Decisions of the United States Court of International Trade

08–68

ZHEJIANG NATIVE PRODUCE AND ANIMAL BY-PRODUCTS IMPORT & EXPORT GROUP CORP., JIANGSU KANGHONG NATURAL HEALTHFOODS CO., LTD., AND ANHUI HONGHUI FOODSTUFF (GROUP) CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and THE AMERICAN HONEY PRODUCERS ASSOCIATION AND THE SIOUX HONEY ASSOCIATION, Def.-Ints.

Before: Richard K. Eaton, Judge
Court No. 06–00234

[The final results of United States Department of Commerce sustained in part and remanded.]

Dated: June 16, 2008

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Bruce M. Mitchell, Ned H. Marshak, Paul G. Figueroa*), for plaintiffs.
Gregory A. Katsas, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, United States Department of Justice Commercial Litigation Branch, Civil Division, (*Jane Chang Dempsey*); Office of the Chief Counsel for Import Administration, United States Department of Commerce, (*Mildred Stewart*), of counsel, for defendant.
Kelley Drye Collier Shannon (*Michael J. Coursey, R. Alan Luberda*), for defendant-intervenors.

OPINION

Eaton, Judge: This matter is before the court on the motion for judgment upon the agency record of plaintiffs Zhejiang Native Produce and Animal By-Products Import & Export Group Corp., Jiangsu Kanghong Natural Healthfoods Co., Ltd., and Anhui Honghui Foodstuff (Group) Co., Ltd. (collectively, "plaintiffs"). *See* Pls.' Mem. Supp. R. 56.2 Mot. J. Agency R. ("Pls.' Mem."). Defendant the 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 the final results of the United States Department of Commerce's ("Commerce" or the "Department") third administrative review of the antidumping duty order on honey from the People's Republic of China ("PRC") for the period of review ("POR") beginning on December 1, 2003, and ending on November 30, 2004. *See* Honey from the PRC, 71 Fed. Reg. 34,893 (Dep't of Commerce June 16, 2006) (final results) and the accompanying Issues and Decision Memorandum (Dep't of Commerce June 9, 2006), Administrative Record ("AR") 265 ("Issues & Dec. Mem.") (collectively, "Final Results"). Jurisdiction lies pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii).

Certain of the issues in this action have been litigated previously in this Court.[1] For the reasons set forth below, the court grants, in part, and denies, in part, plaintiffs' motion and remands certain of the Final Results to Commerce.

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 unlawfulany 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)). It "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) (quotations and citations 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 Foreign Trade Corp. (30) v. United States*, 322 F.3d at 1374 (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). The possibility of drawing two equally justifiable, yet inconsistent conclusions from the record does

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[1] These include: a challenge to Commerce's second administrative review of the antidumping duty order on Chinese honey (for the period of review from December 1, 2002 through November 30, 2003) in *Shanghai Eswell Enter. Co. v. United States*, 31 CIT _____ , Slip Op. 07–138 (Sept. 13, 2007) (not reported in the Federal Supplement) and in *Wuhan Bee Healthy Co., Ltd. v. United States,* 31 CIT _____ , Slip Op. 07–113 (July 20, 2007)(not reported in the Federal Supplement); and a challenge to Commerce's first administrative review of the antidumping duty order on Chinese honey (for the period of review from December 1, 2001 through May 31, 2002) in *Wuhan Bee Healthy Co., Ltd. v. United States*, 29 CIT 587, 374 F. Supp. 2d 1299 (2005).

not prevent the agency's determination from being supported by substantial evidence. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); *Altx, Inc.*, 370 F.3d at 1116.

Moreover, "[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, 404–405, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987) ("*Ceramica*").

DISCUSSION

I. Legal Framework for Calculating Surrogate Values

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[2] or constructed export price[3] and normal value." When merchandise that is the subject of an antidumping investigation is exported from a nonmarket economy ("NME")[4] country, such as the PRC, Commerce, under most circumstances, determines normal value by valuing the factors of production used in producing the merchandise using surrogate data, to which it adds

> an amount for general expenses and profit plus the cost of containers, coverings, and other expenses. . . . [T]he valuation of the factors of production shall be based on 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).

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[2] The "export price" is "the price at which the subject merchandise is first sold . . . by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States," as adjusted. 19 U.S.C. § 1677a(a).

[3] "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).

[4] 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 480, 481, 318 F. Supp. 2d 1339, 1341 (2004). Therefore, because the subject merchandise comes 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).

A. Calculation of Surrogate Value of Raw Honey

In choosing surrogate values, Commerce is directed to meet the "best available information" standard. 19 U.S.C. § 1677b(c)(1). Commerce has stated that it considers several factors, "including quality, specificity, and contemporaneity of the source information" in seeking to meet the standard. Issues & Dec. Mem. at 10. The Department prefers "whenever possible, to use countrywide data, and only resorts to company-specific (or regional) information when countrywide data are not available. In addition, the Department prefers to rely on publicly available data." *Id*. at 11. Prior cases have upheld this methodology to find the best available information. *See, e.g., Wuhan Bee Healthy Co. v. United States*, 31 CIT at ___ , Slip Op. 07–113 at 28 (July 20, 2007) (not reported in the Federal Supplement) ("*Wuhan II*").

Commerce calculated the surrogate value of raw honey using data from the website of EDA Rural Systems Pvt. Ltd. ("EDA"),[5] which Commerce adjusted for inflation for the purported purpose of making the data contemporaneous to the POR. Issues & Dec. Mem. at 10. Plaintiffs argue that Commerce's selection of data to calculate surrogate value was not supported by substantial evidence in the record.

In its Final Results, Commerce found that the adjusted EDA data constituted the best available information on the record. "In selecting the EDA data, the Department finds that these raw honey pricing data are the best information currently available because they are publicly available, quality data, and specific to the raw honey beekeeping industry in India." Issues & Dec. Mem. at 11.

> We note that the EDA data are from a published, publicly available source, the website, www.litchihoney.com. With respect to quality, we find 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. Regarding specificity, we note that the prices quoted in the EDA data are specific to the raw honey beekeeping industry in the state of Bihar in India, which the Department found to be a significant producer of honey in India. Regarding reliability, the Department finds that the data collection methods for the EDA data are documented with respect to data sources, distribution, and collection practice.

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[5] "[T]he EDA data are from a published, publicly available source, the website, www.litchihoney.com." Issues & Dec. Mem. at 11. The website is maintained by EDA Rural Systems Pvt. Ltd., "an organization that provides business development services to the honey and beekeeping sector in India." *Wuhan II*, 31 CIT at ____ , Slip Op. 07–113 at 26.

Issues & Dec. Mem. at 11 (citations omitted).

Plaintiffs contend that, rather than using the EDA data, Commerce should have calculated the price of raw honey based on an average of the prices derived from three news articles found in Indian publications, i.e., the *Tribune of India* (“*Tribune*”), *Business Line Internet Edition* (“*Money*”), and *Hindu Online* (“*Sunderbans*”). Plaintiffs insist that, had Commerce used their preferred evidence, Commerce would have found that the price of raw honey declined during the POR and that the price of raw honey was substantially lower than Commerce found. *See* Pls.’ Mem. 2.

1. Evidence Regarding Price Decline

Plaintiffs first argue that Commerce erred by adjusting the EDA data upward to account for inflation when there was “overwhelming evidence on the record confirming that raw and processed honey prices in India declined during 2004 (POR 3) from their peak in midyear 2003.” Pls.’ Mem. 14. Plaintiffs argue that Commerce ignored record evidence of a price decline, primarily by not taking into account the *Tribune*, *Money*, and *Sunderbans* articles. *See* Pls.’ Mem. 15–16. Specifically, they contend that data from these articles show that raw honey prices were significantly lower in this administrative review (December 2003), and lower in the second half of the third POR (June 2004 through November 2004) than in the first half of that period (December 1, 2003 through May 2004). Pls.’ Mem. 15–16.

At the administrative level, Commerce determined that none of plaintiffs’ proposed sources contained data as “reliable or appropriate” as the EDA data. Issues & Dec. Mem. at 12. As a result, Commerce found that plaintiffs had not shown evidence of a price decline. *See* Issues & Dec. Mem. at 12.

First, Commerce addressed the *Tribune* article, dated December 15, 2003, which states a price for raw honey at 65 rupees per kilogram in 2003:

> As an initial matter, we note that the Tribune article may represent data from a state only slightly larger than that represented by the EDA data, and therefore the EDA data are as representative as the prices in the Tribune article. However, the Department also finds that the EDA data are more detailed in that they contain multiple price points over discrete periods of time for specific types of honey and contain exhaustive information on the source of these data. The Department determines for these final results that the EDA data are a more reliable source to value raw honey because the Department finds that the data collection methods for the EDA data are documented with respect to data sources, distribution, and collection practice.

Issues & Dec. Mem. at 13–14.

Commerce also reviewed the other two articles. The *Sunderbans* article, dated March 5, 2004, valued raw honey at 40 rupees per kilogram and the *Money* article, dated January 26, 2004, valued it at 50 rupees per kilogram. Issues & Dec. Mem. at 4. Commerce found that, unlike the EDA data which pertains to the second-largest honey producing state in India, "the exceptionally limited nature of the Sunderbans and Money articles' data renders them unrepresentative of Indian prices as a whole in comparison with the broader EDA data." Issues & Dec. Mem. at 14. Commerce stated,

> [T]he Department deemed the Money article not representative of prices in India, because the data reported by the article are from a single honey processing society, the Chandram Honey Producers Society. According to the article, the society sold 3,000 kg of honey in the previous year (2003). The same concerns hold for the Sunderbans article, which was placed on the record after the *Preliminary Results*. The Sunderbans article refers to prices in a single region of India, West Bengal, not alleged to be a major honey producing state.

Issues & Dec. Mem. at 13. The Department concluded: "In light of the various price points on the record, the Department cannot agree with respondents that record evidence makes it self-evident that the Indian honey market suffered a significant price decline during the POR." Issues & Dec. Mem. at 12.

The court finds that Commerce did not act unreasonably in finding the EDA data to be more reliable. A review of the record reveals that the EDA data are more detailed and more reliable than the news articles plaintiffs placed on the record.[6] For instance, the EDA data do include "numerous specific price points over a six-year period for multiple types of honey from many suppliers," include "detailed information on production, inputs, and beekeepers," and the data collection methods "are documented with respect to data sources, distribution, and collection practice." *See* Issues & Dec. Mem. at 11. Thus, Commerce was justified in finding that the *Tribune* article was not "unusable as a source for valuing raw honey," and that the EDA data are the "best available information" because they are more detailed and more reliable than the data in the *Tribune* article, and because the EDA data contain many price points over discrete periods of time

[6] Plaintiffs also urged the court to review the Factors of Production Valuation Memorandum for the fourth period of review (for the period December 1, 2004 through November 30, 2005), in which, plaintiffs claim, "the Department expressly acknowledged that raw honey prices in India experienced a 'steady decline through 2004 and the first five months of 2005.' " Pls.' Mem. 16 and n. 12 (footnote omitted). This Memorandum is not part of the record in this action. *Id.* at 16, n. 12. Non-record evidence regarding a price decline put forth by plaintiffs in this way cannot properly be considered as a supplement to the record. *See Hynix Semiconductor Inc. v. United States*, 26 CIT 1154, 1154, Slip Op. 02–117 at 3 (Sept. 30, 2002) (not reported in Federal Supplement).

for specific types of honey and contain detailed information on the source of these data. Issues & Dec. Mem. at 13–14.

Further, unlike the EDA data, the *Sunderbans* and *Money* articles were not as representative of prices in India because the prices were from a single honey processing society (in the *Money* article) or from a single region of India that is not a major honey producing state (in the *Sunderbans* article). Issues & Dec. Mem. at 13. The EDA data, on the other hand, are more representative of country-wide prices because they come from a large honey producing state. Issues & Dec. Mem. at 12. Given the evidence on the record, Commerce reasonably relied on the EDA data, which does not reveal a price decline during the POR. Plaintiffs have thus failed to meet their burden to put forth evidence demonstrating a price decline. *See Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 931, 937, 806 F. Supp. 1008, 1015 (1992).

Plaintiffs next contend that the price of honey derived from the EDA data is not supported by substantial evidence because there was other, more contemporaneous evidence on the record. Plaintiffs argue that the EDA data (which cover sales from December 2002 through June 2003) are entirely outside the period of review (December 1, 2003 through November 30, 2004), and are based solely on prices from the first half of 2003 (five months prior to the beginning of the third period of review) when honey prices reached their peak. Pls.' Mem. 19. Accordingly, plaintiffs insist that the EDA data "do not reflect the honey market conditions in India during [the] POR," and that, because the record contains "reliable, contemporaneous, publicly available surrogate prices for raw honey, the Department committed a reversible error in relying on stale surrogate data. . . ." Pls.' Mem. 19–20.

Commerce states in response that contemporaneousness is but one factor it considers, and where the alternate data is not exactly contemporaneous with the POR, the factor of contemporaneousness does not carry as much weight. *See* Def.'s Opp'n 17 (quoting *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 29 CIT 288, 301, 366 F. Supp. 2d 1264, 1275 (2005) ("*Hebei II*")).

The court finds that plaintiffs have failed to show that the price derived from the EDA data is not supported by substantial evidence. The EDA data are taken from a six-month period beginning a year prior to the period of review. The pricing data's distance from the period of review is, however, not outweighed by plaintiffs' alternative data, which itself is not entirely contemporaneous with the period of review. *See Hebei II*, 29 CIT at 301, 366 F. Supp. 2d at 1275. ("While the contemporaneity of data is one factor to be considered by Commerce, three months of contemporaneity is not a compelling factor where the alternative data is only a year-and-a-half distant from the [period of investigation ("POI")].") (citation omitted). That is, the *Tribune* and *Money* articles provide data for 2003 but only the month of

December 2003 is within the period of review. For their part, plaintiffs have not shown that their proposed data is superior to the EDA data in other respects. As the court has discussed, the EDA data have many more price points and relate to a state that is a significant honey producer. Plaintiffs' data, on the other hand, are not as representative, are less detailed, have fewer price points, and are less well-documented. Therefore, the court agrees with Commerce that the EDA data are the best available information as the EDA data are "publicly available, quality data, and specific to the raw honey beekeeping industry in India." Issues & Dec. Mem. at 11. Therefore, while the evidence offered by plaintiffs may be more contemporaneous than the EDA data, it cannot be said that Commerce unreasonably found that that factor alone was not determinative. Thus, the court finds that Commerce's decision that the EDA data were the best available information is supported by substantial evidence.

2. Plaintiffs' Proposed Benchmark

Plaintiffs also claim that the use of the EDA data is unsupported by substantial evidence because it results in values for raw honey that are higher than the average export price of processed honey. Pls.' Mem. 9–10. Plaintiffs rely on a "benchmark price" for exported honey (based upon data from World Trade Atlas and India Infodrive)[7] to compare Commerce's calculated surrogate values for raw honey to the average export prices for processed honey. According to plaintiffs, this comparison demonstrates that raw honey costs based on the EDA data are artificially high. Plaintiffs insist that this comparison is valid because it is "unlikely that Indian exporters would sell honey below the costs incurred by middlemen purchasing raw honey as an input." Def.'s Opp'n 13. In other words, plaintiffs argue that the Final Results are "anomalous" because the normal value calculated using the EDA Data is higher than their proposed benchmark for exported honey prices.

With respect to plaintiffs' argument for use of a benchmark, Commerce found that "export data may not accurately reflect the market value of the goods within the country of exportation. The Department's stated preference is not to use export data." Issues & Dec. Mem. at 12 (citations omitted). "[E]xport prices may be driven not by the cost of production or market pricing in the exporting country, but by the prices or other market factors in the countries to which the product was exported." Def.-Ints.' Opp'n 11. As a result, for Commerce, plaintiffs' proposed benchmark comparison does not necessarily demonstrate that export prices move in tandem with domestic

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[7] These sources compile and disseminate official import statistics.

prices in a way that would be useful in its analysis. Moreover, Commerce stated:

> [T]he WTA data and Infodrive data rely on values under [Harmonized Tariff Schedule] HTS subheading 04900000, which is a basket category composed of both raw and processed honey shipments. The Department does not use data based on this subheading to value raw honey precisely because it is a basket category. The Department has also indicated in prior cases that it prefers not to use Infodrive data to derive surrogate values or to use as a benchmark to evaluate other potential surrogate values because it does not account for all of the imports that fall under a particular HTS subheading.

Issues & Dec. Mem. at 12. (footnote and quotation omitted).

Commerce has at least some discretion in deciding what is the best available information. *Hangzhou Spring Washer Co. v. United States*, 29 CIT 657, 666–667, 387 F. Supp. 2d 1236, 1245–46 (2005) ("*Hangzhou*"); *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 23 CIT 479, 481, 59 F. Supp. 2d 1354, 1357 (1999)("*Shakeproof*")("The statute requires Commerce to use the best available information, but does not define that term. . . . If Congress had desired to restrict the material onwhich Commerce could rely, it would have defined the best available information.") (footnote and citation omitted). This Court's role is to evaluate whether Commerce's choice of information is reasonable. *Hangzhou*, 29 CIT at 667, 387 F. Supp. 2d at 1246.

Commerce found the EDA data to be the best available information, and plaintiffs' "benchmark" argument has not shown that Commerce's choice was unreasonable. It might seem odd that the price of honey used by the Department should exceed plaintiffs' benchmark. However, plaintiffs have failed to show how their benchmark, based on export prices, is a useful comparison with domestic prices, because they have failed to demonstrate that the benchmark price bears any relationship to the domestic price. For example, plaintiffs have made no effort to show that the market factors affecting domestic prices are the same for export prices. Nor have plaintiffs shown that there is a correlation between the domestic and export prices for honey. Thus, the proposed benchmark, standing alone, fails to provide convincing evidence that Commerce's selection of the EDA data as the best surrogate value source was unreasonable.

B. Selection of Data Source for Calculation of Surrogate Financial Ratios

Title 19 U.S.C. § 1677b (c)(1)(B) requires that the calculation of normal value include amounts for "general expenses and profit." Accordingly, Commerce "usually calculates" separate values for: selling, general and administrative ("SG&A") expenses; manufacturing over-

head; and profit, using ratios derived from financial statements of companies that produce identical or comparable merchandise in the surrogate country. *Wuhan II*, 31 CIT at ___ , Slip Op. 07–113 at 41–42 (citation and quotation omitted).

Here, Commerce determined that the information from the 2004–2005 financial statements of the Mahabaleshwar Honey Producers' Cooperative ("MHPC") was "the best and most contemporaneous available information for valuing the financial ratios." Issues & Dec. Mem. at 19 (footnote omitted). Commerce states that it chose the MHPC financial statements because they contain a chairman/president's report, auditor's notes, and itemized costs associated with honey production and sales, specifically separating MHPC's honey production and sales from MHPC's other business functions. Issues & Dec. Mem. at 19.

Plaintiffs argue that Commerce's use of MHPC financial statements, rather than those of Apis (India) Natural Products ("Apis") caused the results to be unsupported by substantial evidence and not in accordance with law. The court has previously addressed two of plaintiffs' specific arguments in *Wuhan II* and in *Shanghai Eswell Enter. Co. v. United States*, 31 CIT ___ , Slip Op. 07–138 (Sept. 13, 2007) (not reported in the Federal Supplement) ("*Shanghai Eswell*") where it sustained Commerce's decision to rely on the MHPC financials rather than Apis's:

> The court finds that Commerce was justified in determining that the 2003–2004 MHPC financial statement[8] 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." 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." The MHPC's statement, on the other hand, "include[s] a complete annual report, and auditors report, and complete profit and loss and business statement that segregate MHPC's honey and fruit canning businesses." 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

[8] The issues in this litigation are substantially the same although here Commerce relied on the 2004–2005 MHPC financial statements for the Final Results, not the 2003–2004 MHPC financial statements at issue in previous cases. *See* Issues & Dec. Mem. at 19.

> honey produced by particular MHPC members and the price per kilogram. The court thus finds that Commerce's determination that the MHPC financial statement was the best available information to value financial ratios was reasonable.

Shanghai Eswell, 31 CIT at ___ , Slip Op. 07–138 at 11–12 (quoting *Wuhan II*, 31 CIT at ___ , Slip Op. 07–113 at 47–48 (citations omitted)).

Although the MHPC and Apis financial statements at issue here are for different years than those in previous cases and thus contain different numbers, their form and presentation are the same. Because the plaintiffs present identical arguments here, as in previous cases, the court follows the holdings in *Shanghai Eswell* and *Wuhan II* that the MHPC financial statements constitute the best available information.[9] *See* 19 U.S.C. § 1677b (c)(1).

In addition, the court in *Shanghai Eswell* rejected two other arguments identical to those presented here, that: MHPC as a cooperative is not a "true market economy entity"; and, that its financial statements are tainted by expenses related to non-subject merchandise. Pls.' Mem. 27, 35, 37. As in *Shanghai Eswell*, the court finds that "the Final Results demonstrate that Commerce took into consideration MHPC's status as a cooperative when making its determination that its financial statement was more reliable than Apis's financial statement." *Shanghai Eswell*, 31 CIT ___ , Slip Op. 07–138 at 13. The *Shanghai Eswell* Court found no evidence that MHPC's status as a cooperative rendered its financial statement unreliable: "[a]n examination of the record demonstrates that, other than certain unpaid loans, plaintiffs can rely on no record evidence to support their claim [that MHPC's financial data are distorted by nonmarket forces]." *Id.* at ___ , Slip Op. 07–138 at 13. In *Shanghai Eswell*, as here: "Without supporting with record evidence their claim that unpaid, personal loans made by MHPC to its members actually affected MHPC's financial statement, plaintiffs' generalized statement does not undermine Commerce's finding that MHPC's status as a cooperative did not render its financial statement unreliable." *Id.* at ___ , Slip Op. 07–138 at 14.

Plaintiffs also claim that MHPC's financial statement was distorted by its fruit canning division because "there is not a clear division of costs between MHPC's honey and fruit canning operations in some of the schedules used by the Department," and that some expenses in the Department's calculations, such as bank interest, travel expenses, building appreciation and depreciation, included ex-

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[9] The period of review was different in this POR (December 1, 2003 through November 30, 2004) than in *Shanghai Eswell* and *Wuhan II* (December 1, 2002 through November 30, 2003), but the issues are substantially the same. *See Shanghai Eswell*, 31 CIT ____ , Slip Op. 07–138 at 2; *Wuhan II*, 31 CIT at ____ , Slip Op. 07–113 at 1300.

penses for both the honey and the fruit canning divisions. Pls.' Mem. 38. The *Shanghai Eswell* Court addressed this issue, finding that plaintiffs failed to demonstrate that Commerce ignored evidence that the MHPC financial statement was distorted by its fruit canning division:

> [W]hile acknowledging that MHPC produced non-subject merchandise in addition to the subject honey, Commerce found that MHPC's financial statement sufficiently distinguished the costs associated with the honey and fruit canning divisions such that Commerce could derive surrogate financial ratios based solely on honey data.

Shanghai Eswell, 31 CIT at ____ , Slip Op. 07–138 at 14–15. Commerce specifically found that "the asset value of non-subject operations accounts for only a minor portion of MHPC's total asset value." Issues & Dec. Mem. at 20. Moreover, "Commerce calculated a profit only from the honey processing division." Def.'s Opp'n 23. The *Shanghai Eswell* Court then found that its examination of the MHPC financials confirmed the Department's findings. *Shanghai Eswell*, 31 CIT at ____ , Slip Op. 07–138 at 16.

Because plaintiffs present nothing new with respect to their arguments, the court follows the holdings in *Shanghai Eswell* that the plaintiffs have not demonstrated that the MHPC financial statements were unreliable, either because of MHPC's status as a cooperative or because of expenses related to non-subject merchandise.

In addition to those made in previous cases, plaintiffs present two arguments not previously litigated in an effort to demonstrate that the MHPC financials were unreliable. First, plaintiffs complain that the MHPC financials lacked a raw material cost for honey, resulting in Commerce having to extrapolate the raw material cost. Pls.' Mem. 33. Plaintiffs argue that, by doing so, the determination relied on "unsupported assumptions." Pls.' Mem. 33–34.

In answer to plaintiffs' claims, Commerce states that

> the MHPC financial statements provide adequate information to approximate the cost of goods sold, based on the reported amounts of "honey collected" and "honey sold." Contrary to respondents' assertions, the necessity of making certain assumptions in ascertaining the cost of raw honey consumed and the subsequent profit calculation do not make the data unusable.

Issues & Dec. Mem. at 19–20 (footnote omitted). That is, Commerce insists that it was able to calculate an accurate raw material cost as follows: "(total cost of honey purchases/quantity purchased) x (sum of the quantities sold & lost during production)."[10] Factors of Produc-

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[10] Plaintiffs also argue that it is Commerce's practice to "reject a surrogate producer's fi-

tion Valuation Mem. for the Preliminary Results and Partial Rescission of Antidumping Duty Admin. Review of Honey from the PRC dated December 9, 2005, AR 229, Att. 12.[11] Commerce found "that the current calculation methodology provides for a reasonable derivation of the cost of goods sold and profit ratio." Issues & Dec. Mem. at 20.

Although plaintiffs insist that Commerce relied on unwarranted assumptions in its calculation of raw material costs, they identify nothing that would lead the court to agree with them. While the MHPC financials lack a raw material cost, they do contain amounts for "honey collected" and "honey sold." Plaintiffs make no argument that these amounts are not accurate. Therefore, Commerce's straightforward calculation does indeed seem to be a reasonable method of approximating the cost of goods sold. Because Commerce has demonstrated that the MHPC financial statements are equal to or superior to those of Apis in most material respects (i.e., they are more complete, more detailed, and more reliable), and because the Department has shown that it can make a reasonable calculation of the cost of honey, the court sustains its cost of goods sold calculation.

Finally, plaintiffs complain that MHPC, as a cooperative, is not required to comply with Indian Generally Accepted Accounting Principles ("GAAP") requirements and thus that its financial statements cannot be certain to conform to Indian GAAP. Pls.' Mem. 37. As noted above, the court previously addressed the argument that, as a cooperative, MHPC is not a true market entity such that its financial statements could not be reliable.

In response to the argument regarding Indian GAAP, Commerce stated:

> . . . the Department finds that the respondents' claim that the Apis financial statements comport with Indian GAAP, while MHPC's does not, is based on the respondents' assessment rather than an auditor's official certification and we therefore accord it little weight, especially given the Court's acceptance of the Department's reliance on MHPC in prior reviews.

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nancial statement which does not permit a calculation of the raw materials costs." Pls.' Mem. 33 (citing Certain Preserved Mushrooms from the PRC, 63 Fed. Reg. 72,255, 72,265 (Dep't of Commerce Dec. 31, 1998) (notice) ("*Mushrooms*")). *Mushrooms*, however, is inapposite, because in that decision, unlike the present case, the needed data was difficult to isolate in the financials. *Mushrooms*, 63 Fed. Reg. at 72,265 ("The packing material amount is almost as large as the raw materials amount. The raw materials schedule does not include cans or jars in the listing of the major raw materials. Accordingly, we have made the reasonable assumption that Saptarishi Agro included the costs of containers in the packing materials amount, and we are unable to break out this amount further.").

[11] The Department did not change this method of calculation in the Final Results. *See* Factors of Production Valuation Memorandum for the Final Results of Antidumping Duty Admin. Review of Honey from the PRC dated June 9, 2006, AR 266.

Issues & Dec. Mem. at 20 (citation omitted). In fact, plaintiffs cite to no evidence on the record demonstrating that the MHPC financials do not comply with Indian GAAP. Moreover, they fail to demonstrate how Indian GAAP reporting differs from the method used in compiling the MHPC financials. Because plaintiffs have pointed to no record evidence that: (1) the MHPC financials were not kept in accordance with Indian GAAP; or (2) that, even if the MHPC financials were not kept in accordance with Indian GAAP, how they would be less reliable than those of Apis, the court cannot credit plaintiffs' argument.

Plaintiffs have failed to show that the Apis financial statement was more reliable than that of MHPC, and as a result have failed to make the case that the MHPC statement is not the best information available. *See* 19 U.S.C. § 1677b (c)(1). Therefore, it cannot be said that Commerce's choice to rely on the MHPC financial statement is unsupported by substantial evidence or not in accordance with law. *See Ceramica*, 10 CIT at 404–405, 636 F. Supp. at 966. The court sustains Commerce's choice.

C. Calculation of the Surrogate Financial Ratios

In determining normal value, Commerce uses ratios[12] to calculate amounts for "general expenses and profit," calculating separate values for SG&A expenses; manufacturing overhead; and profit. *See Wuhan II*, 31 CIT at ___ , Slip Op. 07–113 at 41–42 (citation and quotation omitted).

1. Calculation on a LIFO Versus FIFO Basis

To determine the denominator in the financial ratios, Commerce must use a closing value for inventory, an element in calculating the cost of materials consumed. As addressed above, plaintiffs have taken issue with the Department's reliance on the MHPC financial statements, in part because they did not include a raw material cost for honey. "As a result, the Department assumed that MHPC has no ending inventory at all and imposed a 'last in, first out' ("LIFO") valuation of MHPC's raw materials, by valuing all production using current honey purchases without regard to the value of raw materi-

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[12] As this Court has explained:

> [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.

Wuhan II, 31 CIT at ____ , Slip Op. 07–113 at 42 n. 15, (citing *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 482, 318 F. Supp. 2d 1339, 1341 (2004)).

als in beginning stock." Pls.' Mem. 40. Plaintiffs claim that a LIFO method of valuing inventory "does not make sense in the case of an input such as honey, where there would be an incentive to use the oldest raw material first." Pls.' Mem. 40. Plaintiffs contend that honey is perishable, meaning that its value would decrease over time, necessitating the use of a first-in-first-out ("FIFO") methodology.

Commerce rejected plaintiffs' claim that it should use a FIFO approach to "calculate the cost of goods sold on the basis that honey is a perishable product." Issues & Dec. Mem. at 22. In doing so the Department stated, "Respondents have provided no evidence to support their claim that honey is perishable; thus, the Department finds no reason to alter its inventory valuation methodology, which was applied in the *Preliminary Results* and previous segments of this order." Issues & Dec. Mem. at 22.

While it may seem obvious that honey is perishable, the discussion at oral argument made clear that there is considerable dispute over how long it can be stored.[13] What is clear, though, is that there is nothing on the record indicating how long raw honey can be kept in inventory. That being the case, any conclusion with respect to plaintiffs' claims would be speculation. Commerce's determination must be based on record evidence and not speculation. *See Anshan Iron & Steel Co. v. United States*, 28 CIT 1728, 1734, n. 2, 358 F. Supp. 2d 1236, 1241, n. 2 (2004) ("Speculation is not support for a finding . . . .") (quotation and citation omitted). Because plaintiffs have not shown by record evidence that Commerce reached the wrong conclusion with respect to ending inventory, it is within Commerce's discretion to use a LIFO methodology to value inventory. *See Wuhan II*, 31 CIT at ____ , Slip Op. 07–113 at 49 (quoting *Shakeproof*, 268 F. 3d at 1382 ("The 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 thus finds that Commerce was reasonable in applying the LIFO approach.

2. Honey Sales Commissions

Commerce calculated the SG&A surrogate ratio "based on publicly available information in the MHPC financial statement, which included 'honey sale[s] commissions' paid by MHPC to salesman [sic] to sell honey." Pls.' Mem. 41. Plaintiffs contend honey sales commissions were "impermissibly double counted because any commissions reported by Respondents, as a matter of law, were deducted from the U.S. sales price." Pls.' Mem. 41. According to plaintiffs:

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[13] *See generally* Transcript of Oral Argument, Court No. 06–00234 (Nov. 29, 2007).

> In calculating the United States side of the dumping equation, the Department deducts an amount for "commissions" from the Plaintiffs' U.S. sales prices. In contrast, in calculating normal value in the instant proceeding, the Department calculated the SG&A surrogate ratio based on publicly available information in the MHPC financial statement, which included "honey sale[s] commissions" paid by MHPC to salesman [sic] to sell honey.

Pls.' Mem. 41 (citations omitted). Thus, plaintiffs contend that Commerce's calculation of the SG&A ratio is contrary to law.

In the Final Results, Commerce rejected this argument, insisting, "the Department has determined that because sales commissions represent standard selling expenses, these commissions should be included in the surrogate SG&A calculation." Issues & Dec. Mem. at 23 (citations omitted).[14] That is, according to the Department, because standard selling expenses relate to both home market sales and United States sales, no adjustment need be made for them either to normal value or constructed export price.

The court cannot accept plaintiffs' argument. While plaintiffs contend that there has been "double counting" with respect to sales commissions, they have failed to demonstrate that the expenses they describe as "commissions" are direct selling expenses and not the kind of standard selling expenses that are not deducted when calculating the SG&A ratio. Plaintiffs cite to no record evidence to substantiate their claims as to how these "commissions" should be characterized. This failure is fatal to their claims. Commerce has the discretion to characterize evidence as long as its determination is supported with substantial evidence. *See Saudi Iron and Steel Co. (Hadeed) v. United States*, 11 CIT 880, 889, 675 F. Supp. 1362, 1371 (1987) (finding substantial evidence supported Commerce's characterization of the transfer of equipment as a lease/purchase rather than as a loan).

Because plaintiffs have not shown that the expenses claimed to be commissions should be treated as being directly related to home market sales, the court upholds Commerce's finding.

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[14] Standard selling expenses stand in contrast to direct selling expenses. Under Commerce's regulations, "direct selling expenses" include "commissions . . . that result from, and bear a direct relationship to, the particular sale in question." 19 C.F.R. § 351.410(c) (2008). In a market economy proceeding, Commerce is required to make a "circumstances-of-sale" adjustment to (A) either export price or constructed export price; and (B) normal value to account for differences in direct selling expenses incurred in the United States and foreign markets. *See* 19 U.S.C. § 1677a(d)(1)(A) (providing for the reduction in the price used to establish constructed export price by the amount of any commissions for selling the subject merchandise in the United States); 19 U.S.C. § 1677b(a)(6)(C)(iii) (providing for adjustment to normal value for differences in circumstances of sale). The purpose of the adjustment is to ensure that export price and normal value are being compared on an "equivalent basis" when Commerce makes its dumping determination. *See* Imp. Admin. Antidumping Manual, Ch. 8 at 16 (Jan. 22, 1998) (available at http://www.ia.ita.doc.gov).

3. Jars and Corks

Plaintiffs also argue that in calculating the financial ratios, Commerce improperly "failed to capture all direct materials in the calculation of the denominator [of the Department's financial ratio calculations], particularly jars and corks for retail-packed honey and honey machine purchases." Pls.' Mem. 43.[15] Plaintiffs claim that MHPC sells its processed honey in jars, meaning that the jars should be considered direct materials. Plaintiffs' position is based on: (1) the listing in MHPC's financial statements of jar and cork expenses along with its other honey-related expenses (such as honey collection, honey sales commissions, and honey boxes purchases); (2) a lack of evidence demonstrating that the jars and corks were used in MHPC's fruit canning division; and (3) the observation that the MHPC financial statements do not show purchases of steel drums or other honey containers. Pls.' Mem. 43–44. According to plaintiffs, "the only reasonable explanation is that MHPC sells its honey in jars and corks." Pls.' Mem. 44.

In the Final Results, Commerce stated that MHPC's financial statements indicate that these items were being purchased and sold by MHPC, rather than being consumed in the sale of honey: "Respondents failed to provide evidence that the 'jars and corks' were consumed as packing[16] in the manner described." Issues & Dec. Mem. at 23.

> The Department notes that the costs and revenues associated with "jars and corks" are independently itemized on the MHPC financial statements—specifically apart from the lines [sic] items labeled "honey sales" and "packaging." Without supporting evidence to suggest that the items are associated with or incorporated into the sale of subject merchandise, the Department must treat the financial statement line items as they have been reported in the MHPC financial statement—independent of sales and packaging. Thus, consistent with previous segments of this order, the Department will continue to deduct only those packing expenses identified in the line item "packing" in the MHPC annual report, and will not adjust the surrogate financial statements to include the expenses for "jars and corks."

Issues & Dec. Mem. at 23.

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[15] In the calculation of surrogate financial ratios, the denominator should include the expenses of all direct material costs. *See* Persulfates from the PRC, 68 Fed. Reg. 6,712 (Dep't of Commerce Feb. 10, 2003) (notice of final results), and accompanying Issues and Decision Memorandum, at Comm. 9 (Dep't of Commerce Feb. 3, 2003).

[16] The Department refers to "packing" and "packaging" interchangeably. It is not clear to the court that the words, as used in MHPC's financial statements, are necessarily referring to the same thing.

Both parties made identical arguments in *Shanghai Eswell*. *See* 31 CIT at ___ , Slip Op. 07–138 at 22–26. After again reviewing the chart on page 15 of the MHPC financial statement, which contains the line items in question, and again finding it nondeterminative, the court finds no reason to deviate from its finding in *Shanghai Eswell* pertaining to this issue.

> First, the court observes . . . that the chart specifically pertains to honey sale and collection. Next, the court notes that the chart contains line items for 250 gram, 500 gram and 1 kilogram jars; 53 millimeter and 38 millimeter corks; and honey machines in both the "Sale" column and the "Purchase" column. The line item for 100 gram jars appears only in the "Sale" column. The chart is therefore ambiguous. While it is possible that MHPC buys and sells jars [with] corks that are either empty or filled with something other than honey, there is no evidence in the MHPC financial statement tending to support such a conclusion. Without further explanation the court cannot accept as adequate Commerce's reliance solely on the line items for jars and corks being separate from other line items, to support its conclusion that they are not direct materials associated with finished honey.

Shanghai Eswell, 31 CIT ___ , Slip Op. 07–138 at 24–25 (citations and footnote omitted); *see also* Pls.' App. 12 at 15 (MHPC Main Journal Business Statement). The court thus rejects as unsupported by substantial evidence Commerce's findings regarding expenses for jars and corks and remands this question to Commerce.

D. Calculation of Labor Costs

The cost of labor is another factor of production used to determine normal value. To calculate the labor wage rate in NME countries, Commerce, pursuant to its regulations, employs a regression-based analysis using data from multiple countries:

> 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. . . . Using this regression analysis, Commerce determines the relationship between countries' per capita Gross National Product [("GNI")][17] and their wage rates; Commerce ap-

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[17] While per capita GNP and per capita GNI are not precisely the same, both courts and the Department use them interchangeably. *See Dorbest Ltd. v. United States*, 30 CIT ____ , ____ , 462 F. Supp. 2d 1262, 1291 (2006); Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments, 71 Fed. Reg. 61,716, 61,723 (Dep't of Commerce Oct. 19, 2006) ("The [World Bank] WB defines GNI per capita as equivalent to gross national product ("GNP") per capita, which is

> proximates 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.

Dorbest Ltd. v. United States, 30 CIT ____ , ____ , 462 F. Supp. 2d 1262, 1291 (2006) (citations omitted) ("*Dorbest I*"); *see* 19 C.F.R. § 351.408(c)(3) ("For labor, the Secretary will use regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries. The Secretary will calculate the wage rate to be applied in nonmarket economy proceedings each year. The calculation will be based on current data, and will be made available to the public.")

Plaintiffs' primary challenge to the Department's labor rate calculation is that it is contrary to law because "the Department's use of a regression analysis based on a group of market economy countries . . . contradicts the statute's language that the factors of production be valued using data from economically comparable countries pursuant to 19 U.S.C. § 1677b(c)[(4)]. . . ." Pls.' Mem. 45. Section 1677b(c)(4) requires that:

> The administering authority, in valuing factors of production [to determine normal value of the subject merchandise exported from a nonmarket economy], shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are . . . at a level of economic development comparable to that of the nonmarket economy country. . . .[18]

Plaintiffs argue that the 2003 labor calculation was "based on a basket of countries not economically comparable to China." Pls.' Mem. 46. Commerce determined that the PRC's wage rate was $0.97 per hour in contrast to that of India, an economically comparable country, whose wage rate is $0.23 per hour. Issues & Dec. Mem. at 28, 30.

The Department insists that its use of data from a wide range of market economy countries enhances the "accuracy, predictability, and stability of the wage rate." Issues & Dec. Mem. at 29.

> Due to the variability of wage rates in countries with similar per capita GNI, were the agency to select a single surrogate country, or even a small group of surrogate countries, to value

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the dollar value of a country's financial output of goods and services in a year divided by its population.") (quotation omitted); Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the PRC, 68 Fed.Reg. 44,040, 44,042 (Dep't of Commerce July 25, 2003) (notice) (referring to GNI as "the current World Bank term for what was previously termed "Gross National Product").

[18] The statute further states that, to the extent possible, the surrogate countries used to determine the wage rate be "significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4)(B).

> labor wage rates, the result would vary widely depending upon the economically comparable countries selected. Thus, the regulations, as implemented, provide for a more accurate and more predictable result by utilizing data from multiple countries.

Issues & Dec. Mem. at 28 (citations omitted). In other words, Commerce bases its case on the idea that its regression analysis would yield inaccurate results if it depended only on data from countries that are economically comparable to the PRC.

Commerce's argument seems to refer to the validity of using data from a wide range of market economy countries within the regression model, but does not explain how its regulations,[19] which rely on per capita GNI, rather than surrogate data from market economy countries at a level of development comparable to that of the nonmarket economy, meet the requirements of the antidumping statute. Issues & Dec. Mem. at 28–29.

Thus, Commerce appears to be side-stepping the issue raised by plaintiffs. In other words, in valuing all other factors of production, Commerce follows the statute and "prices or costs" the factors of production using values found in surrogate countries that are economically comparable to the NME country under investigation. Indeed, as has been seen, here Commerce valued raw honey using surrogate data from India. In its response to the issue raised by plaintiffs, however, the Department attempts to justify the use of data in the methodology prescribed by its regulations, but not the regulations themselves. Because Commerce has failed to explain how its regulations comport with the statute, this matter is remanded for the Department to supply that explanation. "Commerce is obliged to adequately explain how its chosen methodology achieves the required result [of determining antidumping margins as accurately as possible]." *Shandong Huarong Machin. Co. v. United States*, 29 CIT 484, 489, Slip Op. 05–54 at 10 (May 2, 2005) (not reported in Federal Supplement) (citing *NTN Bearing Corp. v. United States*, 14 CIT 623, 634, 747 F. Supp. 726, 736 (1990)).

Plaintiffs also take issue with the implementation of the regulations themselves. In doing so, plaintiffs challenge the exclusion of data from countries that they claim meet the Department's selection criteria, that is, "all countries for which the requisite data are available." Issues & Dec. Mem. at 30. Specifically, plaintiffs cite to the decision in *Dorbest I*, 30 CIT ___ , ___ , 462 F. Supp. 2d 1262, and ask

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[19] The regulation describes the methodology by which the Department calculates expected NME wages: "For labor, the Secretary will use regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries." 19 C.F.R. § 351.408(c)(3).

that the court issue the same instructions to Commerce in this proceeding, i.e., that on remand, Commerce is to either

> (a) justify why its data set constitutes thebest available information; or (b) incorporate those countries meeting its criteria into the data set; and (c) reconsider its use of its methodology or an alternative method for determining the labor rate for the PRC in this case.

Pls.' Mem. 45. The Department notes that its regression analysis, which does not include "all countries for which the requisite data are available" is "the same as that used for the past several years, and is sufficiently robust to conduct a meaningful regression analysis." Issues & Dec. Mem. at 30. To recalculate the regression analysis with a different basket of countries would "amount to a significant change" in the current methodology requiring a public notice and comment process. *Id.*[20] As this Court held in *Wuhan II*, Commerce errs when it excludes countries that meet its selection criteria from the data set:

> 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.

Wuhan II, 31 CIT at ___ , Slip Op. 07–113 at 39 (*quoting Dorbest I*, 30 CIT at ___ , 462 F. Supp. 2d at 1295). Indeed, "Commerce has acknowledged . . . the desirability of a broader data set in its own justification for the creation and utilization of a regression model for wage rates. . . ." *Dorbest I*, 30 CIT at ___ , 462 F. Supp. 2d at 33. Commerce's explanation that the basket of countries it used "is the same as that used for the past several years," and that recalculating would "amount to a significant change" is insufficient to support its

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[20] Commerce did indeed announce 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 61,721–61,722.

determination. Commerce has conceded as much by modifying its selection criteria and list of included countries in at least two cases. *See Wuhan Bee Healthy Co. v. United States*, 32 CIT ___ , ___ , Slip Op. 08–61 (May 29, 2008) ("*Wuhan III*"); *Dorbest Ltd. v. United States*, 32 CIT ___ , ___ , Slip Op. 08–24 (Feb. 27, 2008) ("*Dorbest II*"). As a result, issues relating to Commerce's selection of data used to calculate labor costs will be remanded.

E. Calculation of Brokerage and Handling

Finally, plaintiffs contest Commerce's calculation of brokerage and handling value as unsupported by substantial evidence and not in accordance with law. For the purposes of calculating surrogate values, Commerce "normally values brokerage and handling using nonproprietary information gathered from producers of identical or comparable merchandise in the surrogate country." Def.'s Opp'n 37 (citing 19 C.F.R. § 351.408(c)(4)). Commerce selects this data based on its "quality, specificity and contemporaneity." Issues & Dec. Mem. at 24–25.

Commerce used a simple average of two surrogate values for domestic brokerage and handling:

> The December 2003 – November 2004 data of Essar Steel (Essar) originally submitted in the anti-dumping administrative review of hot-rolled steel flat products from India (hereinafter "Essar" value or data). This value of 0.17 rupees per kilogram is derived from data on shipments totaling 4,000 metric tons.
>
> [The] November 2002 – September 2003 data of Pidilite Industry (Pidilite) originally submitted in the antidumping investigation of carbazole violet pigment 23 from India (hereinafter "Pidilite" value or data). This value of 6.48 rupees per kilogram is derived from data on shipments totaling 13 metric tons.

Pls.' Mem. 47 (citing Factors of Production Valuation Mem. for the Preliminary Results and Partial Rescission of Antidumping Duty Admin. Review of Honey from the PRC dated Dec. 9, 2005, AR 229 at 10).

Plaintiffs argue that only the Essar data should be used because: (1) the Essar data is more contemporaneous; and (2) the Pidilite data has an "aberrationally high brokerage and handling value based on a very low sales quantity." Pls.' Mem. 48.

Commerce acknowledges that the Essar data is the most contemporaneous data on the record, as it overlaps with the POR. Issues & Dec. Mem. at 25. However, it states that "when considering the quality and specificity of the data on the record, *e.g.*, Essar and Pidilite's brokerage and handling values, calculating an average of the two values results in the most appropriate value on the record in this case." *Id.* (footnote omitted). Commerce found that a simple average achieved the most representative value considering the values re-

ported: "[A]s there are no honey-specific brokerage and handling values on the record, the Department finds that a simple average of Essar and Pidilite's values achieves the most representative value." Issues & Dec. Mem. at 25.[21]

Moreover, the Department claims that "the Pidilite value from the period October 1, 2002, through September 30, 2003, is not distant enough from the POR in this case (December 1, 2003 through November 30, 2004) for it to be disqualified for use." Issues & Dec. Mem. at 25 (citing *Hebei II*, 29 CIT at 301, 366 F. Supp. 2d at 1275 ("[t]hree months of contemporaneity is not a compelling factor where the alternative data is only a year-and-a-half distant from the POI.")).

"Despite the broad latitude afforded Commerce, its discretion is not unlimited, but must be exercised in a manner consistent with underlying objective of [the statute]—to obtain the most accurate dumping margins possible." *Hebei Metals & Minerals Imp. & Exp. Co. v. United States*, 28 CIT 1185, ___ , Slip Op. 04–88 at 10 (July 19, 2004) (quotation omitted) (not reported in Federal Supplement) ("*Hebei I*"); *see also Shakeproof*, 268 F.3d at 1382 ("In determining the valuation of the factors of production, the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible."). Commerce acted within its discretion when it concluded that, in the absence of data more specific to honey, the several months' difference in contemporaneousness was not material, and thus that the Pidilite data should not be excluded on that basis alone. Commerce's determination that use of a simple average of the data constituted the best available information for valuing brokerage and handling, however, does not appear to be supported by substantial evidence. Commerce states that the Pidilite data constitutes the best available information for valuing brokerage and handling because of the data's "quality and specificity." The Department at no point, however, explains how the data meets either one of these standards.

"An agency must explain its rationale . . . such that a court may follow and review its line of analysis, its reasonable assumptions, and other relevant considerations. Explanation is necessary . . . for this court to perform its statutory review function." *Shanghai Eswell*, 31 CIT at ___ , Slip Op. 07–138 at 10 (citing *Int'l Imaging Materials, Inc. v. United States Int'l Trade Comm'n*, 30 CIT ___ , Slip Op. 06–11 at 13 (Jan. 23, 2006) (not reported in the Federal

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[21] In addition, Commerce found the average of the data was the most representative because "the values reported by Essar and Pidilite are the actual prices paid by market economy companies and are representative of their normal business practices." Issues & Dec. Mem. at 25–26.

Supplement)). Such an explanation is particularly important because, as plaintiffs point out:

> The Pidilite brokerage charge is derived from only 19 sales consisting of only 13 metric tons of merchandise, resulting in a weighted average brokerage fee of 6.48 Rs/kg.contrast the Essar brokerage charge wasBy derived from over 4,000 metric tons of shipments with a weighted average brokerage fee of 0.17 Rs/kg. Thus, the Pidilite brokerage charge is more than 37 times greater than the Essar value. . . .

Pls.' Mem. 48 (citations omitted). Plaintiffs conclude that "record evidence clearly demonstrates that the Pidilite represents an unrepresentative and aberrational brokerage value." *Id.* Plaintiffs and the court are entitled to an explanation for Commerce's use of the Pidilite data, and therefore, this matter is remanded.

CONCLUSION

For the foregoing reasons, the court grants the plaintiffs' motion for judgment on the agency record, in part, and denies it in part. The court remands this case to Commerce for further action consistent with this opinion.

On remand Commerce shall make specific reference to the questions raised in this opinion, as follows. (1) Commerce shall reconsider and explain its decision not to include expenses for jars and corks in its financial ratio calculations as direct expenses used for producing finished honey. If Commerce concludes that the expenses for the jars and corks should be taken into account in the financial ratio calculations, it shall make the necessary adjustments. (2) Commerce shall reconsider and explain how its regulations for determining the cost of labor conform to the antidumping statute, with specific reference to the reliance on data from countries whose level of development is not comparable to the PRC, and how its insistence that it need not alter its database for the wage rate calculation conforms to its behavior in other cases. In the event that Commerce concludes that its regulations do not conform to the antidumping statute, it shall propose a method for determining the cost of labor that does conform to the statute. (3) Commerce shall reconsider and explain its use of the Pidilite data in calculating the brokerage and handling value with particular reference to "quality and specificity." Should Commerce conclude that its use of the Pidilite data is not justified it shall recalculate the brokerage and handling value using only the Essar data.

Slip Op. 08–69

PS CHEZ SIDNEY, L.L.C., Plaintiff, v. UNITED STATES INTERNATIONAL TRADE COMMISSION, and UNITED STATES CUSTOMS SERVICE, Defendants, and CRAWFISH PROCESSORS ALLIANCE, et al., Defendant-Intervenors.

Before: WALLACH, Judge
Court No.: 02–00635

[United States International Trade Commission's Remand Determination is AFFIRMED; United States Customs and Border Protection's Remand Determination is AFFIRMED; Plaintiff PS Chez Sidney, L.L.C.'s Motion for Entry of Money Judgment Pursuant to 28 U.S.C. § 2643(a)(1) is DENIED.]

Dated: June 17, 2008

William E. Brown and *Arnold & Porter* (*Michael T. Shor*) for Plaintiff PS Chez Sidney, L.L.C.

Gregory G. Katsas, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Franklin E. White*); and *Andrew G. Jones*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of Counsel, for Defendant United States Customs and Border Protection.

Neal J. Reynolds, Assistant General Counsel, Office of the General Counsel, United States International Trade Commission (*Patrick V. Gallagher*), for Defendant United States International Trade Commission.

Adduci, Mastriani & Schaumberg, LLP (*Will E. Leonard*), for Defendant-Intervenors Crawfish Processors Alliance; Bob Odom, Commissioner, Louisiana Department of Agriculture and Forestry; Louisiana Department of Agriculture and Forestry.

Sonnenschein Nath & Rosenthal (*Michael A. Bamberger*) for INA USA Corporation, appearing *amicus curiae* in support of Plaintiff.

Arnold & Porter, LLP (*Michael T. Shor* and *Claire E. Reade*), for Giorgio Foods Inc., appearing *amicus curiae* in support of Plaintiff.

Kelley Drye & Warren (*David A. Hartquist*) and *Stewart and Stewart* (*P. Stewart*) for Committee to Support U.S. Trade Laws, appearing *amicus curiae* in support of Plaintiff.

OPINION

Wallach, Judge:

I
INTRODUCTION

This matter comes before the court following its remand to Defendants United States International Trade Commission (the "Commission") and United States Customs and Border Protection ("Customs"), respectively. In the underlying action, the court held that the support requirement of the Continued Dumping and Subsidy Offset Act of 2000 (the "CDSOA" or the "Byrd Amendment") was unconstitutional and severed that requirement from the statute. The court remanded to the Commission and Customs to determine Plaintiff PS

Chez Sidney, L.L.C.'s ("Chez Sidney") eligibility for CDSOA distributions under the modified version of the statute, and to determine how Chez Sidney would receive those distributions for which it is eligible.

On remand, the Commission determined that Chez Sidney qualified for inclusion on the list of producers eligible for CDSOA distributions, and Customs determined that Chez Sidney was eligible for such distributions in fiscal year ("FY") 2002 and FY 2003. Chez Sidney contests Customs' decision not to furnish payment on the FY 2002 and FY 2003 CDSOA distributions until all appeals in this action have been exhausted; Chez Sidney also challenges Customs' determination that it is ineligible for FY 2004 CDSOA distributions.

This court has jurisdiction pursuant to 28 U.S.C. § 1581(i). For the reasons set forth below, Customs' Remand Determination is affirmed.

II
BACKGROUND

Chez Sidney initiated this action to challenge the requirement that a domestic producer support an antidumping petition in order to be eligible for CDSOA distributions. The court held that the support requirement of the CDSOA was unconstitutional because it violated the First Amendment protections of freedom of speech and freedom of expression. *PS Chez Sidney, L.L.C. v. United States*, 442 F. Supp. 2d 1329, 1358–59 (CIT 2006) ("*PS Chez Sidney I*"); *cf. SKF USA Inc. v. United States*, 451 F. Supp. 2d 1355 (CIT 2006) (holding that the support requirement of the CDSOA was unconstitutional on Equal Protection grounds); *Canadian Lumber Trade Alliance v. United States*, 425 F. Supp. 2d 1321 (CIT 2006), *aff'd* in relevant part, 517 F.3d 1319 (Fed. Cir. 2008) (holding that the NAFTA Implementation Act rendered the CDSOA inapplicable to goods from Canada and Mexico). In a subsequent decision, the court held that it was appropriate to sever the unconstitutional support requirement. *PS Chez Sidney, L.L.C. v. United States*, 502 F. Supp. 2d 1318, 1323–24 (CIT 2007) ("*PS Chez Sidney II*"); *accord SFK*, 415 F. Supp. 2d at 1365.

After striking this requirement, the court found that "all 'affected domestic producers' who are either petitioners or interested parties in an antidumping petition are eligible to be included on the [Commission's] list for CDSOA distributions." *Id.* at 1324; *accord SKF*, 451 F. Supp. 2d at 1365–66. The court remanded the matter to the Commission and Customs. The Commission was instructed to determine whether, under the modified version of the CDSOA, Chez Sidney otherwise met the requirements to qualify as an "affected domestic producer." *Id.* at 1324. If the Commission determined that Chez Sidney qualified as an "affected domestic producer," then Customs was directed to (1) assess the sufficiency of Chez Sidney's

claim, (2) include Chez Sidney on the list of producers eligible for CDSOA distributions for FY 2002, if appropriate, and (3) "determine how Chez Sidney shall receive its pro rata share, if any, of the 2002 CDSOA disbursements." *Id.* at 1324–25. The court also ordered the Commission and Customs to make such determinations for each subsequent year in which Chez Sidney applied for CDSOA distributions. *Id.*

The Commission determined on remand that, under the modified version of the Byrd Amendment, Chez Sidney met the requirements to be included on the list of "affected domestic producers" eligible for CDSOA distributions. Letter from Neal J. Reynolds, Assistant General Counsel for Litigation, United States International Trade Commission to Tina Potuto Kimble, Clerk of the Court, United States Court of International Trade (November 27, 2007) ("Commission's Remand Determination"). That determination did not elicit comments from Chez Sidney and is hereby affirmed.

Subsequently, Customs determined that Chez Sidney is eligible for a *pro rata* share of the FY 2002 and FY 2003 CDSOA distributions "to the extent these funds are either recoverable from the affected domestic producers who initially received them or are available in the Special Account." Reconsideration of the Fiscal Year 2002, 2003, and 2004 CDSOA Certifications of PS Chez Sidney, L.L.C. (February 5, 2008) ("Customs' Remand Determination") at 3. Customs indicated, however, that Chez Sidney will not receive payment until "all opportunities for rehearing and/or appeal have been exhausted." *Id.* at 2. In addition, Customs stated its intention to verify the qualifying expenditures for which Chez Sidney seeks CDSOA disbursements in FY 2002 and FY 2003 "in a manner consistent with 19 C.F.R. § 159.63(d)." *Id.* at 3. Chez Sidney's request for FY 2004 CDSOA distributions was denied on the ground that it had ceased production in 2003. *Id.* at 2.

Chez Sidney contests Customs' Remand Determination on three principal grounds. First, Chez Sidney argues that that Customs' proposed remedy is inadequate. Plaintiff PS Chez Sidney, L.L.C.'s Comments on February 5, 2008 Remand Determination by United States Customs and Border Protection ("Plaintiff's Comments") at 1–2. Second, Chez Sidney argues that it is entitled to both pre- and post-judgment interest on its *pro rata* shares of the FY 2002 and FY 2003 distributions. *Id.* at 10. Third, Chez Sidney asserts that it is entitled to post-FY 2003 CDSOA distributions. *Id.* at 11. Chez Sidney requests that the court direct Customs to either furnish payment on its *pro rata* shares of the FY 2002 and FY 2003 CDSOA distributions immediately or reserve funds in the Special Account for such distribution. *Id.* at 2.

III
STANDARD OF REVIEW

Remand determinations are reviewed "for compliance with the court's remand order." *Dorbest Ltd. v. United States*, No. 05–00003, 2008 Ct. Int'l Trade LEXIS 22, at *3 (February 27, 2008) (citing *NMB Sing. Ltd. v. United States*, 28 CIT 1252, 341 F. Supp. 2d 1327 (2004)). Because jurisdiction over this action is derived from 28 U.S.C. § 1581(i), the applicable standard of review is as established in Section 706 of the Administrative Procedure Act ("APA"). 28 U.S.C. § 2640(e).

IV
ANALYSIS

A
Customs' Remand Determination Fully Complies with the Court's Remand Instructions and Can Not be Characterized as Arbitrary and Capricious

1
Customs' Proposed Remedy is Adequate

Chez Sidney contends that the remedy proposed in Customs' Remand Determination contradicts the court's directive that Customs determine how Chez Sidney "shall receive its pro rata share" of the CDSOA funds for which it is eligible. Plaintiff's Comments at 2 (citing *PS Chez Sidney II*, 502 F. Supp. 2d at 1324–25). In support of this contention, Chez Sidney weighs the perceived risks of not receiving payment from Customs until disposition of the case on appeal, *id.* at 4–6, and ultimately concludes that an order directing "immediate distribution of funds in the Special Account . . . maximizes Chez Sidney's recovery . . . and complies with the letter and the spirit of the [c]ourt's opinion and judgment," *id.* at 7.

Customs has explained that Federal regulations contemplate the possibility that CDSOA disbursements may need to be redistributed and provide a "deliberative and orderly" mechanism for doing so. Defendant United States Customs and Border Protection's Response to Plaintiff PS Chez Sidney, L.L.C.'s Comments on February 5, 2008 Remand Determination ("Customs' Response") at 7 (citing 19 CFR § 159.64(b)(3)). Chez Sidney objects to this process established by federal legislation on the bases that full recovery from the domestic crawfish producers "will be impossible," Plaintiff's Comments at 4–5, and that the "Special Account will be empty," *id.* at 5.

The court specifically authorized Customs not only to determine Chez Sidney's eligibility for CDSOA distributions, but also to establish the mechanism by which Chez Sidney would receive such funds. *PS Chez Sidney II*, 502 F. Supp. 2d at 1325 ("Customs is directed to determine how Chez Sidney shall receive its pro rata share, if any, of

the 2002 CDSOA disbursements.”). Accordingly, Customs’ decision to verify the amounts submitted by Chez Sidney as qualifying expenditures, wait until all appeals are exhausted in this case before furnishing payment to Chez Sidney, and follow its internal administrative process to secure the funds with which to do so is neither inconsistent with the court’s remand instructions nor arbitrary and capricious.

2

Chez Sidney is Not Entitled to Pre- or Post-Judgment Interest on the FY 2002 and FY 2003 CDSOA Distributions

Chez Sidney claims that it “should be entitled to prejudgment and post-judgment interest” on its *pro rata* shares of the FY 2002 and FY 2003 CDSOA distributions. Plaintiff’s Comments at 10.

These claims fail as a matter of law. It is a long-standing principle of U.S. jurisprudence that, in the absence of a constitutional requirement, interest can be recovered against the United States only if Congress has expressly consented to such recovery. *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 658–59, 67 S. Ct. 601, 91 L. Ed. 577 (1947). This limitation, which is commonly referred to as the no-interest rule, “must be strictly construed.” *Id.* at 659. Indeed, the rule of sovereign immunity requires that Congressional “consent to liability for interest on a damage award . . . be ‘affirmatively and separately contemplated’ . . . from a general waiver of immunity for the cause of action resulting in the damages award against the United States.” *Marathon Oil Co. v. United States*, 374 F.3d 1123, 1126–27 (Fed. Cir. 2004) (quoting *Library of Congress v. Shaw*, 478 U.S. 310, 314–15, 106 S. Ct. 2957, 92 L. Ed. 2d 250 (1986)). The no-interest rule applies to claims for both pre- and post-judgment interest. *Id.* (citing *N.Y. Rayon*, 329 U.S. at 661).

According to Plaintiff, the rule does not apply in this case because the funds in the Special Account do not belong to the United States. Plaintiff’s Comments at 10. That fact has no effect, however, on the applicability of the no-interest rule in this case. Indeed, “the *sine qua non* of federal sovereign immunity is the federal government’s *possession* of the money in question. The government need not have an actual interest in the funds in order to invoke the defense.” *Kalodner v. Abraham*, 310 F.3d 767, 769–70 (D.C. Cir. 2002) (citing *N.Y. Rayon*, 329 U.S. 654).

Therefore, because there is neither a constitutional requirement nor evidence of explicit Congressional intent to authorize the payment of interest on CDSOA disbursements, Plaintiff’s claims for both pre- and post-judgment interest on funds held by the United States must fail.

3
Chez Sidney is Not Entitled to CDSOA Distributions in FY 2004 Because it Ceased Operations in 2003

Chez Sidney argues that, notwithstanding the fact that it ceased operations in 2003–2004, it is entitled to CDSOA distributions based on the additional qualifying expenditures it would have submitted in the years after 2003. Plaintiff's Comments at 12–13. According to Chez Sidney, the cessation of its operations in 2003–2004 was a direct result of its inability to collect the CDSOA distributions to which it would have been entitled in previous years in the absence of the support requirement ultimately found unconstitutional by this court in *PS Chez Sidney I*. *Id.* at 11–12. On this basis, Chez Sidney asserts that it is entitled to its *pro rata* share of post-FY 2003 distributions based on the same percentages of qualifying expenditures that it submitted in FY 2002 and FY 2003. *Id.* at 12–13.

Nothing in the court's remand instructions in *PS Chez Sidney II* can be read to require Customs to make CDSOA distributions to Plaintiff for FY 2004 or any other year for which it was not in operation. Customs was directed to determine *whether* Plaintiff is entitled to such distributions after 2002; beyond striking the unconstitutional support provision from the CDSOA, the court did not direct or otherwise constrain Customs' determinative process. The Byrd Amendment specifically excludes companies that have ceased production of the product covered by the antidumping duty order in question from the definition of "affected domestic producer" eligible for CDSOA distributions. 19 U.S.C. § 1675c(b)(1)(B) (2000). Thus, because Chez Sidney was not "in operation" after 2003, it is statutorily ineligible for CDSOA distributions in later years. *Id.* at 14–15.

C
Chez Sidney's Request That the Court, In Effect, Issue a Writ of Mandamus is Inappropriate in These Circumstances

Chez Sidney's requested relief requires the court to take the specific step of ordering Customs to either immediately furnish payment on Chez Sidney's *pro rata* shares of the FY 2002 and FY 2003 CDSOA distributions or to "hold and preserve sufficient funds already in and to be deposited in the Special Account so that funds will be available" to do so. Plaintiff's Comments at 13–14. This is effectively a request that the court issue a writ of mandamus, and will be evaluated accordingly.

The common-law writ of mandamus, as codified in 28 U.S.C. § 1361 and 28 U.S.C. § 1651(a), is a "drastic [remedy], to be invoked only in extraordinary situations." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34, 101 S. Ct. 188, 66 L. Ed. 2d 193 (1980). It is "one of 'the most potent weapons in the judicial arsenal.' " *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380, 124 S. Ct. 2576, 159 L. Ed. 2d 459

(2004) (quoting *Kerr v. United States Dist. Court for N. Dist.*, 426 U.S. 394, 403, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976)). Thus, before the court can issue a writ of mandamus, it must ensure that the party seeking the writ makes three required showings. First, the party must demonstrate that it has “no other adequate means” to attain the desired relief. *Id.* (quoting *Kerr*, 426 U.S. at 403). Second, the party must demonstrate that its right to obtain the writ is “clear and indisputable,” *id.* at 381 (quoting *Kerr*, 426 U.S. at 403) – in other words, the party must demonstrate that he or she is owed a “clear nondiscretionary duty,” *Heckler v. Ringer*, 466 U.S. 602, 616, 104 S. Ct. 2013, 80 L. Ed. 2d 622 (1984). Finally, even after making the first two required showings, the party must demonstrate that a writ of mandamus is “appropriate under the circumstances.” *Cheney*, 542 U.S. at 381.

Chez Sidney has not made the three required showings. There is an alternative means for it to attain the relief it seeks; that alternative is to allow Customs to follow its internal administrative process to obtain the funds with which to render payment on Chez Sidney’s *pro rata* shares of the FY 2002 and FY 2003 CDSOA distributions. While the court’s decision in *PS Chez Sidney II*, 502 F. Supp. 2d 1318, establishes Chez Sidney’s right to those funds, Customs has not given this court any reason to believe that it will not follow through with payment. Therefore, a writ of mandamus is not appropriate in these circumstances.

V
CONCLUSION

For the above stated reasons, the Commission’s Remand Determination is Affirmed, Customs’ Remand Determination is Affirmed, and Chez Sidney’s Motion for Entry of Money Judgment Pursuant to 28 U.S.C. § 2643(a)(1), filed on April 10, 2008, is Denied.

Slip Op. 08–70

AUTO ALLIANCE INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 05–00596

[Plaintiff's Motion to Compel the Deposition of Defendant's Counsel, Saul Davis, is DENIED and its Motion to Re-open the Deposition of Defendant's witness, Ernest Wolney, is GRANTED with specific limitation; Defendant's Cross-Motion for a Protective Order is DENIED.]

Dated: June 18, 2008

Katten Muchin Rosenman LLP (*Bruce J. Casino*); and *Office of the General Counsel, Ford Motor Company* (*Paulsen Vandevert*), for Plaintiff Auto Alliance International, Inc.

Gregory G. Katsas, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Barbara S. Williams*, Attorney-in-Charge, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Saul Davis*); and *Yelena Slepak*, Office the Assistant Chief Counsel, International Trade and Litigation, Bureau of Customs and Border Protection, of Counsel, for Defendant United States.

OPINION

Wallach, Judge:

I
INTRODUCTION

Plaintiff AutoAlliance International, Inc. moves the court to compel the deposition of Saul Davis, counsel for Defendant United States Customs and Border Protection ("Customs"), based on a declaration he submitted in opposition to Plaintiff's Motion to Strike the Declarations of Eugene J. Donohue and William J. Lynch. Memorandum in Opposition to Plaintiff's Motion to Strike Statement, Declaration of Saul Davis ("Davis Declaration"). Because the information Plaintiff seeks to obtain from Mr. Davis is protected by the attorney-client privilege and the work-product doctrine, AutoAlliance International, Inc.'s Motion to Compel the Deposition of Saul Davis is, at the least, premature, and hereby denied.

Plaintiff also moves this court to re-open the deposition of Defense witness Ernest Wolney on the ground that his initial deposition was conducted prior to Defendant's assertion of new legal theories in the Davis Declaration. AutoAlliance International, Inc.'s Motion to Re-open the Deposition of Ernest Wolney is granted in part. Defendant has cross-moved for a protective order; the cross-motion is denied as moot.

II
BACKGROUND

In the underlying action, Plaintiff challenges Customs' denial of its protest to the liquidation of certain entries of automotive components and to the appraised value of the automotive components included in the protested entries. Complaint ¶ 1. After discovery ended, Plaintiff filed its Motion for Summary Judgment. Defendant responded by filing a memorandum in opposition as well as a Cross-Motion for Summary Judgment. In support of its Cross-Motion, Defendant attached the declarations of Eugene J. Donohue, Assistant Field Director for Customs' New York Field Office of Regulatory Audit, and William J. Lynch, Auditor-in-Charge for Customs' Office of Regulatory Audit.

Plaintiff moved to strike these declarations, and asserted that Defendant had never identified Messrs. Donohue and Lynch as individuals with potentially discoverable information or otherwise expressed an intent to use their testimony, as required by USCIT R.26(a)(1). Plaintiff's Motion to Strike the Declarations of Eugene J. Donohue and William J. Lynch ("Plaintiff's Motion to Strike") at 4. In opposing this motion, Defendant submitted the Davis Declaration in which he stated that he needed the testimony of Messrs. Lynch and Donohue to support new defense theories he had developed. Davis Declaration ¶¶ 2–3, 7–8. After reviewing all of the pleadings and papers on file, and holding both in-court and telephonic status conferences with the parties, the court denied Plaintiff's Motion to Strike. In its Order denying the motion, the court re-opened discovery for a period of 120 days and authorized Plaintiff to re-file its Motion for Summary Judgment at the end of that period.

Subsequently, Plaintiff served Defendant with notices of deposition for the two new declarants, Messrs. Donohue and Lynch. Memorandum of Law in Support of AutoAlliance International, Inc.'s Motion to (A) Compel the Deposition of Saul Davis, and (B) Reopen the Deposition of Ernest Wolney ("Plaintiff's Motion to Compel") at 1–2. Plaintiff also served notices of deposition for Defendant's counsel, Mr. Davis, as well as for the Customs Regulatory Auditor previously deposed by Plaintiff, Mr. Wolney. *Id.* at 2.

Defendant took the position that Plaintiff's request did not meet "**any** of the criteria for a deposition of trial counsel" and informed Plaintiff that it would oppose the deposition of Mr. Davis if Plaintiff did not withdraw its notice. *Id.* Ex. D, Letter from Saul Davis to Bruce Casino (November 21, 2007). Moreover, Defendant rejected Plaintiff's assertion that the attorney-client and work-product privileges were waived by Mr. Davis' declaration. *Id.* Ex. E, Letter from Saul Davis to Bruce Casino (December 11, 2007). Defendant characterized the Davis Declaration as "purely procedural" in nature; according to Defendant, it could not be read to have waived any privi-

leges, it merely discussed the fact that Mr. Davis was seeking the assistance of Customs regarding two defenses he was developing. *Id.* Ex. E.

Defendant also took the position that Plaintiff's notice of deposition of Mr. Wolney was improper, as it violated the prohibition on deposing a party more than once without leave of the court. *Id.* Ex. B, Letter from Saul Davis to Bruce Casino (November 29, 2007) (citing USCIT R.30(a)(2)(B)). Defendant informed Plaintiff that it could not agree to the request to re-depose Mr. Wolney, especially without limitation, and advised Plaintiff to seek the court's permission. *Id.* Ex. C, E-mail from Saul Davis to Bruce Casino (December 5, 2007).

III
DISCUSSION

The Rules of this court provide the starting point for analysis. However, given the similarity between this court's discovery rules and the parallel rules in the Federal Rules of Civil Procedure, the jurisprudence of other circuits is a valuable interpretative tool.[1]

A
Plaintiff's Motion to Compel the Deposition of Defendant's Counsel is Denied Because the Information Plaintiff Seeks is Protected by the Attorney-Client Privilege and the Work-Product Doctrine

A party "may obtain discovery regarding any matter *not privileged*, that is relevant" unless otherwise limited by court order. USCIT R.26(b)(1) (emphasis added). Further, a party may take the deposition of "any person" without seeking leave of the court, USCIT R.30(a)(1), subject to certain exceptions not relevant here. "The fact that the proposed deponent is an attorney, or even an attorney for a party to the suit, is not an absolute bar to taking his or her deposition. . . ." 8A Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure: Civil 2d* § 2102 (2d ed. 1994). However, while deposing opposing counsel is not absolutely prohibited, the Rules of this court do establish that information protected under either the attorney-client privilege or the work-product doctrine does not lose the benefits of such protection merely because the deposition of opposing counsel is authorized. *See* USCIT R.26(b)(3) (providing that a party seeking to obtain discovery of information protected under the work-product doctrine must demonstrate (1) substantial need for the materials, (2) inability to obtain the sub-

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[1] *See* USCIT R.1 ("The court may refer for guidance to the rules of other courts."); *Zenith Radio Corp. v. United States*, 10 CIT 529, 530 n.7, 643 F. Supp. 1133 (1986) (noting that it is "particularly helpful" to consider precedent from other circuits).

stantial equivalent of the materials by other means without incurring undue hardship); USCIT R.26(b)(5)(A) (placing the burden upon the party asserting privilege).

Courts have expressed a range of views regarding the practice of taking attorney depositions. *Compare Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327–28 (8th Cir. 1986) ("We view the increasing practice of taking opposing counsel's deposition as a negative development . . . that should be employed only in limited circumstances.") *with Gould Inc. v. Mitsui Mining & Smelting Co., Ltd.*, 825 F.2d 676, 680 n.2 (2d Cir. 1987) ("The disfavor in which the tactic of seeking discovery from adversary counsel is generally regarded . . . is not a talisman for the resolution of all controversies of this nature.").

Defendant contends that *Shelton* provides the appropriate analytical inquiry. Defendant's Opposition to Plaintiff's Motion to Compel and Cross-Motion for a Protective Order ("Defendant's Opposition") at 15–18; *see also* Plaintiff's Motion to Compel Ex. D. Under the *Shelton* test, a party can depose opposing counsel only if three conditions are met: (1) no other means exist to obtain the sought after discovery, (2) the information to be obtained is both relevant and not privileged, and (3) the information is crucial to the deposing party's preparation of its case. *Shelton*, 805 F.2d at 1327.

In contrast, Plaintiff advocates a more "flexible" approach to evaluating the propriety of requests to depose opposing counsel, as articulated in dicta contained in *In re Subpoena issued to Dennis Friedman*, 350 F.3d 65, 71–72 (2d Cir. 2003). Plaintiff's Motion to Compel at 6–8. In that opinion, which was ultimately dismissed as moot because the attorney consented to the deposition, the court expressed its view that all relevant factors and considerations should be evaluated "to determine whether the proposed deposition would entail an inappropriate burden or hardship." *Friedman*, 350 F.3d at 72. Those factors might include: (1) the need to depose the attorney, (2) the attorney's role in connection with the matter on which discovery is sought and also with the pending litigation, (3) the risk of encountering privilege or work-product issues, and (4) the extent of discovery already conducted. *Id.*

Purporting to apply these factors, Plaintiff concludes that it should be permitted to depose Defendant's counsel "with respect to all matters referenced and discussed in [the Davis Declaration]." Plaintiff's Motion to Compel at 7. In support of this conclusion, Plaintiff asserts that Defendant's counsel "interjected himself into this case as a fact witness" by filing the Davis Declaration, thereby waiving the "privilege issue." *Id.* at 7–8. According to Plaintiff, Mr. Davis's status as a "fact witness," coupled with his alleged waiver of the protections of both the attorney-client privilege and the work-product doctrine, "justify allowing the noticed deposition to proceed." *Id.*

Plaintiff makes two alternative arguments. First, Plaintiff argues that applying the *Shelton* test will lead to the same result: the deposition of Defendant's counsel. *Id.* at 6 n.1. In Plaintiff's assessment, all three factors of *Shelton* are met: (1) there is no other means to obtain the information related to the Davis Declaration, (2) Mr. Davis has waived privilege, and (3) the information sought is crucial to Plaintiff's ability "to understand Customs' alleged new facts and theories and the weight they were given within Customs." *Id.* Plaintiff's second alternative argument is that even if Mr. Davis had not waived the privilege, the "mere risk that otherwise good faith questions posed at an attorney's deposition may provoke . . . privilege objections . . . is not itself grounds for prohibiting the deposition to go forward at the outset." *Id.* at 7 n.2.

Plaintiff has not made the required showing, even under the more permissive test for deposing opposing counsel articulated in *Friedman*. First, Plaintiff has demonstrated no need to depose Defendant's counsel. Instead, Plaintiff seeks to determine the "relevance and impact" of his conversations with Defendant's witnesses and also to "better understand why [the new legal theories] were only raised at the eleventh hour." *Id.* at 4. Plaintiff has, in its own words, expressed its desire to obtain information protected by both the attorney-client privilege, i.e. the conversations between counsel and witnesses for Defendant, and the work-product doctrine, i.e. "the facts [Mr. Davis] believes support his two legal theories and the reactions and analysis of [Messrs. Lynch and Donohue] to Mr. Davis' new theories."[2] *Id.* Contrary to Plaintiff's assertion, however, Defendant did not waive the protection afforded under either the attorney-client privilege or the work-product doctrine when it submitted the Davis Declaration. The Davis Declaration informed the court of the existence of new legal theories developed by Defendant's counsel; it did not, in any way, discuss the content of those theories or the substance of the conversations between Defendant's counsel and its witnesses, Messrs. Lynch and Donohue. Finally, Plaintiff incorrectly concludes that Mr. Davis "interjected himself as a fact witness" in the underlying action when he submitted the Davis Declaration to the court. *See* Plaintiff's Motion to Compel at 4. Mr. Davis did not represent that he had personal knowledge of any of the facts, or that

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[2] The term "work product" is used to refer to "materials obtained or prepared . . . with an eye toward litigation." *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S. Ct. 385, 91 L. Ed. 451 (1947); *see also* USCIT R.26(b)(3). It is often divided into two distinct categories: (1) factual work product and (2) "opinion" work product, which is the result of "mental processes such as plans, strategies, tactics, and impressions, whether memorialized in writing or not." *In re Seagate Technology, L.L.C.*, 497 F.3d 1360, 1375 (Fed. Cir. 2007). This distinction is significant because, while factual work product might be discoverable upon a showing of substantial need and undue hardship, opinion work product is "afforded greater, nearly absolute protection." *Id.* (citing USCIT R.26(b)(3)).

he had in any way participated in the events, giving rise to the underlying case.

Plaintiff's alternative arguments also fail. While Plaintiff may satisfy the first condition of the *Shelton* test, i.e. that no other means exist to obtain the information it seeks, it can neither demonstrate the relevance of that information nor the waiver of the otherwise applicable privileges. Further, Plaintiff can not convince this court that the information it seeks is crucial to its preparation of its case against Defendant. This renders Plaintiff's suggestion that the court not proscribe the deposition of Defendant's counsel based on the "mere risk" that privilege issues may arise during the course of the deposition irrelevant.

B

Plaintiff's Motion to Re-open the Deposition of Defendant's Witness is Granted on a Limited Basis

Unless the parties stipulate otherwise, a party must seek leave to depose a person more than once in a given case. USCIT R.30(a)(2)(B). However, courts frequently grant such leave when "new information comes to light triggering questions that the discovering party would not have thought to ask at the first deposition." *Vincent v. Mortman*, No. 3:04 CV 491 (JBA), 2006 U.S. Dist. LEXIS 11213 at *4–*5 (D. Conn. March 17, 2006) (quoting *Keck v. Union Bank of Switz.*, No. 94 Civ. 4912 (AGS) (JCF), 1997 U.S. Dist. LEXIS 10578, at *1 (S.D.N.Y. July 22, 1997)); *see also Zamora v. D'Arrigo Bro. Co. of Cal.*, No. C04–00047 JW, 2006 U.S. Dist. LEXIS 83106 at *4–*5 (N.D. Cal. November 7, 2006); *Collins v. Int'l Dairy Queen*, 189 F.R.D. 496, 498 (M.D. Georgia 1999).

Plaintiff asserts that at the time of Mr. Wolney's deposition, Defendant had not yet introduced the new legal and factual theories it raised in the affidavits of Messrs. Lynch and Donohue, and that these new theories "would implicate much of Wolney's prior testimony." Plaintiff's Motion to Compel at 3, 12. Plaintiff further argues that Mr. Wolney's statement that he did not feel qualified to address Defendant's new theories, in light of his position as the Customs' Regulatory Auditor assigned to the Plaintiff's case over a period of several years, raised questions regarding the accuracy and completeness of the testimony he offered at deposition. *Id.* at 3–4. Defendant did not flatly oppose Plaintiff's request to re-depose Mr. Wolney. *Id.* Ex. C. Rather, Defendant sought to limit the scope of the questioning to only those new issues raised since Mr. Wolney's first deposition. *Id.* Ex. G, Letter from Bruce Casino to Saul Davis (December 3, 2007), at 2. Plaintiff contends that it "cannot reasonably or responsibly agree to such a limitation," Plaintiff's Motion to Compel at 12, even though the cases it cites to support its request to re-open the deposition of Mr. Wolney are consistent with such a limitation. *See id.* at 11–12 (citing *Vincent*, 2006 U.S. Dist. LEXIS 11213 at *4–*5).

Plaintiff will be permitted to re-depose Mr. Wolney. However, the scope of the deposition is limited to: (1) the new issues introduced since Mr. Wolney's first deposition, (2) the rationale underlying Mr. Wolney's assertion that he did not possess sufficient expertise to testify about Mr. Davis' new defenses, and (3) old issues to the extent that they are implicated by information that arose after Mr. Wolney was first deposed.

C
Defendant's Cross-Motion for a Protective Order is Denied as Moot

This court is vested with the authority to prohibit certain discovery, or to regulate the method by which it is obtained, where "justice requires [it] to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." USCIT R.26(c). A party seeking such a protective order must submit to the court a motion, accompanied by a certification that he has, in good faith, attempted to resolve the disputed discovery request without court action. *Id.*

Defendant did not submit the required certification. In any case, a protective order is unnecessary, as Plaintiff's Motion to (A) Compel the Deposition of Saul Davis is DENIED, and (B) Reopen the Deposition of Ernest Wolney has been GRANTED with specific limitation.

IV
CONCLUSION

For the foregoing reasons, Plaintiff's Motion is DENIED with respect to Defendant's counsel, Saul Davis, and GRANTED on a limited basis with respect to Defendant's witness, Ernest Wolney; further, Defendant's Cross-Motion is DENIED.