

2008-1106

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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ZHEJIANG NATIVE PRODUCE & ANIMAL BY-PRODUCTS IMPORT &  
EXPORT CORP., ET AL.

Plaintiffs-Appellants,

v.

DEPARTMENT OF COMMERCE,

Defendant-Appellee,

and

THE AMERICAN HONEY PRODUCERS ASSOCIATION, and  
THE SIOUX HONEY ASSOCIATION

Defendants-Appellees,

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Appeal from the United States Court of International Trade  
in case no. 02-00057, Judge Richard K. Eaton

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DEFENDANT-APPELLEE'S BRIEF

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## Statement of Related Cases

### A. Prior Appeals

Title and Number: Zhejiang Native Produce & Animal By-Products Import & Export Corp., et al. v. United States, Appeal No. 05-1058.

Date of Decision: December 20, 2005, rehearing denied February 14, 2005

Composition of the Panel: Judges Newman, Archer and Rader

Citation of Opinion in the Federal Reporter: 432 F.3d 1363

### B. Cases Pending that Will be Directly Affected by a Decision in this Appeal

The U.S. Court of International Trade (“CIT”) has stayed the proceedings in Zhejiang Native Produce & Animal By-Products Import & Export Corp., et al. v. United States, CIT Ct. No. 02-00057, pending the outcome of this appeal. A decision on the redetermination on remand submitted by the U.S. Department of Commerce (“Commerce”) is still pending.

## Jurisdiction

As discussed more fully below, this Court does not possess jurisdiction over this appeal because Zhejiang has not appealed a final judgment.

## Statement of the Issues

1. Should this Court dismiss Appellants’ appeal because Appellants have not appealed a final judgment?
2. Should this Court dismiss Appellants’ appeal because Appellants waived the

issue of whether they could have been found to have made sales at less than fair value?

3. Should this Court dismiss Appellants' appeal because no change of law has occurred?

4. Should this Court dismiss Appellants' appeal because the suspension agreement at issue was not intended to eliminate dumping?

#### Statement of the Case

Appellants, Zhejiang Native Produce & Animal By-Product Import & Export Corp., et al. (collectively "Zhejiang") appeal an order from the CIT dated September 26, 2007, denying a motion for relief from judgment filed pursuant to CIT Rule 60(b).

#### Statement of Facts

##### A. The Prior Investigation

On October 24, 1994, Commerce initiated an antidumping investigation of certain honey from the People's Republic of China ("PRC"). Initiation of Antidumping Duty Investigation: Honey from the People's Republic of China, 59 Fed. Reg. 54434 (October 31, 1994). On July 3, 1995, Commerce and the government of the PRC signed an agreement suspending this investigation ("suspension agreement"). See Honey from the Peoples Republic of China,

Suspension of Investigation, 60 Fed. Reg. 42521 (August 16, 1995) (“Notice of Agreement”).

Commerce entered into the suspension agreement pursuant to section 734(1) of the Tariff Act of 1930, 19 U.S.C. § 1673c(1). As required by that provision, the suspension agreement was designed to “prevent the suppression or undercutting of price levels of honey in the United States.” Notice of Agreement, 60 Fed. Reg. at 42522. To achieve this goal, the suspension agreement established annual “export limits” and quarterly “reference prices” based upon weighted-average import values from all other countries. Id. at 42524. The quarterly “reference prices” were calculated as “92 percent [of] the weighted average of the honey unit import values from all other countries for the most recent six months” for which data are available at the time the reference price is calculated. Id. The suspension agreement specified also that “reference prices” were to be revised quarterly to reflect the most recent import value of honey based upon publicly available trade statistics from the United States Census Bureau. Id.

The domestic industry “elected not to participate” in the five-year sunset review of the suspension agreement. Id. Accordingly, on July 28, 2000, Commerce terminated the suspended investigation (investigation A-570-838). See Notice of Final Results of Five-Year Review, Termination of Suspended

Antidumping Investigation on Honey from the People's Republic of China, 65 Fed. Reg. 46426 (July 28, 2000).

B. The 2000 Investigation

On September 29, 2000, the domestic industry filed a new petition alleging sales of honey from the PRC at less than fair value. On October 26, 2000, Commerce initiated an antidumping investigation on honey from the PRC (A-570-863). Initiation of Antidumping Duty Investigations: Honey From Argentina and the Peoples Republic of China, 65 Fed. Reg. 65831 (November 2, 2000) (A.R. Pub. Doc. 19). The period of investigation (“POI”) covered January 1, 2000 through June 30, 2000. The suspension agreement from the prior investigation was in effect during the POI.

On October 4, 2001, Commerce published its final affirmative determination of sales at less than fair value. Notice of Final Determination of Sales at Less than Fair Value; Honey from the People's Republic of China, 66 Fed. Reg. 50608 (October 4, 2001) (“Final Determination”). In the Final Determination, Commerce calculated final dumping margins ranging from 25.88% to 57.13% for each of the exporters receiving separate rates under its non-market economy methodology, and 183.80% for the PRC-wide entity. Id. at 50610. Commerce found that critical circumstances existed for three respondents and the PRC-wide entity. Id. In

making this critical circumstances determination, Commerce “imputed” knowledge of sales at less than fair value (i.e. “knowledge of dumping”) to each respondent whose margin exceeded 2%. Final Affirmative and Negative Determination of Critical Circumstances in AD Investigation of Honey from the PRC, at 3-4 dated September 26, 2001.

Zhejiang filed a lawsuit with the CIT challenging Commerce’s Final Determination. Zhejiang argued, *inter alia*, that because the suspension agreement was in effect during the POI, Commerce was precluded from finding sales at less than fair value. See Amended Complaint, para. 11. The Plaintiffs also argued that Commerce could not find that critical circumstances existed because Commerce could not impute knowledge of dumping to importers who were acting in compliance with the suspension agreement. See Amended Complaint, para. 14. The CIT issued an opinion on November 21, 2003, upholding Commerce’s critical circumstances finding, and holding that the suspension agreement did not preclude Commerce from finding sales at less than fair value. Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States, Ct. No. 02-00057, Slip Op. 03-151 (Ct. Int’l Trade November 21, 2003) (“Zhejiang I”). The Court remanded other issues to Commerce for further consideration.

After the CIT sustained Commerce’s remand redetermination, Zhejiang

Native Produce & Animal By-Products Import & Export Corp. v. United States, Ct. No. 02-00057, Slip Op. 04-109 (Ct. Int'l Trade August 26, 2004), Zhejiang appealed to this Court. Before this Court, Zhejiang pursued only one issue on appeal: that the importers' compliance with the suspension agreement precluded Commerce from imputing knowledge of dumping, and, thus, precluded Commerce from finding critical circumstances. Zhejiang failed to appeal the other issue they lost before the CIT, *i.e.*, whether the suspension agreement precluded Commerce from finding sales at less than fair value.

C. The Remand

This Court issued its opinion on December 20, 2005, holding that Commerce's finding of critical circumstances was not supported by substantial evidence. Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States, 432 F.3d 1363, 1368 (Fed. Cir. 2005) ("Zhejiang II"). The Court concluded that where Commerce had established minimum reference prices in the suspension agreement, and importers bought honey from the PRC at or above those reference prices, Commerce could not find that the importers should have known that the sales would be found to be at less than fair value. *Id.* The Government filed a Petition for Rehearing, which was denied.

The CIT remanded the Final Determination to Commerce for further

consideration of the critical circumstances issue. Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States, Ct. No. 02-00057, Slip Op. 06-85 (Ct. Int'l Trade June 6, 2006). Commerce filed its redetermination pursuant to remand on September 5, 2006, finding critical circumstances did not exist. The parties submitted comments to the CIT concerning the remand redetermination. The CIT has not issued a decision concerning the redetermination.

D. Zhejiang's Rule 60(b) Motion

On October 27, 2006, Zhejiang filed a motion pursuant to Rule 60(b) of the Rules of the CIT, seeking relief from the August 26, 2004 judgment. On September 26, 2007, the CIT denied Zhejiang's motion ("Zhejiang III"). Zhejiang appealed the CIT's order on November 16, 2007. The Government filed a motion to dismiss, arguing that the September 2007 order was not a final judgment and that Zhejiang was prohibited under the mandate rule from seeking the relief request. On February 20, 2008, this Court denied the Government's motion, stating that "the better course is for the parties to include their arguments in their briefs."

## Summary of the Argument

This Court does not possess jurisdiction over this appeal because Zhejiang has not appealed a final judgment. Commerce's remand redetermination concerning the issue of whether critical circumstances exists is still pending before the CIT. Accordingly, the CIT's September 2007 order did not resolve all of the matters at issue in this case.

Zhejiang's appeal should be dismissed because it has waived the issue of whether it could have been found to have made sales at less than fair value during the POI. Zhejiang argued this issue before the CIT, and lost in the original proceedings. Zhejiang failed to appeal the issue in its first appeal. Accordingly, Zhejiang is precluded from relitigating the issue now.

Zhejiang's failure to preserve the issue of whether it could have been found to have been dumping is not excused by a change of law. This Court's opinion in Zhejiang II concerned only one issue: whether Commerce could find that critical circumstances existed based on an imputation of knowledge of dumping. The issue of whether Zhejiang could have been found to have been dumping was not before this Court in the first appeal.

Finally, Zhejiang's appeal should be dismissed because the suspension agreement at issue was not intended to eliminate dumping. Rather, the suspension

agreement imposed a quantitative restriction, and was intended to prevent the suppression or undercutting of domestic prices. The reference prices did not measure whether Zhejiang was dumping. Accordingly, this Court should affirm the CIT's order and dismiss Zhejiang's appeal.

### Argument

#### A. Zhejiang's Interlocutory Appeal Should Be Dismissed by this Court

This Court does not possess jurisdiction to entertain this appeal because the September 2007 order is not a final judgment. This Court possesses jurisdiction to review final judgments<sup>1</sup> of the Court of International Trade:

The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction –

. . . (5) of an appeal from a *final decision* of the United States Court of International Trade. . . .

28 U.S.C. § 1295(a) (emphasis added). “A final decision is one that ends the litigation on the merits and leaves nothing for the court to do but execute judgment.” Co-Steel Raritan, Inc. v. ITC, 357 F.3d 1294, 1303 (Fed. Cir. 2004) (internal quotations omitted). Remand decisions in the trade area are generally considered interlocutory and subject to appellate review only after entry of final

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<sup>1</sup> 28 U.S.C. § 1592 provides for jurisdiction over certain interlocutory appeals. However, Zhejiang's appeal does not fall into any of the categories listed.

judgment. See Cabot Corp. v. United States, 788 F.2d 1539 (Fed. Cir. 1986); Badger Powhatan, Inc. v. United States, 808 F.2d 823 (Fed. Cir. 1986). “This result comports with the policies underlying the finality rule and in particular avoids unnecessary piecemeal appellate review without precluding later appellate review of the legal issue or any other determination made on a complete administrative record.” Cabot Corp., 788 F.2d at 1543.

In Zhejiang II, this Court held that Commerce’s finding of critical circumstances was not supported by substantial evidence. Zhejiang II, 423 F.3d at 1368. On June 6, 2006, the CIT, in turn, remanded the matter to Commerce for further consideration. Pursuant to the trial court’s order, Commerce invited interested parties to provide comments, and Commerce further considered whether a reasonable basis existed to impute knowledge of dumping to the importers in this case. Commerce ultimately found that critical circumstances did not exist, and filed the results of its redetermination pursuant to remand on September 5, 2006. The parties filed comments and replies to comments in October 2006. The domestic industry disputed Commerce’s conclusions reached in the redetermination and requested that the CIT remand, again, the proceeding to Commerce to determine, after opening the record, whether the knowledge-of-dumping requirement is supported by substantial evidence under any reasonable

methodology other than the 25% test. Zhejiang argued that Commerce's redetermination should be affirmed. The CIT has not issued a final judgment concerning the remand results. Yet, notwithstanding this fact, Zhejiang filed this appeal. Indeed, Zhejiang admits that "litigation continues before the CIT with respect to a second issue (i.e., critical circumstances) . . . ." Appellant's Br., p. 25. Thus, the September 2007 order was not one that ended litigation on the merits. Accordingly, Zhejiang's appeal is interlocutory and should be dismissed by this Court.

Zhejiang refers to Venture Indus. Corp. v. Autoliv Asp, Inc., 457 F.3d 1322 (Fed. Cir. 2006) in support of its argument that the September 2007 order is final and appealable. Appellant's Br., p. 24. There, the trial court issued a judgment, and then amended its judgment. When the judgment was on appeal, a party filed a Rule 60(b) motion. Although the trial court's judgment was on appeal, the trial court had reached a judgment on the merits. See 457 F.3d at 1326-27. Thus, at the trial court level, there was nothing more for the court to do. In this case, however, the CIT has not yet reached a final judgment on the merits of Commerce's remand redetermination. Thus, the issue of whether critical circumstances existed during the POI is still pending. Venture Indus., therefore, is inapposite.

Zhejiang further refers to Penn West Assocs., Inc. v. Cohen, 371 F.3d 118

(3d Cir. 2004) in support of its argument. Appellant’s Br., pp. 24-25. Zhejiang cites with favor the court’s statement that it may entertain an appeal of a denial of a Rule 60(b) motion if the order is interlocutory “if the denial has the effect of *wrapping up all matters pending on the docket*, thus making the decision final.” 371 F.3d at 123-24 (internal quotations omitted) (emphasis added). The court continued that a final judgment:

leaves nothing to be done in the cause save to superintend, ministerially, the execution of the decree. Accordingly, there is no final order if claims remain unresolved and their resolution is to occur in the [trial] court.

Id. at 125. As stated, there remains a matter to be resolved by the trial court; namely whether to sustain Commerce’s determination that critical circumstances did not exist. Accordingly, there is no final judgment in this case. Zhejiang’s appeal should be dismissed.

B. Zhejiang Waived the Issue of Whether It Could Be Found to Be Dumping During the POI

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Zhejiang waived its right to seek further relief on the issue of whether the existence of the suspension agreement prohibited Commerce from finding that Zhejiang and other respondents were dumping during the POI. After remand from this Court, and further action by Commerce, the CIT held, “[P]laintiffs are not entitled to the relief they seek because they did not appeal the court’s holding that

substantial evidence supported a determination that their sales during the POI were made at less than fair value.” Zhejiang III, at 10 (citation omitted). Any issue that could have been raised upon appeal but was not is waived and further litigation is foreclosed. See Doe v. United States, 463 F.3d 1314, 1327 (Fed. Cir. 2006) (citing United States v. Husband, 312 F.3d 247, 250-51 (7th Cir. 2002), and United States v. Bell, 5 F.3d 64, 66 (4th Cir. 1993)); see also Rumsfeld v. Freedom NY, Inc., 346 F.3d 1359, 1361 (Fed. Cir. 2002) (issues not raised in the opening brief on appeal are waived) (per curiam). The CIT’s holding is therefore correct, and should be upheld by this Court.

1. Zhejiang Lost the Issue in the Original CIT Proceedings and Did Not Appeal It

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In the original proceedings before the CIT, Zhejiang argued that Commerce could not find that its U.S. sales were made at less than fair value. The CIT specifically disagreed:

The court does not agree with Plaintiffs’ argument that Commerce erred by finding Plaintiffs’ U.S. sales were made at less than fair value where those sales were made in compliance with the Suspension Agreement.

Zhejiang I, Slip Op. at 19. The CIT continued, finding that neither the statute nor Commerce’s regulations required Commerce to consider the existence of the suspension agreement, that the use of reference prices were a permissible means of

preventing price suppression or undercutting, and that a suspension agreement under 19 U.S.C. § 1673c(l) was meant to prevent price suppression and undercutting and to restrict import volumes. Id. at 19-20.

Zhejiang did not appeal this holding of the CIT when it noted its 2004 appeal. Zhejiang appealed only Commerce's finding of critical circumstances. See Zhejiang II, 432 F.3d at 1366. Because Zhejiang did not appeal the issue of whether compliance with the suspension agreement required Commerce to find that its sales were not made at less than fair value, Zhejiang has waived the issue and further litigation is foreclosed.

Zhejiang lost this issue before the CIT, did not appeal, and thus waived the opportunity to seek any relief based upon this issue. Zhejiang cannot have the issue re-adjudicated in the context of a Rule 60(b) motion. This Court should therefore affirm the decision of the CIT.

2. This Court's Opinion in *Zhejiang II* Does Not Represent a Change of Law

Zhejiang does not contest that it failed to appeal the issue from the CIT's original decision. Rather, Zhejiang argues that it is not foreclosed from raising the issue now because there has been a change of law. Appellant's Br., pp. 27-29. The holding in Zhejiang II, however, was limited to the issue of critical circumstances and did not address the issue of whether compliance with the suspension agreement

prevented Commerce from finding sales at less than fair value. Zhejiang II, therefore, does not represent a change of law.

a. Zhejiang's Argument Is Inconsistent

As an initial matter, Zhejiang's argument on this point is inconsistent. Zhejiang does not contest that it failed to appeal the issue of whether it could have been found to be dumping during the POI. Thus, the issue was not before this Court for a decision in Zhejiang II. Accordingly, there could not have been a change of law, as Zhejiang now argues.

b. This Court's Holding in *Zhejiang II* Was Limited

At any rate, the CIT properly denied Zhejiang's Rule 60(b) motion based on the limited holding of this Court in Zhejiang II. Specifically, in Zhejiang II this Court held that when the importers purchased honey in compliance with the suspension agreement, Commerce's decision to impute knowledge of dumping based upon margins of 25% or greater was not supported by substantial evidence. Zhejiang II, 432 F.3d at 1368. In denying Zhejiang's motion, the CIT recognized that this Court's holding "does not mention dumping," but rather concerned the imputation of knowledge when a suspension agreement was in effect during the POI. Zhejiang III, at 8-9.

As stated above, in Zhejiang II, the issue before the Court was limited to the

only issue Zhejiang appealed: whether Commerce could base a finding of critical circumstances upon imputation of knowledge of dumping when a suspension agreement was in effect during the POI. Consequently, the holding of the Court was limited to that issue:

Zhejiang argues that the “knew or should have known” requirement for critical circumstances was not met, and that substantial evidence does not support the contrary finding based on imputation. We agree. As Zhejiang states, “it strains credibility to suggest that Commerce could establish minimum prices for honey designed to ‘prevent the suppression or undercutting of price levels of the United States honey products’ and then determine that U.S. importers purchasing honey in accordance with these pricing guidelines should have known these sales would be found to be at less than fair value.” Reply Br. at 15-16. *When all factors are considered, there is not substantial evidence to support the finding of critical circumstances.*

Zhejiang II, 432 F.3d at 1368 (emphasis added). As the CIT noted, “This holding simply does not reach the question of whether plaintiffs could be found to be dumping during the POR.” Zhejiang III, at 9. The CIT continued, “Because plaintiffs appealed no other issue, the Federal Circuit’s holding was limited solely to the issue of imputation of knowledge with respect to a finding of critical circumstances.” Id. at 11. Based on this analysis, the CIT properly denied Zhejiang’s motion.

An examination of the issues presented to this Court in the first appeal demonstrates the accuracy of the CIT’s analysis. This Court examined the

existence of the suspension agreement during the POI from the point of view of the importers to ascertain whether it was appropriate for Commerce to impute knowledge of dumping. 432 F.3d at 1366-67. In this regard, the Court held that because a suspension agreement had established minimum prices at which honey from the PRC could be sold, Commerce could not infer that importers who complied with the suspension agreement knew or should have known that those prices were less than fair value. Id. at 1368. The Court did not hold that Commerce's determination of sales at less than fair value was invalid as a result of the existence of the suspension agreement.

c. Citations to Statements Made During Oral Argument or in a Motion for Rehearing Are Irrelevant

Zhejiang goes to great lengths to cite portions of oral argument before this Court, and portions of the Government's brief in support of its motion for rehearing to support Zhejiang's contention that the Court's decision represented a change of law. Appellant's Br., pp. 10-12, 17, 28-29. Zhejiang's reliance on such statements, however, is unavailing.

The primary evidence of what the Court decided is its written opinion. See EEOC v. Trabucco, 791 F.2d 1, 2 (1st Cir. 1986); Stearns v. Lawrence, 83 F. 738, 743 (6th Cir. 1897). This is consistent with the "best evidence" rule, which provides that to prove the contents of a writing, the writing itself is required. See

F.R.E. 1002. Statements made during oral argument, or in brief in support of a motion for rehearing, cannot expand this Court’s holding in Zhejiang II.

C. The Suspension Agreement in Question Was Intended to Prevent Price Suppression or Undercutting, Not to Eliminate Dumping

Finally, because the suspension agreement in question was not intended to eliminate dumping, the CIT properly denied Zhejiang’s motion. The CIT found that “no serious argument can be made that the Suspension Agreement had as its purpose and effect the elimination of sales at less than fair value during the POI.” Zhejiang III, at 11. The court continued, “While all suspension agreements are authorized by 19 U.S.C. § 1673c, they do not all seek to provide the same relief to U.S. domestic industries.” Id. The court elaborated:

Each kind seeks to serve a different purpose and each contains different requirements. For instance, subsection (b) agreements may be entered into for the purpose of (1) providing for the cessation of exports to the United States, or (2) providing for the revision of prices to eliminate “any amount by which the normal value of the merchandise . . . exceeds the export price,” i.e., to eliminate dumping. 19 U.S.C. § 1673c(b). By way of contrast, subsection (c) agreements permit Commerce, in “extraordinary circumstances,” to enter into agreements “to revise prices” to “eliminate completely the injurious effect” of exports. 19 U.S.C. § 1673c(c)(1). This type of agreement would not necessarily eliminate dumping because, even though the agreement’s prices would be revised to eliminate injury, it could still set out amounts where sales would be at less than fair value. Finally, subsection (l) provides for a “special rule for nonmarket economy countries” under which Commerce may enter into an agreement to restrict the volume of imports into the United States if Commerce finds that the agreement “will prevent the undercutting or suppression

of price levels of domestic products by imports of the merchandise under investigation.” 19 U.S.C. § 1673c(1)(1). Agreements entered into under subsection (1) have as their purpose the prevention of undercutting or price suppression – not dumping. Price suppression and sales at less than fair value are just not the same thing.

Id. at 12-13 (footnotes omitted). Based on this analysis, the CIT properly denied Zhejiang’s motion. The CIT’s order should be affirmed by this Court.

1. The Statute Provides for Different Types of Suspension Agreements; Not All Eliminate Dumping

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As the CIT recognized, the statute contains different types of suspension agreements, each with their own legal requirements. The statutory section in question, 19 U.S.C. § 1673c, establishes the methods by which an investigation can be either terminated or suspended. Thus, subsection (a) provides that an investigation may be terminated by the withdrawal of the petition. 19 U.S.C. § 1673c(a). Subsection (b) provides Commerce with the discretion to suspend an investigation through an agreement with those exporters who account for substantially all of the imports. Through such suspension agreements, the exporters agree either: (1) to eliminate sales at less than fair value; or (2) “to cease exports of the merchandise to the United States within 6 months after the date on which the investigation is suspended.” 19 U.S.C. § 1673c(b). Subsection (c) provides the discretion to Commerce to suspend an investigation in “extraordinary circumstances,” through an agreement that “will eliminate completely the injurious

effect of exports to the United States,” provided certain additional conditions are met. 19 U.S.C. § 1673c(c). This subsection, which addresses suspension agreements that *eliminate injury*, provides that such agreements must prevent suppression or undercutting of price level of domestic products by imports. 19 U.S.C. § 1673(c)(1)(A).

Subsection (d) provides for additional rules and conditions that are mandatory before Commerce may accept an agreement provided for in subsections (b) and (c). Those additional requirements are: (1) that the suspension agreement is in the public interest, and (2) “that effective monitoring of the agreement by the United States is practicable.” 19 U.S.C. § 1673c(d).

Finally, subsection (l) provides a “special rule for nonmarket economy countries,” under which Commerce may enter into an agreement to restrict the volume of imports into the United States if Commerce finds that the agreement will prevent the undercutting or suppression of United States price levels of domestic products. 19 U.S.C. § 1673c(l). Congress added subsection (l) to the statute in 1988 when it perceived that there was a need for a special type of suspension agreement to address exports from non-market economy countries. The House Report noted that neither subsection (b) nor subsection (c) provided for a suspension agreement that included quantitative restrictions:

Section 734 allows for suspension of an antidumping investigation based on:

- (1) an agreement to cease exports within 6 months;
- (2) an agreement to revise prices to eliminate completely any sales at less than fair value; or
- (3) an agreement to revise prices to eliminate completely the injurious effects of the imports.

It does not allow for suspension of antidumping investigations on the basis of quantitative restriction agreements.

H. Rep. No. 100-576, at 592-93 (1988) (emphasis added). See also S. Rep. No. 96-249, at 68 (1979). Congress, therefore, added subsection (l), as “a special rule . . . for suspending antidumping investigations of imports from non-market economy countries based on quantitative restraint agreements.” H. Rep. No. 100-576, at 593 (1988); see also 19 U.S.C. § 1673c(l). The only requirements in addition to restricting the volume of imports that Congress imposed upon subsection (l) suspension agreements were that “[s]uch agreements must satisfy the general requirements for suspension agreements, including public interest criteria, and prevent suppression or undercutting of domestic price levels.” H. Rep. No. 100-576, at 593 (1988). Thus, subsection (l) makes a specific cross-reference to the requirements of subsection (d). 19 U.S.C. § 1673c(l)(1)(A).

Therefore, it is not correct to say that all suspension agreements are intended to eliminate sales at less than fair value, i.e., dumping. This is confirmed by the

language of the statute, as well as by the legislative history. For example, if Commerce concludes a suspension agreement to eliminate injurious effect, under subsection (c), the statute anticipates that some degree of dumping may continue even under the agreement. Specifically, subsection (c) provides:

for each entry of each exporter the amount by which the estimated normal value exceeds the export price (or constructed export price) will not exceed 15 percent of the weighted average amount by which the estimated normal value exceeded the export price (or constructed export price) for all less-than-fair-value entries of the exporter examination [sic] during the course of the investigation.

19 U.S.C. § 1673c(c)(1)(B). Accordingly, if the suspension agreement is concluded pursuant to subsection (c), the statute permits entries of subject merchandise to be dumped, so long as the dumping is reduced by 85 percent from the investigation. See also S. Rep. No. 96-249, at 68 (1979).

The legislative history further confirms that not all suspension agreements are meant to eliminate dumping. When Congress first created alternative suspension agreements (subsections (b) and (c)) through the Trade Agreements Act of 1979, the Senate Report recognized that in some instances Commerce may enter into a suspension agreement that did not completely eliminate dumping:

[A]greements which provide for any action less than complete elimination of dumping or cessation of exports can be accepted only in extraordinary circumstances. . . .

Complete elimination of the injurious effect requires that there be no discernable injurious effect by reason of any amount by which the foreign market value exceeds the United States price under the agreement.

S. Rep. No. 96-249, at 71 (1979); see also id. at 68 (explaining that agreements to eliminate injurious effect need not eliminate all sales at less than fair value).

Thus, the statute only creates two general requirements common to all suspension agreements, which are found in subsection (d). 19 U.S.C. § 1673c(d). Other requirements are specific to the particular type of suspension agreement that is being concluded. See S. Rep. No. 96-249, at 68 (1979). Accordingly, an agreement to eliminate sales at less than fair value or to cease exports must satisfy the requirements of subsection (b); an agreement to eliminate injurious effect must satisfy the requirements of subsection (c); and, an agreement with a non-market economy country must satisfy the requirements of subsection (l). An agreement under one subsection need not satisfy the requirements of an agreement under either of the other two subsections.

Because the suspension agreement in question here was concluded with the PRC, a non-market economy country, it was entered into pursuant to 19 U.S.C. § 1673c(l). The suspension agreement did not require the elimination of sales at less than fair value. Indeed, compliance with the suspension agreement does not preclude Commerce from finding that the export prices of sales made under the

agreement were at less than normal value, and, thus, dumped. See 19 U.S.C. § 1673c(j).

2. The Suspension Agreement Did Not Measure Whether Honey from the PRC Was Dumped

Consistent with the statutory requirement, the suspension agreement did not measure whether the honey at issue was dumped. It established reference prices for the purpose of preventing the suppression or undercutting of domestic honey prices, as required by 19 U.S.C. § 1673c(l). See Notice of Agreement, 60 Fed. Reg. at 42522 and 42524. The manner by which the reference prices were established had nothing to do with whether the sales were at less than fair value.

a. In an NME Country, Normal Value Is Based on the Factors of Production

Dumping exists when the export price or constructed export price of the merchandise subject to the investigation is less than normal value. 19 U.S.C. § 1673. In an investigation involving a non-market economy country, such as the PRC, normal value is determined through the factors of production methodology. See 19 U.S.C. § 1677b(c). Commerce determines the quantity of each input into the subject merchandise and multiplies that quantity by a surrogate value for the input from a market economy country. See 19 C.F.R. § 351.408. Commerce then aggregates all of the values of the inputs, adds an amount for selling, general and

administrative expenses, and adds an amount for profit, in order to construct a normal value for the subject merchandise. Id.

b. The Suspension Agreement Established Reference Prices Based on Honey Imports into the United States, Not the Factors of Production

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By contrast, the suspension agreement here established reference prices below which sales of honey from the PRC could not be sold. Notice of Agreement, 60 Fed. Reg. at 42524. The reference prices were based upon an average of the prices of honey from all countries importing honey into the United States. Id. Those reference prices had nothing to do with the normal value of the honey from the PRC. Rather, the reference price mechanism was a method used to prevent the suppression or undercutting of domestic prices by imports made under this agreement. 19 U.S.C. § 1673c(l).

The “suppression or undercutting” of domestic prices is not the same as sales at less than fair value. The requirement that a suspension agreement prevent “the suppression or undercutting of price levels of domestic products,” was first introduced into the statute when Congress established subsection (c) suspension agreements. 19 U.S.C. § 1673c(c)(1)(A). See also S. Rep. No. 96-249, at 68 (1979). As stated above, this subsection addresses suspension agreements that *eliminate injury*. Suspension agreements under subsection (c) do not eliminate

dumping, and in fact tolerate some degree of continued dumping. 19 U.S.C. § 1673c(c)(1)(B).

Moreover, the requirement to prevent suppression or undercutting of domestic prices focuses upon the comparison between the price of the imported product and the price of the domestic like product. By contrast, elimination of sales at less than fair value would require a comparison of the price of the imported product, i.e., the export price or the constructed export price, and the price of the foreign like product, i.e., normal value. Therefore, the requirement under subsection (1) that the agreement prevent price suppression or undercutting is not meant to address or to accomplish the elimination of sales at less than fair value. It is meant to alleviate the effect of the sales of imported product on the domestic producers.

Accordingly, there was no requirement in the suspension agreement that the imported honey be sold at a non-dumped price. That is, the export or constructed export price could still fall below normal value, which is calculated through the factors of production methodology. So long as that price did not also fall below the reference price, which was established based on imports from other countries, the exporter would be in compliance with the suspension agreement, but still be dumping.

Indeed, in this very case, one of the countries upon which the reference price was based was Argentina. Commerce conducted an antidumping investigation of honey from Argentina, covering the POI of July 1, 1999 through June 30, 2000. Notice of Final Determination of Sales at Less Than Fair Value; Honey From Argentina, 66 FR 50611, 50612 (October 4, 2001). (This period overlapped the POI in the China investigation.) In its investigation, Commerce concluded that honey from Argentina was being sold at less than fair value. *Id.* at 50613. This further demonstrates that while the reference price measured the prices of imports from other countries into the United States, it did not measure whether those imports were, in fact, dumped.

Whether an importer bought honey from the PRC in compliance with the suspension agreement, therefore, is not relevant to the issue of whether that sale was made at less than fair value. The importers' compliance with the suspension agreement during the POI does not compel a finding by Commerce that all of the sales were not dumped. The Court should therefore affirm the CIT's order denying Zhejiang's motion.

c. Zhejiang's Reliance on Statements from this Court's Opinion in *Zhejiang II* is Misplaced

Zhejiang relies upon the statements of the Court that “the prices in compliance with the Suspension Agreement were required to be at a level that would eliminate sales at less than fair value” and “The Court of International Trade erred in holding that the Suspension Agreement was not designed to eliminate dumping.” 432 F.3d at 1367. See Appellant's Br., pp. 28, 30-31. Zhejiang's reliance is misplaced.

First, these statements represent *obiter dictum*, which are not controlling precedent. See Co-Steel Raritan, Inc. v. ITC, 357 F.3d 1294, 1307 (Fed. Cir. 2004). This Court has observed that *dictum* are statements made in an opinion which do not go directly to the question before the Court. Id. (citing Black's Law Dictionary 1100 (7th ed. 1999)). See also Symbol Techs., Inc. V. Lemelson Med., Educ. & Research Found., 422 F.3d 1378, 1385 (Fed. Cir. 2005). “Because statements made in *dicta* do not implicate the substantive holding of the case, they ‘cannot be considered binding authority.’” Co-Steel Raritan, 357 F.3d at 1307 (quoting Kastigar v. United States, 406 U.S. 441, 454-55 (1972)).

The single issue before this Court was whether the importers knew or should have known that the merchandise that they were buying was being dumped. As demonstrated above, Zhejiang failed to preserve the issue of whether sales made

under the suspension agreement during the POI were, in fact, at less than fair value. Therefore, that issue was not before the Court. The statements by the Court concerning the purpose and legal requirements of the suspension agreement do not represent controlling precedent. Accordingly, the CIT appropriately denied Zhejiang's motion.

Second, these statements by the Court in Zhejiang II resulted from a misapplication of the rule of statutory construction enunciated in United States v. Morton, 467 U.S. 822, 828 (1984). Specifically, when this Court stated that the prices in compliance with the suspension agreement had to be made at sales at less than fair value, the Court cited Morton for the proposition that “parts of statutes are not construed in isolation; a statute is read as a whole.” 432 F.3d at 1369. The rule from Morton was meant to address any ambiguity that may result from reading a term from the statute in isolation. See Morton, 467 U.S. at 828. Thus, any particular term within the statute must be construed by looking to the statute as a whole. See, e.g., Stenberg v. Carhart, 530 U.S. 914, 992-93 (2000); Morton, 467 U.S. at 828.

The Court in Zhejiang II did not interpret an ambiguous term from the statute. Rather, in the statements upon which Zhejiang relies, the Court considered the purposes and requirements of suspension agreements in general. As discussed

above, the statute creates an orderly scheme, whereby Commerce is authorized to enter into different types of suspension agreements, each with its own purpose and set of requirements. Only one type of suspension agreement authorized by 19 U.S.C. § 1673c(b) requires the elimination of sales at less than fair value. The others do not. Accordingly, the Court should not rely upon these statements in considering whether the CIT properly denied Zhejiang's motion.

Conclusion

For the reasons stated above, the Government respectfully requests that Zhejiang's appeal be dismissed, and the CIT's order affirmed.

Respectfully submitted,

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