

UNITED STATES COURT OF INTERNATIONAL TRADE

SHANGHAI ESHELL 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.	:	
	:	
UNITED STATES,	:	
	:	
Defendant,	:	
	:	
and	:	
	:	
THE AMERICAN HONEY PRODUCERS	:	
ASSOCIATION OF AMERICA AND	:	
THE SIOUX HONEY ASSOCIATION,	:	
	:	
Def.-Ints.	:	

OPINION

[United States Department of Commerce's Remand Results are sustained.]

Dated: November 18, 2008

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

Gregory G. Katsas, Assistant Attorney General; Jeanne E. Davidson, Director, Reginald T. Blades, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Jane C. Dempsey); Office of the Chief Counsel for Import Administration, United States Department of Commerce (Sapna Sharma), for defendant.

Kelley Drye & Warren LLP (Michael J. Coursey and R. Alan Luberda), for defendant-intervenors.

Eaton, Judge: In *Shanghai Eswell Enterprise Co., Ltd. v. United States*, 31 CIT ___, Slip Op. 07-138 (Sept. 13, 2007) (not reported in the Federal Supplement) ("*Shanghai Eswell I*"), this court sustained, in part, and remanded the final results of the United States Department of Commerce's ("Commerce" or the "Department") second administrative review of the antidumping duty order on imports of honey from the People's Republic of China ("PRC") for the period December 1, 2002, to November 30, 2003 ("POR"). See *Honey from the PRC*, 70 Fed. Reg. 38,873, 38,874 (Dep't of Commerce July 6, 2005) ("notice") and the accompanying Issues and Decision Memorandum (June 27, 2005), Pub. Doc. 341 ("Issues & Dec. Mem.") (collectively, "Final Results").

Commerce has now issued the Final Results of Redetermination Pursuant to Court Remand (Dep't of Commerce Feb. 11, 2008) ("Remand Results"). 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") have filed their comments to the Remand Results. See Pls.' Comments to Remand Results ("Pls.' Comments"). In addition, Commerce has filed its response to those comments, and defendant-intervenors The American Honey Producers Association of America, Inc. and The Sioux Honey Association (collectively, "defendant-intervenors") have filed their responses, as well. See Def.'s Resp. to Pls.'

Comments ("Def.'s Resp."); Def.-Ints.' Resp. to Pls.' Comments ("Def.-Ints.' Resp."). 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 Remand Results are sustained.

STANDARD OF REVIEW

The court reviews Commerce's Remand Results under the substantial evidence standard: "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. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Normal Value

In antidumping investigations, Commerce must determine whether merchandise is sold, or is likely to be sold, at less than fair value by making "a fair comparison . . . between the export price,¹ or constructed export price² and normal value."

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

19 U.S.C. § 1677b(a). In cases where the subject merchandise originates from a non-market economy ("NME")³ country, such as the PRC, Commerce usually determines normal value by employing surrogate data to value the factors of production used to produce the merchandise. See 19 U.S.C. § 1677b(c)(1). The Department then adds "an amount for general expenses and profit plus the cost of containers, coverings and other expenses." *Id.*

A. Valuation of Factors of Production: Raw Honey

In its Final Results, Commerce relied on Indian data from the website maintained by EDA Rural Systems Pvt. Ltd. ("EDA") to calculate the value of raw honey.⁴ In response, plaintiffs

exporter, to a purchaser not affiliated with the producer or exporter," as adjusted. 19 U.S.C. § 1677a(b).

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 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).

⁴ Commerce explained: "In selecting the EDA Data, the Department determines that the raw honey pricing data in this article is the best information currently available because it is publicly available, quality data, specific to the raw honey

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contended that Commerce had not adequately considered evidence of a decline in honey prices during the second half of the POR and cited data from the World Trade Atlas ("WTA") as evidence of this decline. *Shanghai Eswell I*, 31 CIT at __, Slip Op. 07-138 at 8; see Pls.' Comments at 2-5.

In *Shanghai Eswell I*, the court found merit in plaintiffs' arguments. *Shanghai Eswell I*, 31 CIT at __, Slip Op. 07-138 at 9-10. Thus, the court directed Commerce to

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.

Id. at __, Slip Op. 07-138 at 11.

On remand, Commerce addressed the evidence of a price decline offered by plaintiffs: 1) the WTA data; and 2) three additional sources, specifically, two news articles and the statements of a journalist.

1. World Trade Atlas Data

On remand, Commerce claims that it did not use the WTA data offered by plaintiffs for two reasons: (1) because "the WTA

⁴(...continued)
beekeeping industry in India, and contemporaneous with the POR." Issues & Dec. Mem. at 10.

export data represent export prices from India to other countries," and that this data does not necessarily "accurately reflect the market value of the goods within the country of exportation"; and (2) because the Harmonized Tariff heading ("HTS")⁵ on which the WTA data is based is a "basket category" that may include merchandise other than raw honey. Remand Results at 5-6.

As to the use of export data, Commerce insists that the WTA data, and export data generally, are not "a reliable source for valuing inputs or serving as an indicator of internal pricing trends because [Commerce] could not ascertain whether export prices reflected or mirrored the domestic prices of honey in the marketplace." Def.'s Comments 3 (citations omitted). Thus, the Department would have "no way of knowing if export prices mimic

⁵ The heading upon which the WTA data is based, HTS 0409.00.00 is described as "natural honey" in the Harmonized Tariff Schedule of the United States ("HTSUS"). See HTSUS, USITC Pub. 3477, sec. 1, ch. 4, at 35 (2002). HTSUS is a listing of classifications of all goods imported into the United States and the accompanying duties on those imports.

The Explanatory Notes to this heading describe it as covering "honey produced by bees (*Apis mellifera*) or by other insects, centrifuged, or in the comb or containing comb chunks, provided that neither sugar nor any other substance has been added. Such honey may be designated by floral source, origin or color." Harmonized System Explanatory Notes 04.09 (2d ed. 1996). The court notes that, while the explanatory notes are not legally binding, they are persuasive and considered "generally indicative of the proper interpretation of a tariff provision." *Drygel, Inc. v. United States*, 541 F. 3d 1129, 1134 (Fed. Cir. 2008)(citations and quotation omitted).

or even reflect domestic prices in the marketplace." Remand Results at 5. In other words, Commerce does not find the WTA data to be the best available information⁶ because, unlike the EDA data, there is no evidence on the record demonstrating that the WTA data reflect domestic prices.

In their comments, plaintiffs do not directly address Commerce's claim that record evidence does not support the conclusion that export prices necessarily reflect domestic prices. Rather, plaintiffs insist that Commerce's argument that export prices are not reliable as a source for valuing domestic inputs is "reversible legal error" because it "summarily rejects declining export prices as evidence that Indian raw honey prices declined during the [POR]." Pls.' Comments 4.⁷

⁶ In choosing surrogate values, Commerce is directed to value the factors of production 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).

⁷ In addition, plaintiffs contend that the Department's claim that export prices do not necessarily reflect domestic prices has been "effectively overruled" by *Fuyao Glass Indus. Group Co. v. United States*, 27 Int'l Trade Rep. (BNA) 1328 (Ct. Int'l Trade 2005) ("*Fuyao*") which rejected the Department's position that export prices were unreliable based solely upon speculation that subsidies may have affected these prices. Pls.' Comments 3.

Contrary to plaintiff's argument, however, *Fuyao* is inapplicable in this case because Commerce did not decline to use the WTA export data based on a suspicion of export subsidies. Rather, Commerce explicitly stated that the WTA export data "may not accurately reflect the market value of the goods within the

(continued...)

With respect to the HTS heading upon which the WTA data is based, Commerce finds that even if it were to

accept export data in this instance for purposes of evaluating domestic pricing trends, we do not find the WTA export data to constitute an acceptable source for such because the category of merchandise covered by the data is much broader than the merchandise covered by the scope of the order.

Remand Results at 6. To support this position, Commerce claims that the WTA export data is based upon an HTS heading that "includes exports of both raw honey and processed honey, and may include specialty forms of honey in jars, bottles, etc." Remand Results at 6. That this category of merchandise includes processed honey is not contested, and plaintiffs specifically note in their comments that the record contained "data for over 70 percent of Subheading⁸ [0409.00.00] merchandise . . . which revealed that these exports consisted of processed and filtered honey packaged in drums." Pls.' Comments 4 (footnote omitted).

As Commerce notes, because a basket category may not reflect prices solely of subject merchandise "[w]hen valuing respondents' factors of production ("FOPs") the Department prefers product specific tariff classifications rather than basket tariff provisions, unless there is no other available information."

⁷(...continued)
country of exportation." Remand Results at 5.

⁸ Plaintiffs refer to heading 0409.00.00 as a subheading.

Remand Results at 6 (citations omitted). As a result, Commerce does not find the WTA data to be the best available information to value raw honey, particularly because the record contains the EDA data which reflects the price solely of raw honey, the subject of the review. Accordingly, on remand the Department does not consider the evidence derived from the WTA export data as probative of a decline in raw honey prices during the latter half of the POR.

Plaintiffs sole argument in response is that "[t]he Department's belief that the HTS category [used in the WTA data] is 'broad and expansive' is simply wrong. Subheading [0409.00.00] is not a 'basket' HTS subheading encompassing multiple products. It is limited to honey - the precise product subject to this investigation." Pls.' Comments 4 (citation omitted).

The court sustains Commerce's findings and holds that Commerce supports with substantial evidence its reasons for excluding the WTA data. First, Commerce fully explains the basis for its decision not to rely on the WTA data as evidence of a decline in honey prices. Specifically, the Department explains that the WTA data represents export data, and that being the case, Commerce has no way of determining if this export data reflects domestic prices. Put another way, there is no evidence on the record showing that the WTA data reflects domestic prices,

in contrast to the EDA data which does reflect domestic pricing. The court therefore finds that the Department's decision to exclude the WTA data in favor of the EDA data was reasonable and supported by substantial evidence. See *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 23 CIT 479, 481, 59 F. Supp. 2d 1354, 1357 (1999) ("The statute requires Commerce to use the best available information, but does not define that term If Congress had desired to restrict the material on which Commerce could rely, it would have defined the best available information.") (footnote and citation omitted).

Second, Commerce explains that, in addition, it did not use the WTA data because they are for a broad category of honey products, not just raw honey, and thus may not accurately represent prices for raw honey. Plaintiffs do not address how the price for this HTS heading, which includes both processed and raw honey, is calculated. More to the point, plaintiffs fail to explain if and how the data for export prices under HTS 0409.00.00 were affected (i.e., skewed upward) by the inclusion of processed honey in this category. Accordingly, this information cited by plaintiffs does not constitute substantial evidence of a price decline during the second half of the POR.

2. Other Evidence Regarding Price Decline

On remand, in reaching its determination on surrogate value, Commerce chose not to use evidence from three additional sources that plaintiffs put on the record in the administrative review to support their argument that the WTA data reflected a price decline during the second half of the POR. These three sources are: (1) "Honey Sweet Despite Price Fall," published by the Tribune of India on December 15, 2003, giving a range of honey prices for 2003 as between 105 and 65 rupees ("Tribune article"); (2) statements by the author of the Tribune article who advised Commerce that in September 2003, honey prices were between 45 and 75 rupees ("prices from the journalist"); and (3) "Prospects of Bee Keeping in Rubber Plantations of Kerala," from Indiainfoline, giving the range of honey prices in September 2003 as between 40 and 42 rupees ("Indiainfoline article").⁹ Def.'s Comments 6 n. 1; see also Pls.' Comments 5.

As stated, on remand Commerce was instructed to explain how plaintiffs' proffered evidence of a price decline was taken into account in the Final Results. Commerce explains in the Remand Results that, because the WTA export data primarily relied upon by plaintiffs did not demonstrate the alleged decline in raw

⁹ Indiainfoline is a financial services company focused on industry in India. Among other things, it provides research and content for brokerage, commodities, mutual fund and portfolio management services businesses. See Indiainfoline, <http://www.indiainfoline.com> (last visited Nov. 18, 2008).

honey prices within India, it had not "specifically addressed" three other sources offered by plaintiff as further evidence of a price decline in the Final Results. See Def.'s Comments 6; Remand Results at 23. On remand, Commerce has addressed arguments made by defendant-intervenors on remand regarding the additional sources, outlining its reasons for rejecting the evidence from these three sources. Plaintiffs claim that, nonetheless, the Department has still "failed to explain the basis of its decision" to exclude this material. Pls.' Comment 6.

Despite plaintiffs' claim, the court finds that the Department has now given a sufficient explanation for rejecting the additional sources. In reaching its determination on remand, Commerce states, "the evidence contained in these two articles and the prices from the journalist fail to demonstrate that raw honey prices fell during the second half of the POR, or that our calculation methodology resulted in an inappropriate surrogate value for raw honey." Remand Results at 23.

First, Commerce states that the surrogate value for raw honey (74.9 rupees) "fell within the range of prices reported in the Tribune article [from 105 rupees to 65 rupees] and provided by the journalist [from 75 rupees to 45 rupees]," such that these sources "did not undermine Commerce's decision not to take into account WTA export data or rejecting the use of the information

in adjusting or determining the surrogate data." Def.'s Comments 6 (citing Remand Results at 22). An examination of these sources reveals that Commerce is correct in making these statements, and thus these two sources do not provide substantial evidence for plaintiffs' claim of a price decline.

In addition, Commerce correctly notes that this court has previously determined that the *Indiainfoline* article "was an unreliable source for surrogate value data." Def.'s Comments 7 (citing Remand Results at 22; *Shanghai Eswell I*, 31 CIT at __, Slip Op. 07-138 at 7-8 (finding "the *Indiainfoline* article contained nothing to indicate it was reliable. In particular, there was 'no additional information on the author's qualifications or the sources of his information' other than his status as a first-year business student.") (quoting *Wuhan Bee Healthy Co. v. United States*, 31 CIT __, __, Slip Op. 07-113 at 32-33 (July 20, 2007) (not reported in the Federal Supplement) ("*Wuhan I*"). Consequently, the Department maintains that "this evidence fails to substantiate plaintiffs' argument that the surrogate honey price chosen by the Department was incorrect." Remand Results at 23 (citation omitted). The court finds no reason to depart from this Court's previous holding that the *Indiainfoline* article is unreliable.

Thus, plaintiffs' argument that Commerce on remand "summarily rejected" the additional sources is unfounded. See

Wuhan Bee Healthy Co. v. United States, 32 CIT __, __, Slip Op. 08-61 at 8 (May 29, 2008) (not reported in the Federal Supplement) ("*Wuhan II*") (citing *United Steel, Paper and Forestry, Rubber, Manufac., Energy, Allied Industr. and Service Workers Int'l Union v. United States Sec'y of Labor*, 32 CIT __, __, Slip Op. 08-45 at 7 (Apr. 30, 2008) ("A fundamental requirement of administrative law is that an agency set forth its reasons for decision.") (quotation and citation omitted)). Based on the foregoing analysis, the court holds that Commerce's surrogate value determination for the factor of production raw honey is sustained.

B. 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: (1) selling, general and administrative ("SG&A") expenses; (2) manufacturing overhead; and (3) profit, using ratios derived from financial statements of companies that produce identical or comparable merchandise in the surrogate country. *Wuhan I*, 31 CIT at __, Slip Op. 07-113 at 41-42 (citation and quotation omitted).

In *Shanghai Eswell I*, the court affirmed the Department's reliance on data from Mahabaleshwar Honey Producers Cooperative

Society, Ltd.'s ("MHPC") financial statement as the "best available information" for calculating surrogate financial ratios. *Shanghai Eswell I*, 31 CIT at __, Slip Op. 07-138 at 12. The court, however, remanded for further explanation (1) Commerce's decision to include honey sales commissions in its calculation of selling, general and administrative expenses ("SG&A"),¹⁰ rather than using them to make an adjustment to constructed value, and (2) Commerce's failure to treat MHPC's expenses for jars, corks and honey machine purchases as direct materials. *Id.* at __, Slip Op. 07-138 at 20, 26.

(1) Honey Sales Commissions

In its Final Results, Commerce determined that the honey sales commissions found on the MHPC financial statements should

¹⁰ As this Court explained in *Shanghai Foreign Trade*:

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

Shanghai Foreign Trade Enters. Co. v. United States, 28 CT 480, 482, 318 F. Supp. 2d 1339, 1341 (2004) (citations omitted).

be included in the calculation of the surrogate SG&A ratio as standard selling expenses.¹¹

The court in *Shanghai Eswell I* held that Commerce had not addressed plaintiffs' argument that in this case sufficient record evidence existed of an "exact correlation" between Shanghai Eswell's, Zhejiang's, and the surrogate producer's expenses to enable Commerce to make a circumstances-of-sale ("COS") adjustment, and that remand was thus appropriate. *Shanghai Eswell I*, 31 CIT at __, Slip Op. 07-138 at 21. The court remanded this issue to Commerce to explain in more detail its determination that the record evidence was insufficient to permit a COS adjustment in this case. *Id.* On remand, Commerce continues to find that "honey sales commissions should be included in the surrogate SG&A calculation," primarily because

¹¹ 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>).

there is not sufficient evidence of an "exact correlation" between Shanghai Eswell's, Zhejiang's, and the surrogate producer's expenses. Remand Results at 9.

For their part, plaintiffs claim that "the commission expenses incurred by Shanghai Eswell and Zhejiang parallel the expenses incurred by MHPC [the surrogate producer]." Pls.' Comments 7. Plaintiffs argue that "MHPC incurs selling commissions in its home market sales, which mirror exactly the honey sale commission expense incurred by plaintiffs in their sales in the U.S. market." *Id.*

Commerce, however, disagrees. It states:

record evidence cited by plaintiffs reveals that neither Shanghai Eswell, nor Zhejiang, paid commissions on sales in the United States as the exporter. Rather, the commissions paid on U.S. sales were paid in the United States by Shanghai Eswell's and Zhejiang's U.S. affiliates.

Remand Results at 10 (citations omitted). By way of contrast, "MHPC's financial statement does not contain activity for overseas affiliates; therefore, it is reasonable to conclude that the commissions reflected on MHPC's financial statement were incurred and paid by MHPC itself within India." *Id.*

Accordingly, Commerce finds that "an exact correlation did not exist with respect to commissions between Shanghai Eswell, Zhejiang, and the surrogate producer." Def.'s Comments 8.

The court finds that Commerce has provided a sufficient

explanation, supported by substantial evidence, for its decision not to make a COS adjustment for commissions indicated on MHPC's financial statement. The record evidence does not demonstrate that an exact correlation existed between the commissions paid by Shanghai Eswell, Zhejiang, and the surrogate producer. This is because the surrogate producer's financial statement does not contain entries relating to activity for overseas activity. Thus, it is fair to assume that any commissions paid were for home market sales. The commissions cited by Shanghai Eswell and Zhejiang on the other hand, were paid in the United States by their affiliates. Therefore, the record does not support with substantial evidence a finding of an "exact correlation" between the MHPC financials and plaintiffs' actual experience. Beyond claiming that an exact correlation exists, plaintiffs have not pointed to any evidence to substantiate their claim. Thus, the Department's findings as to its inclusion of honey sales commissions are sustained.

(2) Jars, Corks and Honey Machine Purchases

In its Final Results, Commerce did not include MHPC's expenses for (1) jars and corks and (2) honey machines in its financial ratio calculation. See Issues & Dec. Mem. at 23; *Shanghai Eswell I*, 31 CIT at __, Slip Op. 07-138 at 22. Commerce explained that its decision not to include these expenses was

justified because these expenses "appear separately in both the 'Sales' and 'Purchase' columns, independent of the 'Honey Collection' and 'Honey Sale' line items" Issues & Dec. Mem. at 23.

In *Shanghai Eswell I*, the court noted that the chart of these expenses in the MHPC financial statement, upon which Commerce relied, "specifically pertains to honey sale and collection" and that there was no evidence to support a conclusion that the jars were used for anything other than containers for honey. 31 CIT at __, Slip Op. 07-138 at 24-25. As for the honey machines, the court found Commerce's conclusion that honey machines are a "productive asset" to be inadequately explained. *Shanghai Eswell I*, 31 CIT at __, Slip Op. 07-138 at 25. The court therefore remanded these issues and instructed Commerce to further explain its decision not to include expenses for jars, corks and honey machines in its financial ratio calculation as direct expenses for producing finished honey. *Id.* at __, Slip Op. 07-138 at 26.

As to jars and corks, on remand Commerce reconsiders its treatment of expenses for jars and corks and revises its financial ratios to include these expenses as direct material costs. Remand Results at 15. With respect to honey machines, Commerce continues to find that they are a productive asset and therefore do not constitute a direct expense to be included in

its financial ratio calculation. *Id.* at 16.

As to the honey machines, the Department explains that, in accordance with generally accepted accounting principles ("GAAP"), "[p]roductive assets are defined as tangible property to be used in a productive capacity that will benefit the enterprise for greater than one year" and that the purchase of productive assets do not result in a direct expense. *Id.* In addition, Commerce notes, honey machines are independently itemized on MHPC's financial statement. *Id.* at 16. Accordingly, the Department finds that they are properly treated as a productive asset to be depreciated, rather than as a direct input to be expensed. *Id.*

It is worth noting that plaintiffs have not commented on the Department's Remand Results with respect to jars, corks or honey machines. Accordingly, Commerce "may well be entitled to assume that the silent party has decided, on reflection, that it concurs in the agency's [remand results], and the court will uphold the parties' concurrence." *Wuhan II*, 32 CIT at ___, Slip Op. 08-61 at 12 (quotation and citation omitted).

The court sustains the Department's findings regarding the treatment of jars, corks, and honey machines, as there is substantial evidence on the record supporting its conclusions. See *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404-05, 636 F. Supp. 961, 966 (1986). The decision to include

expenses for jars and corks in the financial ratios is supported by a) the MHPC statement which "specifically pertains to honey sale and collection," and b) the lack of evidence to support a conclusion that the jars were used for anything other than as containers for finished honey. See *Shanghai Eswell I*, 31 CIT at ___, Slip Op. 07-138 at 24-25.

The court also finds that the Department's explanation for choosing to treat the honey machines as productive assets rather than direct expenses is reasonable and supported by substantial evidence. Specifically, honey machines fit the GAAP designation of productive assets and are separately itemized on MHPC's financial statement. As a result, Commerce was correct to treat them as a capital asset subject to depreciation rather than an input to be expensed. The Remand Results are sustained with respect to the treatment of these expenses.

II. Commerce's Decision to Use Export Price for Jinfu PRC's United States Sales

In the Final Results, Commerce found that, prior to October 25, 2003, the date of the transfer document ("Certificate of Transfer of Shares"), Jinfu PRC and Jinfu Trading (U.S.A.) Co., Ltd. ("Jinfu USA")¹² were not under common ownership or otherwise

¹² As explained in *Shanghai Eswell I*, Jinfu USA is the
(continued...)

"affiliated," within the meaning of 19 U.S.C. § 1677(33)(F).¹³

See Issues & Dec. Mem. at 45. Because of this finding, 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." Issues & Dec. Mem. at 45 (citations omitted).

In *Shanghai Eswell I*, the court sustained the Department's determination that CEO B,¹⁴ the chairman and CEO of Jinfu PRC, did

¹²(...continued)

successor company to Yousheng Trading (U.S.A.) Co., Ltd. ("Yousheng USA"), a company to which Jinfu PRC sold its honey during the POR. On November 8, 2002, Yousheng USA filed an amendment to its articles of incorporation changing its name to Jinfu Trading (U.S.A) Co., Ltd. 31 CIT at ___, Slip Op. 07-138 at 27 n. 12.

¹³ 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.

19 U.S.C. § 1677(33)(F).

¹⁴ As in *Shanghai Eswell I*, the court will apply the same shorthand that it used most recently in *Jinfu Trading Co. v. United States*, 32 CIT ___, Slip Op. 08-38 (Apr. 4, 2008) (not reported in the Federal Supplement). 31 CIT at ___, Slip Op. 07-

(continued...)

not own Jinfu USA prior to October 25, 2003.¹⁵ *Shanghai Eswell I*, 31 CIT at __, Slip Op. 07-138 at 29-30. The court, however, also found that Commerce had failed to provide a sufficient explanation for its determination on affiliation (which does not necessarily entail ownership) and remanded this matter to Commerce. *Shanghai Eswell I*, 31 CIT at __, Slip Op. 07-138 at 34.

In accordance with the court's remand instructions, Commerce reexamined the record evidence. On remand, it continues to find

¹⁴(...continued)

138 at 27 n. 13. Specifically, Jinfu USA's sole employee is referred to as "Mr. A"; the chairman and CEO of Jinfu PRC is referred to as "CEO B"; and the original owner of Yousheng USA is referred to as "Mr. D". *Id.*

¹⁵ The *Shanghai Eswell I* court based its determination on the Certificate of Transfer of Shares executed between CEO B and Mr. D. The document provides, by its terms, that "This certificate transfer is effective upon execution by the undersigned," and accordingly, that the document was not to gain legal effect unless and until the parties signed it. *Shanghai Eswell I*, 31 CIT __, Slip Op. 07-138 at 29 (citation omitted). Moreover, despite the document being dated October 25, 2003, it was apparently signed in December of 2003, and the parties involved backdated the document to October 25, 2003. *Id.* at __, Slip Op. 07-138 at 29 n. 15. Thus, the court found:

[t]he earliest possible effective date of the ownership transfer agreement would be October 25, 2003. As a result, the court finds, as it did in *Jinfu I*, that it cannot find as unsupported by substantial evidence Commerce's determination that CEO B did not have sole ownership of either Yousheng USA or Jinfu USA prior to October 25, 2003.

Shanghai Eswell I, 31 CIT at __, Slip Op. 07-138 at 29-30 (footnote, quotation and citations omitted).

that the companies were not affiliated prior to October 25, 2003. Remand Results at 18. Plaintiffs argue that this remand determination is unsupported by substantial evidence. In addition, plaintiffs contend that, in light of a recent United States Court of Appeals for the Federal Circuit decision, the court should revisit Commerce's determination that the Chairman and CEO of Jinfu PRC did not own Jinfu USA prior to October 25, 2003.

A. Commerce's Determination That Jinfu PRC and Jinfu USA Were Not Affiliated Until October 25, 2003

Plaintiffs claim that they have demonstrated that Jinfu PRC and Jinfu USA were affiliated "during POR 2 [December 1, 2002 through November 30, 2003]". Pls.' Comments 11, 17. 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 1096, 1101, 387 F. Supp. 2d 1353, 1358 (2005) (quotation and citation 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)(3) (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").

The facts surrounding the affiliation of the two companies have been the subject of earlier litigation in this Court. In *Jinfu Trading Co. v. United States*, 32 CIT ___, Slip Op. 08-38 (Apr. 4, 2008) (not reported in the Federal Supplement) ("*Jinfu III*"), the Court sustained Commerce's finding that Jinfu PRC was not affiliated with Jinfu USA on or before November 2, 2002. Having reviewed *Jinfu III* and having considered the parties arguments, the court adopts the holding in *Jinfu III* and finds that Jinfu PRC and Jinfu USA were not affiliated prior to November 2, 2002.

Plaintiffs contend that, regardless of the Court's ruling in *Jinfu III* finding no affiliation during the new shipper review at issue in that case, Commerce's affiliation findings in this case are not supported by substantial evidence. Specifically, plaintiffs argue that record evidence exists to support a finding that CEO B controlled Jinfu USA prior to the October 25, 2003 Certificate of Transfer of Shares. See Pls.' Comments 12-14. Plaintiffs argue that evidence of events occurring after November 2, 2002 demonstrates that the two companies were affiliated after

that date but prior to October 25, 2003. First, plaintiffs insist that "Mr. A expressly named CEO B as Jinfu USA's President in [an annual report] he filed with the State of Washington on March 12, 2003." Pls.' Comments 13 (citations omitted). Second, plaintiffs state that "CEO B was also named as Jinfu USA's President and owner in documents filed with the Internal Revenue Service and Customs Service." Pls.' Comments 13. Finally, plaintiffs contend that certain sale-specific documents were signed by CEO B on behalf of Jinfu USA "in his capacity as President of that company." Pls.' Comments 13 (citing Jinfu Supplemental Section D Response (May 17, 2004), Administrative Record ("AR") Doc. 4[7] at Ex. 2 (Human Consumption Certificate dated Aug. 19, 2003; Certificate of Non-Reimbursement of Antidumping Duties dated Aug. 19, 2003)).

In response, Commerce states that the documents submitted by Jinfu PRC, taken as a whole, do not constitute substantial evidence that the two companies were affiliated prior to October 25, 2003. In addition, Commerce cites one post-November 2, 2002 document to support its case:

Jinfu USA's Master License Application, filed with King County, Washington on November 18, 2002, was signed by Jinfu USA's sole employee. We note that under the "Purpose of Application" section, which instructs the applicant to "Please check all boxes that apply," the only checked box is "Open/Reopen Business." The next box, "Change Ownership," is left blank. In addition, under "List all owners: Sole proprietor, partners, officers,

and LLC members," Jinfu USA's sole employee only lists himself as the secretary. There is no mention of any owner of Jinfu USA, other than this employee asserting that he is the owner.

Remand Results at 29 (citing Final Results at Comment 8). As to the Master License Application, the court finds, and plaintiffs do not dispute, that this document is substantial evidence that no change with respect to affiliation occurred after November 2, 2002 and before November 18, 2002.

With respect to the documents cited by plaintiffs as evidence that CEO B controlled Jinfu USA during the POR, the court first turns to the March 12, 2003 submission to the state of Washington. This one page annual report does indeed name CEO B as president of Jinfu USA and was signed by Mr. A. Nonetheless, this document, by itself, does not demonstrate ownership of Jinfu USA by CEO B. As the court has previously held, the earliest that the transfer of ownership could be found is October 25, 2003, the date of the Certificate of Transfer of Shares. See *Shanghai Eswell I*, 31 CIT at __, Slip Op. 07-138 at 29-30 (The document provides, by its terms, 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." *Shanghai Eswell I*, 31 CIT at __, Slip Op. 07-138 at 29 (citation omitted)).

Moreover, the March 12, 2003 document is scant evidence that CEO B was in a position to exercise actual or potential control over Jinfu USA. That is, because the overwhelming evidence up to this point has been that Mr. A operated Jinfu USA independent of CEO B's control (see *Jinfu III*, 32 CIT at ___, Slip Op. 08-38 at 15), Commerce is acting within its discretion in finding the bare representation in the March 12 document that CEO B was president of Jinfu USA is not by itself dispositive. In other words, because the evidence to this point has been that Mr. A had sole operational control of Jinfu USA, the March 12 document cannot be said to be substantial evidence that the state of affairs had changed. This is because there is nothing in the document demonstrating that CEO B was in a position to impact Jinfu USA's "price or cost" decisions. See *U.S. Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996) ("It is the [Department's] task to evaluate the evidence it collects during its investigation.").

Next, plaintiffs point to documents allegedly prepared for the Internal Revenue Service in which CEO B was named as Jinfu USA's President and owner. With regard to these documents, this Court has previously found, in *Jinfu Trading Co. v. United States*, 30 CIT ___, Slip Op. 06-137 (Sept. 7, 2006) (not reported in the Federal Supplement) ("*Jinfu I*"), that the 2002 tax return "was unsigned, and [it] was unclear whether it was ever filed."

Def.'s Comments 13; see *Jinfu I*, 30 CIT at ___, Slip Op. 06-137 at 24. Thus, these papers are of little probative value. See *Jinfu I*, 30 CIT at ___, Slip Op. 06-137 at 24.

Regarding the sale-specific documents signed by CEO B on behalf of Jinfu USA, these documents designate Jinfu PRC and Jinfu USA as "related" companies "on entry summaries filed with Customs for each shipment," and two of these documents (the Human Consumption Certificate dated Aug. 19, 2003 and the Certificate of Non-Reimbursement of Antidumping Duties dated Aug. 19, 2003), were signed by CEO B on behalf of Jinfu USA "in his capacity as President of that company." Pls.' Comments 13 (citation omitted). These documents, filed with Customs and regarding a sale, also do not overcome the evidence of the Certificate of Transfer of Shares, nor do they indicate the level of control necessary to show affiliation. In particular, neither of these documents evidence any control, on CEO B's part, over costs or pricing of the products Jinfu USA handles.

Here, Commerce specifically discussed and addressed plaintiffs' proffered evidence and found it unpersuasive. Commerce must assess the weight to be assigned to specific evidence. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350 (Fed. Cir. 2006). Having reviewed Commerce's explanation, the court finds that Commerce's determination that Jinfu PRC was not affiliated with Jinfu USA prior to October 25, 2003 is

supported by substantial evidence.

B. Commerce's Determination That CEO B Did Not Have Ownership of Jinfu USA Prior to October 25, 2003

Plaintiffs argue that this court's prior decision that CEO B did not have ownership of Jinfu USA before October 25, 2003 must be revisited and reversed. As discussed above, in *Shanghai Eswell I*, the court affirmed the Department's determination that CEO B did not have ownership of Jinfu USA prior to October 25, 2003 based on the execution of the Certificate of Transfer of Shares. *Shanghai Eswell I*, 31 CIT at ___, Slip Op. 07-138 at 29-30. Plaintiffs now claim that the recent Federal Circuit decision in *Crawfish Processors Alliance v. United States*, 477 F.3d 1375 (2007) ("*Crawfish Processors*"), requires the court to reverse its previous decision because the Federal Circuit has rejected certain evidence upon which the court relied as not required to prove affiliation. See Pls.' Comments 18.

In *Crawfish Processors*, the company claiming ownership purchased stock in the other entity using a promissory note committing the purchaser to pay the purchase price, in merchandise, over a period of time. See *Crawfish Processors*, 477 F.3d at 1378. Commerce rejected the purchaser's affiliation claim, asserting that 19 U.S.C. § 1677(33) requires that a "transfer of cash or merchandise" be fully effectuated within the period of review in order to demonstrate ownership, and that

because payment in full was not made during the period of review the transfer did not occur. See *id.* at 1380-81. The Federal Circuit rejected Commerce's requirement that payment be made within the period of review, stating that "[t]he statute imposes no time requirement on financial transactions showing affiliation." *Id.* at 1381. In other words, because the documents transferring title were executed, and a promissory note was delivered, during the period of review, these alone were sufficient to put ownership of both companies in one place.

Plaintiffs argue that because the court's previous ruling on the question of ownership was based, in part, on CEO B's failure to pay for his interest in Jinfu USA until more than one year after the new shipper sale, *Crawfish Processors* requires the Court to "revisit its decision, and based on the legal analysis set forth above, find that CEO B, in fact, had acquired ownership of Jinfu USA in October 2002, when all of the parties to the transaction intended that the transfer of ownership take place." See Pls.' Comments 21. The court finds that plaintiffs overstate the application of *Crawfish Processors* to the present matter.

The plaintiffs in *Jinfu III* made this same argument in support of their contention that the Court should revisit its holding that CEO B did not own Jinfu USA on the date of the purported new shipper sale (November 2, 2002). The *Jinfu III* Court found that, unlike Jinfu PRC's situation, the petitioners

in *Crawfish Processors* "demonstrated that the transfer of ownership itself took place [during the period of review] notwithstanding the method of payment. . . ." *Jinfu III*, 32 CIT at ___, Slip Op. 08-38 at 16-17. In contrast, here, as in *Jinfu III*, the record evidence demonstrates that because the Certificate of Transfer of Shares was dated October 25, 2003, ownership did not pass until that date. See *Id.* at ___, Slip Op. 08-38 at 17.¹⁶ Consequently, the *Jinfu III* Court found, even if it were to "'discount[] the importance of the time when final payment was made,' as urged by plaintiff, it still could not

¹⁶ The *Jinfu III* Court noted:

The court has previously detailed six independent reasons in support of this conclusion. They are that: (1) Yousheng USA was not renamed Jinfu USA until at least November 8, 2002; (2) either Mr. A or Mr. D owned Yousheng USA from its date of incorporation at least until its name was changed to Jinfu USA; (3) the Certificate of Transfer of Shares explicitly stated that it is to be "EFFECTIVE UPON EXECUTION BY THE UNDERSIGNED" and that the execution took place on December 30, 2003; (4) CEO B did not pay Mr. D the consideration for the shares until more than a year after November 2, 2002; (5) the portion of the November 18, 2002 Master Application for Jinfu USA's business license that asked if Yousheng USA was owned, controlled or affiliated with another entity was left blank; and (6) the tax return stating that Jinfu USA was wholly owned by CEO B was dated June 13, 2003, unsigned, and may never have been filed.

Jinfu III, 32 CIT at ___, Slip Op. 08-38 at 17 (citations omitted).

conclude that CEO B acquired [Jinfu USA] prior to November 2, 2002 because there is no documentary evidence that the acquisition took place." *Jinfu III*, 32 CIT at __, Slip Op. 08-38 at 17-18.

As noted, the record in this case demonstrates that Jinfu PRC had no ownership interest in Jinfu USA until, at the earliest, the date of October 25, 2003 found on the Certificate of Transfer of Shares: "[t]he earliest possible effective date of the ownership transfer agreement would be October 25, 2003. . . . The [Certificate of Transfer of Shares] is dated October 25, 2003" *Shanghai Eswell I*, 31 CIT at __, Slip Op. 07-138 at 29; 29 n. 15; Remand Results at 28. This is the very date used by Commerce in this case in finding that ownership of Jinfu USA transferred. Accordingly, the court finds that the decision in *Crawfish Processors* does not require it to revisit its ownership analysis, because, regardless of when payment was made, ownership did not transfer prior to October 25, 2003.

For the reasons above, the court finds that the Department has complied with the court's remand instructions and sustains the Department's finding that Jinfu PRC was not affiliated with Jinfu USA prior to October 25, 2003.

CONCLUSION

For the foregoing reasons, the court sustains the Department's Remand Results. Judgment shall be entered accordingly.

/s/Richard K. Eaton
Richard K. Eaton

Dated: November 18, 2008
New York, New York