Slip. Op. 07–108

FORMER EMPLOYEES OF INDEPENDENT STEEL CASTINGS COMPANY, INC., Plaintiffs, v. UNITED STATES DEPARTMENT OF LABOR, Defendant.

Before: The Hon. Richard W. Goldberg
Senior Judge
Court No. 06–00338
PUBLIC VERSION

[Labor's determination regarding ATAA eligibility is remanded.]

Dated: July 10, 2007

Joyce Goldstein & Associates (*Joyce Goldstein* and *Gina Fraternali*) for the Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Tara J. Kilfoyle*), for the Defendant.

OPINION

GOLDBERG, Senior Judge: Independent Steel Castings Company ("ISCCO"), based in New Buffalo, Michigan, produced steel, aluminum and bronze mold and cast products. The plant closed on May 27, 2005. On March 2, 2006, thirty-nine former employees of ISCCO ("Plaintiffs") filed a petition with the U.S. Department of Labor ("Labor") for Trade Adjustment Assistance ("TAA") and Alternative TAA ("ATAA"), pursuant to 19 U.S.C. §§ 2271–2273, 2318.

On July 14, 2006, Labor certified Plaintiffs as eligible to apply for TAA benefits but denied their eligibility to apply for ATAA benefits, citing a failure to satisfy one of the ATAA group eligibility criteria. On July 17, 2006, Plaintiffs sent Labor a request for reconsideration of Labor's negative determination with regard to ATAA group eligibility. This request was also denied.

Plaintiffs filed a complaint with this Court on October 6, 2006, and subsequently filed a motion, pursuant to USCIT Rule 56.1, for judgment upon the agency record. Plaintiffs seek the reversal of Labor's

negative determination regarding ATAA eligibility and Labor's denial of the motion for reconsideration. They argue that Labor's conclusions are not supported by substantial evidence and ask the Court to order Labor to certify Plaintiffs as eligible to apply for ATAA. In the alternative, Plaintiffs ask the Court to remand the case back to Labor with instructions to conduct a more thorough investigation. In response, Labor argues that this Court lacks authority to order Labor to certify Plaintiffs as eligible for ATAA benefits, and, moreover, that there is substantial evidence to support Labor's conclusions.

This Court has jurisdiction under 28 U.S.C. § 1581(d)(1). Because this Court finds that Labor's conclusions regarding Plaintiffs' ATAA group eligibility are not supported by substantial evidence, this action is remanded to Labor for further proceedings consistent with this opinion.

I. *BACKGROUND*

A. Relevant Legal Framework

TAA and ATAA are government programs designed to assist workers who have become unemployed due to the effects of international trade. *See Former Employees of Int'l Bus. Machs. Corp. v. U.S. Sec'y of Labor*, 29 CIT ___ , ___ , 403 F. Supp. 2d 1311, 1314 (2005). The goal of these programs is to help trade-affected workers quickly reenter the workforce. *See* U.S. Gov. Accounting Office, *TAA: Reforms Have Accelerated Training Enrollment, but Implementation Challenges Remain*, GAO–04–1012, Sept. 2004, at 25 ("GAO Report 04–1012"). The ATAA program was created specifically for older TAA-certified workers for whom retraining may not be appropriate. *Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 30 CIT ___ , ___ , 454 F. Supp. 2d 1306, 1310 n.5 (2006). It provides a wage subsidy for such workers who quickly obtain reemployment at a lower wage than what they previously earned. *See* U.S. Gov. Accounting Office, *TAA: Most Workers in Five Layoffs Received Services, but Better Outreach Needed on New Benefits*, GAO–06–43, Jan. 2006, at 9.

For an individual worker to receive benefits under ATAA, (1) the worker group must be certified as ATAA-eligible, and (2) the worker must be individually certified as ATAA-eligible. *See* 19 U.S.C. § 2318 (Supp. IV 2004). Labor considers three criteria to determine whether to grant group certification under the ATAA. *See ATAA Program: Training and Employment Guidance Letter Interpreting Federal Law* ("*Guidance Letter*"), 69 Fed. Reg. 60,904, 60,904–05 (Dep't of Labor Oct. 13, 2004). These three criteria are:

(I) Whether a significant number of workers in the workers' firm are 50 years of age or older.

(II) Whether the workers in the workers' firm possess skills that are not easily transferable.

(III) The competitive conditions within the workers' industry.

19 U.S.C. § 2318(a)(3)(A)(ii). Then, to be individually eligible for ATAA benefits, the worker must, inter alia, be at least fifty years of age and obtain reemployment not more than twenty-six weeks after the date of separation from the adversely-affected employment. *Id*. § 2318(a)(3)(B)(ii)–(iii).

B. Labor's Investigation

On July 14, 2006, Labor published its determinations in the *Federal Register* certifying Plaintiffs as eligible to apply for TAA benefits, but denying their eligibility to apply for ATAA benefits. *Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance* ("*Notice of Determinations*"), 71 Fed. Reg. 40,156, 40,157 (Dep't of Labor July 14, 2006). The denial of ATAA eligibility was based on Labor's determination that one of the ATAA criteria, whether the workers in the workers' firm possess skills that are not easily transferable, had not been satisfied. *Id*. On July 17, 2006, Plaintiffs sent Labor a request for administrative reconsideration of Labor's negative determination, pursuant to 29 C.F.R. § 90.18(c). In support of their request for reconsideration, and in an attempt to provide Labor with "facts not previously considered," *id*., Plaintiffs submitted assorted statistics showing unemployment rates in New Buffalo and the surrounding parts of Michigan. On July 31, 2006, Labor sent Plaintiffs a letter denying their application for administrative reconsideration. In that letter, Labor bolstered its determination that the Plaintiffs possess skills that are easily transferable by divulging that during Labor's initial investigation, an ISCCO company official had revealed that each of the separated workers in question had been offered positions at another foundry in the area. Pls.' Mot. App. A 99 (Letter from Linda G. Poole, Certifying Officer, Department of Labor, Division of Trade Adjustment Assistance, to Thomas C. Carey, Associate General Counsel, International Union, United Automobile, Aerospace and Agriculture Implement Workers of America (July 31, 2006)) ("Letter from Labor").

The confidential administrative record later revealed that [ ]. Labor issued its negative determination with regard to the Plaintiffs' ATAA eligibility.

II. *STANDARD OF REVIEW*

Based on the record, Labor's findings of fact are conclusive if supported by substantial evidence. *See* 19 U.S.C. § 2395(b) (Supp. IV 2004). Under the substantial evidence standard, the court is "not free to substitute its judgment for that of the agency. . . ." *Int'l Bus.*

Machs., 29 CIT at ___ , 403 F. Supp. 2d at 1324. On the other hand, substantial evidence is more than a "mere scintilla," *e.g.*, *Former Employees of Chevron Prods. Co. v. U.S. Sec'y of Labor*, 27 CIT 1135, 1143, 279 F. Supp. 2d 1342, 1349 (2003) (quotation marks omitted), and "must do more than create a suspicion of the existence of the fact to be established. . . ." *SSIH Equip. S.A. v. U.S. Int'l Trade Comm'n*, 718 F.2d 365, 382 (Fed. Cir. 1983) (quotation marks omitted). Furthermore, all rulings based on the agency's findings of fact must not be arbitrary and capricious, but rather the result of reasoned analysis. *See Former Employees of Gen. Elec. Corp. v. U.S. Dep't of Labor*, 14 CIT 608, 611 (1990). "Courts have not hesitated to set aside agency determinations which are the product of perfunctory investigations." *Int'l Bus. Machs.*, 29 CIT at ___ , 403 F. Supp. 2d at 1315.

III. *DISCUSSION*

The issue before the Court is whether Labor's finding that Plaintiffs' skills are easily transferable is supported by substantial evidence.

Plaintiffs contend that Labor's finding of fact is not supported by substantial evidence by arguing that (1) a job offer does not constitute substantial evidence that workers' skills are easily transferable, (2) [ ] statements are unreliable and therefore do not constitute substantial evidence, and (3) Labor cannot rely on [ ] that Plaintiffs' skills are easily transferable because this is a legal conclusion.

Labor contends that there is substantial evidence to support its conclusion that Plaintiffs' skills are easily transferable to other positions in the local commuting area. In support of this, Labor argues that (1) it conducted a reasonable investigation and, (2) it properly relied upon the factual statements of a knowledgeable company official in reaching its determination.

Due to the nature of the TAA programs, Labor is "obligated to conduct [its] investigation with *the utmost regard* for the interest of the petitioning workers." *BMC Software*, 30 CIT at ___ , 454 F. Supp. 2d at 1312 (quotation marks omitted). The second criterion for ATAA group eligibility–that the workers' skills are not easily transferable to other employment–prevents workers who obtain new employment requiring similar skills from receiving wage insurance benefits under ATAA. *See* GAO Report 04–1012 at 26. Labor's own guidelines provide instructions on how to gather evidence for this criterion:

> For criterion 2, the necessary information will . . . be obtained through telephone communication with the appropriate company official at the subject firm. Specifically, the company official will be asked to confirm that the worker group for whom a petition has been filed possesses job skills that are not easily transferable to other employment, *with a focus on what skills*

> *the worker possesses.* Should the company official be unable to provide information as to whether the skills are easily transferable, the state . . . will be asked to furnish the assessment.

Guidance Letter, 69 Fed. Reg. at 60,905 (emphasis added).

In addition to requiring non-transferability of skills at the group certification level, one of the requirements of individual ATAA eligibility is that the workers must obtain new employment within twenty-six weeks of separation. 19 U.S.C. § 2318(a)(3)(B)(ii). In other words, while the program requires workers to find reemployment quickly, it only covers those who quickly find reemployment requiring *different* skills. *See Guidance Letter*, 69 Fed. Reg. at 60,905 ("Under the ATAA program, workers in an eligible worker group who are at least 50 years of age and who obtain *different*, full-time employment within 26 weeks of separation from adversely-affected employment at wages less than those earned in the adversely-affected employment [will be eligible for ATAA benefits]." (emphasis added)). As such, the program's wage subsidy is clearly designed to encourage older workers who might have difficulty finding reemployment that utilizes their existing skill-sets to quickly reenter the labor market by accepting lesser-paying jobs.

In this case, Labor appears to have lost sight of the purpose of this criterion and, particularly, the evidence required to satisfy it.[1] [ ]. While [ ] provided ample room for *assumptions* as to the skills of the workers and the types of jobs that were offered, nothing [ ], or anywhere else in the record, provides information regarding the actual skills of the petitioning workers that would assist a Labor investigator in assessing whether this criterion has been satisfied.

Moreover, [ ].[2] Labor "cannot simply adopt as its own the legal conclusions of employers. . . . Rather, the agency must reach its own conclusions, based on its own thoughtful, thorough, independent analysis of all relevant record facts." *Int'l Bus. Machs.*, 29 CIT at ___, 403 F. Supp. 2d at 1331. Indeed, "it is Labor's responsibility, not the responsibility of the company official, to determine whether a former employee is eligible for benefits." *Former Employees of Federated Merch. Group v. United States*, Slip. Op. 05–16, 2005 WL

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[1] It should be mentioned that Plaintiffs appear to have similarly lost sight of the purpose of this criterion. The evidence that Plaintiffs proffered in their application for reconsideration of the initial negative determination regarding ATAA group eligibility spoke only to unemployment statistics in the area surrounding New Buffalo. *See* Pls.' Mot. App. A 87–88 (Letter from Thomas C. Carey, Associate General Counsel, International Union, United Automobile, Aerospace and Agriculture Implement Workers of America, to Edward Tomchick, Program Manager, Division of Trade Adjustment Assistance, United States Department of Labor, Attach. B–D (July 17, 2006)). As Labor noted in its denial of the request for reconsideration, general unemployment figures speak neither to the skills that the Plaintiffs possess nor to the skills required by jobs potentially available to Plaintiffs. *See* Pls.' Mot. App. A 99 (Letter from Labor).

[2] [ ]

290015, at *6 (CIT Feb. 7, 2005). [ ] cannot, without more, constitute substantial evidence that the Plaintiffs' skills are easily transferable.

[ ] is not instructive as to the workers' skills because [ ] fails to provide substantial evidence of skills either possessed by the workers or required by the jobs that they were allegedly offered.

The only evidence in the record that speaks to the transferability of skills is that Plaintiffs worked at a steel, aluminum and bronze mold and cast products plant, and that they were offered jobs at a nearby "foundry." *See supra* Part I.B. Given the requirement that workers be employed within twenty-six weeks of separation in order to be individually eligible for ATAA benefits, 19 U.S.C. § 2318(a)(3)(B)(ii), it would be inapposite if evidence of a job offer alone could disqualify a worker group. The discovery that Plaintiffs were offered jobs at a nearby foundry might give rise to a suspicion that they were offered jobs similar to those that they had held at ISCCO. However, without more information regarding the skills that the workers possess and the skills required by the jobs that they were allegedly offered, this evidence does not constitute substantial evidence that the workers possess skills that are easily transferable to other employment.

This Court is not persuaded by Plaintiffs' assertion that Labor is not entitled to rely on the factual statements by [ ]. Labor is "entitled to base an adjustment assistance eligibility determination on statements from company officials if [Labor] reasonably concludes that those statements are creditworthy and are not contradicted by other evidence." *Former Employees of Marathon Ashland Pipe LLC v. Chao*, 370 F.3d 1375, 1385 (Fed. Cir. 2004). First, as Labor points out, [ ]. Plaintiffs' contention that [ ], even if true, is not significant enough of an error to question [ ] credibility with regard to the information relating to criterion two. Second, there is no evidence in the record to contradict the relevant information that [ ] provided Labor. Plaintiffs' unemployment statistics are too general to give Labor good cause to question the veracity of the specific information provided by [ ]. Accordingly, Labor's failure to satisfy the requirements of 19 U.S.C. § 2318(a)(3)(A)(ii) is not due to the source of the evidence procured, but rather its lack of substantiality.

Finally, given that further fact-finding is required to determine the outcome of the ATAA petition, remand is the appropriate remedy. *See* 19 U.S.C. § 2395(c). As such, the Court need not address the issue of court-ordered certification in the instant case. *See Former Employees of Int'l Bus. Machs. Corp. v. U.S. Sec'y of Labor*, 31 CIT at ____, 483 F. Supp. 2d 1284, 1337 (2007) ("[I]f a case of court-ordered certification is to have any shot at surviving on appeal, it must be a clear-cut case where another remand would be plainly futile.").

IV. *CONCLUSION*

For the foregoing reasons, this matter is hereby remanded to Labor for reconsideration of Plaintiffs' ATAA group eligibility, with specific instructions to acquire more information on criterion two. A separate order will be issued accordingly.

FORMER EMPLOYEES OF INDEPENDENT STEEL CASTINGS COMPANY, INC., Plaintiffs, v. UNITED STATES DEPARTMENT OF LABOR, Defendant.

Before: Richard W. Goldberg
Senior Judge
Court No. 06–00338

ORDER

Upon consideration of Plaintiffs' motion for judgmentupon the agency record and briefs in support thereof,Defendant's brief in opposition thereto, upon all otherpapers and proceedings had herein, and upon duedeliberation, it is hereby

ORDERED that Labor's negative determination ofPlaintiff's ATAA eligibility is remanded; and it is further

ORDERED that Labor shall, if it is able, point toother record evidence or conduct further investigations todetermine whether the Plaintiffs possess skills that arenot easily transferable; and it is further

ORDERED that Labor shall, within forty (40) days ofthe date of this Order, issue a remand determination inaccordance with the instructions provided herein; and it isfurther

ORDERED that the parties may, within twenty (20) daysof the date on which Labor issues its remand determination,submit briefs addressing Labor's remand determination, notto exceed twenty (20) pages in length; and it is further

ORDERED that the parties may, within fifteen (15) daysof the date on which briefs addressing Commerce's remanddetermination are filed, submit response briefs, not toexceed fifteen (15) pages in length.

SO ORDERED.

Slip Op. 07–112

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

UNITED STATES, Plaintiff, v. FORD MOTOR COMPANY, Defendant.

Court No. 02–00106

Held: Plaintiff's motion to clarify judgment and to collect pre-judgment interest on unpaid duties granted.

Dated: July 19, 2007

Peter D. Keisler, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David A. Levitt* and *David S. Silverbrand*); of counsel: *Katherine F. Kramarich*, Bureau of Customs and Border Protection, for the United States, Plaintiff.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (David M. Murphy, *Steven P. Florsheim*, *Robert B. Silverman*, and *Frances P. Hadfield*); of counsel: *Paulsen K. Vandevert*, for Ford Motor Company, Defendant.

OPINION

TSOUCALAS, Senior Judge: This matter comes before the Court on the motion of the United States ("Plaintiff" or "Government") to clarify the judgment issued in *United States v. Ford Motor Co.* ("*Ford CIT*"), 29 CIT ___ , 387 F. Supp. 2d 1305, 1334 (2005), in favor of the Government and against the Ford Motor Company ("Defendant" or "Ford") awarding the Government unpaid duties in the amount of $184,495 and civil penalties in the amount of $3,000,000("July 20, 2005 Judgment"). *See Ford CIT*, 29 CIT at ___ , 387 F. Supp. 2d at 1334. The July 20, 2005 Judgment was issued contemporaneously and in accordance with the Court's Opinion of that date ("July 20, 2005 Opinion"), which "order[ed] Ford to tender $184,495 for unpaid duties, and assesse[d] Ford a civil penalty in the amount of $3,000,000, plus lawful interest." *Ford CIT*, 29 CIT at ___ , 387 F. Supp. 2d at 1334. The Court of Appeals for the Federal Circuit ("CAFC") reversed this Court's decision in part, and affirmed, *inter alia*, the amounts of duties and penalties awarded by this Court. *See United States v. Ford Motor Co.* ("*Ford CAFC*"), 463 F.3d 1286, 1298–1299 (Fed. Cir. 2006).

In the instant motion, the Government seeks to determine whether the Court's award of "lawful interest" in the July 20, 2005 Judgment encompasses pre-judgment interest on unpaid duties of $184,495 accrued from July 19, 1995, the date of Custom's demand. Gov't Mot. Clarify J. Collect Prejudgment Interest ("Gov't Brief") at 1.

Statement of Facts

The full factual and procedural background of this case has been set forth in the prior decision of the CAFC and this Court. *See Ford CAFC*, 463 F.3d 1286; *Ford CIT*, 29 CIT ___ , 387 F. Supp. 2d 1305. The facts relevant to the instant inquiry are as follows. During the period February 2, 1989 through March 12, 1989, Ford imported automotive tooling and stamping dies to the United States from Japan. *See Ford CIT*, 29 CIT at ___ , 387 F. Supp. 2d at 1310. The Bureau of Customs and Border Protection ("Customs")[1] demanded payment for unpaid duties as of July 19, 1995. Gov't Brief at Ex. 1; Def's Opp'n Gov't Mot. Clarify J. Collect Prejudgment Interest ("Ford Brief") at Ex. 2. On January 24, 2002, the Government commenced the instant action against Ford alleging that Ford committed fraud, gross negligence or negligence by making false statements on the price of such merchandise, in violation of 19 U.S.C. §§ 1592(a)–(d). *See Ford CIT*, 29 CIT at ___ , 387 F. Supp. 2d at 1308. In its Complaint, the Government sought unpaid duties, pre-judgment interest and post-judgment interest associated with such duties, a civil penalty, post-judgment interest on the penalty, and attorney's fees. Complaint, at 5. A bench trial was held from February 28 through March 10, 2005. On July 20, 2005, this Court issued a decision finding that Ford had committed gross negligence in violation of 19 U.S.C. §§ 1484 and 1485 and ordered Ford to pay $3,000,000 in penalties, $184,495 in unpaid duties, plus any "lawful interest." *Ford CIT*, 29 CIT at ___ , 387 F. Supp. 2d at 1334. As noted above, on November 22, 2006, the CAFC reversed this Court's decision in part, and affirmed, *inter alia*, the amounts of duties and penalties awarded by this Court. *Ford CAFC*, 463 F.3d 1286, 1298–1299.

By letter dated December 5, 2006,the Government sought payment of unpaid duties in the amount of $184,495, pre-judgment interest thereon in the amount of $196,956.23, penalties in the amount of $3,000,000 and post-judgment interest on unpaid duties and penalties accruing at the rate of $332.59 per day. Gov't Brief at 1; Ford Brief at 2. Ford thereafter paid all unpaid duties, penalties and post-judgment interest on unpaid duties and penalties, but declined to pay the pre-judgment interest sought by the Government on the ground that the July 20, 2005 Judgment did not award same. Gov't Brief at 2; Ford Brief at 3. On March 14, 2007, the Government filed the instant motion seeking to clarify the July 20, 2005 Judgment and to recover from Ford pre-judgment interest on unpaid duties ("Motion"). *Id.* On March 28, 2007, Ford submitted its opposition to

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[1] The Bureau of Customs and Border Protection was renamed United States Customs and Border Protection, effective March 31, 2007. *See Name Change From the Bureau of Immigration and Customs Enforcement to U.S. Immigration and Customs Enforcement, and the Bureau of Customs and Border Protection to U.S. Customs and Border Protection*, 72 Fed. Reg. 20,131 (April 23, 2007).

the Motion. Ford Brief at 12. On April 4, 2007, the Government filed a motion for leave to file its reply papers on the ground that Ford's opposition to the Motion addressed issues not included in the Motion. On April 10, 2007, Ford opposed the Government's motion for leave to file its reply papers asserting that the Government failed to state the basis of its motion with particularity. On April 11, 2007, the Court granted the Government leave to file its reply papers. The Government filed its reply to the Motion that date.

Discussion

As a threshold matter, Ford opposes the Government's motion on the ground that it seeks to alter or amend this Court's judgment. Ford Brief at 3–4. As such, Ford claims the Motion should have been brought pursuant to USCIT Rule 59(e). *Id.* Motions brought under Rule 59(e) must be filed within 30 days of the entry of the judgment. USCIT Rule 59(e). Claiming that the Government failed to bring the instant motion within 30 days of July 20, 2005, the date of the entry of the judgment which the Government seeks to clarify, Ford asserts that the Motion was made untimely in violation of Rule 59(e). Ford Brief at 3–4; USCIT Rule 59(e).

A motion to clarify and a Rule 59(e) motion to alter or amend a judgment are distinct motions. *See Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174 (1989); *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451 (1982) (citing *Browder v. Director, Illinois Dept. of Corr.*, 434 U.S. 257 (1978)); *Britt v. Whitmire*, 956 F.2d 509, 512, (5th Cir. 1992) (quoting *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 669–670 (5th Cir. 1986)). A Rule 59(e) motion involves "reconsideration of matters properly encompassed in a decision on the merits." *White*, 455 U.S. at 451. "No matter how it is labeled, a motion is treated as one made under Rule 59(e) if it 'calls into question the correctness of a judgment' and seeks to alter or amend it." *Britt*, 956 F.2d at 512.

As such, the instant motion does not require this Court to reconsider the correctness of the July 20, 2005 Judgment. The Government is not belatedly seeking an award of pre-judgment interest. Rather, it seeks to clarify whether the July 20, 2005 Opinion awarding "lawful interest" encompassed an award of pre-judgment interest on unpaid duties. See Gov't Reply Clarify J. Collect Prejudgment Interest ("Gov't Reply") at 5. Accordingly, the instant motion is not subject to the time limitation of Rule 59(e).[2]

As to the substance of the instant motion, the long-established rule in the Federal Courts permits the United States to recover in-

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[2] Ford's request for reconsideration of the undervaluation and loss of revenue amounts does seek to alter or amend the July 20, 2005 Judgment and is therefore untimely pursuant to Rule 59(e).

terest on money due to the government even in the absence of any statutory authorization for an award of pre-judgment interest. *See United States v. Goodman*, 6 CIT 132, 139–140, 572 F. Supp. 1284, 1289 (1983)(citing *Billings v. United States*, 232 U.S. 261 (1914) and *United States v. Abrams*, 197 F.2d 803, 805 (6th Cir. 1952), *cert. denied*, 344 U.S. 855 (1952)). Indeed, the CAFC has affirmed this Court's authority to award pre-judgment interest in other similar cases based on considerations of equity and fairness. *See, e.g., United States v. Imperial Food Imports*, 834 F.2d 1013, 1016 (Fed. Cir. 1987); *United States v. Monza Automobili*, 12 CIT 239, 683 F. Supp. 818 (1988).

The Government is entitled to pre-judgment interest on unpaid duties in the absence of a delay in assessing and collecting duties. *See United States v. Jac Natori*, 22 CIT 1101, Slip Op. 1998–162 (holding that a judgment awarding unpaid duties recovered pursuant to 19 U.S.C § 1592 and "interest as provided by law" includes pre-judgment interest); *Monza Automobili*, 12 CIT at 242, 683 F. Supp. at 820. The rationale behind this general rule is to compensate the Government for lost use of the money due. *See Imperial Food Imports*, 834 F.2d at 1016 (noting that "[i]t would be inequitable and unfair for the government to make an interest-free loan of this sum from the date of final demand to the date of judgment"). In awarding "lawful interest" in the July 20, 2005 Opinion, which is incorporated by reference in the July 20, 2005 Judgment, the Court awarded both pre-judgment and post-judgment interest on unpaid duties.

The Government did not abandon its claim for pre-judgment interest by failing to refer to it in the pre-trial order or in the post-trial brief. *See, e.g., United States v. Nat'l Semiconductor Corp.*, 30 CIT ___, Slip Op. 2006–138; *in Re Crescent Ship Serv. Inc.*, 2005 WL 1038652 (E.D. La. 2005) (noting that "a claim for pre-judgment interest does not have to be referred to in proposed findings of fact if it is included in the complaint").

Moreover, the Court's award of pre-judgment interest in the July 20, 2005 Judgment is not barred by Rule 37 of Fed. R. App. P. ("FRAP") as claimed by Ford. FRAP Rule 37 provides, *inter alia*, that:

> *Unless otherwise provided by law*, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. (Emphasis added).

It specifically permits award of pre-judgment interest if it is "otherwise provided by law[.]" *See New England Ins. Co. v. Healthcare Underwriters Mut. Ins. Co.*, 352 F.3d 599 (2d Cir. 2003); *Newburger, Loeb & Co., Inc. v. Gross*, 611 F.2d 423 (2d Cir. 1979). In the instant

matter, the Court awarded pre-judgment interest on unpaid duties pursuant to its discretionary authority as allowed by law.[3]

Conclusion

Based on the foregoing, the Government's motion to clarify and to seek pre-judgment interest on unpaid duties is granted.

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

UNITED STATES, Plaintiff, v. FORD MOTOR COMPANY, Defendant.

Court No. 02–00106

JUDGMENT

Upon consideration of Plaintiff's Motion To Clarify Judgment And To Collect Pre-Judgment Interest, Defendant's Opposition, Plaintiff's Reply, the entire record herein, and after due deliberation, having rendered a decision herein; now, in accordance with said decision, it is hereby

ORDERED that Plaintiff's Motion is granted; and it is further

ORDERED that Plaintiff shall recover against Ford pre-judgment interest in the amount of $196,956.23 in accordance with the judgment entered in *United States v. Ford Motor Co.*, 29 CIT ___ , 387 F. Supp. 2d 1305 (2005) and post-judgment interest thereon pursuant to 28 U.S.C. § 1961.

Slip Op. 07–113

WUHAN BEE HEALTHY CO., LTD. and PRESSTEK INC., Plaintiffs, v. UNITED STATES, Defendant, and THE AMERICAN HONEY PRODUCERS ASSOCIATION OF AMERICA and THE SIOUX HONEY ASSOCIATION, Deft.-Ints.

Before: Richard K. Eaton,
Judge Court No. 05–00438

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

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[3] The parties apparently do not dispute that pre-judgment interest accrues from the date of Custom's last demand. *See Monza Automobili*, 12 CIT at 240; 683 F. Supp. at 820 (awarding pre-judgment interest from the date of final demand for payment); *Imperial Food Imports*, 834 F.2d at 1016 (award of pre-judgment interest from the date of final demand was not an abuse of discretion); *United States v. Reul*, 959 F.2d 1572, 1579–1581 (Fed. Cir. 1992)(pre-judgment interest accrues while the government pursues the claim).

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.

OPINION AND ORDER

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.

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[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.

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 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 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

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[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 toinclude in its U.S. sales database).

[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.

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. 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]

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

"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 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 notavailable on the record, or
>
> (2) an interested party or anyother person—
>
> (A) withholds informationthat has been requested by [Commerce] . . . under this subtitle,
>
> (B) fails to provide suchinformation by the deadlines for submission of the information or in the form and manner requested . . . ,
>
> (C) significantly impedesa proceeding under this subtitle, or
>
> (D) provides suchinformation but the information cannot be verified as provided in section 1677m(i) of this title,[5]

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[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).

> [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 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 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-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. 'In-

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[6] The argument that plaintiffs may not have kept records of blend ratios in the normal course of business does not stand 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*.

adequate 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 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 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

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[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 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).

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 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

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[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).

> 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 exceptionallylimited nature of [this] data renders [it] unpersuasive of Indian prices as a whole in comparison with the broader EDA Data.

Issues & Dec. Mem. at 13.

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

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[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

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 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, 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,

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each year. The calculation will be based on current data, and will be made available to the public.

19 C.F.R. § 351.408(c)(3) (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.

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

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[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.

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 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 values for selling, general and administrative [("SG&A")] expenses, manufacturing overhead and profit, using ratios[15] derived from financial

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[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.

[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)).

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 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 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

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[16] MHPC, a cooperative, "is in the business of buying raw honey from its members and selling processed honey to its customers. . . . " Issues & Dec. Mem. at 18.

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 openingperiod inventory was valued at the price of raw honey purchased during the [reported accounting period]. Commerce further assumed [2] all honey sold during the [reportedaccounting period] was processed during the [reported accounting period].
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> 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 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 Pro-

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[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).

duction 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 al-

lows 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 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 noted in the Final Results, Commerce's decision to use a per kilogram methodology here was based

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[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).

[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 appraisement 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.

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.

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

Slip Op. 07–114

VALUE VINYLS, INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 01–00896

[Defendant's motion for rehearing or reconsider-ation of the court's judgment granted, in part.]

Dated: July 20, 2007

Givens & Johnston PLLC (*Robert T. Givens* and *Rayburn Berry*) for the plaintiff.
Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department ofJustice (*James A. Curley*); and Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection (*Beth C. Brotman*), of counsel, for the defendant.

Memorandum & Order

AQUILINO, Senior Judge: Final judgment has been entered in this action pursuant to slip opinion 07–17, 31 CIT ___ (Jan. 30, 2007), familiarity with which is presumed, that adjudged and decreed plaintiff's merchandise as correctly classifiable under subheading 3921.90.11 of the Harmonized Tariff Schedule of the United States ("HTSUS") and that ordered U.S. Customs and Border Protection ("CBP") to reliquidate any entries of that merchandise that have not been liquidated thereunder. Counsel for the defendant have responded with a Motion for Rehearing or Reconsideration of the Court's Judgment, which protests that this court has

> erred in (1) placing undue reliance on the cross-references found in the *Conversion Report* (USITC Pub.1400), rather than on the traditional classification process . . .; and (2) failing to apply the traditional classification process to determine whether the imported merchandise satisfied the requirements for classification under subheading 3921.90.11. . . .

Defendant's Brief in Reply, p. 2 (citations omitted).

I

Suffice it to report that this motion has caused the court to reconsider its slip opinion and concomitant judgment. Suffice it also to verify, however, that, as always in a matter such as this, the court has adhered to its duty "to find the correct result[ ] by whatever procedure is best suited to the case at hand", *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878, *reh'g denied*, 739 F.2d 628 (Fed.Cir. 1984) (emphasis in original), and has indeed applied "the traditional classification process". *See* Slip Op. 07–17 *passim*.

Whether labeled "appropriate means", 733 F.2d at 880, or "traditional process", classification under the tariff schedules always involves first a reading of the language that particular imports arguably implicate therein. Here, there is no dispute as to what that HTSUS language is, namely, heading 3921 ("Other plates, sheets, film, foil and strip, of plastics") and subheadings:

3921.90	Other:
	Combined with textile materials and weighing not more than 1.492 kg/m^2:
	Products with textile components in which man-made fibers predominate by weight over any other single textile fiber:
3921.90.11	Over 70 percent by weight of plastics
	* * *
3921.90.19	Other

The defendant now apparently considers this language clear and unambiguous. This court does not. Indeed, as recognized in slip opinion 07–17, in a prior case Customs took the position that the language "[w]ith textile components in which man-made fibers predominate by weight over any other single textile fiber", which was also found in HTSUS subheading 4010.91.15 (1989),

> does *not* require the presence of more than one "class of" textile fiber in order for man-made fibers "to predominate by weight over any other single textile fiber."

31 CIT at ___ , Slip Op. 07–17, p. 11, quoting from *Semperit Indus. Prods., Inc. v. United States*, 18 CIT 578, 582, 855 F.Supp. 1292, 1296 (1994) (emphasis in original). The court in that matter did not agree.

Where the language of a statute is clear, a court should not inquire further into the intent of Congress. *E.g.*, *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed.Cir. 1999). That is not the case here, nor was it in *Semperit*, where the court considered the common and popular meaning of the word "predominate" after concluding there was no clear legislative intent. *See* 18 CIT at 585, 855 F.Supp. at 1298.

In the case at bar, this court has had to apply the same statutory interpretation hierarchy to all of the terms at issue, taking the legislative intent into account. *See, e.g.*, *Brecht Corp. v. United States*, 25 CCPA 9, 13, T.D. 48977 (1937); and *United States v. Clay Adams Co.*, 20 CCPA 285, 288–89, T.D. 46078 (1932). That is, in accordance with the traditional classification process, this court resorted to legislative history for assistance in interpreting the meaning. *See* 31 CIT

at ___ , Slip Op. 07–17, p. 2, citing *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005).

The defendant apparently considers the reported result of this resort to be "undue reliance". But other courts have taken the "Conversion Report", USITC Pub. 1400 (June 1983), into account. *E.g.*, *Jewelpak Corp. v. United States*, 297 F.3d 1326, 1342–43 (Fed.Cir. 2002) (Gajarsa, J., dissenting)("that Congress intended [the conversion] to be essentially revenue neutral[ ] provides a strong rationale"); *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1368 (Fed.Cir. 1998) ("Conversion Report is 'clearly relevant' in determining the correct classification"), citing *Beloit Corp. v. United States*, 18 CIT 67, 81, 843 F.Supp. 1489, 1499 (1994). Indeed, as noted in slip opinion 07–17, the defendant took the position in *Semperit*, *supra*, that

> Congress intended to diverge from the principle set forth in the ITC Report and relied upon by plaintiff that the rates established in the TSUS [Tariff Schedules of the United States] should carry over to the HTSUS.

18 CIT at 583–84, 855 F.Supp. at 1297. Again, that court did not agree with the defendant. *See* 31 CIT at ___ , Slip Op. 07–17, p. 13, quoting from 18 CIT at 588, 855 F.Supp. at 1300.

Be those cases as they were, including, for example, *Lonza, Inc. v. United States*, 46 F.3d 1098 (Fed.Cir. 1995), wherein a particular HTSUS provision was found to be a marked departure from the TSUS, defendant's motion at bar does not show any intent on the part of Congress that transformation of the TSUS into the HTSUS would also transmogrify the 4.2 percent duty that clearly would have attached to entries of plaintiff's goods under TSUS item 355.81 into the duty advance CBP now demands.

The record reflects that plaintiff's product by weight is 82 percent plastic and 18 percent man-made textile material that together weigh less than 1.492 kilograms per square meter. Given this makeup, in the light of the "duty" enunciated by the court of appeals in *Jarvis Clark*, this court cannot (and therefore has not) come to conclude that classification of this merchandise is more correct, or better, under HTSUS subheading 3921.90.19 than 3921.90.11.

II

In having hereby engaged in reconsideration of slip opinion 07-17, as requested by defendant's instant motion, this court cannot discern any "miscarriage of justice" of the kind that motions like defendant's are interposed to correct. *See, e.g.*, *Starkey Laboratories, Inc. v. United States*, 24 CIT 504, 110 F.Supp.2d 945 (2000), and cases cited therein. Ergo, the requested amendment of the judgment entered pursuant to slip opinion 07–17 must be, and it hereby is, denied.

So ordered.