

UNITED STATES COURT OF INTERNATIONAL TRADE

SHANGHAI ESWELL ENTER. CO., :
LTD.; JINFU TRADING CO., LTD.; :
and ZHEJIANG NATIVE PRODUCE :
AND ANIMAL BY-PRODUCTS IMPORT :
& EXPORT GROUP CORP., : Before: Richard K. Eaton, Judge
: :
Plaintiffs, : Court No. 05-00439
: :
v. : Public Version
: :
UNITED STATES, :
: :
Defendant, :
: :
and :
: :
THE AMERICAN HONEY PRODUCERS :
ASSOCIATION OF AMERICA AND :
THE SIOUX HONEY ASSOCIATION, :
: :
Deft.-Ints. :
: :
:

OPINION AND ORDER

[United States Department of Commerce's final results are sustained in part and remanded.]

Dated: September 13, 2007

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (Bruce M. Mitchell, Ned H. Marshak, Adam M. Dambrov, Paul G. Figueroa), for plaintiffs.

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

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

Eaton, Judge: This matter is before the court on the Rule 56.2 motion for judgment upon the agency record of plaintiffs Shanghai Eswell Enterprise Co., Ltd. ("Shanghai Eswell"); Jinfu Trading Co., Ltd. ("Jinfu PRC"); and Zhejiang Native Produce and Animal By-Products Import & Export Group Corp. ("Zhejiang") (collectively, "plaintiffs"). See Pls.' Br. 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.

By their motion, plaintiffs challenge certain aspects of the final results of the United States Department of Commerce's ("Commerce" or the "Department") second administrative review of the antidumping duty order on honey from the People's Republic of China ("PRC") for the period of review beginning on December 1, 2002, and ending on November 30, 2003 ("POR"). See Honey from the PRC, 70 Fed. Reg. 38,873, 38,874 (Dep't of Commerce July 6, 2005) (final results) and the accompanying Issues and Decision Memorandum (June 27, 2005), Pub. Doc. 341 ("Issues & Dec. Mem.") (collectively, "Final Results"). Jurisdiction is had pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). For the reasons set forth below, the court sustains the Final Results in part and remands this case to Commerce for

further action consistent with this opinion.

STANDARD OF REVIEW

The court reviews the Final Results under the substantial evidence and in accordance with law standard set forth in 19 U.S.C. § 1516a(b)(1)(B)(i) ("The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law"). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). 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) (internal quotation marks & 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 (30)*, 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 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); see also *Altx, Inc.*, 370 F.3d at 1116. The court "must affirm [Commerce's] determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from [Commerce's] conclusion." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (internal quotation marks & citation omitted).

DISCUSSION

I. Normal Value

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 price¹ or constructed export price² and normal value." When merchandise that is the subject of an antidumping

¹ 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).

² "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).

investigation is exported from a nonmarket economy ("NME")³ 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." 19 U.S.C. § 1677b(c)(1).

The facts surrounding Commerce's selection of surrogate data to value raw honey and to derive selling, general and administrative expenses ("SG&A"); overhead; and profit ("surrogate financial ratios") are not new to the court. Commerce's construction of normal value for raw honey is the subject of another challenge to Commerce's second administrative review of the antidumping duty order on Chinese honey in *Wuhan Bee Healthy Co. v. United States*, 31 CIT ___, Slip Op. 07-113 (July 20, 2007) (not reported in the Federal Supplement)

³ A "nonmarket economy country" is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Because it deems China to be a nonmarket economy country, Commerce generally considers information on sales in China and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise." *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT ___, ___, 318 F. Supp. 2d 1339, 1341 (2004). Therefore, since the subject merchandise 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).

("Wuhan I").

A. Valuation of the Factors of Production

With respect to Commerce's construction of normal value, plaintiffs first challenge Commerce's decision, when valuing raw honey, to rely exclusively on surrogate data from India taken from a Web site maintained by EDA Rural Systems Pvt. Ltd., an Indian organization that provides business development services to the honey and beekeeping sector ("EDA Data").⁴ Pls.' Mem. 2. Based on this data, Commerce derived an average price for raw honey of 74.90 Rupees per kilogram during the POR. See Factors of Production Valuation Mem. for the Final Results, Pub. Doc. 340 ("Final FOP Mem.") at 2. In deciding to use EDA Data exclusively in valuing raw honey, Commerce rejected articles from three

⁴ In the Final Results, Commerce explained its decision to value raw honey with EDA Data: "[T]he EDA Data . . . constitute[s] a[n] . . . appropriate surrogate value source for this POR. [It is] . . . the best information currently available because it is publicly available, quality data, specific to the raw honey beekeeping industry in India, and contemporaneous with the POR." Issues & Dec. Mem. at 10. With respect to quality, Commerce found that "the EDA Data source is highly documented, including numerous specific price points over a six year period for multiple types of honey from many suppliers, and includes detailed information on production, inputs, and beekeepers." *Id.* at 10-11. With respect to specificity, Commerce noted that "the prices quoted in the EDA Data are specific to the raw honey beekeeping industry in the state of Bihar in India." *Id.* at 11. With respect to contemporaneity, Commerce found that "the EDA Data is contemporaneous to this administrative review . . . and it includes monthly data points over a majority of the POR." *Id.* (footnote omitted).

sources: (1) *Hindu Business Line*;⁵ (2) *Indiainfoline*;⁶ and (3) *Indian Express*.⁷

Plaintiffs insist that it was unreasonable for Commerce to rely exclusively on the EDA Data to value raw honey and that Commerce should have averaged the EDA Data with that found in the three publications. Pls.' Mem. 11-16. In *Wuhan I*, the court upheld Commerce's rejection of the articles. First, with respect to the *Hindu Business Line* article, the court found:

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

Wuhan I, 31 CIT at __, Slip Op. 07-113 at 32 (citations to record omitted). Next, the court found no error in Commerce's conclusion that the *Indiainfoline* article was unreliable:

Commerce found that unlike the EDA Data, the sources of which were well-documented and made available by a business entity, the *Indiainfoline* article contained nothing to

⁵ "Girijan co-op targets Rs 135-cr turnover" (dated Apr. 17, 2003).

⁶ "Prospects of Bee Keeping in Rubber Plantations of Kerala" (dated Sept. 2, 2003).

⁷ "In Jharkhand, it's all about honey, honey" (dated Feb. 17, 2003).

indicate it was reliable. In particular, there was "no additional information on the author's qualifications or the sources of his information" other than his status as a first-year business student.

Id., 31 CIT at __, Slip Op. 07-113 at 32-33. Finally, the court sustained Commerce's decision not to rely on the *Indian Express* article noting that it was not "as representative as the EDA Data because it pertained to the experience of only a single beekeeper." *Id.*, 31 CIT at __, Slip Op. 07-113 at 33. Because the facts here are the same as those in *Wuhan I*, the court follows its conclusions in that case and finds that Commerce's decision not to average the EDA Data with the data found in the three articles was reasonable.

In addition to the arguments made in *Wuhan I* concerning the EDA Data, plaintiffs make additional claims, the principal one being that Commerce did not adequately consider the decline in prices in the second half of the POR. Pls.' Mem. 10. In particular, plaintiffs cite information they placed on the record from the World Trade Atlas, which indicated a decline in export prices during the second half of the POR (July 2003 to November 2003), from one hundred twelve Rupees per kilogram to eighty-four Rupees per kilogram. Pls.' Mem. 11 (citing Respondents' Second Surrogate Value Submission (Jan 8, 2005), Pub. Doc. 257, Ex. 1). Plaintiffs argue that Commerce's failure to consider this and other record evidence renders its determination unacceptably

flawed.

Defendant maintains that "Commerce did not base its valuation of honey solely upon the first half of the [POR], prior to the second half decline in prices, but rather, did take price decline into consideration." Def.'s Opp'n 17 (internal quotation marks, citation & ellipsis omitted). As evidence that Commerce considered the price decline, defendant points to Attachment 1 to Commerce's Final FOP Memorandum. Def.'s Mem. 16.

Plaintiffs respond that "[t]he Government's characterization of the Department's analysis is simply wrong." Pls.' Reply 7. Plaintiffs maintain that Attachment 1 to the Final FOP Memorandum contained prices taken from the EDA Data for the first half of the POR only, i.e., from December 2002 to June 2003, "which steadily increased from 62 Rs/kg in December 2002 - January 2003, to 73 Rs/kg in March - April 2003, to 87 Rs/kg in May - June 2003." Pls.' Reply 7-8. To determine the value of honey for the second half of the POR, however, Commerce used data solely from the month of October, and then adjusted it for inflation. Plaintiffs assert that Commerce took a price for honey from October 2002, "which the Department inflated to reflect a change in India's [wholesale price index, or "WPI"], without taking into consideration the evidence that honey prices in India had declined during the second half of 2003." Pls.' Reply 8.

An examination of the record leads the court to find that

Commerce did not adequately explain how it took into consideration evidence of a decline in prices during the second half of the POR. There appears to be no dispute that a decline in the price of raw honey took place during that period. See Pls.' Mem. 10; Def.'s Opp'n 16. In the Final FOP Memorandum, however, Commerce indicated that it calculated a surrogate value for raw honey by taking a "weighted average of the price for each month from December 2002 through June 2003 based on the percentage of each type of honey produced and sold." Final FOP Mem. at 2. For the second half of the POR, it took the value reported in only one month, i.e., October 2002 (60 Rupees per kilogram) and adjusted it upward to take account of inflation. The result was a price of 61.93 Rupees per kilogram. Final FOP Mem., Attach. I.

Commerce has not explained how inflating the price of raw honey takes into consideration the record evidence showing raw honey prices declined in the second half of the POR. "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." *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 published in the Federal Supplement) (internal alteration, quotation marks &

citations omitted); *see also Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.D.C. Cir. 2001) (“A fundamental requirement of administrative law is that an agency set forth its reasons for decision.”) (internal quotation marks omitted). On remand, Commerce shall either (1) address the evidence cited by plaintiffs and explain whether and how the observed decline in prices during the second half of the POR is reflected in its calculation of the value of raw honey; or (2) recalculate the value to reflect a reasonable interpretation of the record evidence concerning the decline.

B. Surrogate Financial Ratios: Choice of Data Source

Next, plaintiffs claim that by declining to use the financial statement of Apis (India) Natural Products (“Apis”) Commerce rendered the Final Results unsupported by substantial evidence and not in accordance with law. Pls.’ Mem. 16-17. This issue was also addressed in *Wuhan I*, where the court sustained, as reasonable, Commerce’s decision to rely on Mahabaleshwar Honey Producers Cooperative Society, Ltd.’s (“MHPC”) financial statement instead of Apis’s financials:

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

contemporaneity. It then concluded based on this examination that "the Apis financial statement . . . is not a reliable source for calculating the surrogate financial ratios because it is neither complete, nor sufficiently detailed to provide a reliable source for surrogate values." 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, an auditors report, and complete profit and loss and business statements 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 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.

Wuhan I, 31 CIT at ___, Slip Op. 07-113 at 47-48 (citations omitted). To the extent plaintiffs' arguments are identical to those found in *Wuhan I*, the court follows its holding in that case that the MHPC financial statement constitutes the best available information. See 19 U.S.C. § 1677b(c)(1) (surrogate values "shall be based on the best available information . . . in a market economy country or countries considered to be appropriate by the administering authority"); see also *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999).

In addition to those arguments, plaintiffs also claim that

Commerce ignored evidence that: (1) the MHPC financial statement was "distorted by non-market forces" because "MHPC is a cooperative which does not operate as a true market entity"; and (2) the MHPC financial statement is distorted by the production of non-subject merchandise. Pls.' Mem. 24-25. With respect to the latter argument, plaintiffs claim that "MHPC's fruit canning division . . . affect[ed] the cooperative's financial performance, skewing the factory overhead and SG&A ratios." Pls.' Mem. 25.

Neither of these arguments persuades the court that remand is necessary. First, 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. In particular, Commerce stated:

[W]ith respect to respondents' assertion that MHPC does not operate as a true market entity because it is a cooperative, we disagree. Other than to note that loans to its members are not always repaid on time, which is not unusual in that many companies have provisions for bad loans, respondents have not cited evidence that supports their claim that MHPC's results are distorted by non-market forces.

Issues & Dec. Mem. at 19. An examination of the record demonstrates that, other than certain unpaid loans, plaintiffs can rely on no record evidence to support their claim. Rather, they rely on generalized statements. See Pls.' Mem. 24-25 n.15

("Companies generally loan money to vendors for business purposes; they do not make personal loans to members. MHPC's unpaid loans to its members affect MHPC financial statements, which in turn skew the ratios calculated by the Department. This is direct evidence that the cooperative nature of MHPC distorts its financial results."). 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.

Plaintiffs' second claim also fails to demonstrate that Commerce ignored evidence that the MHPC financial statement was distorted by its fruit canning division. Plaintiffs insist that "[t]here 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 included in the Department's calculations, such as bank interest, travel expenses and building depreciation, "include[d] expenses for both the honey and the fruit canning divisions." Pls.' Mem. 25. Having considered plaintiffs' arguments at the administrative level, Commerce found that MHPC's financial statement sufficiently separated data regarding its fruit canning and honey production divisions such that Commerce could use the data on honey production to derive

surrogate financial ratios. Specifically, Commerce found that (1) "MHPC's financial statements are narrowly tailored to subject merchandise"; (2) "the total asset value of non-subject operations accounts for only 16.71 percent of MHPC's total asset value"; and (3) "the Department has calculated a profit only from the honey processing division." Issues & Dec. Mem. at 18-19.

Thus, while 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. Indeed, a review of the MHPC financial statement reveals that it contains separate tables pertaining to each division, e.g., the "Fruit canning profit and loss statement" and the "Fruit canning business statement." Final FOP Mem., Attach. II (MHPC financial statement) at 16 & 17. In addition, the "Main Journal Business Statement" specifically pertains to honey sale and collection. See Final FOR Mem., Attach. II (MHPC financial statement) at 15 (listing, *inter alia*, line items for "Honey Sale," "honey collection," "Honey boxes Sale," "Honey machine Sale," "honey collection (extracted)"). As with its claim with respect to MHPC's status as a cooperative, plaintiffs have made observations but have not demonstrated that Commerce was unable to use the entries on MHPC's financial statement so as to create

an accurate picture of its honey business.

This Court has held that “[w]here there exist[] on the record ‘alternative sources of data that would be equally or more reliable . . . it is within Commerce’s discretion to use either set of data.’” *Wuhan Bee Healthy Co. v. United States*, 29 CIT ___, ___, 374 F. Supp. 2d 1299, 1304 (2005) (quoting *Geum Poong Corp. v. United States*, 26 CIT 322, 326, 193 F. Supp. 2d 1363, 1369 (2002)). Contrary to plaintiffs’ arguments, Commerce did not fail to consider either MHPC’s status as a cooperative or its production of non-subject merchandise. In addition, plaintiffs have failed to point to record evidence that the MHPC did not “operate as a true market entity.” Issues & Dec. Mem. at 19. Plaintiffs have thus failed to make the case that the Apis financial statement is more reliable than the MHPC financial statement. In light of the foregoing, plaintiffs have failed to establish that (1) the MHPC financial statement was unreliable, either because the organization was a cooperative or because MHPC produced non-subject merchandise, or that (2) the Apis financial statement was more reliable than the MHPC financial statement. Therefore, having considered Apis’s financials, MHPC’s financials and Commerce’s finding that MHPC’s financials were more reliable than Apis’s, which was sustained in *Wuhan I*, the court sustains Commerce’s choice to rely on the MHPC financial statement.

C. Surrogate Financial Ratios: Calculation of Ratios

Next, plaintiffs challenge (1) Commerce's failure to deduct honey sales commissions from its calculation of SG&A; and (2) Commerce's failure to treat MHPC's expenses for jars, corks and honey machine purchases as direct raw materials.

(1) Honey Sales Commissions

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 U.S. 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), 1677b(a)(6)(C)(iii) (providing for adjustment to normal value for differences in circumstances of sale). 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) (2005). 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 Antidumping Manual, Ch. 8 at 16.

In an NME proceeding, on the other hand, "Commerce maintains

an established practice of not making circumstances-of-sale adjustments in NME cases." *Shandong Huarong Mach. Co. v. United States*, 30 CIT __, __, 435 F. Supp. 2d 1261, 1293 (2006).

Instead, Commerce "includes all standard selling expenses," which Commerce has determined encompass sales commissions, in the SG&A calculation. Issues & Dec. Mem. at 22; see also *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the PRC*, 63 Fed. Reg. 63,842, 63,852-53 (Dep't of Commerce Nov. 17, 1998) (final results) ("[Commissions are] standard selling costs and, as such, are properly categorized under SG&A."). In the Final Results, Commerce explained its practice of treating sales commissions differently in market economy and NME proceedings:

[I]t is not possible to deconstruct surrogate financial ratios at the level of detail that would be necessary to make [circumstances-of-sale] adjustments, because it is not known whether there is an exact correlation between the NME producer's and the surrogate producer's expenses. Therefore, "the Department normally bases normal value . . . on factor values from a surrogate country on the premise that the actual experience in the NME cannot meaningfully be considered."

Issues & Dec. Mem. at 22 (quoting *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the Republic of Romania*, 61 Fed. Reg. 51,427, 51,429 (Dep't of Commerce Oct. 2, 1996) (final results)). Accordingly, in the Final Results, Commerce found that honey sales commissions should be included in the calculation of the surrogate SG&A ratio as standard selling

expenses. *Id.*

Plaintiffs insist that Commerce's practice of not deducting commissions from SG&A in the NME context results in an inaccurate dumping margin because commissions were deducted from the U.S. price.⁸ Pl.'s Mem. 28-29. They take the position that market economy cases and NME cases should be treated similarly with respect to the deduction of commissions:

Insofar as the Department's calculation of normal value [in the NME context] is intended to achieve the same, reasonable, "apples to apples," no-double counting results, [Commerce] is required to apply the same basic rules in NME cases as it does when adjusting [export price/constructed export price] and [constructed value] for commissions in market economy proceedings.

Pls.' Mem. 28-29 (citing *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 28 CIT ___, Slip Op. 04-88 (July 19, 2004) (not reported in the Federal Supplement)). Plaintiffs insist that "in this case it is possible to make the adjustment because there is one adjustment at issue. Moreover, . . . there is an exact correlation between the NME producer and the surrogate producer expense, namely the commission on honey sales expense."

⁸ The "U.S. price" can be either the export price or the constructed export price. "When an arm's-length transaction takes place between a foreign producer and an independent importer, U.S. price is calculated using the statutory Export Price (EP) provision; [constructed export price] is used when the foreign producer and the importer are affiliated." *Mittal Steel Point Lisas Ltd. v. United States*, 491 F. Supp. 2d 1222, 1226 (2007).

Pls.' Mem. 30. In other words, plaintiffs contend that because plaintiffs Shanghai Eswell and Zhejiang incurred selling commission expenses in the sale of honey, there is an "exact correlation" between these expenses and those incurred by the surrogate MHPC. See Respondents' Comments on the Application of Surrogate Ratios (Dec. 3, 2004), Pub. Doc. 223, at 2; Shanghai Eswell's Sec. C Questionnaire Resp. (Mar. 25, 2004), Conf. Doc. 17, at 24-26 & Ex. 1 (indicating commission expenses); Zhejiang Sec. C Questionnaire Resp. (Mar. 25, 2004), Conf. Doc. 11, at 24 & Ex. 1 (same); Final FOP Mem., Attach. II (MHPC financial statement) at 15 (indicating "honey sale commission" under "Purchase" column).

The court finds remand appropriate here so that Commerce may explain in more detail its decision not to deduct commissions from the SG&A ratio. In *Shandong Huarong Machinery Co.*, Commerce refrained from making a circumstances-of-sale adjustment to account for commissions that an NME producer paid, citing its practice not to do so in the NME context. There, the Court found Commerce's explanation insufficient and remanded the matter to Commerce:

[I]t is apparent that Commerce's past practice to refrain from making circumstances-of-sale adjustments in NME situations is based on its conclusion that, in most such cases, there is not enough information on the record to make a determination based on substantial evidence. While this may be true in most cases, the

court observes that Commerce does not cite any evidentiary basis for its determination in this case, other than its past practice. For that reason, the court remands this issue to Commerce to allow the agency to further explain its determination that the record here was devoid of substantial evidence to permit a circumstances-of-sale adjustment.

Shandong Huarong Mach. Co., 30 CIT at __, 435 F. Supp. 2d at 1293. As in *Shandong Huarong Machinery Co.*, Commerce did not cite any evidentiary basis in the Final Results for its determination not to deduct sales commissions. Rather, the Department relied on its past practice based on the general notion that in NME cases the record does not contain sufficient information to determine whether there is "an exact correlation between the NME producer's and the surrogate producer's expenses." Issues & Dec. Mem. at 22. Plaintiffs insist that there is sufficient evidence of an exact correlation, namely the record evidence showing that Shanghai Eswell, Zhejiang and MHPC incurred selling commission expenses, and that Commerce deducted selling commissions from Shanghai Eswell's and Zhejiang's U.S. price calculations. Because the Department did not discuss this evidence, its determination is wanting. See *Int'l Imaging Materials, Inc.*, 30 CIT at __, Slip Op. 06-11 at 13. The court therefore remands this matter to allow Commerce to further explain its determination that the record evidence was insufficient to permit a circumstances-of-sale adjustment, or to make a circumstances-of-sale adjustment.

(2) Jars, Corks and Honey Machine Purchases

Plaintiffs next take issue with Commerce's failure to include MHPC's expenses for jars, corks and honey machines in its financial ratio calculation as direct expenses used for producing finished honey. In the Final Results, Commerce supported its decision not to include jars, corks and honey machines by pointing to that portion of the MHPC financial statement where those items "appear separately in both the 'Sales' and 'Purchase' columns, independent of the 'Honey Collection' and 'Honey Sale' line items" Issues & Dec. Mem. at 23. For Commerce, these entries supported the conclusion that expenses for jars, corks or honey machines were independent from honey production and thus were not part of MHPC's finished product. Therefore, Commerce concluded that it "[would] not adjust the surrogate revenue and will not adjust the [materials, labor and energy] denominator to include the expenses for 'jars and corks' or honey machines." Issues & Dec. Mem. at 23.

Plaintiffs argue that the exclusion of expenses for jars, corks and honey machines from Commerce's financial calculation is not supported by record evidence. They contend that, because the MHPC financial statement shows that MHPC purchased different size jars and corks, "the only reasonable explanation is that MHPC sells its honey in jars [with] corks." Pls.' Mem. 32. Because honey is "sold retail in different size jars, these jars and

corks costs should be treated as direct raw materials." Pls.' Mem. 32. In addition, plaintiffs note that "[h]oney machines process the honey for sale and are a vital part of the direct materials." GDLSK 2nd Refiling of Admin. Case Br. (May 10, 2005), Conf. Doc. 108, at 33.

Plaintiffs further contend that Commerce erred by failing to deduct an amount for jars and corks from the net revenue. "Given that the starting figure to calculate profit encompasses the sale of retail honey in jars," plaintiffs argue, "the only way for the Department to calculate an accurate profit is by deducting all costs from the revenue, including the costs for jars and corks." Pls.' Mem. 33 (emphasis in original).

Defendant argues that Commerce's determination that "expenses for jars, corks, and honey machines were not direct expenses is supported by substantial evidence" Def.'s Opp'n 33. Defendant contends, as Commerce did in the Final Results, that because jars, corks and honey machines are listed separately from expenses associated with honey production in the MHPC financial statement these items were being bought and sold but could not be tied to the production of finished honey. Thus, defendant argues that "without supporting evidence that the items were associated with or incorporated into the sale of subject merchandise, Commerce determined that it would not adjust the surrogate revenue or the denominator of the financial ratio

calculation to include expenses for jars and corks." Def.'s Opp'n 34.

The court remands for further explanation Commerce's finding that jars, corks and honey machines were not direct materials in the production of finished honey. In the Final Results, Commerce insists that it must "treat the financial statement line items as they have been reported in the MHPC financial statement— independent of sales and packaging."⁹ Issues & Dec. Mem. at 23. The court has reviewed the chart on page 15 of the MHPC financial statement, which contains the line items referenced by Commerce. First, the court observes, as noted *supra*, that the chart specifically pertains to honey sale and collection. See Final FOP Mem., Attach. II (MHPC financial statement) at 15. 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.¹⁰ The line item for 100 gram jars appears only in the

⁹ Contrary to Commerce's statement, the chart does not contain a line item for "packaging," but only "packing." "Packaging" means "to present (as a product) in such a way as to heighten its appeal to the public," while "packing" means "material (as a covering or stuffing) used to protect packed goods (as for shipping)." Merriam-Webster Online Dictionary, available at <http://www.merriam-webster.com/>. Thus, while the line items for jars and corks may understandably be set apart from "packing," they may appropriately be considered "packaging," i.e., the presentation of the finished product to the public.

¹⁰ The MHPC financial statement indicates prices next to
(continued...)

"Sale" column. The chart is therefore ambiguous. While it is possible that MHPC buys and sells jars and 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.

With respect to the purchase of honey machines, defendant's assertion that "honey machines are a productive asset, not a direct expense, for which Commerce would calculate depreciation," Def.'s Mem. 34, is raised for the first time in its papers before this court and cannot take the place of Commerce's own reasoning on this issue in the Final Results. See *Burlington Truck Lines*,

¹⁰(...continued)
the line items for jars, corks and honey machines:

Sale	Rs.	Purchase	Rs.
honey machines	3,960.00	honey machines	3,960.00
100 gm. jars stock	25,296.00	None	
250 gm. jars stock	122,121.00	250 gm. jars	120,159.00
500 gm. jars stock	132,436.00	500 gm. jars	139,625.00
1 kg. jars stock	95,004.00	1 kg. jars	89,270.00
53 mm. corks stock	110,548.75	53 mm. corks	68,064.00
38 mm. corks stock	8,433.60	38 mm. corks	14,078.00

Inc. v. United States, 371 U.S. 156, 168-69 (1962) (“The courts may not accept appellate counsel’s *post hoc* rationalizations for agency action For the courts to substitute their or counsel’s discretion for that of the [agency] is incompatible with the orderly functioning of the process of judicial review.”) (internal quotation & citation omitted). Therefore, on remand, Commerce shall explain, with specific reference to the questions raised in this opinion, its decision not to include expenses for jars, corks and honey machines in its financial ratio calculation as direct expenses used for producing finished honey.

II. Commerce’s Decision to Use Export Price for Jinfu PRC’s U.S. Sales

In the Final Results, Commerce found that Jinfu PRC and Jinfu Trading (U.S.A.) Co., Ltd. (“Jinfu USA”) were not “affiliated,” within the meaning of 19 U.S.C. § 1677(33)(F),¹¹

¹¹ In pertinent part, the statute provides:

The following persons shall be considered “affiliated” or “affiliated persons”: . . .

(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person. . . .

For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.

(continued...)

prior to October 25, 2003.¹² Issues & Dec. Mem. at 45.¹³ As a result, Commerce "treated any sales made between Jinfu PRC and Jinfu USA prior to October 25, 2003, on an [export price] basis, while all sales made after this date have been treated as [constructed export price] sales." *Id.* Plaintiff Jinfu PRC disputes Commerce's finding that Jinfu PRC and Jinfu USA were not affiliated prior to October 25, 2003. Again, the facts pertinent to this issue are familiar to the court. Commerce's finding of no affiliation with respect to Jinfu PRC is presently the subject

¹¹(...continued)
19 U.S.C. § 1677(33) (F).

¹² Jinfu USA is the successor company to Yousheng Trading (U.S.A.) Co., Ltd. ("Yousheng USA"), an import company to which Jinfu PRC sold its honey during the POR. See Second Supplemental Questionnaire Resp. of Jinfu PRC, Conf. Doc. 71, Ex. 4(16) (indicating that on November 8, 2002, Yousheng USA filed an amendment to its articles of incorporation with the State of Washington to change its name to Jinfu Trading (U.S.A.) Co., Ltd.).

¹³ Commerce's affiliation finding is the subject of *Jinfu Trading Co. v. United States*, Court No. 04-00597, which is pending before the court. For purposes of confidentiality, the court will employ the same shorthand references it used in *Jinfu Trading Co. v. United States*, 30 CIT ___, Slip Op. 06-137 (Sept. 7, 2006) (not reported in the Federal Supplement) ("*Jinfu I*") and *Jinfu Trading Co. v. United States*, 31 CIT ___, Slip Op. 07-95 (June 13, 2007) (not reported in the Federal Supplement) ("*Jinfu II*"). Specifically, Jinfu USA's sole employee [[]] is referred to as "Mr. A"; [[]], the chairman and CEO of Jinfu PRC as "CEO B"; [[]], the unaffiliated U.S. buyer as "Customer C"; and [[]], the original owner of what was then Yousheng USA as "Mr. D." The attorney retained in October 2002 to aid in the attempted transfer of ownership of Yousheng USA to CEO B is referred to as "Attorney E."

of *Jinfu Trading Co. v. United States*, Court No. 04-00597, familiarity with which is presumed.¹⁴ In that case, Jinfu PRC challenges Commerce's rescission of its new shipper review based on the conclusion that Jinfu PRC was not affiliated with either Jinfu USA or its predecessor Yousheng Trading (U.S.A.) Co., Ltd. ("Yousheng USA"), within the meaning of 19 U.S.C. § 1677(33)(F) or (G). See *Honey from the PRC*, 69 Fed. Reg. 64,029 (Dep't of Commerce Nov. 3, 2004). In *Jinfu Trading Co. v. United States*, 30 CIT ___, Slip Op. 06-137 (Sept. 7, 2006) (not reported in the Federal Supplement) ("*Jinfu I*") and *Jinfu Trading Co. v. United States*, 31 CIT ___, Slip Op. 07-95 (June 13, 2007) (not reported in the Federal Supplement) ("*Jinfu II*"), the court remanded Commerce's decision to rescind Jinfu PRC's new shipper review. See *Jinfu I*, 30 CIT at ___, Slip Op. 06-137 at 32; *Jinfu II*, 31 CIT at ___, Slip Op. 07-95 at 24. To the extent the issues presented in this review are identical to those addressed in *Jinfu I* and *Jinfu II*, the court follows its previous reasoning and directs the same result.

¹⁴ Plaintiffs contend that the affiliation finding they challenge here, i.e., Commerce's finding that Jinfu PRC was not affiliated with either Yousheng USA or Jinfu USA, is the same finding that formed the basis of Commerce's decision to rescind the new shipper review. See Pls.' Mem. 33 n.19 ("The Department's affiliation determination . . . subject to this Civil Action is a sequel to its Final Determination . . . to rescind Jinfu's New Shipper Review . . . for the period December 1, 2002 through May 31, 2003. This rescission determination was based on the same 'no affiliation' subsidiary determination which is the subject of the instant Civil Action.").

A. Affiliation: Ownership Interest

Here, as in *Jinfu I*, plaintiffs argue that Commerce was unreasonable in finding that Jinfu PRC and Jinfu USA were not affiliated because Jinfu PRC owned Jinfu USA starting in October 2002, i.e., a year prior to the execution of the October 25, 2003 ownership transfer agreement between Jinfu PRC's CEO and Jinfu USA's owner. Pls.' Mem. 36 ("[E]ffective October 25, 2002, [CEO B] acted as if he owned and controlled Jinfu USA."). Having reviewed the evidence and arguments presented here, the court finds, as it did in *Jinfu I*, that Commerce's conclusion that ownership did not transfer to CEO B prior to October 25, 2003, the date of the ownership transfer agreement between CEO B and Mr. D, is supported by record evidence:

By [the ownership transfer agreement's] terms, the document provides that: "THIS CERTIFICATE TRANSFER IS EFFECTIVE UPON EXECUTION BY THE UNDERSIGNED." It is clear, therefore, that the Certificate of Transfer of Shares was not to gain legal effect unless and until the parties signed it.

Jinfu I, 30 CIT at __, Slip Op. 06-137 at 23. The earliest possible effective date of the ownership transfer agreement would be October 25, 2003.¹⁵ As a result, the court finds, as it did in *Jinfu I*, that it "cannot find as unsupported by substantial

¹⁵ The document is dated October 25, 2003, but it was apparently signed in December of 2003. See Issues & Dec. Mem. at 39 ("Although the purchase of Jinfu USA by [CEO B] occurred some time in December 2003, the parties involved backdated the CTS for that transaction to October 25, 2003.").

evidence Commerce's determination that CEO B did not have sole ownership of either Yousheng USA or Jinfu USA" prior to October 25, 2003. *Jinfu I*, 30 CIT at __, Slip Op. 06-137 at 25.

B. Affiliation: Control

Next, plaintiffs claim that Jinfu PRC controlled Jinfu USA's pricing decisions. This Court has held that Commerce is required to find affiliation where the party alleging affiliation has demonstrated that "[t]wo or more entities . . . share various control relationships whereby one entity is legally or operationally in a position to exercise restraint or direction over the other and that such relationship provides one entity the significant potential for the manipulation of price or production of the other." *Hontex Enters., Inc. v. United States*, 29 CIT __, __, 387 F. Supp. 2d 1353, 1358 (2005) (internal quotation marks & citations omitted); see also 19 U.S.C. § 1677(33) ("[A] person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person."); 19 C.F.R. § 351.102(b) (finding of control requires that "the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product").

In *Jinfu I*, the court agreed with plaintiffs' claim that the record evidence indicated that Jinfu PRC controlled Jinfu USA's

pricing decisions and found that "Commerce unreasonably concluded that [Jinfu PRC and Jinfu USA] were not affiliated." *Jinfu I*, 30 CIT at __, Slip Op. 06-137 at 28. The court examined the verification report, which plaintiffs cite here as evidence to support its argument that CEO B had operational control of Jinfu USA, as well as correspondence between CEO B and Mr. A and found:

[I]n the [verification] report, Mr. A explains that for transactions where he resells honey originally purchased from Jinfu PRC, he takes the following steps:

- (1) negotiate material terms of sale with U.S. customer;
- (2) enter a non-binding sales contract with the U.S. customer;
- (3) purchase merchandise from Jinfu in the PRC;
- (4) inform [CEO B] by telephone of finalized . . . material terms of sale and fax him a copy of the sales contract;
- (5) receive bill of lading, which includes on-board date of the merchandise;
- (6) receive shipping notification of estimated arrival date;
- (7) prepare sales invoices for estimated arrival date; and
- (8) issue invoice to the U.S. customer once the merchandise has cleared FDA.

For the sale in question, Mr. A stated that:

Subsequent to his negotiations with [Customer C], . . . [Mr. A] faxed a letter to [CEO B] relaying the result of his negotiations . . . and U.S. honey market research. . . . In a reply fax, [CEO B] agreed that the sale with [Customer C] was a good opportunity for Jinfu USA and that the negotiated price was reasonable. As such, . . . [Mr. A] entered into a sales

contract with [Customer C]

As a result, the fax sent by Mr. A to CEO B on November 13, 2002, read as follows:

Firstly, I would like to report you that the current market price of honey in the United States is between [[]] and [[]] per pound. Because of the sharp reduction of the export of honey from other countries, the domestic sales and price of honey in the United States is very promising.

I contacted a US local client who was willing to order a container of honey at the ex-warehouse price of [[]] USD per ton on the condition that it can pass the examination of US customs and FDA. Since the annual purchasing amount of this client is relatively significant, if a good relationship can be established with this client, it will be of great help to our company's sales to the US. Please let me know you[r] opinion and advise me further.

CEO B sent a reply fax on the same day stating that:

We received you[r] letter and felt happy that there are clients are [sic] interested in the honey product of our company. You did a good job on the report of the US market. We finished a container . . . on November 5.

In order to open the US market and better understand the marketing information, I agree with you. We accept the client's quotation of [[]] USD per ton as ex-warehouse price on the condition that it passes the examination of

the US customs and FDA. Please make the preparation and keep in touch with the client for purpose of long term cooperation. I hereby authorize you to sign contract with the client.

Id. at __, Slip Op. 06-137 at 28-30 (footnote omitted). Thus, the court concluded that the record evidence tended to support the conclusion that CEO B had operational control of Jinfu USA and exercised that control with respect to pricing decisions at the time of the claimed new shipper sale (November 2, 2002). The court thus remanded the matter to Commerce. *Id.* at __, Slip Op. 06-137 at 28, 32; see *TIJID, Inc. v. United States*, 29 CIT __, __, 366 F. Supp. 2d 1286, 1293 (2005).

On remand, Commerce continued to find that Jinfu PRC was not affiliated with Jinfu USA or its predecessor Yousheng USA, at the relevant time, largely because it found the faxes exchanged between Mr. A and CEO B to be incredible. *Jinfu II*, 31 CIT at __, Slip Op. 07-95 at 21. In addition, Commerce maintained that "even if considered credible or reliable, [the faxes] merely indicate that Mr. A found a customer willing to pay X price per [metric ton] for the honey and that CEO B agreed to this price." *Id.*, Slip Op. 07-95 at 21. The *Jinfu II* Court found Commerce's analysis wanting:

Commerce has not articulated a rational connection between its conclusion that CEO B did not control Jinfu USA's pricing decisions and its statement that the faxes, if valid, would not evidence control. Of particular

concern is Commerce's failure to expressly state why CEO B's approval of the sales price and authorization to execute the contract do not evidence control.

Id. at ___, Slip Op. 07-95 at 22. The Court remanded the matter to Commerce a second time and directed Commerce to explain "why the contents of the faxes exchanged between Mr. A and CEO B, if credible and reliable, do not support a conclusion that CEO B controlled Jinfu USA," and to "reopen the record to allow plaintiff to put on the record new evidence regarding the credibility and reliability of the faxes" *Id.* at ___, Slip Op. 07-95 at 24.

As in its prior decisions, the court remands this matter to Commerce. On remand, Commerce is directed to either find that Jinfu PRC and Jinfu USA were affiliated prior to October 25, 2003, or to provide other record evidence to support its conclusion that the companies were not affiliated.

CONCLUSION

For the foregoing reasons, the court sustains the Final Results in part and remands for further action consistent with this opinion. Remand results are due on December 13, 2007. Comments to the remand results are due on January 14, 2008.

Replies to such comments are due on January 25, 2008.

/s/ Richard K. Eaton
Richard K. Eaton

Dated: September 13, 2007
New York, New York