	266,069	1,272,711	1,497,781	225,070	231,711

First Remand Determination, at *8 n.42.

tory, consisting at the most of 8.7% of the domestic inventories during the POI, and less than 5% in two of the years of the POI, contributed significantly, rather than minimally, to the suppression of domestic prices," *id.*, and to consider the "dissenting Commissioner's conclusion that monthly subject import volumes fluctuated significantly in a manner that did not correlate with fluctuations in prices." *Id.* at 1346 n.27.

In the *First Remand Determination*, the Commission addressed the court's concerns and provided a sufficient explanation for its conclusions, finding that demand factors "did not significantly contribute to the price suppression experienced by the domestic producers for two reasons." *First Remand Determination*, at *10. First, the Commission emphasized that domestic consumption had increased during the POI, which "should have made it easier for domestic producers to pass on higher costs to their customers through higher prices." *Id.* Second, the Commission stated that "domestic producers should have been capable of increasing their prices without increasing retail orange juice prices and consequently reducing downstream orange juice demand, because the gap between wholesale prices of certain orange juice and retail orange juice prices increased over the period of investigation." *Id.* at *11 (citing *Original Determination* at *23–24). The Commission found that retailers should therefore have had the "financial latitude to maintain retail orange juice prices even as domestic producers recovered their costs through higher certain orange juice prices." *Id.*

The Commission also cited additional factors, including "the domestic industry's limited capacity, the limited number of competitors, and the inelasticity of certain orange juice demand," as further evidence that domestic producers should have been able to raise certain orange juice prices without affecting retail prices of orange juice. *Id.* The Commission noted, however, that "the cost-price squeeze affecting the domestic industry intensified toward the end of the [POI], as the volume of low-priced subject imports increased more than the increase in U.S. apparent consumption." *Id.* The Commission also stated that subject imports undersold the domestic like product in forty-one out of forty-eight quarterly comparisons. *Id.* The Commission therefore concluded that "the increase in the volume of low-priced subject imports in excess of U.S. apparent consumption growth, in the absence of any residual demand that needed to be met by subject imports, contributed significantly to the domestic industry's inability to raise prices commensurate with increasing costs." *Id.*

The Commission addressed the court's concerns on how the low level of subject imports held in inventory could affect domestic prices, finding that "even a relatively modest increase in the volume of subject merchandise would likely have [had] significant price-suppressing effects in a commodity market like that for certain or-

ange juice." *Id.* The Commission reasoned that the accumulation of subject imports in domestic inventory "would have dampened demand for the domestic like product just as domestic industry costs were increasing." *Id.* at *12. The Commission found that "the timing and magnitude of the increase in subject import inventories, coupled with the price sensitivity of the certain orange juice market, contributed significantly to the domestic industry's inability to recoup higher costs through higher prices."[11] *Id.*

Because the Commission provided sufficient explanation and substantial evidence in support of its finding that demand did not significantly affect the price suppression experienced by domestic producers, the Commission's conclusion is affirmed.

IV. Domestic Industry's Opposition to the Petition

Finally, in *Tropicana I*, the court instructed the Commission to "explain why the opposition of the domestic industry did not cast doubt upon the Commission's findings." *Tropicana I*, 484 F. Supp. 2d at 1348–49. In the *First Remand Determination*, the Commission stated that "[t]he level of industry support for the petition is one factor among many," and that "the more important and objective consideration is whether the shipment, financial, market share, and inventory data demonstrate that the domestic industry as a whole suffered material injury by reason of subject imports from Brazil." *First Remand Determination*, at *14. The Commission stated that it "will not speculate on . . . the motives of certain domestic producers for opposing the petition," but noted that some of the processors opposed to the petition had "corporate ties to companies with financial interests in the production or importation of the Brazilian subject product."[12] *Id.* at *14–15. The Commission therefore maintained its determination that the domestic orange juice industry was materially injured by reason of subject imports.

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[11] The Commission also noted that "the absence of any inverse correlation between trends in subject import volume and trends in prices for the domestic like product" is insignificant because the Commission found that subject imports suppressed domestic prices, rather than depressed domestic prices. *First Remand Determination*, at *12. The Commission again emphasized that domestic prices did not increase enough to compensate for higher domestic industry costs and that the ratio of the cost of goods sold to net sales reached its highest level during crop year 2004/05, and found that the inverse correlation between trends in subject import volume and trends in prices for the domestic like product "does not capture the extent to which domestic prices were suppressed or the factors that contributed to price suppression." *Id.*

[12] The Commission found that "[[ ]] producers, accounting for [[ ]] percent of domestic production in the final crop year of the period examined, supported the petition," while "[[ ]] producers, accounting for [[ ]] percent of domestic production, opposed the petition." *First Remand Determination* (Confidential), at *23. [[ ]] of the [[ ]] opposing producers, accounting for approximately [[ ]] percent of domestic production, "have corporate ties to companies with financial interests in the production or importation of the Brazilian subject product." *Id.*

The Commission has properly considered the opposition to the petition and sufficiently explained its decision to attribute less weight to the opposition to the petition by processors with ties to Brazilian exporters. "[T]he court's function is not to 'reweigh the evidence or substitute its own judgment for that of the agency.' " *Allegheny Ludlum*, 475 F. Supp. 2d at 1374 (quoting *Usinor v. United States*, 342 F. Supp. 2d 1267, 1272 (CIT 2004)). The court therefore affirms the Commission's determination with respect to domestic opposition to the petition.

CONCLUSION

For the foregoing reasons, the affirmative remand determination by the Commission is affirmed. The Commission has addressed all of the concerns noted by the court in *Tropicana I* and *II*, and its conclusions are supported by substantial evidence. Judgment is entered for the defendant.