

UNITED STATES COURT OF INTERNATIONAL TRADE

WUHAN BEE HEALTHY CO., LTD. :
and PRESSTEK INC., :
 :
Plaintiffs, :
 :
v. : Before: Richard K. Eaton, Judge
 :
UNITED STATES, : Court No. 05-00438
 :
Defendant, :
 :
and :
 :
THE AMERICAN HONEY PRODUCERS :
ASSOCIATION OF AMERICA and :
THE SIOUX HONEY ASSOCIATION, :
 :
Deft.-Ints. :
 :
:

OPINION AND ORDER

[United States Department of Commerce's Final Results sustained in part and remanded.]

Dated: July 20, 2007

Kalik Lewin (Martin J. Lewin and Brenna Steinert Lenchak), for plaintiffs.

Peter D. Keisler, Assistant Attorney General; Jeanne E. Davidson, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (David S. Silverbrand); Office of the Chief Counsel of Import Administration, United States Department of Commerce (Douglas S. Ierley), of counsel, for defendant.

Kelley Drye Collier Shannon (Michael J. Coursey and R. Alan Luberda), for defendant-intervenors.

Eaton, Judge: Before the court is the Rule 56.2 motion for judgment upon the agency record of plaintiffs Wuhan Bee Healthy Co., Ltd. ("Wuhan Bee") and Presstek Inc. ("Presstek") (collectively, "plaintiffs"). See Pls.' Br. Supp. Mot. J. Agency R. ("Pls.'s Mem."). Defendant United States and defendant-intervenors The American Honey Producers Association and The Sioux Honey Association oppose the motion. See Def.'s Mem. Opp'n Pls.' Mot. J. Agency R. ("Def.'s Opp'n"); Def.-Ints.' Br. Opp'n Pls.' Mot. J. Agency R. ("Def.-Ints.' Opp'n"). By their motion, plaintiffs challenge certain aspects of the final results of the United States Department of Commerce's ("Commerce" or the "Department") second administrative review of the antidumping duty order on honey from the People's Republic of China ("PRC") for the period of review, December 1, 2002, through November 30, 2003 ("POR"). See *Honey from the PRC*, 70 Fed. Reg. 38,873 (Dep't of Commerce July 6, 2005) (final results) and the accompanying Issues and Decision Memorandum (June 27, 2005), Pub. Doc. 341 ("Issues & Dec. Mem.") (collectively, "Final Results").

Jurisdiction is had pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). For the reasons that follow, the court sustains the Final Results in part and remands this case to Commerce for further action consistent with this opinion.

BACKGROUND

Plaintiffs Wuhan Bee and Presstek are, respectively, a producer and exporter of honey from the PRC, and a honey importer and distributor in the United States. During the POR, Wuhan Bee exported honey from the PRC (the "subject merchandise") to its affiliate Presstek, which in turn sold the honey to Pure Sweet Honey ("PSH"), an affiliated honey blender.¹ PSH then blended plaintiffs' merchandise with honey from other countries and resold it to unaffiliated customers in the United States.

On December 2, 2003, Commerce published a notice of opportunity to request an administrative review of the antidumping duty order on honey from the PRC. See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation, 68 Fed. Reg. 67,401 (Dep't of Commerce Dec. 2, 2003) (notice). Pursuant to the notice, Wuhan Bee asked for a review of its entries during the POR. See Honey From the PRC, 69 Fed. Reg. 77,184 (Dep't of Commerce Dec. 27, 2004) (prelim.). Commerce initiated the second administrative review on January 22, 2003. See Initiation of Antidumping and Countervailing Duty Admin. Revs. and Req. for Revocation in Part, 68 Fed. Reg. 3009 (Dep't

¹ Commerce found Wuhan Bee was affiliated with Presstek for a part of the POR, i.e., from July 20, 2003, forward. Presstek and PSH were affiliated during the entire POR. See Issues & Dec. Mem. at 68.

of Commerce Jan. 22, 2003) (notice).

During the course of its review, Commerce issued questionnaires to Wuhan Bee asking for information concerning, among other things, its sales to the United States (Section C); factors of production (Section D); and costs associated with further manufacturing in the United States (Section E). Commerce also issued supplemental questionnaires to Wuhan Bee, which focused on its calculation of "blend ratios."² That is, by these supplemental questionnaires, Commerce sought to determine the percentage of Wuhan Bee's honey contained in each sale of blended honey made by PSH to unaffiliated U.S. customers. As Commerce noted in the Final Results, blend ratios are "essential to the reported U.S. sales and further manufacturing databases because the ratios determine whether a particular honey sale is of subject or non-subject merchandise and the quantity of the sale of subject merchandise." Issues & Dec. Mem. at 80.

Commerce notified Wuhan Bee that it would verify its questionnaire responses pertaining to U.S. sales made through

² Wuhan Bee first identified "blend ratios" in its Section C response as "the percentage of subject honey contained within the honey resold by Wuhan Bee's U.S. affiliate" Wuhan Bee's Sec. C Ques. Resp., Conf. Doc. 13 at 25 (adding field 30.1 "BLENDRATU (%)" to the fields Commerce requested Wuhan to include in its U.S. sales database).

Presstek and PSH between July 20, 2003 and the end of the POR, in the United States offices of PSH.³ Verification was scheduled for April 27, 2005, to April 29, 2005.

Prior to verification, Commerce forwarded to Wuhan Bee an outline indicating the areas to be covered, e.g., "Sales Process and Sales Traces" and "Further Manufacturing," and the type of documentation that it would require in order to verify the information in Wuhan Bee's questionnaire responses. See CEP Verification Outline (Apr. 20, 2005), Conf. Doc. 101 at 7, 9. In particular, Commerce asked Wuhan Bee to be prepared to provide "[d]ocumentation supporting the 'blend ratio,'" so that the verifiers could trace data from documents to the responses. CEP Verification Outline, Conf. Doc. 101 at 8. It also instructed Wuhan Bee to "[p]lease be prepared to demonstrate the blend ratio for all sales . . . and provide support documentation for all costs associated with further manufacturing . . . as reported in your questionnaire responses." CEP Verification Outline, Conf. Doc. 101 at 9.

At verification, Commerce selected fifty-one U.S. sales invoices for review from Wuhan Bee's U.S. sales databases.

³ Presstek and PSH shared a physical address in Verona, Wisconsin. See Verification of U.S. Sales and Further Manufacturing Expenses for Wuhan Bee, Conf. Doc. 106 at 1 n.2.

Twenty-six of the invoices were selected from a database providing information about sales of subject and non-subject merchandise during the POR. For five of the twenty-six invoices, company officials failed to provide supporting documentation. As for the other twenty-one invoices, Commerce found discrepancies in blend ratios in three of them. The remaining twenty-five invoices were selected from a database that quantified the differences between the amount of subject merchandise sold by Wuhan Bee to its affiliates and the amount of subject merchandise in the blended honey sold to unaffiliated U.S. customers. For nine of the twenty-five invoices, company officials were unable to provide supporting documentation, and for the remaining sixteen, Commerce found discrepancies with respect to the reported blend ratios/blend content for thirteen of the invoices. See Verification Rep., Conf. Doc. 106 at 3.

On May 19, 2005, plaintiffs filed a brief with Commerce ("Case Brief") in an attempt to correct deficiencies in blend ratios discovered at verification. Commerce rejected an attachment to the Case Brief and the narrative references to the attachment, claiming they were "new information" that was untimely filed and thus could not be verified. Plaintiffs were given an opportunity to submit a redacted version of the Case Brief, i.e., one with the claimed untimely new information

omitted, which they did on May 24, 2005. See Letter from Commerce to Bruce M. Mitchell of 5/23/05, Conf. Doc. 113; see also Letter from Bruce M. Mitchell to Commerce of 5/24/05, Conf. Doc. 116.

On July 6, 2005, Commerce published notice of the Final Results. See Honey from the PRC, 70 Fed. Reg. at 38,873. In the Final Results, Commerce applied adverse facts available ("AFA") to sales made by Wuhan Bee through affiliated parties in the United States, i.e., Presstek and PSH, after July 20, 2003, and assigned an antidumping duty rate of 183.80% to those sales. Issues & Dec. Mem. at 82.

By their motion, plaintiffs challenge Commerce's decision to use AFA. They also challenge Commerce's valuation of the factors of production of the subject merchandise (in particular, raw honey and labor) and Commerce's calculation of surrogate financial ratios, i.e., the cost of factory overhead; selling, general and administrative expenses; and profit. Finally, they challenge Commerce's decision to change the methodology it used to calculate the assessment rate and cash deposit rate from an *ad valorem* basis to a per kilogram basis.

STANDARD OF REVIEW

The court reviews the Final Results under the substantial evidence and in accordance with law standard, set forth in 19 U.S.C. § 1516a(b)(1)(B)(i) ("The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law"). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "Substantial evidence requires more than a mere scintilla, but is satisfied by something less than the weight of the evidence." *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (internal citations & quotation marks omitted).

The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Huaiyin*, 322 F.3d at 1374 (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). The court "must affirm [Commerce's] determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from [Commerce's]

conclusion.” *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (internal quotation marks & citation omitted). In addition, “[a]s long as the agency’s methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency’s conclusions, the court will not impose its own views as to the sufficiency of the agency’s investigation or question the agency’s methodology.” *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404-05, 636 F. Supp. 961, 966 (1986), *aff’d*, 810 F.2d 1137, 1139 (Fed. Cir. 1987) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

DISCUSSION

I. Commerce’s Use of Facts Available/Adverse Facts Available with respect to Wuhan Bee’s U.S. Sales

In determining whether the subject merchandise is being, or is likely to be, sold at less than fair value, 19 U.S.C. § 1677b(a) requires Commerce to make “a fair comparison . . . between the export price or constructed export price and normal value.” Because a portion of Wuhan Bee’s U.S. sales during the POR were made through its U.S. affiliates, Presstek and PSH, Commerce compared the “constructed export price” of the subject

merchandise to normal value.⁴ "Constructed export price" is "the price at which the subject merchandise is first sold . . . in the United States . . . by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter," as adjusted. 19 U.S.C. § 1677a(b).

In this case, the first sale of Wuhan Bee's honey to an unaffiliated U.S. purchaser was made through PSH after it had blended Wuhan Bee's honey with honey from other sources. The "blend ratios" for the sales Wuhan Bee made through PSH, i.e., the percentage of subject merchandise in each sale, were an important element in the calculation of constructed export price. In the Final Results, Commerce found that many of Wuhan Bee's reported blend ratios could not be verified as accurate. Issues & Dec. Mem. at 79 ("Of the invoices that we reviewed at verification, 43 percent failed to be verified as accurate. Thus, the Department determines that Wuhan Bee's reported blend ratios cannot be verified.").

Where a respondent in an administrative review provides information that Commerce cannot verify, the Department is

⁴ Commerce's construction of normal value is discussed *infra* in Part II.

permitted to "fill[] gaps in the record" using facts otherwise available. Statement of Administrative Action, H.R. Doc. No. 103-316, at 869 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4198-99 ("SAA"). The relevant section of the antidumping duty statute, 19 U.S.C. § 1677e, requires Commerce to determine (1) whether to use facts otherwise available; and, if reliance on such facts is warranted, (2) whether to use an adverse inference in selecting from among the facts otherwise available. First, under subsection 1677e(a):

If—

(1) necessary information is not available on the record, or

(2) an interested party or any other person—

(A) withholds information that has been requested by [Commerce] . . . under this subtitle,

(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested . . . ,

(C) significantly impedes a proceeding under this subtitle, or

(D) provides such information but the information cannot be verified as provided in section 1677m(i) of this

title,⁵

[Commerce] . . . shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

19 U.S.C. § 1677e(a). As the Court of Appeals for the Federal Circuit has held:

The focus of subsection (a) is respondent's *failure to provide information*. The reason for the failure is of no moment. The mere failure of a respondent to furnish requested information—for any reason—requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1381 (Fed. Cir. 2003) (emphasis in original). Thus, subsection (a) mandates the use of facts otherwise available when a respondent provides Commerce with information that “cannot be verified.” 19 U.S.C. § 1677e(a)(2)(D).

Once it determines that the use of facts otherwise available is required, Commerce, in some circumstances, may use an inference that is adverse to the interests of the respondent in selecting from the facts on the record. Pursuant to subsection

⁵ Subsection 1677m(i) requires Commerce to verify all information relied upon in reaching its final results under 19 U.S.C. § 1675(a), if (1) verification is timely requested by an interested party; and (2) no verification was made during the two immediately preceding reviews of the same order. See 19 U.S.C. § 1677m(i)(3)(A)-(B).

1677e(b):

If [Commerce] . . . finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce] . . ., [Commerce] . . ., in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.

19 U.S.C. § 1677e(b). The *Nippon Steel* Court stated that, as distinguished from subsection (a),

subsection (b) permits Commerce to "use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available," only if Commerce makes the separate determination that the respondent "has failed to cooperate by not acting to the best of its ability to comply." The focus of subsection (b) is respondent's *failure to cooperate to the best of its ability*, not its failure to provide requested information.

Nippon Steel, 337 F.3d at 1381 (quoting 19 U.S.C. § 1677e(b)) (emphasis and alteration in original). "[T]he statutory mandate that a respondent act to 'the best of its ability' requires the respondent to do the maximum it is able to do." *Id.* at 1382.

Determining whether a respondent did the maximum it was able to do to comply with Commerce's requests involves both objective and subjective inquiries. First, Commerce must make "an objective showing that a reasonable and responsible importer would have known that the requested information was required to

be kept and maintained under the applicable statutes, rules, and regulations." *Nippon Steel*, 337 F.3d at 1382 (citation omitted). Second, Commerce must make a subjective showing that the respondent not only has failed promptly to produce the requested information, "but further that the failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records." *Id.* at 1382-83.

Finally, for the court to sustain the application of AFA, Commerce must "articulate why it concluded that a party failed to act to the best of its ability, and explain why the absence of this information [was] of significance to the progress of its investigation." *Mannesmannrohren-Werke AG v. United States*, 23 CIT 826, 839, 77 F. Supp. 2d 1302, 1313-14 (1999).

In the Final Results, Commerce concluded that the use of facts available was required for Wuhan Bee's U.S. sales to its affiliates because its reported blend ratios could not be verified as accurate. Issues & Dec. Mem. at 79. Further, Commerce found that resort to facts available was appropriate "[b]ecause Wuhan Bee did not inform the Department that its blend ratios were not accurate until the Department discovered the fact

at verification" *Id.* at 80; see SAA at 869, 1994 U.S.C.C.A.N. at 4198 ("[Subsection 1677e(a)] requires Commerce . . . to make determinations on the basis of the facts available where requested information is missing from the record or cannot be used because, for example, it has not been provided, it was provided late, or Commerce could not verify the information."). In addition, because this discovery was made at verification, Commerce found that it "did not have the opportunity to allow Wuhan Bee to correct its deficient data," pursuant to 19 U.S.C. § 1677m(d). *Id.*

Next, Commerce used an adverse inference in selecting from among the facts available because it concluded that Wuhan Bee had failed to act to the "best of its ability," i.e., failed to do the maximum it was able to do, to produce documents related to reported blend ratios:

Wuhan Bee had sufficient opportunity to inform the Department that its blend ratios were not accurate, yet as late into the proceeding as March 15, 2005, respondent asserted on the record just the opposite – that its blend ratios were accurate and could be easily verified. . . . [R]espondent's own letters to the Department in December 2004 and March 2005, addressing various issues regarding the blend ratios and further manufacturing cost, make it clear that respondent knew how important and central these ratios were to the Department's ultimate margin calculations. Nevertheless, the Department gave respondent appropriate notice in its verification outline that it

would be verifying respondent's blend ratios and that respondent should "be prepared to demonstrate the blend ratio for all sales . . . and provide supporting documentation for all costs associated with further manufacturing." . . .

At verification, the Department discovered that the blend ratios were not accurate, at least not with the documentation that respondent was prepared to show the Department. Only at this time did respondent claim that the ratios could not be verified. Wuhan Bee hindered the calculation of accurate dumping margins in this review because it was not more forthcoming about the problems and issues surrounding the reporting of the blend ratios, even though the issue was discussed numerous times throughout this proceeding.

Issues & Dec. Mem. at 81. In other words, Commerce concluded that Wuhan Bee failed to put forth its maximum effort by failing to inform Commerce of problems surrounding its ability to accurately report blend ratios and by representing that the blend ratios were accurate and could easily be verified.

Plaintiffs do not challenge the propriety of Commerce's decision to resort to facts available under 19 U.S.C. § 1677e(a). See Pls.' Mem. 32 (acknowledging "errors in the calculation of blended ratios and the inability of PSH to fully comply with Commerce's . . . document and reconciliation requests"). Plaintiffs do, however, challenge Commerce's decision to take an adverse inference against Wuhan Bee in selecting from among the facts available.

First, plaintiffs object to Commerce's decision to use AFA based on the finding that Wuhan Bee and its affiliates did not act to the best of their abilities. They argue that Commerce failed to articulate why it concluded that a party failed to act to the best of its ability through a reasoned inquiry into the facts." Pls.' Mem. 32. Plaintiffs insist that the record does not support a finding "that Wuhan and its affiliates failed to cooperate fully with Commerce, or that the errors in blend ratio[s] were intended, or in fact, would have enabled Wuhan to obtain a more favorable result." Pls.'s Mem. 32.

Plaintiffs argue that Commerce decided to apply AFA based on a presumption "that Wuhan was aware, or should have been aware, that some of the blend ratios it calculated were in error." Pls.' Mem. 21. They claim this presumption is unreasonable and unfounded given the "commercial realities" of PSH's honey blending. Pls.' Mem. 24. In particular, plaintiffs contend that the record evidence shows that: (1) blending honey is an "art form," which is done according to customer preferences with respect to moisture content and color; (2) "honey is blended according to a plan recorded on . . . daily processing report[s]," which "do not specify the quantity or source of the honey barrels that enter into production"; and (3) "for commercial purposes, the amount of either subject or non-subject

merchandise is considered immaterial." Pls.' Mem. 23-24. As a result, for this review, Wuhan Bee manually reviewed documents to calculate blend ratios, since "PSH did not maintain blend ratios in the normal course of its record keeping," then reported the blend ratios in its section C and supplemental questionnaire responses. Pls.' Mem. 28.

For its part, defendant argues that "Commerce properly determined that [Wuhan Bee] and PSH failed promptly to produce or put forth the maximum effort to investigate and obtain the requested information" about blended honey sales. Def.'s Opp'n 12. Defendant insists that: (1) a reasonable importer would have known that the requested information was required to be kept and maintained, Def.'s Opp'n 15; and (2) Wuhan Bee failed to cooperate fully because it knew that blend ratios were a significant issue in Commerce's investigation and had notice that Commerce would examine those ratios at verification, yet failed to put forth the maximum effort to investigate and obtain the requested information. Def.'s Opp'n 18-22.

The court finds that Commerce's application of AFA is justified. Although not explicitly identified as such, the first required finding under *Nippon Steel*, i.e., an objective inquiry, has been satisfied. The key to this inquiry is whether

plaintiffs' behavior has been reasonable and responsible. As expressed in the Final Results, Commerce apparently found that plaintiffs were neither reasonable nor responsible in their record keeping and in representing that their questionnaire responses were accurate and could easily be verified. Commerce further apparently found that a reasonable and responsible respondent would have brought any problems surrounding its supporting documentation to Commerce's attention before the verification. These assumptions are consistent with the *Nippon Steel* Court's injunction that a reasonable importer "have familiarity with all of the records it maintains in its possession, custody, or control; and . . . conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question" *Nippon Steel*, 337 F.3d at 1382.

The second required finding, that Wuhan Bee failed to act to the best of its ability, has also been satisfied. Based on correspondence between Wuhan Bee and Commerce, it is clear that Wuhan Bee recognized that blended honey sales and further manufacturing expenses were significant issues in this review and that the databases submitted in response to Commerce's questionnaires on these issues would be the subject of verification. See, e.g., Letter from Jeffrey S. Grimson to

Commerce of 12/3/04, Pub. Doc. 222 at 1, 2 (acknowledging that Wuhan Bee was "unique among all honey respondents in that Chinese honey sold by Wuhan Bee through its US affiliate is blended with non-subject merchandise prior to sale to the first unaffiliated U.S. customer"; "[Data submitted on further manufacturing] represents the total cost of blending, including the non-subject honey."). Indeed, it represented that its questionnaire responses could be verified:

Wuhan Bee's responses to the Department's questionnaires have been sufficiently complete and accurate for the Department to be able to complete its verification of PSH's resale prices and U.S. expenses, including further manufacturing expenses, when verification takes place

Letter from Bruce M. Mitchell to Commerce of 3/15/05, Conf. Doc. 96 at 13. Along with this representation, Wuhan Bee indicated that it was reviewing its questionnaire responses. Letter from Bruce M. Mitchell to Commerce of 3/15/05, Conf. Doc. 96 at 13 n.6 (stating that plaintiffs had found certain clerical errors in their responses, but that "none . . . undermine[d] the overall veracity of the submission"). It did not, however, bring to Commerce's attention any problems affecting its ability to accurately report blend ratios, nor did plaintiffs ask Commerce for help in this regard.⁶ On the contrary, it assured Commerce

⁶ The argument that plaintiffs may not have kept records of blend ratios in the normal course of business does not stand (continued...)

that "PSH's record keeping system . . . used to compile the blend ratios reported in Sections C and E, conform to stringent industry standards and are sufficiently precise to allow PSH to trace the source of honey in its blends" Letter from Bruce M. Mitchell to Commerce of 3/15/05, Conf. Doc. 96 at 11. Nonetheless, at verification, PSH's officials failed to produce supporting documentation for twenty-eight percent of the invoices Commerce selected for review. Verification Rep., Conf. Doc. 106 at 3. With respect to those invoices for which PSH supplied supporting documentation, Commerce discovered inaccuracies forty-

⁶(...continued)

in the way of Commerce's application of an adverse inference because the "best of its ability" standard, particularly with respect to a successive review,

assumes that importers are familiar with the rules and regulations that apply to the import activities undertaken and requires that importers, to avoid a risk of an adverse inference determination in responding to Commerce's inquiries: (a) take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable importer should anticipate being called upon to produce; (b) have familiarity with all of the records it maintains in its possession, custody, or control; and (c) conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of the importers' ability to do so.

Nippon Steel, 337 F.3d at 1382. While the "best of its ability" standard recognizes that mistakes sometimes occur, it "does not condone inattentiveness, carelessness, or inadequate record keeping." *Id.*

three percent of the time. See Issues & Dec. Mem. at 79; Verification Rep., Conf. Doc. 106 at 3. That the errors in blend ratios may not have been intended is not relevant to Commerce's decision to take an adverse inference. *Nippon Steel*, 337 F.3d at 1383 ("While intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the statute does not contain an intent element. 'Inadequate inquiries' may suffice. The statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent."). Commerce's subjective inquiry, then, focuses on plaintiffs' "fail[ure] to put forth [their] maximum efforts to investigate and obtain the requested information from [their] records." *Id.* at 1382-83.

Finally, plaintiffs make the argument that the Case Brief as originally submitted, i.e., with the attachment, confirmed that the errors in blend ratios that Commerce discovered at verification did not result in any advantage to Wuhan Bee. That is, Wuhan Bee insists that it "[did] not obtain a more favorable result by failing to cooperate than if it had cooperated fully." Pls.' Mem. 31 (internal quotation marks & citation omitted). Commerce may take an adverse inference to induce compliance with its requests, and, indeed, to ensure that uncooperative

respondents do not receive a benefit as a result. See *Timken Co. v. United States*, 354 F.3d 1334, 1345 (Fed. Cir. 2004).

Commerce's decision whether or not to take an adverse inference, however, does not turn on whether Wuhan Bee's failure to comply with Commerce's requests resulted in any advantage to it. That Wuhan Bee did not comply to the best of its ability is enough to trigger the use of an adverse inference. *Nippon Steel*, 337 F.3d at 1381. Moreover, to the extent plaintiffs argue that Wuhan Bee did not "intend" the errors in blend ratios, this argument is immaterial because intent is not relevant to Commerce's decision to use AFA. *Id.* at 1383 ("The statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent."). It may be true, as plaintiffs contend, that the Case Brief and the attachment did not contain new information, but rather a resorting of information that had been verified. See Pls.' Mem. 30-32. Nonetheless, because the sole purpose of the attachment to the Case Brief was to show that "any differences between 'precise' quantities sold and 'actual' quantities reported would not have [had] an advantageous impact on Wuhan Bee's margins," Case Brief, Conf. Doc. 113, Attach. 1 at 20, Commerce's rejection of the attachment and narrative references thereto, if in error, was harmless error.

In light of the foregoing, Commerce justifiably found that a reasonable importer would have known that blend ratios were an important issue in this investigation and that the questionnaire responses, and the documents to support the responses, with respect to such ratios would be subject to verification. Commerce also reasonably concluded that Wuhan Bee was aware that the mix of subject and nonsubject merchandise in U.S. sales would be the subject of inquiry by Commerce at verification. Furthermore, Wuhan Bee's failure to maintain adequate records of blended honey sales and to bring any of the documentary problems to Commerce's attention prior to verification justified Commerce's finding that Wuhan Bee failed to do the maximum it was able to do. The court thus sustains Commerce's use of AFA.

II. Commerce's Construction of Normal Value

Next, the court turns to plaintiffs' challenges to Commerce's construction of normal value under 19 U.S.C. § 1677b(c)(1). When merchandise that is the subject of an antidumping investigation is exported from a nonmarket economy ("NME")⁷ country, such as the PRC, Commerce generally determines

⁷ A "nonmarket economy" country is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Because it deems China to be a nonmarket economy country, Commerce generally considers

(continued...)

its normal value by valuing the factors of production used in producing the merchandise to which it adds "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1). Factors of production include the quantities of raw materials consumed and the hours of labor needed to produce the subject merchandise. See 19 U.S.C. § 1677b(c)(3).

Commerce is directed to use "the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(1). What constitutes best available information is not defined by statute or regulation, but Commerce normally considers the quality, specificity and contemporaneity of the data and prefers to use public, country-wide data, where it is available. See *Goldlink Indus. Co. v. United States*, 30 CIT __, __, 431 F. Supp. 2d 1323, 1337 (2006); *Freshwater Crawfish Tail Meat from the PRC*, 66 Fed. Reg. 20,634 (Dep't of Commerce Apr. 24, 2001) (notice), Issues and Decision

⁷(...continued)

information on sales in China and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise." *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT __, __, 318 F. Supp. 2d 1339, 1341 (2004). Therefore, since the subject merchandise came from the PRC, Commerce constructed normal value by valuing the factors of production using surrogate data from India. See 19 U.S.C. § 1677b(c)(4).

Mem., cmt. 2.

A. Valuation of the Factors of Production

Plaintiffs dispute Commerce's decision as to what constitutes the "best available information" to value: (1) raw honey; and (2) labor costs.

1. Raw Honey

In the Final Results, Commerce valued raw honey using data submitted by plaintiffs from a Web site maintained by EDA Rural Systems Pvt. Ltd., an organization that provides business development services to the honey and beekeeping sector in India ("EDA Data"). See Factors of Production Valuation Mem. for the Final Results, Pub. Doc. 340, Attach. I. Based on this information, Commerce derived an average price for raw honey of 74.90 Rupees per kilogram during the POR. See Factors of Production Valuation Mem. for the Final Results, Pub. Doc. 340 at 2.

Commerce decided to use EDA Data exclusively in valuing raw honey. In doing so, it rejected three articles also submitted by plaintiffs, which contained different values of honey, from: (1)

Hindu Business Line;⁸ (2) *Indiainfoline*;⁹ and (3) *Indian Express*.¹⁰ Plaintiffs argue that the values contained in the three articles should be averaged with the value of honey found in the EDA Data.

In the Final Results, Commerce explained its decision to value raw honey using just the EDA Data: “[T]he EDA Data . . . constitute[s] a[n] . . . appropriate surrogate value source for this POR. [It is] . . . the best information currently available because it is publicly available, quality data, specific to the raw honey beekeeping industry in India, and contemporaneous with the POR.” Issues & Dec. Mem. at 10. With respect to quality, Commerce found that “the EDA Data source is highly documented, including numerous specific price points over a six year period for multiple types of honey from many suppliers, and includes detailed information on production, inputs, and beekeepers.” *Id.* at 11. With respect to specificity, Commerce noted that “the prices quoted in the EDA Data are specific to the raw honey beekeeping industry in the state of Bihar in India.” *Id.* With

⁸ “Girijan co-op targets Rs 135-cr turnover” (dated Apr. 17, 2003).

⁹ “Prospects of Bee Keeping in Rubber Plantations of Kerala” (dated Sept. 2, 2003).

¹⁰ “In Jharkhand, it’s all about honey, honey” (dated Feb. 17, 2003).

respect to contemporaneity, Commerce found that the "EDA Data is contemporaneous to this administrative review, . . . and it includes monthly data points over a majority of the POR." *Id.* (footnote omitted).

In addition, Commerce addressed the reliability and persuasiveness of the three other data sources proposed by plaintiffs and rejected each one:

[1] [T]he [*Hindu Business Line* article] . . . is not reliable because . . . the information is based on data provided by . . . an Indian cooperative, and represents the experience of only one producer; and . . . the Department has rejected this data in previous segments of this proceeding because it was not obtained from publicly available sources and may not be representative of country-wide prices in India. . . .

[2] [T]he [*Indiainfoline* article] appears to be nothing more than a school paper written by a first-year business student and posted on the Business School section of the website with no additional information on the author's qualifications or the sources of his information. . . .

[3] [T]he [*Indian Express* article] . . . states that the prices quoted are limited to a single beekeeper that only produces 1.5 MT per year, and . . . was rejected as unreliable [in a previous segment of the proceeding] [T]he exceptionally limited nature of [this] data renders [it] unpersuasive of Indian prices as a whole in comparison with the broader EDA Data.

Plaintiffs do not quarrel with Commerce's use of the EDA Data. Rather, they argue that Commerce's rejection of the other sources plaintiffs proposed was unreasonable. According to plaintiffs, the three articles "covered different regions of India but showed a relatively narrow range of prices for raw honey" Pls.' Reply Br. to Def.'s & Def.-Ints.' Resp. Brs. ("Pls.' Reply") 10. Plaintiffs further maintain that the prices contained in the EDA Data are not representative of the price of honey found in India generally. Pls.' Mem. 34; Pls.' Reply 9. Thus, plaintiffs contend that "[a]s all information on the record is region-specific, the most reasonable method to arrive at a country-wide surrogate value is to calculate an average price derived from all this data" Pls.' Mem. 37.

Plaintiffs therefore insist that "Commerce's reasons for rejecting [the *Hindu Business Line*, *Indiainfoline* and *Indian Express* articles] were arbitrary and capricious." Pls.' Reply 9.

Commerce rejected the [*Hindu Business Line* article] because the information related to a cooperative, while using the data from another cooperative, [Mahabaleshwar Honey Production Cooperative Society Ltd.], to determine financial ratios. Commerce rejected the [*Indiainfoline* article] as it had concerns over the origins of the article written by a business student, but used the EDA Data, found on a random website. Further, Commerce relied upon articles published in . . . *Indiainfoline* . . . in other proceedings. Finally, Commerce rejected [the *Indian Express* article] as it

was limited to the results of a single beekeeper and had previously rejected this information before. Yet, there is nothing to suggest that the price information in the article was unreliable.

Pls.' Reply 9. Plaintiffs thus seek a remand with instructions to value raw honey based on an average of the honey values found in the *Hindu Business Line*, the *Indiainfoline* and the *Indian Express* articles as well as the EDA Data.

In response, defendant contends that Commerce's explanations for rejecting plaintiffs' proposed data are reasonable, and that the record supports Commerce's decision not to average the honey values:

[T]he [*Hindu Business Line*, *Indiainfoline* and *Indian Express*] articles either quote prices from single producers, or contain data from unknown origins, which Commerce determined not to be comparable with the EDA data. Further Commerce "continue[d] to find that the [three articles] are unreliable sources for valuing honey." . . .

In this case, the sources for the surrogate value of raw honey contained upon the record were all regionally limited. EDA data are based upon the raw honey beekeeping industry in the second largest honey producing state in India, offering more representative prices than the article from Indiainfoline, the prices for which are from the Kerala region, which accounts for only nine percent of India's honey production. In addition, Commerce rejected the articles from [*Indiainfoline*] and Hindu Business Line because they either quote prices from single producers, making them less representative than EDA data, or contain data from unknown

origins rather than from public sources,
unlike the EDA data.

Def.'s Opp'n 29 & 31. Thus, defendant insists that, since the alternative data sources proposed by plaintiffs were not reliable, Commerce's decision not to average them with the EDA Data is justified.

Commerce enjoys some latitude in selecting among the available information in valuing the factors of production. See *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999). In choosing from among the available data, Commerce "must act in a manner consistent with the underlying objective of 19 U.S.C. § 1677b(c) - to obtain the most accurate dumping margins possible." *Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 838, 159 F. Supp. 2d 714, 719 (2001) (citation omitted); *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001)). To determine whether Commerce's selection of surrogate values furthers this statutory purpose, the court must determine whether "Commerce's choice of what constitutes the best available information evidences a rational and reasonable relationship to the factor of production it represents." *Shandong Huarong*, 25 CIT at 838, 159 F. Supp. 2d at 719 (citations omitted).

Here, the court finds reasonable Commerce's use of the EDA

Data and the exclusion of the other three sources proposed by plaintiffs. First, plaintiffs do not dispute the reliability of the EDA Data. Indeed, although now declaring the data as being from a "random website," at the administrative level they argued in favor of Commerce using it as a part of an average. See Issues & Dec. Mem. at 10. Moreover, Commerce's decision not to average the EDA Data with the three articles proposed by plaintiffs was reasonable in light of the deficiencies Commerce found in those sources.

First, Commerce was justified in rejecting the *Hindu Business Line* article. In a single sentence the article states a range of prices received by a single producer, the Girijan Co-operative Corporation Ltd. See *Hindu Business Line* Article at 2. The EDA Data, on the other hand, contains information on numerous producers and therefore represents a wider range of prices. In addition, there is no indication that the sources of the data contained in the *Hindu Business Line* article are publicly available. See Issues & Dec. Mem. at 12.

Second, the court finds no error in Commerce's conclusion that the *Indiainfoline* article was unreliable. Commerce found that unlike the EDA Data, the sources of which were well-documented and made available by a business entity, the

Indiainfoline article contained nothing to indicate it was reliable. In particular, there was "no additional information on the author's qualifications or the sources of his information" other than his status as a first-year business student. *Id.* 12-13.

Third, the *Indian Express* article was found not to be as representative as the EDA Data because it pertained to the experience of only a single beekeeper.

In light of the proposed sources' deficiencies, the court finds reasonable Commerce's decision not to average this data with the EDA Data, which Commerce found was (1) publicly available; (2) well-documented, with numerous price points for multiple types of honey from many suppliers; (3) detailed information on production, inputs and beekeepers; (4) based on India's second largest honey-producing region (Bihar); and (5) contemporaneous with the POR. Thus, Commerce's conclusion that the EDA Data was the "best available information" on the record on which to base its valuation of raw honey is supported by substantial evidence and in accordance with law.

2. Labor Costs

The cost of labor is another factor of production used to

construct normal value. As this Court has observed, "Commerce treats the wage rate differently from all other factors of production[.] [F]or labor, Commerce employs regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries."¹¹ *Dorbest Ltd. v. United States*, 30 CIT __, __, 462 F. Supp. 2d 1262, 1291 (2006). "Using this regression analysis, Commerce determines the relationship between countries' per capita Gross National Product ["GNI"] and their wage rates; Commerce approximates the wage rate of the PRC by using the PRC's GNI as the variable in the equation that was the result of the regression." *Id.* at __, 462 F. Supp. 2d at 1291.

Here, Commerce based its regression analysis upon the average wages from a basket of fifty-six market economy

¹¹ In full text, Commerce's regulation with respect to how labor is to be valued in the nonmarket economy context provides:

For labor, the Secretary will use regression-based wage rates reflective of the observed relationship between wages and the national income in market economy countries. The Secretary will calculate the wage rate to be applied in nonmarket economy proceedings each year. The calculation will be based on current data, and will be made available to the public.

countries.¹² Factors of Production Valuation Mem. for the Prelim. Results, Pub. Doc. 231, Attach. 14. Therefore, after making its calculation, it "use[d] the 2004-revised expected wage rate of \$0.93/hour as a surrogate for Chinese labor costs, in accordance with its regulations and long-standing practice." Issues & Dec. Mem. at 28.

Plaintiffs challenge Commerce's methodology for calculating the surrogate wage rate, arguing that in determining which countries make up the basket of fifty-six countries, Commerce "selectively excluded many low wage countries and selectively included non-comparable source countries." Pls.' Mem. 41. For example, plaintiffs point out that Commerce included "source countries, such as Switzerland, the U.K., Norway, and Germany," Pls.' Mem. 18, and excluded available data, which plaintiffs placed on the record, for twenty-two additional countries, e.g., Albania, Bangladesh, Cambodia and the Czech Republic. Pls.' Mem. 41; see also Letter from Bruce M. Mitchell to Commerce of 1/18/05, Ex. 5, Attach. 1, Pub. Doc. 257 (placing on the record data for twenty-two countries); Case Brief dated May 10, 2005,

¹² The basket of countries includes high-wage countries, such as Switzerland (\$18.24/hour); the United Kingdom (\$15.11/hour); and the United States (\$14.83/hour); and low-wage countries, such as India (\$0.15/hour); Pakistan (\$0.26/hour); and Sri Lanka (\$0.30/hour). Factors of Production Valuation Mem. for the Prelim. Results, Pub. Doc. 231, Attach. 14.

Pub. Doc. 301 at 44 & n.16. Commerce's exclusion of available data, plaintiffs argue, was arbitrary and contrary to Commerce's own position that "more data is better than less data." Pls.' Mem. 41.

Plaintiffs also contend that in performing its regression analysis, Commerce improperly combined data from 2001 (regarding the wage rates and per capita GNI of the fifty-six market economy countries) with data from 2002 (regarding Chinese GNI), when 2002 data was available with respect to the wage rates and per capita GNI of the market economy countries. Pls.' Mem. 17 (citing arguments raised below in plaintiffs' Case Brief dated May 10, 2005, Pub. Doc. 301 at 38-39). Plaintiffs charge that by mixing Chinese GNI data from 2002 with wage rate and per capita GNI data from 2001, Commerce violated its regulations which require use of "current data." Pls.' Mem. 41 (quoting 19 C.F.R. § 351.408(c)(3)). Thus, plaintiffs argue, Commerce's methodology "critically undermines any assertion that the regression based wage calculation significantly enhances the accuracy and fairness in the NME case." Pls.' Mem. 41.

Defendant responds that because "Commerce has consistently based its regression analysis upon average wages from a basket of 56 countries since it updated its regression analysis in 2000,"

the twin aims of predictability and fairness are served by using this method of calculating wage rate. Def.'s Opp'n 43. In addition, Commerce insists that changing the methodology as plaintiffs propose, i.e., to add twenty-two countries to the basket currently compiled, is a significant change that would require comment from the general public, which would be impracticable in this review. Def.'s Opp'n 43-44.

As to its wage rate finding, however, Commerce requests remand because it acknowledges that it "mistakenly relied upon income data from two different years [i.e., 2001 and 2002,] in its calculation of the surrogate wage rate." Def.'s Opp'n 41. Thus, defendant asks the court to sustain its wage rate calculation methodology and to remand for the limited purpose of recalculating the labor wage rate using "the correct GNI data." Def.'s Opp'n 45.

The court cannot sustain Commerce's labor calculation. When valuing factors of production, Commerce is required to use "the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate." 19 U.S.C. § 1677b(c)(1). In the Final Results, Commerce rejected plaintiffs' request to recalculate the surrogate wage:

The Department is reviewing its regression-based wage rate calculation . . .; however, comprehensively re-examining each country in the existing dataset and recalculating the wage rate regression using GNI requires more time than is currently available. To revise the data here would be impracticable given the time constraints of this review. The Department is fully satisfied that the current figures are reasonable and correct, and will use them unless and until they are changed as a result of a thorough review. Recalculating the regression analysis using a significantly different basket of countries would amount to a significant change in the Department's methodology; such a change should be subject to notice and comment from the general public. Thus, it would be inappropriate to restrict this public-comment process to the context of the instant review. Consequently, the Department will invite comments from the general public on this matter in a proceeding separate from the current review of this order.

Issues & Dec. Mem. at 28. In other words, Commerce declined to revise the data set it relied upon in the Final Results because: (1) it was impracticable under the statutory deadlines for completing its investigation; and (2) recalculating the regression analysis using a significantly different basket of countries would likely result in a significant change in methodology that would require comment from the public. This Court has rejected both of these arguments.

In *Dorbest Ltd.*, the Court found wanting the argument that statutory deadlines for completing investigations prevented Commerce from considering available information in updating its

regression model:

Congress was certainly sensitive to this concern [of completing investigations within statutory deadlines] by limiting Commerce's choice of data to that "available" during the investigation. But in recognizing this concern, Congress nonetheless required that if information was available, i.e., placed on the record, Commerce was compelled to consider it. Therefore, Commerce's defense runs directly against its statutory duty. Consequently, Commerce's . . . defense must . . . be rejected.

Id. at __, 462 F. Supp. 2d at 1296. As to Commerce's past practice of relying on data from fifty-six countries in making PRC wage rate calculations and the need for public comment prior to any change in that practice, the *Dorbest Ltd.* Court observed:

Commerce's . . . argument . . . that the data set in question must be developed through notice-and-comment rulemaking[] appears to be inconsistent with Commerce's past practice. Commerce has in the past updated and expanded the number of countries within the data set without resorting to notice and comment rulemaking. In fact, during the investigation here, Commerce used a basket of fifty-six countries, but during the voluntary remand, used a basket of only fifty-four. No notice-and-comment rulemaking was used to effect the change. Commerce has also, over time, expanded its data set of countries from forty-five countries to fifty-six countries without vetting its choices through notice-and-comment rulemaking.

Id. at __, 462 F. Supp. 2d at 1295. The court agrees with the *Dorbest Ltd.* Court's observations and likewise rejects Commerce's

arguments.¹³

In light of the foregoing, this matter is remanded so that Commerce may consider the information plaintiffs have placed on the record with respect to the twenty-two additional countries. Further, Commerce must explain its decisions: (1) to exclude the twenty-two low-wage countries with respect to which plaintiffs placed information on the record; and (2) to include data from high-wage countries, such as Switzerland, the United Kingdom and the United States. In the event that on remand Commerce rejects the data from the twenty-two additional countries, it must explain its decision with reference to specific evidence and without reference to time constraints. In addition, Commerce must explain its decision to rely on a methodology that results in the disparity observed between the hourly wage rate in, e.g., India (\$0.15/hour), a market economy country found to be economically comparable to the PRC, and the hourly wage rate

¹³ The court also notes that Commerce announced a revised methodology in a notice published on October 19, 2006. See Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawbacks; and Request for Comments, 71 Fed. Reg. 61,716, 61,721-23 (Dep't of Commerce Oct. 19, 2006). Under the revised methodology, the basket of countries "will include data from all market economy countries that meet the criteria described [in the notice] and that have been reported within 1 year prior to the Base Year," which is the most recent reporting year of the data required for the regression methodology. *Id.* at 61,722.

calculated for the PRC (\$0.93/hour).¹⁴ *Dorbest Ltd.*, 30 CIT at ___, 462 F. Supp. 2d at 1269 (“For the court to conclude that a reasonable mind would support Commerce’s selection of the best available information, Commerce needs to justify its selection of data with a reasoned explanation.”).

Finally, with respect to its request for voluntary remand to revise its wage rate finding, Commerce is instructed to recalculate the wage rate using the correct, most current GNI data. See *Allied Pac. Food (Dalian) Co. v. United States*, 30 CIT ___, ___, 435 F. Supp. 2d 1295, 1309 (2006) (granting voluntary remand instructing that “Commerce must support its findings of fact concerning the surrogate value for the labor wage rate by citing to specific evidence on the record and also must include an explanation for the choices it makes from among the various alternatives it considers”).

B. Surrogate Financial Ratios

In accordance with the requirement under 19 U.S.C. § 1677b(c)(1)(B) that normal value include amounts for “general expenses and profit,” Commerce “usually calculates separate

¹⁴ As plaintiffs point out, “the calculated wage rate of \$0.93/hour is more than 600% higher than India’s published, country-wide labor rate of \$0.15/hour.” Issues & Dec. Mem. at 25.

values for selling, general and administrative [("SG&A")] expenses, manufacturing overhead and profit, using ratios¹⁵ derived from financial statements of one or more companies that produce identical or comparable merchandise in the surrogate country." *Shanghai Foreign Trade*, 28 CIT at __, 318 F. Supp. 2d at 1341.

Here, Commerce determined that data from Mahabaleshwar Honey Production Cooperative Society Ltd.'s ("MHPC") 2003-2004 financial statement was the "best available information" from which to derive surrogate financial ratios.¹⁶ In choosing to

¹⁵ As this Court explained in *Shanghai Foreign Trade*,

[t]o calculate the SG & A ratio, the Commerce practice is to divide a surrogate company's SG & A costs by its total cost of manufacturing. For the manufacturing overhead ratio, Commerce typically divides total manufacturing overhead expenses by total direct manufacturing expenses. Finally, to determine a surrogate ratio for profit, Commerce divides before-tax profit by the sum of direct expenses, manufacturing overhead and SG & A expenses. These ratios are converted to percentages ("rates") and multiplied by the surrogate values assigned by Commerce for the direct expenses, manufacturing overhead and SG & A expenses.

Id. at __, 318 F. Supp. 2d at 1341 (citing *Manganese Metal From the PRC*, 64 Fed. Reg. 49,447, 49,448 (Dep't of Commerce Sept. 13, 1999) (final results)).

¹⁶ MHPC, a cooperative, "is in the business of buying raw honey from its members and selling processed honey to its
(continued...)

rely on the MHPC financial statement, it rejected the financial statement of Apis (India) Natural Products ("Apis"), a honey supplier:

With respect to quality, we find that MHPC is a better source of data than Apis because the MHPC materials include a complete annual report, an auditors report, and complete profit and loss business statements that segregate MHPC's honey and fruit canning businesses. With respect to specificity, we note that MHPC is a honey processor in India, and the financial statements include details on MHPC's costs and revenues related to its honey processing business. The MHPC statement is also contemporaneous to the POR In contrast, we find that the Apis statement does not include any auditor notes, nor does it appear to include complete schedules or details on Apis' operations. Therefore, we are not using the Apis data because we determine that it is not as reliable or detailed as that of MHPC, and because we have other publicly available information which meets the Department's criteria for data on which to base the surrogate financial ratios.

Issues & Dec. Mem. at 17. Thus, Commerce concluded the MHPC financial statement was more reliable than the Apis financial statement and used the data in the MHPC financial statement to derive the financial ratios.

When calculating the ratio for manufacturing overhead, it was necessary to include the cost of raw honey used in making

¹⁶(...continued)
customers" Issues & Dec. Mem. at 18.

processed or finished honey. The MHPC financial statement, however, did not include a raw material cost for honey. Accordingly, Commerce extrapolated the raw material cost, using the following methodology:

[The] raw material cost was derived by dividing the total cost of honey by the quantity [MHPC] purchased [from its members] and then multiplying this figure by the sum of the quantities [MHPC] sold [to its customers] and lost during production.

Issued & Dec. Mem. at 18. Commerce included the cost of raw materials as a component of direct manufacturing costs. See Factors of Production Valuation Mem. for the Final Results, Pub. Doc. 340, Attach. II (Surrogate Financial Ratios).

Plaintiffs argue that: (1) Commerce's use of the MHPC financial statement was unreasonable because it did not include a figure representing the raw material cost for honey; and (2) the methodology Commerce used to extrapolate the raw material cost for honey is flawed because it is based on unsupported assumptions. Pls.' Mem. 37-38.

First, plaintiffs claim that without "separate opening and closing raw materials inventories or [an] indicat[ion] [of] the amount of honey processed during the reported accounting period," the MHPC financial statement is incomplete on its face. Pls.' Mem. 37. Plaintiffs contend that the absence of this information

makes Commerce's decision to use the MHPC financial statement unreasonable.

Second, the methodology Commerce used to extrapolate the raw material cost for honey, plaintiffs claim, is based on unsupported assumptions. According to plaintiffs:

In the absence of . . . data [on either the opening and closing raw materials inventories or the amount of honey processed during the reported accounting period], Commerce assumed [1] any raw honey processed from opening period inventory was valued at the price of raw honey purchased during the [reported accounting period]. Commerce further assumed [2] all honey sold during the [reported accounting period] was processed during the [reported accounting period].

Commerce's calculation of financial ratios is predicated on these assumptions. However, there is nothing in the MHPC Financials to support these assumptions, as opposed to alternative assumptions that honey consumed from inventory to process finished honey was priced higher or lower than purchased raw honey or that MHPC processed more honey than it sold during the [reported accounting period] or less than it sold - any of which would radically change the surrogate financial ratios. As such it was impossible for Commerce to calculate accurate, actual surrogate financial ratios from the MHPC Financials.

Pls.' Mem. 37-38. In other words, plaintiffs charge that the MHPC financial statement does not support the assumptions that (1) the cost of raw honey (if any) taken from MHPC's inventory was the same as later purchased raw honey; and that (2) all of

the honey MHPC sold during the reported accounting period was processed during that period. Commerce would not have had to make these assumptions, plaintiffs argue, had it used the Apis financial statement.

Plaintiffs also argue that the MHPC financial statement lacks a report indicating it is in accordance with Indian Generally Accepted Accounting Principles ("GAAP"). Pls.' Mem. 38-39. Plaintiffs argue that as a cooperative, MHPC is not required to report its financial statements in accordance with the Indian GAAP. Pls.' Mem. 39. They further contend that Apis is so required, and "therefore its auditor's report illustrates that the statements are reliable as in accordance with the financial/accounting standards of India." Pls.' Reply 13 n.18. Plaintiffs thus seek a remand to Commerce with instructions to use the Apis financial statement to calculate the surrogate values for factory overhead, SG&A expenses and profit.

For its part, defendant contends Commerce's use of the 2003-2004 MHPC financial statement to derive surrogate financial ratios was reasonable because the statement was contemporaneous with the POR and included complete and detailed information regarding MHPC's financial and business operations. Def.'s Opp'n 35-36.

Next, defendant argues that the methodology Commerce used to extrapolate the cost of raw materials consumed is reasonable. First, defendant contends that the methodology "is consistent with [the antidumping statute,]¹⁷ which permits Commerce to allocate costs and make adjustments where the reported costs do not reasonably reflect the costs associated with the subject merchandise." Def.'s Opp'n 37; see also Issues & Dec. Mem. at 18. Second, defendant states: "[R]espondents have cited no specific evidence that the derived MHPC raw material cost of honey is distortive." Def.'s Opp'n 37 (quoting Issues & Dec. Mem. at 18). Finally, with respect to plaintiffs' argument that the MHPC financial statement is not GAAP compliant, defendant contends that plaintiffs' argument is barred because it was not previously raised before Commerce. Def.'s Opp'n 32; see also Def.-Ints.' Opp'n 30.

The court finds that Commerce was justified in determining that the 2003-2004 MHPC financial statement was the best available information to value factory overhead, SG&A expenses and profit. It is apparent from the Final Results that Commerce examined both the MHPC and Apis financial statements and compared

¹⁷ In its opposition brief, defendant incorrectly cites 19 U.S.C. § 1677a(c), which pertains to adjustments for export price and constructed export price. The court presumes that defendant intended to cite 19 U.S.C. § 1677b(f).

their quality, specificity and contemporaneity. It then concluded based on this examination that "the Apis financial statement . . . is not a reliable source for calculating the surrogate financial ratios because it is neither complete, nor sufficiently detailed to provide a reliable source for surrogate values." Issues & Dec. Mem. at 17. As Commerce observed, "the Apis statement does not include any auditor notes, nor does it appear to include complete schedules or details on Apis' operations." *Id.* The MHPC's statement, on the other hand, "include[s] a complete annual report, an auditors report, and complete profit and loss and business statements that segregate MHPC's honey and fruit canning businesses." Issues & Dec. Mem. at 17; Factors of Production Valuation Mem. for the Final Results, Pub. Doc. 340, Attach. II. Unlike Apis's statement, MHPC's statement details its honey operations with both narrative text and schedules indicating, for example, the number of kilograms of honey produced by particular MHPC members and the price per kilogram. See Rebuttal to Pet'r Surrogate Data, Pub. Doc. 265, Attach. 1. The court thus finds that Commerce's determination that the MHPC financial statement was the best available information to value financial ratios was reasonable.

While Commerce reasonably found the MHPC's financial statement to be more reliable than Apis's, as has been noted, the

MHPC financial statement lacks a figure representing the raw material cost for honey. In the absence of this data, Commerce extrapolated the data using a methodology, which it expressed mathematically as follows: total cost of honey purchased during MHPC's reporting year, i.e., April 1, 2003, to March 31, 2004 (2,598,344 Rs.)/quantity purchased during that year (29,433.80 kg.) X the sum of the quantities sold and lost during production during that year (40,540.20 Rs.) = 3,578,789.88 Rs. See Factors of Production Valuation Mem. for the Final Results, Pub. Doc. 340, Attach. II. The court will sustain Commerce's chosen methodology "[a]s long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence on the record supporting the agency's conclusions" *Ceramica Regiomontana, S.A.*, 10 CIT at 404-05, 636 F. Supp. at 966; *Shakeproof Assembly Components*, 268 F.3d at 1382 ("[T]he critical question is whether the methodology used by Commerce is based upon the best available information and establishes antidumping margins as accurately as possible.").

The court finds reasonable Commerce's methodology for determining the raw material cost of honey. First, while plaintiffs complain that the methodology was unsupported by the record, they do not propose an alternative methodology. Second,

Commerce's use of the methodology was not unreasonable because it resulted in Commerce's use of prices that are closest in time to the POR. Issues & Dec. Mem. at 17 ("[I]t is the Department's established practice to select the most contemporaneous surrogate values to value the factors-of-production and financial ratios.").

With respect to plaintiffs' GAAP argument, the court finds it is barred because it was not raised before the agency. Title 28 U.S.C. § 2637(d) provides that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." *Id.* The doctrine of exhaustion is not an absolute requirement in Commerce cases; it is left to this Court to determine when exhaustion is appropriate. *Koyo Seiko Co. v. United States*, 26 CIT 170, 175, 186 F. Supp. 2d 1332, 1338 (2002); *Carpenter Tech. Corp. v. United States*, 30 CIT __, __, 452 F. Supp. 2d 1344, 1346 ("[E]xhaustion is generally appropriate in the antidumping context because it allows the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review - advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency.") (citation omitted). "Failure to allow an agency to consider the matter and make its ruling deprives the agency of its function and results in the court

usurping the agency's power as contemplated by the statutory scheme." *China First Pencil Co. v. United States*, 30 CIT __, __, 427 F. Supp. 2d 1236, 1244 (2006) (citations omitted).

Plaintiffs make no argument that an exception to this rule applies, e.g., where administrative consideration would be futile, or the issue raised is a pure question of law. See, e.g., *id.*; *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) (where "[s]tatutory construction alone [was] not sufficient to resolve this case," the case "[did] not qualify for the 'pure question of law' exception to the exhaustion doctrine").

Plaintiffs raise for the first time the issue of GAAP compliance in support of its argument that the MHPC financial statement is not as reliable as the Apis financial statement. While plaintiffs presented their other arguments with respect to the reliability of the MHPC financial statement at the administrative proceeding, they failed to raise this argument. Thus, because this issue was not raised before Commerce it is barred by the exhaustion of remedies doctrine. See *Carpenter Tech. Corp.*, 30 CIT at __, 452 F. Supp. 2d at 1346 (finding plaintiff failed to exhaust administrative remedies on issue of collapsing where plaintiff failed to raise the issue before Commerce). Therefore, the court shall not consider plaintiffs'

GAAP argument.

III. Commerce's Calculation of Plaintiffs' Assessment Rate and Cash Deposit Rate

The court next turns to plaintiffs' challenge to Commerce's method of calculating cash deposit and assessment rates. In the Final Results, Commerce "determined that, with respect to the antidumping duty order on honey from the PRC, *per-kilogram* antidumping duty cash deposit and assessment rates are appropriate." Issues & Dec. Mem. at 30 (emphasis added).

Plaintiffs contend that "[t]hroughout the prior annual reviews and new shipper reviews on honey, Commerce's practice was to base its assessment rate and cash deposit rate upon an *ad valorem* basis." Pls.' Reply 14. Yet, "after all case briefs and rebuttal briefs had been filed, and the record closed . . . Commerce requested comments regarding a possible revision to Commerce's standard methodology for calculating assessments and cash deposits, from an *ad valorem* basis to a per kilogram basis," and allowed "less than two days for commenting on the issue, denying Wuhan an opportunity to fully review and comment on [the] issue." Pls.' Mem. 42. Plaintiffs argue that "'principles of fairness prevent Commerce from changing its methodology at this late stage {and} Commerce is required to administer the antidumping laws fairly.'" Pls.' Reply 14 (quoting *Shikoku Chem.*

Corp. v. United States, 16 CIT 382, 388, 795 F. Supp. 417, 421 (1992)).

Defendant responds that while Commerce's regulations "provide for the agency to 'normally'¹⁸ calculate the assessment rate upon an *ad valorem* basis," the "regulation **does not require** Commerce to calculate the assessment rate on an *ad valorem* basis." Def.'s Opp'n 38, 39 (emphasis in original). With respect to the amount of time given to the parties to comment on the proposed use of a per kilogram methodology, defendant asserts that "Wuhan could have requested an extension of time, but did not." Def.'s Opp'n 40. Thus, defendant urges the court to sustain Commerce's decision to apply an assessment rate and the

¹⁸ Title 19 C.F.R. § 351.212 states that "normally" the assessment rate will be based on the entered value of merchandise. Entered value is not, however, the sole means by which Commerce may calculate assessment rate:

If the Secretary has conducted a review of an antidumping order under § 351.213 (administrative review), . . . the Secretary normally will calculate an assessment rate for each importer of subject merchandise covered by the review. The Secretary normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes. The Secretary then will instruct the Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise.

19 C.F.R. § 351.212(b)(1).

cash deposit rate on a per kilogram basis.

Here, because (1) Commerce used the *ad valorem* methodology to calculate such rates in the first annual review and new shipper reviews on honey,¹⁹ and (2) Commerce asked for comments on a possible change from an *ad valorem* to a per kilogram basis late in the course of this review, i.e., after the record was closed, the court finds that Commerce unreasonably restricted the time in which the parties could comment to two days.²⁰ While the regulations do not require Commerce to use the *ad valorem* method in all situations, as evidenced by the word "normally," considerations of fairness favor allowing plaintiffs more time to respond to Commerce's proposed change in methodology after having used the *ad valorem* methodology in this and prior reviews. As

¹⁹ See, e.g., Honey from the PRC, 68 Fed. Reg. 69,988, 69,994 (Dep't of Commerce Dec. 16, 2003) (prelim. results of first antidumping duty admin. rev.) ("[T]he Department will issue appraisal instructions directly to CBP to assess antidumping duties on appropriate entries by applying the assessment rate to the entered value of the merchandise."); Honey from the PRC, 69 Fed. Reg. 69,350, 69,356 (Dep't of Commerce Nov. 29, 2004) (notice of prelim. results of new shipper revs.) ("[W]e will calculate importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of the dumping margins calculated for the examined sales to the total entered value of those same sales.").

²⁰ By letter dated May 24, 2005, Commerce requested comments from the interested parties regarding its proposed revision to the assessment and cash deposit methodology by the close of business on May 26, 2005. Letter from Commerce to All Interested Parties of 5/24/05, Pub. Doc. 317 at 1.

noted in the Final Results, Commerce's decision to use a per kilogram methodology here was based on its finding that "there can be a substantial difference between the U.S. sales price for honey and the average entered value reported to U.S. Customs and Border Protection." Issues & Dec. Mem. at 30. This finding led Commerce to conclude that it "[was] unable to calculate *ad valorem* cash deposit rates that [would] ensure the collection of total antidumping duties due." *Id.* Commerce reached its decision, however, without adequate time being allotted for either the giving of comments or for consideration of comments. As a result, plaintiffs were prejudiced by the Department's actions. See *Sea-Land Serv., Inc. v. United States*, 14 CIT 253, 257, 735 F. Supp. 1059, 1063 (1990) (requiring a showing that procedural errors by the agency "'were prejudicial to the party seeking to have the action declared invalid'") (citations omitted), *aff'd and adopted*, 923 F.2d 838 (Fed. Cir. 1991). The court thus finds that on remand plaintiffs shall have the opportunity to submit further comments on whether Commerce should calculate assessment and cash deposit rates on an *ad valorem* basis or a per kilogram basis, in light of Commerce's concern that it would be unable to "ensure the collection of total antidumping duties due." *Id.* Furthermore, plaintiff shall be allowed to place evidence on the record, should it find it necessary to do so, specifically with respect to how an *ad*

valorem methodology furthers, or does not further, the collection of total duties owed. Finally, Commerce must fully explain its decision to use a per kilogram or *ad valorem* methodology by reference to evidence placed on the record.

CONCLUSION

For the forgoing reasons, the court sustains the Final Results in part and remands for further action consistent with this opinion. Remand results are due October 20, 2007. Comments to the remand results are due November 20, 2007. Replies to such comments are due December 4, 2007.

/s/ Richard K. Eaton
Richard K. Eaton

Dated: July 20, 2007
New York, New York

ERRATA

Wuhan Bee Healthy Co. v. United States, Court No. 05-00438, Slip Op. 07-113, dated July 20, 2007.

Page 3: In line 18, replace "January 22, 2003" with "January 22, 2004"

In line 20, replace "68 Fed. Reg. 3009" with "69 Fed. Reg. 3117"

Page 4: In line 1, replace "Jan. 22, 2003" with "Jan. 22, 2004"

July 20, 2007