SLIP OP. 08–121

GPX INTERNATIONAL TIRE CORPORATION AND HEBEI STARBRIGHT TIRE CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, AND BRIDGESTONE AMERICAS HOLDING, INC., BRIDGESTONE FIRESTONE NORTH AMERICAN TIRE, LLC, TITAN TIRE CORPORATION, AND UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, Defendant-Intervenors.

Before: Jane A. Restani, Chief Judge
Court Nos. 08–00285, 08–00286, 08–00287

Public Version

[Plaintiffs' motion for a temporary restraining order and a preliminary injunction denied.]

Dated: November 12, 2008

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Gregory G. Katsas, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*John J. Todor* and *Loren M. Preheim*); *Irene H. Chen* and *Matthew D. Walden*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel; *James M. Lyons*, General Counsel, *Andrea C. Casson*, Assistant General Counsel, U.S. International Trade Commission (*Rhonda M. Hughes* and *Peter L. Sultan*) for the defendant.

King & Spalding, LLP (*Joseph W. Dorn, Christopher T. Cloutier, Daniel L. Schneiderman, J. Michael Taylor*, and *Kevin M. Dinan*); *Stewart and Stewart* (*Wesley K. Caine, Elizabeth A. Argenti, Elizabeth J. Drake, Eric P. Salonen, Geert M. De Prest, Terence P. Stewart*, and *William A. Fennell*) for the defendant-intervenors.

OPINION

Restani, Chief Judge: This matter is before the court on the motion of plaintiffs GPX International Tire Corporation ("GPX") and Hebei Starbright Tire Co., Ltd. ("Starbright") (collectively "plain-

tiffs") for a temporary restraining order and preliminary injunction to prevent collection of full antidumping duty ("AD") and countervailing duty ("CVD") deposits. GPX, a domestic importer of certain off-the-road ("OTR") tires, and Starbright, a foreign producer and exporter of certain OTR tires, seek immediate relief from the near 44% cash deposit requirement, which they allege would impose such financial hardship as to cause permanent and irreparable harm to GPX. This motion is opposed by the Department of Commerce ("Commerce") and the International Trade Commission ("ITC") (collectively "defendants"), as well as defendant-intervenors Bridgestone Americas Holding, Inc., Bridgestone Firestone North American Tire, LLC, Titan Tire Corporation, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (collectively "defendant-intervenors").

BACKGROUND

Commerce initiated AD and CVD investigations on July 30, 2007 for certain pneumatic OTR tires from the People's Republic of China ("PRC") for the period of October 1, 2006 through March 31, 2007.[1] *See Initiation of Antidumping Duty Investigation: Certain New Pneumatic Off-the-Road Tires From the People's Republic of China*, 72 Fed. Reg. 43,591 (Dep't Commerce Aug. 6, 2007); *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Initiation of Countervailing Duty Investigation*, 72 Fed. Reg. 44,122 (Dep't Commerce Aug. 7, 2007).

On July 15, 2008, Commerce published its final AD and CVD determinations with respect to the subject merchandise from the PRC. *See Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 40,485 (Dep't Commerce July 15, 2008); *CVD Final Determination*, 73 Fed. Reg. at 40,480. On September 4, 2008, Commerce published an amended AD final determination and AD order and a CVD order. *See AD Final Determination*, 73 Fed. Reg. at 51,624; *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Countervailing Duty Order*, 73 Fed. Reg. 51,627 (Dep't Commerce Sept. 4, 2008). In the final determinations,

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[1] Among other tires, Commerce excluded from the scope certain larger construction and mining tires with a rim diameter equal to or exceeding 39 inches. *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 73 Fed. Reg. 51,624, 51,625 (Dep't Commerce Sept. 4, 2008) ("*AD Final Determination*"); *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 73 Fed. Reg. 40,480, 40,484 (Dep't Commerce July 15, 2008) ("*CVD Final Determination*").

Commerce calculated for Starbright an AD rate of 29.93% and a CVD rate of 14%. *AD Final Determination*, 73 Fed. Reg. at 51,625; *CVD Final Determination*, 73 Fed. Reg. at 40,483. The International Trade Commission ("ITC") published its affirmative injury determination on September 5, 2008. *See Certain Off-the-Road Tires from China; Determination*, 73 Fed. Reg. 51,842 (ITC Sept. 5, 2008).

On September 9, 2008, plaintiffs filed three complaints with the court, contesting the CVD determination (No. 08–00285), the AD determination (No. 08–00286), and the ITC's injury determination (No. 08–00287). Plaintiffs then filed a motion for a temporary restraining order and a preliminary injunction to prevent the collection of the cash deposits while the merits of these three cases are decided.

DISCUSSION

A. Availability of Injunctive Relief

As a preliminary matter, contrary to the position of defendants, the court has the power to grant injunctive relief to postpone the immediate collection of the full cash deposits established by Commerce. Congress provided for judicial review of AD and CVD investigative proceedings that set deposit rates and it is these deposit rates themselves that are being reviewed here. It is not necessary to wait for a later phase of the case or for a later periodic administrative review proceeding before commencing judicial review with its attendant remedies. 19 U.S.C. § 1516a(a)(2)(B)(i). Further, the court has been granted broad injunctive powers and therefore, the ordinary remedies provided under 19 U.S.C. § 1516a(c)(2) and (e) do not limit the court's power to grant injunctions in extraordinary circumstances. *See* 28 U.S.C. § 2643(c)(1) ("[T]he Court of International Trade may . . . order any other form of relief that is appropriate in a civil action, including . . . injunctions."); *see also* 28 U.S.C. § 1585 ("The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.").

This conclusion is consistent with the jurisprudence of this Court and the Court of Appeals for the Federal Circuit ("Court of Appeals"). As *Decca Hospitality Furnishings, LLC v. United States*, 427 F. Supp. 2d 1249 (CIT 2006), explained, *NTN Bearing Corp. of America v. United States*, 892 F.2d 1004 (Fed. Cir. 1989), on which Commerce so heavily relies, focused on lack of a "final" decision in rejecting injunctive relief, but it appears that at the time the Court of Appeals was referring to lack of a final decision in the Court of International Trade case. *Decca Hospitality*, 427 F. Supp. 2d at 1261 n.19; *see also NTN Bearing*, 892 F.2d at 1006. Now we know that under the ordinary operation of the statutory scheme, suspended entries are not to be liquidated and estimated duties returned until a conclusively fi-

nal decision, i.e., no appeal or certiorari petition denied. *See Yancheng Baolong Biochem. Prods. Co. v. United States*, 406 F.3d 1377, 1381–82 (Fed. Cir. 2005). *NTN Bearing* did not discuss remedies under USCIT Rule 65 because apparently the Court of International Trade neither labeled its decision an injunction nor provided any analysis of the factors warranting such an injunction. *See NTN Bearing*, 892 F.2d at 1006 n.2. *Decca Hospitality* also was not a USCIT Rule 65 case and does not resolve the issue here. *See Decca Hospitality*, 427 F. Supp. 2d at 1257 n.14. *NTN Bearing* specifically addresses what are appropriate remedies under the statutory scheme when an administrative error is found and a remand is ordered, but the case is not yet concluded in the Court of International Trade. *NTN Bearing*, 892 F.2d at 1006. It is clear that return of duties at this phase was particularly troubling to the Court. *Id. NTN Bearing* does not hold that no matter how wrong the agency decision might be, irreparable harm cannot be prevented until certiorari is denied. The court did not reach such a draconian conclusion in *Queen's Flowers de Colombia v. United States*, 947 F. Supp. 503 (CIT 1996) (deposit collection preliminarily enjoined), and the court does not now apply *NTN Bearing* in such an overly broad manner.

In any case, what is clear is that this is not an *NTN Bearing* situation. The court would not be entering a partial judgment or a remand order and ordering a new deposit rate and return of duties. The court is not asked to void the estimated duty rate, but rather to allow plaintiffs to post some security instead of full cash deposits in order to prevent irreparable harm, until litigation in this case or an administrative review alters the situation.[2]

Plaintiffs, however, have "an extremely heavy burden" to meet and "[i]t is only in the rarest of instances that this form of injunctive relief will be granted." *See Queen's Flowers*, 947 F. Supp. at 506. In order to obtain a preliminary injunction, plaintiffs must establish the following four factors: (1) the threat of immediate irreparable harm; (2) the likelihood of success on the merits; (3) the public interest would be better served by the relief requested; and (4) the balance of hardship on all the parties favors plaintiffs. *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983). Congress provided for the collection of cash deposits for estimated duties, *see* 19 U.S.C. §§ 1671e(a)(3), 1673e(a)(3), and the court can act and grant temporary relief only if plaintiffs have satisfied the full four-factor test.

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[2] The court does not agree with defendant-intervenor Titan Tire Corporation's position that the mere fact of an affirmative CVD or AD determination means that one has "unclean hands" and may not seek equitable relief. Titan is correct that plaintiffs have the burden of proving Commerce wrong under 28 U.S.C. § 2639(a)(1), but that is what plaintiffs are entitled to try to demonstrate. Further, it is quite a leap to assume that less than fair value sales and receipt of subsidies are the kind of behavior normally thought of as "unclean hands."

B. Evidence Issues

To address the four factors relevant to a preliminary injunction motion, the parties chose to present their arguments and evidence to the court in essentially two ways. First, issues related to the likelihood of plaintiffs' success on the merits were addressed in briefing, which included exhibits presented to the deciding agencies. Those exhibits will eventually become part of the administrative record to be filed with the court, so that it may perform its judicial review based on that record pursuant to USCIT Rule 56.2. On November 5, 2008, oral argument was heard with respect to the likelihood of success on the merits issues, and the court excluded certain exhibits presented at that time, on the basis of fairness and orderly presentation. (*See* Oral Arg. (Nov. 5, 2008).) The first three of plaintiffs' ITC oral argument exhibits were admitted and for continuity purposes are now marked Plaintiffs' Exhibits 5–7. The parties then reached an agreement to permit both plaintiffs' AD/CVD oral argument exhibits, now marked Plaintiffs' Exhibits 8–14, and defendant-intervenors' AD/CVD and ITC oral argument exhibits, marked Defendant-Intervenors' Exhibits A–D. Presentation of excerpts from the yet-to-be compiled agency record is a reasonable way to proceed with regard to likelihood of success on the merits, as it is the agency record that is key as to that factor.

Second, with respect to the other three injunction factors, an evidentiary hearing was held the week prior to oral argument. Plaintiffs' witness, Bryan Ganz, Chairman of the Board of GPX, testified and various exhibits were admitted. (*See* Prelim. Inj. Hr'g (Oct. 28, 2008), Pls.' Exs. 1–5.) His affidavit filed with the briefing is of no moment, as it is clear that both parties expect the court to rely on his trial testimony. Further, injunction hearings are trials *de novo* and testimony subject to cross-examination is required, unless there is agreement otherwise. Agreement was also reached to admit Plaintiffs' Exhibits 1–4 presented at the November 5, 2008, hearing with respect to the three factors. The remaining evidentiary issue concerns Exhibit 16 to plaintiffs' AD brief, a declaration by Valerie Owenby, a consultant for plaintiffs. (*See* Mem. of Law in Supp. of Pls.' Mot. for TRO & for Prelim. Inj. (AD Case) ("Pls.' AD Br."), Ex. 16.) This declaration attempts to establish that if Tianjin United Tire & Rubber International Co., Ltd.'s ("TUTRIC"), another Chinese producer, and Starbright's data were collapsed for purposes of calculating a single weighted-average AD margin, and all other aspects of the calculation were held constant, a weighted-average margin of 8.02% would result. (*See id*.) Plaintiffs' view of the declaration is that apart from its obvious purpose of showing the extent of Commerce's error, it (1) is relevant to a showing of the irreparable harm they are suffering as a result of Commerce's alleged error, (2) weighs

on their side in balancing hardships, and (3) helps to define what the scope of the injunction should be.[3]

The declaration, obviously, is pure hearsay, but both sides discussed the exhibit as if it were in evidence.[4] Accordingly, the court ruled that any hearsay objections were waived and it was admitted into evidence. Such a declaration, however, has little probative weight. Without testimony subject to cross-examination, this bare declaration accomplishes little. This is not a simple issue. The declaration represents an opinion based on many factors that need exploration. It does not establish that plaintiffs likely will succeed in demonstrating that the administrative record, as properly interpreted, will lead to an 8.02% margin. Given the lack of attention of all parties to the niceties of evidence, if the court were convinced that a collapsing error had occurred, the court would consider requiring live testimony on this issue. That is not the case. Because the court finds that plaintiffs did not establish likelihood of success on the merits of the collapsing issue, this evidentiary issue is essentially moot.

C. Likelihood of Success on the Merits

Because an injunction is an extraordinary remedy, it must follow that the court will not disturb a well-founded administrative determination, even in the face of some irreparable harm. Accordingly, the court begins its analysis by reviewing plaintiffs' likelihood of success on the merits.

1. Injury Determination

Plaintiffs allege that error in the ITC's determination is the most critical to their likelihood of success on the merits. Arguably, if they are able to satisfy the success factor for the ITC's determination, no cash deposits should be required as it would be unlikely that an order should have issued at all. The court has examined those parts of the ITC determination challenged by plaintiffs in the injunction proceeding and for the following reasons cannot find that plaintiffs will show that, based on alleged errors, this affirmative injury determination will likely become a negative injury determination. Those

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[3] Plaintiffs' position is, however, that they need not demonstrate that without Commerce's errors any particular rate would be calculated in order for the court to rule that they will likely succeed on the merits. They believe demonstration of an error in procedure will do. Nonetheless, plaintiffs wish the court to conclude that they will succeed at least to the degree that their AD margin would be reduced to the 8% level. Plaintiffs produced nothing of substance to support their alternative claim that their duty deposit rate should be an average of the rate of other parties.

[4] Commerce did state in its brief that this declaration was not part of the administrative record. (*See* Def.'s Opp'n to Pls.' Mot. for Prelim. Inj. 10.) This argument is irrelevant with regard to three of the four injunction factors, and it is likely that some evidence extrinsic to the administrative record would be permitted to demonstrate what an alternate calculation would be, based on the administrative record evidence.

parts of the ITC determination challenged by plaintiffs include the "like product" produced by the domestic industry, data selection, the degree to which the subject merchandise was found to undersell the domestic industry and the degree of injury to the domestic industry attributable to merchandise found to be unfairly traded.[5]

Determining the "domestic like product" is an inherently difficult factual determination that is based on a variety of factors. The ITC appears to have evaluated all of the factors and made the kind of like product determination that it normally makes when it faces a range of U.S. manufactured goods potentially corresponding to the subject imported merchandise. Here, the ITC found significant distinctions between the domestic like product and other tires in physical characteristics and uses, common manufacturing facilities and employees, and channels of distribution. *Certain Off-The-Road Tires from China*, USITC Pub. 4031, Inv. Nos. 701–TA–448 & 731–TA–1117, at 6–10 (Aug. 2008), *available at* http://hotdocs.usitc.gov/docs/pubs/701_731/pub4031.pdf. It also found a significant price difference between its choice of a domestic like product comprising certain OTR tires for agricultural, construction and industrial vehicles and equipment coterminous with the scope of the investigations and plaintiffs' proposed broader domestic like product, the scope of which included larger construction and mining tires. *Id.* at 6–7, 10. The "like product" determinations appear to be substantially supported.

With respect to the selection of data used by the ITC to determine the volume and market share of the subject merchandise, the ITC acknowledged that it was obligated to choose from imperfect data sets, due to an incomplete response rate to importer questionnaires and Harmonized Tariff Schedule subheadings that were not closely aligned with the scope of the subject merchandise. *Id.* at 13. The ITC determined that although the questionnaire data likely understated the levels of subject and non-subject imports, the use of the questionnaire data was endorsed by respondents, including plaintiffs, and was representative of the subject import trends as experienced by the importers responding to the questionnaires. *Id.* at 14–15. The ITC also disagreed with plaintiffs' contention that the volume of the imports should be determined by weight, finding that the data for volume based on units and value was more complete on the record. *Id.* at 15. The court does not find likely reversible error here.

Additionally, with regard to its finding of underselling, which appears to be the key injury causation issue, the ITC's characterization of the data on U.S. brand premiums as being in the 10% to 15% range, rather than the 10% to 25% range, appears supported by the evidence on the record before it. *See id.* at 21 n.155. The ITC noted that market participants supplied estimates of premiums ranging

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[5] Because of emergency matters, plaintiffs did not fully develop all arguments that might be made when this case is fully briefed.

from 3% to 50% or more, with the majority of estimates ranging from 10% to 25%, and that an independent, published source indicated that a smaller advantage of 5% to 10% existed for mining tires of certain premium brands. *Id.* It appears that the evidence on price premiums before the ITC was sufficient under the standard of review to support the finding of the ITC, even though it may have supported an alternate determination. Thus, the court cannot say that plaintiffs are likely to succeed on the merits in demonstrating that the brand premiums estimate relied on by the ITC to account for some of the underselling that occurred was unsupported by substantial evidence. *See id.* at 24–25.

The court is also not persuaded by plaintiffs' arguments on the degree of injury to the domestic industry by reason of the unfairly traded imports, including the effect of the preliminary remedies and the domestic industry shift from smaller tires. The ITC acknowledged the mixed record on these issues, and these issues were simply too undeveloped, and likely somewhat misdescribed by plaintiffs, for the court to find that plaintiffs would likely succeed on the merits. *Id.* at 26–29.

The court cannot find that plaintiffs are likely to succeed on the merits of the ITC determination because plaintiffs have not demonstrated any overarching legal error in the ITC's affirmative injury determination. Instead, plaintiffs contest the ITC's factual determinations, and the court has found that to the extent the issues have been developed here, there appears to be sufficient evidence on the record to support the ITC's factual conclusions. Accordingly, plaintiffs cannot demonstrate that they are likely to succeed in achieving a negative injury determination after judicial review.

2. Commerce AD Determination

In the underlying Commerce AD case, plaintiffs allege that due to a close supplier relationship between GPX and TUTRIC, GPX's supplier from the PRC, GPX and TUTRIC should be found affiliated. As a result, plaintiffs argue Starbright and TUTRIC should be collapsed for purposes of calculating a weight-averaged margin. According to plaintiffs, this would result in an AD margin for Starbright of approximately 8%. (*See* Pls.' AD Br., Ex. 16.) Collapsing business entities based on control involves a multifaceted determination. *See* 19 U.S.C. § 1677(33) (definition of affiliated persons); 19 C.F.R. § 351.102(b)(3) (same); 19 C.F.R. § 351.401(f) (requirements for collapsing).[6] Plaintiffs rely on the long-term contract between GPX and

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[6] In general, the following test must be met in order for Commerce to collapse two or more entities: "(1) the entities must be 'affiliated,' (2) they must 'have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities,' and (3) there must be 'a significant potential for the manipulation of price or production.' " *Carpenter Tech. Corp. v. United States*, 510 F.3d 1370, 1373 (Fed. Cir. 2007) (quoting 19 C.F.R. § 351.401(f)(1)).

TUTRIC, which entitles GPX to certain products from the TUTRIC factory at certain prices, to demonstrate sufficient GPX operational control over TUTRIC to entitle Starbright and TUTRIC to be collapsed. Commerce, in contrast, argues that no control can be demonstrated because there is a lack of ownership between TUTRIC and GPX, lack of evidence of consolidation of financial statements, lack of influence over the other's capital structure or financial costs, lack of voting rights, and a lack of dependence and reliance due to the sale of the majority of TUTRIC's products to other customers around the world. *Issues and Decision Memorandum for the Antidumping Investigation of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, A–570–912, POR 10/1/06–3/31/07, at 131–41 (July 7, 2008), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E8–16156–1.pdf. Commerce further argues that the acts of control alleged by GPX over TUTRIC, such as GPX's providing guidance on product design and quality control, technical training and expertise concerning production, and other assistance were merely evidence of commercial cooperation inherent in a business relationship and do not amount to GPX's being in a position "to exercise restraint or direction" over TUTRIC. *Id.* at 135; *see also* 19 U.S.C. § 1677(33).

While GPX and TUTRIC may have a close working business relationship, plaintiffs have failed to show that their case is so similar to the small set of cases involving sole suppliers that Commerce likely would be compelled to collapse TUTRIC and Starbright for purposes of the AD determination. *See, e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod From Korea*, 63 Fed. Reg. 40,404, 40,404–05 (Dep't Commerce July 29, 1998); *Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Live Swine from Canada*, A–122–850, at 78–82 (Dep't Commerce Mar. 4, 2005), *available at* http://ia.ita.doc.gov/frn/summary/canada/E5–1029–1.pdf. In fact, testimony at the evidentiary hearing regarding production apart from the current contract and overall control issues made it clear that Starbright does not have operational control of TUTRIC. Consequently, plaintiffs have not demonstrated a likelihood of success on the merits regarding the affiliation between GPX and TUTRIC.

The court is greatly concerned as to plaintiffs' alternate argument in the AD context, that is, that Commerce did not even consider plaintiffs' request to give Starbright market-oriented-enterprise ("MOE") treatment or to otherwise adjust for the new CVD treatment applicable to the PRC. Commerce determined in 2007 that for CVD purposes, "China's economy is best characterized as one in which constrained market mechanisms operate alongside (and sometimes, in spite of) government plans" and "though distorted, is observably more flexible that the Soviet-style economies. . . . [which] were most notably characterized by the absence of market forces." *Countervailing Duty Investigation of Coated Free Sheet Paper from*

the People's Republic of China – Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy, C–570–907 (Mar. 29, 2007), *available at* Pls.' AD Br., Ex. 14, at 9. ("*Georgetown Steel Memorandum*"). Despite Commerce's conclusion that the PRC's economy had sufficiently changed so as to allow CVD measures based on the calculation of subsidies for the PRC, *see id.* at 10, Commerce still refused to consider MOE status for Starbright on the basis that Commerce had no set procedures for handling such situations. (*See* Pls.' AD Br., Ex. 15.) Commerce has long stated that it needs flexibility, that it looks at matters on a case-by-case basis, and that it can institute new procedures when necessary, yet it rejected any attempt at doing so here. Commerce did decide in 2006 to continue non-market economy ("NME") treatment under the AD statute, but circumstances have not remained static. *See Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China ("China")-China's status as a non-market economy ("NME")*, A–570–901 (Aug. 30, 2006), *available at* Oral Arg., Pls.' Ex. 8. Presumably the PRC has continued to change and the 2007 CVD decision was itself a sea change. *See Georgetown Steel Memorandum* at 2, 10. It is likely that Commerce erred in not addressing the MOE issue.

For their part, plaintiffs apparently provided information to Commerce that might have been sufficient for Commerce to make a determination using market economy AD procedures; however, plaintiffs have not gone the step further to demonstrate what the margins likely would be if Commerce had granted Starbright MOE treatment. In essence, plaintiffs would require the court effectively to reduce the AD cash deposit rate temporarily to a 10% or lower level based on their general statement that duties will change dramatically if such MOE procedures are followed. One might intuit that, but the court cannot determine that the cash deposit rates should be at a certain level based on intuition alone. While it may be a hard burden for plaintiffs to establish within what range duties are likely to be if the proper procedures were followed, plaintiffs' assertion, or even demonstration, of procedural error is not sufficient for the court to make the proper decision it must make on the merits in this case regarding whether that procedural error is likely to have significantly affected plaintiffs' AD margin. Accordingly, plaintiffs' allegations of procedural error do not demonstrate ultimate likelihood of success on the merits in this AD case. Plaintiffs' further allegations of calculation error have not been fully developed in their AD brief in order for the court to accurately assess the likelihood of success on the merits as to those claims.

3. Commerce CVD Determination

Finally, with respect to the merits of the underlying CVD case, the leading case on the application of CVD law to a NME is *Georgetown*

Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986), whereby the Court of Appeals upheld Commerce's decision not to apply CVD measures to NME countries. This case is more than twenty years old. It is also not clear whether the Court of Appeals in interpreting the trade laws at issue in *Georgetown Steel* was deferring to a determination of Commerce based on ambiguity in the statute or whether the Court held that there was only one legally valid interpretation of the statute.[7] *See id.* at 1314–18. There is now guidance on how to proceed in such a situation, that is, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). *Brand X* states that in a case of this type of ambiguity, that is, when we are not sure what the court meant, for *stare decisis* purposes we are to read the case as deciding that the agency determination at issue did not conflict with the statute, not that a new agency reading, not before the court at the time, must be rejected. *See id.* at 982–86. This does not tell us, however, if Commerce's new interpretation of the statute—that it may impose CVD measures in NME countries—is reasonable or even if the aspect of the statute before us now is ambiguous. As the outcome in this case is not directed by *Georgetown Steel*, the court must consider anew Commerce's new interpretation and application of the statute.[8]

The law concerning CVD measures, 19 U.S.C. §§ 1671, 1677(5), has not changed since *Georgetown Steel* in any way relevant to this issue and, from 1986 to 2007, apparently Commerce accepted that the NME procedures specified in the AD laws were intended by Congress to cover the ground of the unfair trade remedies for NMEs. Now Commerce says that conclusion is flawed. The questions thus remain whether Commerce may (1) refuse in the AD context to use any market economy procedures in the PRC and apply the blunt procedures of the NME statute with its lack of fine-tuned adjustments, and (2) at the same time apply CVD measures to the same industry in the PRC. Does this directly conflict with the statute? Is this fundamentally unfair and thus an unreasonable interpretation or abusive application of the statute? The court does not resolve these grave questions in the context of this preliminary injunction proceeding because, as will be discussed in Section D, success on these issues will not prevent the irreparable harm alleged by plaintiffs.

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[7] The Court of Appeals speaks in very clear terms as to what the statute means, but near the end of the opinion states, "[w]e cannot say that the Administration's conclusion that the benefits the Soviet Union and the German Democratic Republic provided for the export of potash to the United States were not bounties or grants under section 303 was unreasonable, not in accordance with law or an abuse of discretion. *Id.* at 1318 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984)).

[8] The court's dismissal for lack of jurisdiction in *Government of the People's Republic of China v. United States*, 483 F. Supp. 2d 1274 (CIT 2007), in no way resolves this matter because that case involved only Commerce's authority to determine the parameters of its own investigation.

Plaintiffs also attack the substance of that part of the CVD determination that resulted in a large part of the CVD rate, that is, a finding of debt forgiveness attributable to government action. Plaintiffs allege that Commerce never made a finding of a financial contribution to Starbright, as required by 19 U.S.C. § 1677(5)(B), (D). That is, they argue that even if Starbright's predecessors were relieved of certain loan guarantee obligations by a government-controlled bank, Commerce cannot presume that the benefit of the loan forgiveness devolved to Starbright. The court believes that this determination was made. To greatly simplify this discussion, Commerce, in essence, determined according to its ongoing policies that the asset purchase form is of no moment and that Starbright bought assets from a partially state-owned entity that were unburdened with debt allocable to such assets. *Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination: Certain New Pneumatic Off-the-Road Tires (OTR Tires) from the People's Republic of China*, C–570–913, at 126–27, 137–40, 148–50 (July 7, 2008), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E8–16154–1.pdf. Commerce then turned to whether the subsidy was extinguished by a fair market, arm's length sale to Starbright, i.e., a sale that represented a fair price for the unburdened assets. *Id.* at 128–36. Thus, the determination of a government financial contribution to Starbright likely was made through an acceptable procedure.[9]

Plaintiffs allege at least two more errors. One is that Commerce failed to find that Starbright paid fair market value for the assets in an arm's length transaction, thus extinguishing any subsidy. Commerce seems to have the better of this argument. No appraisal was done until after the negotiations for the sale. *Id.* at 134. The sales bidding was not completely open or well advertised. *Id.* at 135–36. Certain parties were involved on both sides of the sales transaction. *Id.* at 124–36. Plaintiffs' remaining argument is that, in any case, there was nothing to extinguish, i.e., the debt was already extinguished by operation of Chinese law, either before December, 2001, the cut-off date for considering subsidies in the PRC, or it was extinguished through generally applicable bankruptcy law, and not by action of a government-controlled bank after December, 2001. The problem is that plaintiffs had the burden to demonstrate such occurrence timely before Commerce and in a convincing fashion. An excerpt from Chinese law was rejected as submitted too late, but even if accepted, it is not clear that the Chinese law was fully proved or explained or that discharge in bankruptcy was demonstrated. (*See* Pls.' Mem. of Law in Supp. of Pls.' Mot. for TRO & for Prelim. Inj. (CVD Case), Ex. 11.) Plaintiffs also argue that the value of the sub-

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[9] The court does not address defendant-intervenors' argument that the "butterfly" methodology is a separate, alternative method of finding direct countervailable subsidy to Starbright.

sidy was not properly calculated, but that argument was not developed with calculations to demonstrate the effect on the deposit rate. Nonetheless, the court need not reach any final conclusion as to plaintiffs' likelihood of success on the CVD issues. The court concludes that even if plaintiffs were likely to succeed in eliminating all of the CVD rate, because of the plaintiffs' failure to establish likely success in substantially reducing the AD rate or overturning the ITC injury determination, this limited likelihood of success on the merits is insufficient to tip the balance of equitable factors so as to require relief.

D. Irreparable Harm

Mr. Ganz testified that only a cash deposit rate of 10% (or possibly slightly higher) will prevent irreparable harm. [[ ]] For purposes of the motion the court accepts Mr. Ganz's testimony as true and assumes GPX established irreparable harm attributable to any deposit rate above the 10–15% range.

Assuming that plaintiffs have established that there is sufficient likelihood that the duty deposit rate should be approximately 30% rather than 44%, based on a reduction for eliminated CVD, and plaintiffs therefore are required to make a cash deposit of 30%, plus some security for the remainder, plaintiffs cannot prevail. Plaintiffs have made it clear to the court through both argument and testimony that this is not the relief they seek and that plaintiffs cannot put up both such a cash deposit and the accompanying security. At this point there has been no showing of a likelihood of success on the merits on the ITC's affirmative injury determination or Commerce's AD determination. Success as to at least one of the two would be necessary in order for the court to provide any meaningful relief.

E. Remaining Factors

Given that the court cannot grant the relief that will ameliorate the irreparable harm alleged by plaintiffs, it is unnecessary to do a full analysis of the balance of hardship and the public interest. Suffice it to say that there would be hardships to defendants caused by the lack of adequate security in the form of cash deposits for duties potentially owed and also to defendant-intervenors due to the competitive disadvantage they would suffer if they did not receive the full remedies the agency granted them. If Commerce's and the ITC's errors were sufficiently clear so that plaintiffs were likely entitled to a duty rate at a level that would allow them to continue operating their business in something close to normal mode, the hardships of defendants and defendant-intervenors would pale in comparison to those harms potentially suffered by plaintiffs. But this is not the case here. Similarly, while the public interest is served by ensuring that government agencies follow the law exactly, it is also served by

allowing the statutory scheme to play itself out in the normal way, unless all of the injunction factors are satisfied.

CONCLUSION

Plaintiffs have not demonstrated a likelihood of success on the merits sufficient to tip the balance of equitable factors so as to require relief. For all the foregoing reasons, plaintiffs' motion for a temporary restraining order and a preliminary injunction is denied.

Slip Op. 08–123

BAO ZHU CHEN, MEI YUN ZHENG, AND CONNIE CHEN, FORMER EMPLOYEES OF ADVANCED ELECTRONICS, INC., Plaintiffs, v. **ELAINE L. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,** Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 06–00337

[Remanding to United States Department of Labor its determination denying eligibility for benefits under the Trade Adjustment Assistance and Alternative Trade Adjustment Assistance programs.]

Dated: November 18, 2008

Greater Boston Legal Services (*Cynthia Mark* and *Monica Halas*) for plaintiffs.

Gregory G. Katsas, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Meredyth Cohen Havasy*); *R. Peter Nessen*, Office of the Solicitor, United States Department of Labor, of counsel, for defendant.

OPINION AND ORDER

Stanceu, Judge: Plaintiffs, three former employees of Advanced Electronics, Inc., contest a determination by the United States Department of Labor ("Labor" or the "Department") denying them eligibility for benefits under the Trade Adjustment Assistance ("TAA") and Alternative Trade Adjustment Assistance ("ATAA") programs administered under Title II of the Trade Act of 1974, as amended (the "Act"). 19 U.S.C. §§ 2271–2321, 2395 (Supp. V 2005). The Department concluded that the employees did not meet statutory eligibility requirements, based on its finding that plaintiffs' separations from employment at Advanced Electronics, Inc. ("Advanced Electronics," "AEI," or the "Company"), which previously manufactured printed circuit boards in Boston, Massachusetts, were attributable neither to increases in imports of like products nor to a shift in production to a foreign country. Before the court is the Department's second notice

announcing a negative determination of eligibility for TAA and ATAA benefits, which Labor issued in response to the court's order effecting a voluntary remand sought by the Department. Also before the court is plaintiffs' motion for judgment on the agency record, in which plaintiffs seek an order compelling Labor to issue an affirmative determination of eligibility. For the reasons stated below, the court concludes that the Department's investigation was inadequate to allow the Department to make findings of fact that were essential to a negative determination. Specifically, the investigation did not determine whether, and to what extent, an increase in imports into the United States of articles like or directly competitive with the Company's printed circuit boards caused the Company to lose business from a significant foreign customer. The court again remands this matter to the Department, which must reopen its investigation and issue a new determination grounded in appropriate findings of fact that are supported by substantial evidence.

I. BACKGROUND

The Act authorizes various forms of adjustment assistance to workers who have lost their jobs as a result of increased imports or shifts of production out of the United States. 19 U.S.C. §§ 2291–98, 2318. These benefits, provided under federal and related state programs, include training, re-employment services, and various allowances, such as income support, job search, and relocation allowances. *Id*.

The Complaint indicates that plaintiffs lost their jobs at Advanced Electronics when the Company ceased its Boston manufacturing operations on September 30, 2005. Compl. ¶¶ 7–8, 10, Attach. 2 at 1 (*Petition for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA)* ("*Petition*")). Prior to their separations, plaintiffs had assembled and tested "subassembly" printed circuit boards and provided product support to the Company's customers. *Id*. ¶ 9. On June 6, 2006, plaintiffs sought the Department's certification of eligibility to apply for TAA and ATAA benefits. *Id*. ¶ 11, Attach. 2 (*Petition*). In July of that year, the Department issued its first notice announcing a negative determination ("First Notice"), concluding that the statutory requirements for eligibility had not been satisfied because the separations were the result of neither increases in imports of like products nor a shift in production to a foreign country. *Negative Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance And Alternative Trade Adjustment Assistance* (July 18, 2006) (Admin. R. at 60–62) ("*First Notice*").

Plaintiffs brought this action on October 2, 2006, alleging that the negative determination was unsupported by substantial evidence or was otherwise not in accordance with law. Compl. ¶ 18. Plaintiffs moved on June 29, 2007 to supplement the administrative record in

this case with additional evidence and for a remand of the case to the Department for further investigation. Pls.' Mot. to Supplement the Admin. R. and to Remand this Case to the Department of Labor for the Consideration of All Relevant Factors ("Pls.' Remand Mot.") 1–2. Defendant responded with a motion for a voluntary remand, to which plaintiffs consented. Def.'s Consent Mot. for Voluntary Remand.[1] The court granted defendant's consent motion, ordering the Department to "reopen its administrative record and investigation, reconsider its negative determination, and issue a redetermination as to whether plaintiffs are eligible for worker adjustment assistance benefits and alternative trade adjustment assistance." Order (Oct. 23, 2007).

Rather than setting forth a new decision upon remand, the Department's second notice affirmed the First Notice but also announced two new findings of fact. Notice of Negative Determination On Remand (Dec. 19, 2007) (Supplemental Admin. R. at 8–10) ("Second Notice"). Plaintiffs responded to the Second Notice by moving for judgment on the agency record pursuant to USCIT Rule 56.1. Pls.' Mot. for J. on the Admin. R. ("Pls.' Mot. for J."); Pls.' Resp. to Def.'s Notice of Negative Determination on Remand in Supp. of Mot. for J. on the Admin. R. ("Pls.' Remand Resp."). Arguing that another remand would be futile, plaintiffs seek a court order directing Labor to certify all workers of Advanced Electronics who were laid off in September 2005. Pls.' Mot. for J. 1; Pls.' Remand Resp. 1. Defendant opposes plaintiffs' motion, maintaining that Labor's Second Notice is supported by substantial evidence and is otherwise in accordance with law. Def.'s Mem. in Opp'n to Pls.' Mot. for J. on the Admin. R. 1 ("Def.'s Mem. in Opp'n"). Defendant requests that the court affirm Labor's determination and dismiss this action. *Id.*

II. DISCUSSION

The court exercises jurisdiction under 28 U.S.C. § 1581(d)(1), which grants the Court of International Trade exclusive jurisdiction over any civil action commenced to review final determinations by Labor on the eligibility of workers for adjustment assistance under the Act. *See* 28 U.S.C. § 1581(d)(1) (2000). Upon review, Labor's findings of fact are deemed conclusive if they are supported by substantial evidence. 19 U.S.C. § 2395(b). Labor's decisions on certification for TAA benefits are affirmed upon judicial review if they are supported by substantial evidence contained in the administrative

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[1] Plaintiffs requested oral argument on their remand motion. Pls.' Mot. to Supplement the Admin. R. and to Remand this Case to the Department of Labor for the Consideration of All Relevant Factors 2. Oral argument was not held because plaintiffs consented to defendant's motion for voluntary remand and plaintiffs have not sought oral argument following the Department's issuance of its decision upon remand. *See* Def.'s Consent Mot. for Voluntary Remand 3.

record and are otherwise in accordance with law. *Woodrum v. Donovan*, 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983), *aff'd sub nom. Woodrum v. United States*, 737 F.2d 1575, 1576 (Fed. Cir. 1984). "Substantial evidence has been held to be more than a 'mere scintilla,' but sufficient enough to reasonably support a conclusion." *Former Employees of Swiss Indus. Abrasives v. United States*, 17 CIT 945, 947, 830 F. Supp. 637, 639–40 (1993) (citing *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137, 1139 (Fed. Cir. 1987)).

Pursuant to 19 U.S.C. § 2272(a), if a significant number or proportion of the workers in a firm have become separated from employment, the workers may obtain eligibility for TAA benefits in either or two ways. 19 U.S.C. § 2272(a). First, under § 2272(a)(2)(A), such workers qualify if all of the following criteria are met: (1) sales or production of the employing firm have decreased absolutely; (2) imports of articles like or directly competitive with articles produced by the employing firm have increased; and (3) the increase in imports "contributed importantly" to the employees' separation and to the decline in the sales or production of the employing firm. *Id.* § 2272(a)(2)(A). Second, under § 2272(a)(2)(B), the workers qualify if the employing firm shifts production of like or directly competitive articles to a foreign country and if any of certain criteria are met.[2] *Id.* § 2272(a)(2)(B). Plaintiffs do not argue that a shift in production to a foreign country occurred and instead base their claim on § 2272(a)(2)(A). They submit that the Company's ceasing production satisfies criterion (1) and that United States import statistics (included in their motion to supplement the administrative record) showing an increase in printed circuit board imports during the three years prior to 2005, when the plant in Boston closed, satisfy criterion (2). Pls.' Remand Resp. 4; Pls.' Mot. for J. 1–2. Plaintiffs disagree with Labor's conclusion that criterion (3) has not been satisfied and argue that the Department's investigation was inadequate. Pls.' Remand Resp. 2–4; Pls.' Mot. for J. 1–2. According to plaintiffs, Labor should have found that an increase in imports of printed circuit boards contributed importantly to the termination of the manufacturing operations of Advanced Electronics in Boston and, thus, to their separation. Pl.'s Mot. for J. 1–2.

It is undisputed that a significant number of the workers of Advanced Electronics were separated from their employment and that sales and production of printed circuit boards at Advanced Electronics decreased absolutely during what the Department termed the

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[2] The criteria are: (1) the shift in production was to a country with which the United States has entered into a free trade agreement; (2) the shift in production was to a country that benefits from one of several trade preference programs; or (3) there has been or is likely to be an increase in imports of articles like or directly competitive with articles produced by the employing firm. 19 U.S.C. § 2272(a)(2)(B)(ii) (Supp. V 2005).

"period under investigation."[3] *Id*.; Def.'s Mem. in Opp'n 8; *Findings of the Investigation* (Confidential Admin. R. at 63). With respect to criterion (2), Labor did not make a finding on whether there was an increase of imports of articles like or directly competitive with the Company's printed circuit boards. Because criterion (3) also must be satisfied for eligibility, a finding on criterion (2) would not be necessary if Labor's analysis concerning criterion (3) were adequate. However, that analysis is deficient.

The shortcoming in the Department's investigation is the basis on which it concluded that criterion (3) of the statute was not satisfied. With respect to criterion (3), the Department's ultimate finding was that an increase in imports of products like or directly competitive with the Company's printed circuit boards during the period under investigation did not contribute importantly to the employees' separation and to the decline in the sales or production of the employing firm. *See* Second Notice (Supplemental Admin. R. at 10); *First Notice* (Admin. R. at 61). That ultimate finding was dependent on several other factual findings, which were stated in the First and Second Notices. All but one of these subordinate findings are supported by substantial record evidence. Standing alone, the findings that are supported by substantial evidence are not sufficient to support the ultimate finding.

In the First Notice, Labor deemed plaintiffs ineligible for certification under § 2272(a)(2)(A) based on several factual findings, all of which pertained to criterion (3). *First Notice* (Admin. R. at 60–62). It found that Advanced Electronics did not import products like or directly competitive with those produced at the subject plant during the period under investigation. *Id*. (Admin. R. at 61). It surveyed major domestic customers of Advanced Electronics that had reduced their purchases of the Company's printed circuit boards and found that they did not import printed circuit boards during that period. *Id*.; *Findings of the Investigation* (Confidential Admin. R. at 64); *Confidential Data Request, Advanced Electronics, Inc.* (Confidential Admin. R. at 36–37). From these findings, the Department concluded in the First Notice that criterion (3) had not been satisfied. *First Notice* (Admin. R. at 61). Labor further found, however, that some of the decline in the sales of Advanced Electronics was due to a decrease in purchases from a single foreign customer during the relevant period. *Id*.

In challenging the First Notice, plaintiffs based their principal argument on the foreign customer, arguing that Labor did not contact that customer and thus failed to investigate a potentially significant

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[3] The Department referred to "2004, 2005, January through May 2006" as the "period under investigation." *Negative Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance And Alternative Trade Adjustment Assistance* (July 18, 2006) (Admin. R. at 60–62).

cause of the Company's decline in sales. Pls.' Remand Mot. 2, 4–5. Highlighting the importance of the foreign customer, they stated in their motion for remand that the domestic customers that the Department surveyed represented less than half of the decline in the Company's sales during the 2002–2005 period. *Id.*

The Department's Second Notice "affirm[s] the original notice of negative determination of eligibility to apply for worker adjustment assistance." Second Notice (Supplemental Admin. R. at 10). While affirming the First Notice, Labor used the Second Notice to announce two new findings of fact. *Id.* Based on interviews conducted with former Company officials, Labor found that Advanced Electronics did not send printed circuit boards to a domestic facility of the foreign customer during the period under investigation and instead sent these products to a facility of the foreign customer outside of the United States. *Id.* (Supplemental Admin. R. at 9–10). Relying upon this finding, Labor further found in the Second Notice that "the foreign customer did not import articles like or directly competitive with the printed circuit boards produced by the subject firm." *Id.* (Supplemental Admin. R. at 10).

Plaintiffs take issue with the Department's finding that the foreign customer did not import like or directly competitive articles, which they view as unsubstantiated. Pls.' Remand Resp. 2. In their comments on the Second Notice, they again characterize the Department's investigation as inadequate, stating as follows:

> The Department failed to contact the foreign customer to determine whether it did or did not import like or directly competitive articles, and the Department failed to determine whether the foreign customer's new supplier, another American contractor, resulted in increased imports which is entirely plausible, given that this American contractor's employees have been certified for Trade Adjustment Assistance ("TAA") benefits on five occasions between 2002 and 2007.

Id. at 2–3 (footnote omitted). They also argue that the Department again ignored the evidence of increased imports of circuit boards, which evidence they claim shows a 59% increase in United States imports of printed circuit board assemblies between 2002 and 2005. *Id.* at 3. "The Department does not address overall imports or domestic market conditions in either of its negative determinations." *Id.*

Substantial evidence supports a finding that increasing imports of like or directly competitive articles did not contribute importantly to the reduction in the Company's sales to domestic customers. Labor surveyed some of the customers Advanced Electronics had identified in a confidential data request as customers to whom sales of printed circuit board had declined between 2003 and 2005. *Confidential Data Request, Advanced Electronics, Inc.* (Confidential Admin. R. at

36–37); *Customer Survey Responses* (Confidential Admin. R. at 48–49, 51–53); *Memo. from LeRoynda Brooks, U.S. Dep't of Labor to File* (July 12, 2006) (Confidential Admin. R. at 56). The responses indicate that none of the surveyed customers switched its supply from printed circuit boards produced by Advanced Electronics to competitive imports. *See Customer Survey Responses* (Confidential Admin. R. at 48–49, 51–53); *Memo. from LeRoynda Brooks, U.S. Dep't of Labor to File* (July 12, 2006) (Confidential Admin. R. at 56). Specifically, the responses indicate that the surveyed customers did not purchase printed circuit boards from foreign firms and that they did not purchase from domestic suppliers printed circuit boards wholly manufactured in a foreign country. *Customer Survey Responses* (Confidential Admin. R. at 48–49, 51–53); *Memo. from LeRoynda Brooks, U.S. Dep't of Labor to File* (July 12, 2006) (Confidential Admin. R. at 56). Substantial record evidence indicates that the only domestic customers who had reduced their purchases that Labor did not survey accounted for a very small portion of the Company's sales and sales decline during the period under investigation. *See Confidential Data Request, Advanced Electronics, Inc.* (Confidential Admin. R. at 36–37, 40).

A determination concerning eligibility for benefits must be based upon an investigation conducted with the utmost regard for the interests of petitioning workers. *See Abbott v. Donovan*, 7 CIT 323, 327-28, 588 F. Supp. 1438, 1442 (1984) (quoting *Local 167, Int'l Molders & Allied Workers' Union v. Marshall*, 643 F.2d 26, 31 (1st Cir. 1981)). In this instance, however, the Department's investigation left unanswered the question of the cause of the decline in the Company's sales to the foreign customer during the period of investigation. The cause of the sales decline is important because, according to the record evidence, the foreign customer accounted for a significant percentage of all of the Company's total sales in the Company's 2004 fiscal year and its total sales in the first eight months of its 2005 fiscal year. *See Confidential Data Request, Advanced Electronics, Inc.* (Confidential Admin. R. at 36–37, 40). Only one of the domestic customers listed in the Company's response to Labor's data request accounted for a greater proportion of the Company's sales during the period under investigation than did the foreign customer. *See id*. Additionally, the foreign customer accounted for a higher percentage of the total sales *decline* between the first eight months of the Company's 2004 fiscal year and the first eight months of the 2005 fiscal year than did any other customer for that time period. *See id*.

The Department stated a finding in the Second Notice that the foreign customer "did not import articles like or directly competitive with the printed circuit boards produced by the subject firm." Second Notice (Supplemental Admin. R. at 10). Substantial evidence does not exist on the record to support this finding. The relevant evi-

dence, placed on the record during the reopened investigation, consists of an exchange of e-mail and telephone communications between a Labor official and former representatives of Advanced Electronics. In these communications, Labor's inquiries were limited principally to whether Advanced Electronics, in supplying the foreign customer, had shipped printed circuit boards abroad or to a domestic facility. *See Memo. from Del-Min Chen, U.S. Dep't of Labor, to File* (Nov. 7, 2007) (Supplemental Confidential Admin. R. at 3); *E-mail from T.O. Yeung, Adcotron EMS, Inc., to Del-Min Chen, U.S. Dep't of Labor* (Nov. 27, 2007) (Supplemental Confidential Admin. R. at 5–6); *E-mail from John Boyle, Adcotron EMS, Inc., to Del-Min Chen, U.S. Dep't of Labor* (Dec. 6, 2007) (Supplemental Confidential Admin. R. at 7). The result of these inquiries was Labor's finding that the Company "did not send printed circuit boards to a domestic facility of the foreign customer." Second Notice (Supplemental Admin. R. at 10). That finding is supported by substantial record evidence, but the finding itself does not rule out the possibility that like or directly competitive articles were imported into the United States by the foreign customer, an affiliate of the foreign customer, or another supplier and contributed so significantly to the Company's loss of sales to the foreign customer during the period under investigation as to have been an important cause of the Company's ceasing its manufacturing activity in Boston. In this regard, the statute does not require increased imports to be the *most* important cause of worker separation for criterion (3) to be satisfied. Rather, the term "contributed importantly" means "a cause which is important *but not necessarily more important than any other cause*." 19 U.S.C. § 2272(c)(1) (emphasis added).

As plaintiffs have suggested, an investigation that included inquiries to the foreign customer could have revealed that the foreign customer stopped purchasing printed circuit boards from Advanced Electronics and began purchasing products from another American supplier (or suppliers). *See* Pls.' Remand Resp. 2–3. A new supplier possibly could have begun supplying the foreign customer by importing circuit boards like the Company's circuit boards. For example, a new supplier could have conducted minor packaging, processing, or testing operations at a domestic facility, in preparation for exportation of foreign-origin circuit boards to the foreign customer.[4] Al-

[4] The Department's customer survey questionnaires (sent in this investigation only to the Company's domestic customers) contemplate that a customer could switch its supply of a product from a domestic producer to a domestic supplier of a product produced outside the United States. *See Customer Survey Responses* (Confidential Admin. R. at 47–49, 51–53) (asking customers to whom sales of Advanced Electronics had declined if "any of the product(s) purchased from other domestic firms [were] wholly manufactured in a foreign country," and asking the respondent to provide details as to what portion of their purchases fit such a description). A similar scenario could involve importation of a like or directly competitive product prior to exportation of that product to a foreign customer.

though this possibility is hypothetical and speculative, Labor's failure to inquire further into the Company's loss of business with the foreign customer undermined Labor's finding that increased imports of a like or directly competitive product did not contribute importantly to plaintiffs' separation. That finding cannot be said to be supported by substantial evidence on the record.

Defendant argues that Labor was not obligated to investigate "imports of the foreign customer's new domestic supplier" because the statute, according to defendant, does not require Labor to investigate "an indirect effect of imports." Def.'s Mem. in Opp'n 10–11. According to defendant, "such imports, if they existed, would be insufficient to show the required connection between imports and AEI's workers' separation." *Id.* at 6. In making this argument, defendant appears to rely on, but does not explicate, its interpretation of the term "contributed importantly" as used in 19 U.S.C. § 2272(a)(2)(A)(iii). *Id.* at 10–11. What is more, no discussion of the statutory construction issue alluded to by defendant appears in the First or Second Notice.

The court must review an agency's determination based on the reasons the agency set forth in that determination, not upon *post hoc* rationalizations of agency actions. *See NEC Home Electronics, Ltd. v. United States*, 54 F.3d 736, 743 (Fed. Cir. 1995) (stating that the court is "powerless to affirm an administrative action on a ground not relied upon by the agency" (citation omitted)); *see also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) (holding that "courts may not accept . . . *post hoc* rationalizations for agency action"). The court will not affirm Labor's negative determination based on reasoning that was advanced for the first time by counsel in briefs submitted to the court.

In addition, the argument concerning the proper causation standard under the Act, as presented by defendant, is unpersuasive. Defendant relies on *Estate of Finkel v. Donovan*, 9 CIT 374, 382, 614 F. Supp. 1245, 1251 (1985) (citing *Abbott v. Donovan*, 8 CIT 237, 240, 596 F. Supp. 472, 475 (1984)), for the principle that the term "contributed importantly" as used in the Act suggests a direct and substantial relationship between increased imports and a decline in sales or production. Def.'s Mem. in Opp'n 10–11. Defendant argues that any effect of imports of the foreign customer's new domestic supplier would have been an indirect effect that Labor was not required to investigate. *Id.* at 6, 10–11. However, the facts of *Estate of Finkel*, and the causation issue considered by the Court of International Trade in that case, are not analogous to the facts and causation issue presented here.

Estate of Finkel considered the question of whether Labor correctly applied the "contributed importantly" causation standard in the Act in finding that imports of men's and boys' slacks did not contribute importantly to plaintiffs' separation from employment from a

domestic producer of these products. *See Estate of Finkel*, 9 CIT at 382–83, 614 F. Supp. at 1251–52. Labor had based a negative determination of eligibility in *Estate of Finkel* on its findings that most of the customers of the domestic producer that employed the plaintiffs prior to separation did not import men's or boys' slacks in 1979 and 1980, and that those customers who did import these products represented a relatively small percentage of the producer's sales during those years. *Id.* at 376–77, 614 F. Supp. at 1247. Plaintiffs argued that Labor should have taken into account (1) those customers who decreased purchases from the domestic producer and switched to imports, or to other domestic sources who had lowered their prices to compete with imports, and (2) the domestic producer's inability to attract new customers due to increasing import penetration. *Id.* at 382, 614 F. Supp. at 1251. The Court in *Estate of Finkel* upheld the findings on which Labor had based its negative determination. *See id.* at 376–77, 382–83, 614 F. Supp. at 1247, 1251–52. Citing legislative history instructing that a cause must be significantly more than *de minimis* to have contributed importantly, the Court held that these findings were sufficient to rule out the possibility that imports of men's and boy's slacks were an important contributing cause of the domestic producer's loss of business and the eventual separation of the employees. *Id.* at 383, 614 F. Supp. at 1252 (quoting S. Rep. No. 93–1298, at 133 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7186, 7275).

Estate of Finkel does not support defendant's argument that "Labor was not obligated to investigate the American supplier's imports because such imports, if they existed, would be insufficient to show the required connection between imports and AEI's workers' separation." *See* Def.'s Mem. in Opp'n 6. Labor's valid findings in this case (i.e., those supported by substantial evidence), taken together, are not sufficient to rule out imports as an important causative factor. In *Estate of Finkel*, the Court of International Trade was not persuaded by plaintiffs' argument that Labor should have considered (1) those customers who decreased purchases from the domestic producer and switched to imports, or to other domestic sources who had lowered their prices to compete with imports, and (2) the domestic producer's inability to attract new customers due to increasing import penetration. *Estate of Finkel*, 9 CIT at 382–83, 614 F. Supp. at 1251–52. Plaintiff's argument in *Estate of Finkel* concerning customers who switched to imports was refuted by Labor's finding that such switching was relatively insignificant. *See id.* at 383, 614 F. Supp. at 1252. The effect of domestic sources who lowered their prices to compete with imports and the effect of import penetration on the producer's inability to attract new customers, both of which were characterized as indirect effects in the opinion in *Estate of Finkel*, are not analogous to what plaintiffs are alleging in this case. *See id.* at 382–83, 614 F. Supp. at 1251–52. Plaintiffs are alleging, in essence, that im-

ports into the United States, after re-exportation, could have displaced the printed circuit boards the Company previously supplied to the foreign customer and that Labor's investigation was inadequate because it did not consider this possibility. Pls.' Remand Resp. 2–3. The court declines to adopt a construction of the Act under which Labor need never consider, in any circumstances, whether increased imports of a like or directly competitive article contributed importantly to a plaintiff's separation by causing the employer to lose business from a customer outside of the United States. Moreover, the Department has not indicated that it based its own decision on such a construction. Any construction of the Act must consider the remedial purpose of this statute and interpret its provisions so as to effectuate the statutory purpose. *Woodrum*, 5 CIT at 198, 564 F. Supp. at 832 ("It is true . . . that the remedial nature of the [TAA] statute requires a liberal construction." (citing *United Shoe Workers of Am. v. Bedell*, 506 F.2d 174, 187 (D.C. Cir. 1974)), *aff'd sub nom. Woodrum v. United States*, 737 F.2d at 1576; *see also Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (stating that the Supreme Court is "guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes").

The court, for good cause shown, may remand an investigation to the Secretary of Labor to take further evidence. 19 U.S.C. § 2395(b). Because Labor's decision to deny plaintiffs' petition for certification was based on an investigation that was not adequate to allow Labor to make findings of fact necessary to support its denial of eligibility, the court sets aside the negative determination affirmed in the Second Notice and concludes that plaintiffs have shown good cause for another remand to the Department. The court, therefore, orders a remand during which the Department must reopen its investigation and must attempt to determine whether, and to what extent, an increase in imports into the United States of articles like or directly competitive with the Company's printed circuit boards caused the Company to lose business from its foreign customer.[5]

Plaintiffs move for a judgment on the agency record, ordering the Secretary of Labor to certify as eligible under the TAA and ATAA all workers of the Company who were laid off in September 2005. Pls.'s Mot. for J. 1. The court declines to do so and instead, pursuant to 19 U.S.C. § 2395(c), will set aside the Department's determination of ineligibility as set forth in the First and Second Notices. For the reasons stated in this Opinion and Order, a remand for further investi-

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[5] Because the court is remanding this matter to the Department to investigate further the cause of the loss of business with the foreign customer, it is not necessary to consider plaintiffs' argument that the Department's investigation was inadequate because it did not consider the effects of overall domestic market conditions. Pls.' Mot. for J. on the Admin. R. 2; Pls.' Resp. to Def.'s Notice of Negative Determination on Remand in Supp. of Mot. for J. on the Admin. R. 3.

gation is the appropriate disposition of the Second Notice that is now before the court and the appropriate disposition of plaintiffs' motion for judgment on the agency record.

III. CONCLUSION AND ORDER

The court concludes that the Department's investigation was inadequate to allow the Department to make findings of fact that were essential to a negative determination because Labor failed to attempt to determine the cause of the Company's loss of sales to its foreign customer. As a result, Labor's investigation was inadequate to determine, as required by 19 U.S.C. § 2272(a)(1) and (a)(2)(A), whether increased imports of articles like or directly competitive with the Company's printed circuit boards occurred and contributed importantly to the decline in the Company's sales or production and to plaintiffs' separation from employment.

Based on the court's review of the First and Second Notices, the administrative record, and all submissions made herein, it is hereby

ORDERED that the Department's negative determination of eligibility be, and hereby is, set aside, and this matter is remanded to the Department for further proceedings consistent with this Opinion and Order; it is further

ORDERED that the Department shall issue a new determination on the issue of plaintiffs' eligibility for TAA and ATAA benefits that complies with this Opinion and Order, that is supported by substantial evidence, and that is in accordance with law; it is further

ORDERED that the Department shall reopen its investigation and the administrative record in this proceeding and shall attempt in the reopened investigation to determine whether, and to what extent, an increase in imports into the United States of articles like or directly competitive with the Company's printed circuit boards caused the Company to lose business from its foreign customer; and it is further

ORDERED that the Department shall have 60 days from the date of this Opinion and Order to file its new determination upon remand in this proceeding and that plaintiffs shall have 30 days from the filing of the new determination to file comments thereon with the court.

Slip Op. 08–124

SHANGHAI ESWELL ENTER. CO., LTD.; JINFU TRADING CO., LTD.; and ZHEJIANG NATIVE PRODUCE AND ANIMAL BY-PRODUCTS IMPORT & EXPORT GROUP CORP., Plaintiffs, v. UNITED STATES, Defendant, and THE AMERICAN HONEY PRODUCERS ASSOCIATION OF AMERICA AND THE SIOUX HONEY ASSOCIATION, Def.-Ints.

Before: Richard K. Eaton, Judge

Court No. 05–00439

[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.

OPINION

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 price[2] and normal value." 19 U.S.C. § 1677b(a). In cases where the subject merchandise originates from a nonmarket 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 cal-

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[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).

[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).

culate the value of raw honey.[4] In response, plaintiffs 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 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 in-

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[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 beekeeping industry in India, and contemporaneous with the POR." Issues & Dec. Mem. at 10.

[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).

puts 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 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 information[6] 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]

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 Subheading[8] [0409.00.00] merchandise . . . which revealed that these exports con-

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[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 country of exportation." Remand Results at 5.

[8] Plaintiffs refer to heading 0409.00.00 as a subheading.

sisted 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." 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. Accord-

ingly, 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 advisedCommerce 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 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.

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[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).

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 mer-

chandise 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 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 ___ ,

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[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).

[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).

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 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 "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).

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[12] As explained in *Shanghai Eswell I*, Jinfu USA is the 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).

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

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[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. 07–138 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).

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 own-

ership, 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 conclude that CEO B acquired [Jinfu USA] prior to November 2, 2002 because there is no

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[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).

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.