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October 25, 2004

MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Jeffrey A. May
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results and Final Rescission, In Part, of the New Shipper Review of the Antidumping Duty Order on Honey from the People's Republic of China

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Summary

We have analyzed the comments and rebuttals thereof from interested parties in the new shipper review of the antidumping duty order on honey from the People's Republic of China (PRC) (A-570-863). As a result of our analysis, including factual information obtained since the preliminary results, we find that Jinfu Trading Co., Ltd. (Jinfu PRC) failed to comply with the applicable certification requirements for a new shipper review, and therefore, we are rescinding its review. For Cheng Du Wai Yuan Bee Products Co., Ltd. (Cheng Du), we have determined that it made sales to the United States at less than normal value during the period of review (POR). We recommend that you approve the positions developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this review for which we received comments from interested parties:

Comment 1: Submission of New Factual Information by Jinfu PRC
Comment 2: Relationship between Jinfu PRC and Jinfu Trading (USA), Inc. (Jinfu USA)
Comment 3: *Bona Fides* of the Relevant U.S. Sale
Comment 4: Calculation of the Surrogate Value for Raw Honey
Comment 5: Calculation of the Surrogate Financial Ratios

Background

We published in the *Federal Register* the preliminary results of this new shipper review on June 3, 2004. *See Preliminary Results and Partial Rescission of Antidumping Duty New*

Shipper Review: Honey from the People's Republic of China, 69 FR 31348 (June 3, 2004) (*Preliminary Results*).

On August 11, 2004, the Department fully extended the deadline for the final results of this new shipper review by 60 days until October 25, 2004. *See Extension of Time Limit for Final Results of Antidumping Duty New Shipper Review: Honey from the People's Republic of China*, 69 FR 51062 (August 17, 2004).

We invited parties to comment on our *Preliminary Results*. We received case briefs from petitioners (the American Honey Producers Association and the Sioux Honey Association (collectively, petitioners)) and Jinfu PRC on July 7, 2004. We received rebuttal briefs from petitioners and Cheng Du on July 16, 2004. Parties did not request a public hearing.

Scope of the Antidumping Duty Order

The products covered by this order are natural honey, artificial honey containing more than 50 percent natural honey by weight, preparations of natural honey containing more than 50 percent natural honey by weight, and flavored honey. The subject merchandise includes all grades and colors of honey whether in liquid, creamed, comb, cut comb, or chunk form, and whether packaged for retail or in bulk form.

The merchandise subject to this review is currently classifiable under subheadings 0409.00.00, 1702.90.90, and 2106.90.99 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise under order is dispositive.

Changes Since the *Preliminary Results*

1. Calculation of Raw Honey Surrogate Value - *See* Comment 4 below.
2. Calculation of Surrogate Financial Ratios - *See* Comment 5 below.
3. For labor, in the *Preliminary Results*, we used the PRC regression-based wage rate at Import Administration's home page, Import Library, Expected Wages of Selected NME Countries, revised in September 2002 and corrected in February 2003. In September 2004, the Expected Wages of Selected NME Countries was updated. For these *Final Results*, we are using the PRC regression-based wage rate in the Expected Wages of Selected NME Countries, revised in September 2004. *See* Cheng Du Final Analysis Memo at Attachments 3 and 9.

For our analysis of the above-mentioned changes to our preliminary margin calculation for Cheng Du, *see* Memorandum to the File regarding Analysis of the Data Submitted by Cheng Du Wai Yuan Bee Products Co., Ltd. (Cheng Du) in the Final Results of the New Shipper Review on the Antidumping Duty Order on Honey from the People's Republic of China (October 25, 2004) (Cheng Du Final Analysis Memo).

Discussion of the Issues

Comment 1: Submission of New Factual Information by Jinfu PRC

In its July 7, 2004 case brief, Jinfu PRC submitted various affidavits and a payment receipt in support of its argument that Jinfu PRC and Jinfu USA were affiliated at the time of sale (*i.e.*, November 2, 2002) and during the POR. In submitting this new information, Jinfu PRC argues that the Department is required to accept, as part of the record, the affidavits and payment receipt provided at Exhibits 1 through 3 of its case brief because this information is necessary to correct a "clerical error" in the administrative record. Specifically, Jinfu PRC claims that the Department's preliminary factual determination that Jinfu PRC was not affiliated with Jinfu USA was based on a "clerical error" in the "Certificate of Transfer of Stocks."

Citing *Certain Fresh Cut Flowers From Colombia; Final Results of Antidumping Duty Administrative Review*, 61 FR 42833-02 (August 19, 1996) (*Colombian Flowers*), Jinfu PRC states that the Department established a six-factor test to decide when to accept a respondent's correction of clerical errors in an administrative record. According to Jinfu PRC, application of these factors to the facts and circumstances in the instant case requires that the Department determine that ownership of Jinfu USA was transferred to the Chief Executive Officer (CEO) and President of Jinfu PRC as of October 25, 2002, rather than October 25, 2003. In particular, Jinfu PRC argues that its CEO, intended to date the "Certificate of Transfer of Stocks" as October 25, 2002, the date on which ownership was actually transferred. Therefore, Jinfu PRC contends that its CEO committed a clerical error, rather than a methodological or substantive error, or an error in judgment, when he dated the document as October 25, 2003.

Jinfu PRC states that during verification the Department interviewed the individuals involved in the stock transfer and found no discrepancies in the information they provided. Jinfu PRC adds that during verification, the Department also examined documents confirming that: (1) the attorney who prepared the transfer documents was paid for his services in January 2003; (2) on October 19, 2002, Jinfu PRC's Board of Directors authorized its CEO to set up an affiliated U.S. company (*see* Jinfu PRC's December 30, 2003 supplemental questionnaire response (SQR) at Exhibit 3); (3) on October 28, 2002, Yousheng Trading (USA) Co., Ltd. (Yousheng USA) and Jinfu PRC issued resolutions confirming that the stock had been transferred to the CEO of Jinfu PRC (*see* Jinfu CEP Verification Exhibit 2);[1] (4) Jinfu PRC's CEO approved the sale of honey by Jinfu USA to its unaffiliated U.S. customer; and (5) in June 2003, Jinfu USA advised the Internal Revenue Service (IRS) that during 2002 it was owned by the CEO of Jinfu PRC.

[1] *See* Memorandum to the File through Abdelali Elouaradia, Program Manager, Sales Verification of Questionnaire Responses Submitted by Jinfu Trading Co., Ltd. on behalf of its U.S. affiliate, Jinfu Trading (USA), Inc., dated May 5, 2004 (Jinfu CEP Verification Report). A public version of this report is on file in the Central Records Unit (CRU) located in room B-099 of the Herbert H. Hoover Building, 1401 Constitution Avenue, NW, Washington, DC.

Therefore, according to Jinfu PRC, the Department should be satisfied that the corrective documentation provided in support of the clerical allegation is reliable.

Furthermore, Jinfu PRC alleges that it was unaware of this clerical error until the error was brought to its attention in the *Preliminary Results*. Jinfu PRC states that it had previously believed that the stock transfer document had been signed as of the date of the stock transfer, *i.e.*, October 25, 2002. Therefore, Jinfu PRC asserts that its case brief was the earliest opportunity it had to correct the error.

According to Jinfu PRC, the clerical error does not entail any revision of Jinfu PRC's questionnaire response. Jinfu PRC argues that it responded to the Department's questionnaire based on the understanding that Jinfu PRC and Jinfu USA were affiliated, and the Department verified Jinfu PRC's responses based on this assumption. Jinfu PRC asserts that the Department's verification reports confirm that Jinfu PRC's responses were complete and accurate, and therefore, the Department has sufficient information with which to calculate Jinfu PRC's dumping margins based on the price paid by Jinfu USA's unaffiliated U.S. customer.

Jinfu PRC contends that the Department confirmed at its PRC verification, that its CEO had a majority ownership interest in Jinfu PRC and was responsible for approving the price paid to Jinfu USA by its customer for the merchandise subject to this review. Jinfu PRC states that the Department concluded in its preliminary results that the information provided during verification did not establish the existence of affiliation between Jinfu PRC and Jinfu USA prior to the date of sale because of the incorrectly dated document (*i.e.*, the "Certificate of Transfer of Stocks"). However, Jinfu PRC notes that the Department did not bring this obvious clerical error to Jinfu PRC's attention at verification or advise Jinfu PRC of its importance until the preliminary results.

Jinfu PRC states that when the error is corrected, the reason why the Department "questioned the reliability of the information submitted by Jinfu PRC" no longer exists. Jinfu PRC asserts that the documents examined by the Department during verification, including the document with the corrected clerical error, supports rather than contradicts the accuracy of this verified information and a finding that the CEO of Jinfu PRC acquired an ownership interest in Yousheng USA/Jinfu USA effective October 25, 2002.

In support of its argument above, Jinfu PRC cites *AK Steel Corporation v. United States*, 34 F.Supp. 2d 756,773 (CIT 1998) (*AK Steel*), and states that the Court of International Trade (CIT), in that case, rejected petitioner's claim that "Commerce is precluded from considering as evidence an explanation proffered after publication of its preliminary results because the record was then closed" and "that, even if Commerce might consider it, the {respondent's} explanation is not substantial evidence because it is a self-serving statement." Jinfu PRC claims that it is in the same position as the respondent in *AK Steel*, because prior to the receipt of the *Preliminary Results*, Jinfu PRC was unaware of the need to provide additional evidence that the stock transfer took place on October 25, 2002, rather than October 25, 2003. According to Jinfu PRC, the Department cannot penalize Jinfu PRC for not having submitted information during verification

that it was not then aware it needed to provide. Additionally, Jinfu PRC argues that, since the affidavits submitted in its case brief are supported by contemporaneous documents created in the ordinary course of business and not "contradicted by harder evidence," the Department would be acting reasonably, and in accordance with law, in determining that Jinfu PRC's CEO acquired ownership interest in Jinfu USA on October 25, 2002.

Jinfu PRC also cites *Werner Finer Foods v. United States*, 24 CIT 541, 2000 WL 897752 (CIT 2000) and argues that the Department had abused its discretion, in that case, by refusing to allow a respondent to correct an "unintentional error." Jinfu PRC also cites *Maui Pineapple Company v. United States*, 264 F.Supp. 2d 1244, 1261 (CIT 2003) (*Maui Pineapple*), and argues that the CIT affirmed the Department's decision to correct a clerical error in the record after publication of the preliminary results, reasoning that correcting errors conformed to the overriding policy "that Commerce must determine dumping margins as accurately as possible and that antidumping laws are remedial, not punitive." *See Maui Pineapple*, 264 F.Supp. at 1262. In the instant proceeding, because the error was unintentional (*i.e.* the CEO of Jinfu PRC dated the "Certificate of Transfer of Stocks" as October 25, 2003, rather than October 25, 2002), Jinfu PRC argues that the Department should not penalize Jinfu PRC by rescinding its new shipper review. Instead, Jinfu PRC requests that the Department conform its final decision to the overriding purpose of the law to "determine dumping margins as accurately as possible" by accepting the documentation in its case brief.

According to Jinfu PRC, if the Department refuses to accept this documentation and to correct the record, the Department will be acting unfairly, which the CIT, in *Bowe-Passat v. United States*, 17 CIT 335, 343, 1993 WL 179269 (CIT 1993) (*Bowe-Passat*) instructed the Department to avoid. Jinfu PRC states that at no time in this proceeding did the Department ask Jinfu PRC to explain why the stock transfer agreement was not dated until October 25, 2003, exactly one year after the date that Jinfu PRC had claimed was the transfer date of Jinfu USA. Jinfu PRC argues that not asking for an explanation contrasts with the Department's practice in a new shipper review involving pasta from Italy, which was affirmed by the CIT in *GSA, S.R.L. v. United States*, 77 F.Supp. 2d 1349 (CIT 1999). Jinfu PRC contends that it was misled into believing that it had satisfied its burden regarding the transfer of ownership of Jinfu USA on October 25, 2002, because nothing was mentioned in the Department's deficiency questionnaires or during verification.

Moreover, Jinfu PRC states that the CIT has not allowed the Department to rely on adverse facts available (AFA) unless a respondent willfully refuses to respond to a clear request for information. Citing *Ta Chen Stainless Steel v. United States*, 1999 WL 1001194, 12-14, 21 ITRD 2057 (CIT 1999), Jinfu PRC states that the CIT found that the "failure by Commerce to provide respondents with sufficient notice can render the {AFA} decision unsupported by substantial evidence and otherwise contrary to the law." Jinfu PRC argues that, in the instant proceeding, the Department failed to notify Jinfu PRC of the deficiency when it had an opportunity to do so, such as, before the *Preliminary Results* were issued. Thus, according to Jinfu PRC, the Department's determination that Jinfu PRC and Jinfu USA were not affiliated, and its decision to apply an adverse margin because Jinfu PRC failed to provide information

regarding its sale honey to Jinfu USA, does not constitute notice pursuant to 19 USC § 1677m(d).

Jinfu PRC claims that, if the Department does not allow Jinfu PRC to correct the clerical error relating to the date of transfer of ownership, this would also constitute a violation of the United States' international obligations, as set forth in Article 6 and Appendix II of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (International Antidumping Code). Jinfu PRC states that, pursuant to Article 6.1, all interested parties shall be given ample opportunity to present in writing all evidence, which they consider relevant to the review in question. Jinfu PRC also cites other articles, including Article 6.7, which states, that determinations can only be made on the basis of facts available when any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation. Jinfu PRC claims that, in accordance with the Protocol on the Accession of the People's Republic of China into the World Trade Organization, the United States is required to apply these International Antidumping Code provisions to antidumping duty proceedings involving imports of PRC origin.

In sum, Jinfu PRC states that, for all of the reasons listed above, the Department is required to consider the documentation submitted at Exhibits 1, 2, and 3 of its July 7, 2004, case brief. Jinfu PRC contends that the documents in these exhibits correct the record and conclusively establish that the ownership stock of Yousheng USA was transferred to the CEO of Jinfu PRC on October 25, 2002. Further, Jinfu PRC argues that when the record is corrected, it cannot be seriously disputed that at the time Jinfu USA sold the subject merchandise to its U.S. customer, Jinfu PRC and Jinfu USA were affiliated parties, as defined in section 771(33) of the Act.

On July 14, 2004, petitioners requested that the Department reject Jinfu PRC's July 7, 2004 case brief, arguing that the affidavits and receipt constituted new factual information, and therefore, must be removed from Jinfu PRC's case brief. *See* Petitioners' Letter to the Department dated July 14, 2004. Petitioners reiterated this argument in their July 16, 2004, rebuttal brief (*see* pages 14-16).

According to petitioners, Jinfu PRC has not satisfied the criteria set forth in *Colombian Flowers*. Petitioners state that while there is no definition of a "clerical error" in the Department's regulations, the term appears in the agency's definition of a "ministerial error," which, pursuant to section 351.224(e), the Department may correct within 30 days after the date of publication of a preliminary determination. Petitioners also state that a "ministerial error" is defined as "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial." *See* section 351.224(f) of the Department's regulations.

Petitioners contend that Jinfu PRC should have submitted the agreement to the Department as it existed in the ordinary course of Jinfu PRC's business records with an

explanation as to why the agreement was not signed on October 25, 2002, the date Jinfu PRC claims it gained control of Yousheng USA. Based on sworn statements by the CEO of Jinfu PRC and the owner of Yousheng USA, petitioners state that both men intended to back-date the document as having been executed on October 25, 2002. Thus, petitioners argue, the "inadvertent" and "clerical" error at issue is the "mistake that these two men made in failing to correctly falsify the agreement's execution date." Further, petitioners note that Jinfu PRC's December 30, 2003 SQR, which included the falsified stock transfer agreement, also included a certification signed by the President (and CEO) of Jinfu PRC stating that he had read the response, and that everything in the response was true and accurate to the best of his knowledge and belief.

Petitioners allege that because the Jinfu PRC's CEO and the original owner of Yousheng USA admit to falsifying the agreement by back-dating it, the Department should call into question the veracity of the documents provided in Jinfu PRC's July 7, 2004, case brief. Specifically, petitioners claim the Department should also reject Exhibit 3, which purports to be a receipt bearing October 25, 2002 as the correct date of the stock transfer. Because it is hand-written, like the agreement in question, petitioners argue that it could have been back-dated or created well after its purported date to buttress Jinfu PRC's current claim. Moreover, petitioners assert that this receipt was never mentioned in any narrative response concerning the creation and sale of Jinfu USA prior to Jinfu PRC's July 7, 2004, case brief. Lastly, petitioners argue that the "receipt" is not consistent with any of the documents filed with the State of Washington by Jinfu USA's "Secretary," a resident of Washington State (U.S. individual one). In particular, petitioners note that this receipt contradicts the date Jinfu USA filed its "Application for a Master License." *See* Jinfu CEP Verification Exhibit 1.

Petitioners claim that the earliest reasonable opportunity for Jinfu PRC to correct this discrepancy would have been in December 2003, when it realized that the agreement had never been executed. Since Jinfu PRC did not avail itself of the earliest opportunity to alert the Department about this "mistake," petitioners contend that it cannot qualify as a correctable clerical error. According to petitioners, Jinfu PRC was aware of the need to notify the Department about the alleged clerical error when the preliminary results were announced; however, Jinfu PRC waited more than a month to bring this "mistake" to the Department's attention, and then did so by introducing substantial new information in its case brief.

Petitioners claim that correcting Jinfu PRC's alleged clerical error would entail a substantial revision of its response. Specifically, petitioners argue that Jinfu PRC's admission that it falsified documents should cause the Department to question the legitimacy of the records and statements currently on the record, even those that had been previously verified. Petitioners assert that acceptance of this new information should lead the Department to doubt, rather than confirm, the accuracy and authenticity of Jinfu PRC's submitted documents. Lastly, petitioners argue that acceptance of this new information contradicts other information on the record. As such, petitioners claim that the Department has ample grounds to reject this newly submitted information.

Because the error Jinfu PRC seeks to correct is not clerical, inadvertent, or unintentional

in nature, petitioners contend that the judicial precedents cited by Jinfu PRC do not support its claim that the Department is "required" to allow Jinfu PRC to correct this clerical error. First, unlike the evidence that was proffered by respondents in *AK Steel* after the close of the record, petitioners note that Jinfu PRC's explanation is a signed and sworn explicit acknowledgment that it back-dated a document that was critical to the establishment of affiliation with Yousheng USA/Jinfu USA. Thus, petitioners argue, this statement ascends far beyond one that is self-serving, and can only be characterized as fraudulent. Moreover, petitioners reiterate that, there is ample, verified record evidence that contradicts Jinfu PRC's explanation. In particular, petitioners note that the only corroborating document that could support this explanation, a hand-written receipt, was not subject to verification and lacks authenticity.

Finally, petitioners argue that because Jinfu PRC was aware that it had not accurately reported the events surrounding the signature of this important document, it cannot now allege that it was "unaware that it needed to provide" a further explanation. Similarly, petitioners contend that Jinfu PRC's error was not an "unintentional error" or mere "inadvertency," like the error in *World Finer Foods* or *Maui Pineapple*. In contrast, petitioners assert that the stock transfer agreement's signatories clearly intended to back-date the agreement; their only mistake was, allegedly, "failing to correctly back-date it." According to petitioners, Jinfu PRC's contention that the Department has engaged in "predatory gotcha policy," which the CIT noted with disapproval in *Bowe-Passat*, is patently absurd because by its own acknowledgment Jinfu PRC actively misled the Department. It is Jinfu PRC, and not the Department, petitioners claim, who is acting in a manner that is contrary to the promotion of "cooperation or accuracy or reasonable disclosure by cooperating parties intended to result in realistic dumping determinations."

In addition, petitioners argue that Jinfu PRC's claim that, like the respondents in *Ta Chen*, the Department failed to provide Jinfu PRC with sufficient notice, is without merit because (1) the Department asked sufficiently clear questions about the nature of the affiliation and sales between Jinfu PRC and Jinfu USA, (2) it was not the Department's job to ask for the receipt, which Jinfu PRC did not submit at that time, as the Department is not in the position to know what relevant documentation Jinfu PRC has in its possession concerning Jinfu USA's establishment, and (3) when Jinfu PRC provided this document, it could have explained why the document was not signed or dated. While Jinfu PRC attempts to assign blame to the Department for failing to point out inconsistencies arising from its attempt to manipulate documents, petitioners assert that the respondent carries the burden of creating an adequate record, as noted by the court in *Ta Chen* (citing *Chinsung Indus. Co. v. United States*, 13 CIT 103, 106, 705 F. Supp. 568, 601 (1989)).

Petitioners claim that Jinfu PRC has failed to establish good cause for the Department to accept its untimely-submitted information. To the contrary, petitioners argue that the new information submitted by Jinfu PRC indicates that it has attempted to conceal information and perpetrate a fraud on the Department. When a respondent has engaged in such deceptive activities, as Jinfu has done here, petitioners state that there is no reason for the Department to apply or even consider this equitable remedy. Petitioners contend that to permit Jinfu PRC to file untimely information under these circumstances would be inherently unfair to petitioners, who by regulation now have only ten days to respond to this information. *See* section

351.301(c)(1) of the Department's regulations. Petitioners explain that had Jinfu PRC properly raised this issue with the Department at its earliest opportunity in December 2003, petitioners, the Department, and Jinfu PRC could have had the benefit of at least an additional six months to brief and comment on the alleged error. Moreover, petitioners note that the Department could have thoroughly examined this issue at verification. Petitioners contend that there is absolutely no basis on which the Department can or should grant Jinfu PRC's request to correct an error the owners of Jinfu PRC and Yousheng USA made in falsifying a highly relevant document.

Department's Position:

We disagree, in part, with Jinfu PRC and petitioners. Contrary to Jinfu PRC's claims, the Department does not find that the factual information included in its July 7, 2004, case brief (*i.e.*, affidavits from the CEO of Jinfu PRC, the original owner of Yousheng USA, and Yousheng USA's/Jinfu USA's U.S. attorney (*see* Exhibits 1-2) and an alleged proof of payment for the purchase of Yousheng USA (*see* Exhibit 3)) should be accepted as a correction of a "clerical error" in the instant review based on the criteria established in *Colombian Flowers*. Nevertheless, the Department has determined to accept this new factual information under its discretionary authority to extend any time limit for good cause.

As noted in *Colombian Flowers*, the Department considers six factors in determining whether or not to accept corrections of clerical errors by interested parties during the course of an antidumping duty proceeding. In particular, the Department will accept corrections of clerical errors when the following conditions are met: (1) the error in question must be demonstrated to be a clerical error, not a methodological error, an error in judgment, or a substantive error; (2) the Department must be satisfied that the corrective documentation provided in support of the clerical error allegation is reliable; (3) the respondent must have availed itself of the earliest reasonable opportunity to correct the error; (4) the clerical error allegation, and any corrective documentation, must be submitted to the Department no later than the due date for the respondent's administrative case brief; (5) the clerical error must not entail a substantial revision of the response; and (6) the respondent's corrective documentation must not contradict information previously determined to be accurate at verification. *See Colombian Flowers* at 42834.

In applying these factors to the instant case, we find that Jinfu PRC has failed to demonstrate that the date appearing on the "Certificate of Transfer of Stocks" constitutes a "clerical" error within the meaning of *Colombian Flowers*. In particular, the CEO of Jinfu PRC admittedly committed an error in judgment, rather than a clerical error, in acting upon his intention to date the "Certificate of Transfer of Stocks" for a date other than the actual date on which he signed this document. We further note that the owner of Yousheng USA admitted that he "inserted the same date" used by Jinfu PRC's CEO, believing that the signing of the certificate "was merely a formality." *See* Jinfu PRC's July 7, 2004 case brief at Exhibit 1. This too, therefore, was clearly an error in judgment by the owner of Yousheng USA, and not a clerical error. In addition, with respect to the alleged receipt of payment submitted by Jinfu PRC at Exhibit 3 of its July 7, 2004 case brief, we note that Jinfu PRC failed to provide an explanation as to how the alleged receipt qualifies as a clerical error under the first prong of the

Department's test. As such, the first prong of the Department's test is not met.

Under the second prong of the test, the Department must be satisfied that the corrective documentation provided in support of the clerical error allegation is reliable. In reviewing the record in its entirety for these final results, we have concerns as to the veracity of the factual information provided by Jinfu PRC in its July 7, 2004 case brief, especially the alleged proof of payment. First, in their sworn statements, both the CEO of Jinfu PRC and the owner of Yousheng USA appear to admit to "back-dating" the "Certificate of Transfer of Stocks." *See* Jinfu PRC's July 7, 2004 case brief at Exhibit 1. Hence, the Department has concerns as to the reliability of documentation signed by parties that openly admit to dating a document to reflect a date other than the actual date on which it was signed.

Second, the unverified and unsubstantiated, hand-written "receipt" raises more questions than it answers, stating merely that, "I receive {$1,100} from {the CEO of Jinfu PRC} for transfer of the stock ownership in the U.S. Corp." *See* Jinfu PRC's July 7, 2004, case brief at Exhibit 3 (public version). The Department cannot, at this late date, confirm the credibility of this document. For example, the Department is left to assume that "the U.S. Corp." refers to Yousheng USA. Contrary to the unsubstantiated statements made by Jinfu PRC in its case brief, there is no evidence on the record suggesting that Department officials were ever presented with or verified this "receipt" at any time during verification in the PRC or in the United States. *See* Jinfu PRC and Jinfu CEP Verification Reports. Thus, this unverified, hand-written document, submitted at a very late stage in this review is not reliable, and therefore, the second prong of the Department's test is not met.

The "error" submitted by Jinfu PRC also fails the third prong of the Department's test, which states that the respondent must have availed itself of the earliest reasonable opportunity to correct the error. The Department finds that Jinfu PRC's "earliest reasonable opportunity to correct the error" would have been no later than in its December 30, 2003 SQR, which is when the stock transfer certificate was submitted and after the date the document was actually signed. Instead, the CEO of Jinfu PRC certified that the information therein was "to the best of his knowledge, complete and accurate." Notwithstanding his certification in the December 30, 2003 SQR, Jinfu PRC's CEO had knowingly signed and dated the "Certificate of Transfer of Stocks" for a date other than the date on which it was in fact signed. Further, the SQR was not "complete" as Jinfu PRC's certification implies, because Jinfu PRC did not provide the alleged receipt for the transfer of stock in response to the Department's request for "all relevant documentation" pertaining to the events that led to the establishment of Jinfu USA. *See* the Department's supplemental questionnaire to Jinfu PRC dated December 11, 2003. Lastly, the Department noted the date discrepancy of the "Certificate of Transfer of Stocks" in its Jinfu CEP Verification Report, which was released to Jinfu PRC on May 5, 2004 (*i.e.*, 3 weeks prior to the preliminary results). *See* Jinfu CEP Verification Report at 2-3. Jinfu PRC, therefore, knew of this "error" prior to the Department's preliminary results, and did not avail itself of the earliest reasonable opportunity to explain or correct this discrepancy.

Moreover, record evidence from the State of Washington and the "Amended Articles of Incorporation" prepared by Yousheng USA's/Jinfu USA's U.S. attorney, contradict the

information submitted and statements by Jinfu PRC concerning the date on which the transfer of ownership took place. First, none of the documents filed with the State of Washington state that the CEO of Jinfu PRC is the owner of Yousheng USA or Jinfu USA or that either Yousheng USA or Jinfu USA changed ownership. In fact, the document filed with the State of Washington on November 8, 2002, in which U.S. individual one amended the company name from Yousheng USA to Jinfu Trading (USA) Co., Ltd. requires the following: "If amendment provides for an exchange, reclassification, or cancellation of issued shares, provisions for implementing the amendment must be included. If necessary, attach additional amendments or information." However, the record lacks evidence demonstrating that Jinfu USA informed the State of Washington of any alleged change in ownership as late as November 8, 2002. Furthermore, Jinfu USA's "Amended Articles of Incorporation" were signed well after January 2003,[2] further calling into question the alleged date of transfer of ownership, and it is unclear from the record whether this document was in fact filed by Jinfu USA with the State of Washington. *See* the Department's BPI Memo at 2 for further discussion.[3] Lastly, Jinfu USA's application for a "Master Business License," examined by the Department at its Jinfu CEP Verification, contradicts Jinfu PRC's assertion that its CEO owned Jinfu USA on October 25, 2002. Due to the proprietary nature of this document, *see* the Department's BPI Memo at 2 for further discussion. *See* BPI Memo at 2

For all the reasons stated above, we have not accepted Jinfu PRC's correction as a clerical error or minor correction. Nevertheless, as explained below, the Department is exercising its discretion pursuant to 19 CFR 351.302(b) to accept this new factual information for the record of this new shipper review. Specifically, 19 CFR 351.302(b) provides that the Department may extend any deadline for "good cause." The Department determines that there is good cause for accepting the new factual information submitted in Jinfu PRC's July 7, 2004, case brief. We note that the submitted factual information is relevant to our analysis of whether or not Jinfu PRC is affiliated with Jinfu USA for purposes of this new shipper review. Moreover, we note that this factual information relates directly to the date of transfer of ownership, and to Jinfu PRC's claim concerning an alleged error in the "Certificate of Transfer of Stocks" which is already on the record. We, therefore, believe that it is appropriate in these circumstances to accept this information in order to evaluate Jinfu PRC's claims. We also note that our acceptance of this information will not otherwise prejudice any of the parties to this proceeding, as we have allowed the parties to comment on this new information.

We do not agree with petitioners that the acceptance of this new information would be inherently unfair. As noted above, petitioners were afforded the opportunity to comment on this

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[2] Jinfu USA claims that its U.S. attorney was paid in January 2003 for rendered legal services, including preparing its "Amended Articles of Incorporation" and "Certificate of Transfer of Stocks."

[3] Due to the proprietary nature of certain record documentation, we detail our analyses of these documents in the Memorandum to the File, through Abdelali Elouaradia, Analysis of Certain Business Proprietary Information Relating to the Relationship Between Jinfu Trading Co., Ltd. and Jinfu Trading (USA), Inc. (BPI Memo), dated October 25, 2004. A public version of the BPI Memo is on file in the CRU located in room B-099 of the Main Commerce Building.

information. Given the significance of this issue and in order to guarantee that our system is transparent and that all parties may provide insight into our decision-making process, we find good cause to accept this information.

Comment 2: Relationship between Jinfu PRC and Jinfu Trading (USA), Inc. (Jinfu USA)

General Overview

As noted above under Comment 1, in its case brief, Jinfu PRC provided new factual information in the form of affidavits from its CEO, the owner of Yousheng USA and Yousheng USA's/Jinfu USA's U.S. attorney, and proof of payment from Jinfu PRC's CEO for Yousheng USA.[4] *See* Jinfu PRC's July 7, 2004, case brief at Exhibits 1-3. Jinfu PRC placed this new information on the record to demonstrate that Jinfu PRC and Jinfu USA were "affiliated" during the relevant time period of the new shipper review. The crux of Jinfu PRC's argument is that the Department incorrectly determined that the major shareholder (and CEO) of Jinfu PRC was not the owner of Jinfu USA at the time that Jinfu PRC made the sale of subject merchandise being reviewed in this proceeding.

Due to the detailed factual nature of Jinfu PRC's comments on this issue, we have segregated Jinfu PRC's comments and petitioners' rebuttal comments into two subsections below. We address both in a consolidated Position following the second subsection.

A. The CEO of Jinfu PRC Acquired Yousheng USA On October 25, 2002, (Not October 25, 2003)

Jinfu PRC asserts that it was affiliated with Jinfu USA during the POR, specifically at the time of the sale that served as the basis for this new shipper review because the CEO of Jinfu PRC purchased Yousheng USA on October 25, 2002 (and not October 25, 2003) and Jinfu USA existed as a legally authorized corporation in the State of Washington as of October 4, 2002.

As discussed above, Jinfu PRC argues that the Department is required to correct the clerical error in the administrative record (*i.e.*, that the majority shareholder of Jinfu PRC acquired Yousheng USA on October 25, 2003).[5] Jinfu PRC contends that when this error is

[4] Although treated as proprietary information in Jinfu PRC's case brief, the name of Jinfu USA's predecessor, "Yousheng Trading (USA) Co., Ltd.," was treated as public information in the *Preliminary Results* because this information was released to the public in Jinfu PRC's December 30, 2003 SQR at Exhibit 16 (public version).

[5] Jinfu PRC claims that even if the Department does not correct the clerical error or does not determine that Jinfu PRC and Jinfu USA were affiliated by reason of a control relationship, the Department still should not rescind Jinfu PRC's new shipper review, since: (1) it submitted all relevant documentation regarding the sale between Jinfu PRC and Jinfu USA as Exhibits 7 and 8 of its September 17, 2003 Section A response; and (2) the facts and circumstances surrounding this sale have been verified by the Department. With respect to its latter claim, Jinfu PRC contends that the Department would be elevating form over substance by rescinding the instant review simply because certain documents which were submitted in a timely manner and subsequently verified were not placed on the record when the review was requested. Moreover, Jinfu PRC argues that since the Department's reporting requirements are informational, as distinguished from jurisdictional, the Department should allow a review to proceed to conclusion, when it discovers after the review has been initiated, and after verification has been

corrected, by a finding that ownership, in fact, was transferred on October 25, 2002, there can be no question that Jinfu PRC and Jinfu USA were affiliated parties prior to November 2, 2002, the date of Jinfu PRC's first sale of honey to the United States, and December 17, 2002, the date on which Jinfu USA resold the honey purchased from Jinfu PRC to an unaffiliated U.S. customer.

Jinfu PRC explains that during the course of preparing its supplemental questionnaire response in December 2003, counsel requested that Jinfu PRC send counsel all relevant documents required to respond to the Department's request for information and documentation surrounding the establishment of Jinfu USA, including evidence of any stock transfer between the original owner of Yousheng USA and the CEO of Jinfu PRC. Jinfu PRC claims that it sent to counsel the relevant PRC documents, including the original owner's receipt for payment for the sale of his interest in Yousheng USA to Jinfu PRC's CEO, dated October 25, 2002 (provided for the record in Jinfu PRC's July 7, 2004 case brief at Exhibit 3), and the "Certificate of Transfer of Stocks," signed by Yousheng's previous owner and the CEO of Jinfu PRC, dated "2003/10/25." However, according to Jinfu PRC, as a result of having to submit a comprehensive 455-page response to the Department's supplemental questionnaire by December 30, 2003, immediately after the Christmas weekend, counsel did not notice the obvious discrepancy between the date of signature on the "Certificate of Transfer of Stocks" and the date of actual transfer and payment.

Jinfu PRC notes that its counsel was not alone in failing to notice this obvious clerical error, since (1) counsel for petitioners did not comment on this discrepancy, (2) the Department issued a second supplemental questionnaire without asking for an explanation, and (3) this inconsistency was not raised by the Department during the U.S. verification nor in its verification report. Therefore, Jinfu PRC states it was astounded at the Department's preliminary determination to rescind its new shipper review based on the subsidiary finding that its CEO did not own Jinfu USA during the POR because the "Certification of Transfer of Stocks" was dated October 25, 2003.[6]

Jinfu PRC states that business transactions in the PRC between relatively unsophisticated businessmen are not conducted with the same precision as the Department is used to seeing in antidumping proceedings involving products from more highly-developed countries, including the United States, where parties are extremely conscious of the potential legal consequences of not having every aspect of a transaction memorialized in a formal, signed, and written agreement. As stated in his affidavit, the CEO of Jinfu PRC claims that in mid-December 2003,

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completed "without discrepancies" that the initial request for the review may not have contained all of the documents normally submitted prior to initiation. In support of its contention, Jinfu PRC cites *Ferro Union, Inc. v. United States*, 44 F.Supp. 2d 1310, 1316 - 1317 (CIT 1999) and *Taiyuan Heavy Machinery Import and Export Corp. v. United States*, 1999 WL 816108, 21 ITRD 1888 (CIT 1999).

[6] As a result of the Department's preliminary results, Jinfu PRC states that counsel requested that its CEO, the original owner of Yousheng USA, and the U.S. attorney responsible for drafting and filing the documents in issue explain the reason for this obvious discrepancy. Affidavits from these individuals are attached as Exhibits 1-2 of Jinfu PRC's case brief dated July 7, 2004.

when he received counsel's request for evidence of a stock transfer, after realizing that he forgot to sign the agreement, he signed the "Certificate of Transfer of Stocks" with the intention of dating it October 25, 2002, but inadvertently wrote down 2003. Jinfu PRC explains that this same mistake was repeated by the original owner of Yousheng USA.

According to Jinfu PRC, the fact that the "Certificate of Transfer of Stocks" was prepared in October 2002, and not in 2003, is proven by the "Receipt for Legal Services" rendered by Yousheng USA's/Jinfu USA's attorney and the affidavit from the U.S. attorney responsible for drafting and filing the documents at issue (provided at Exhibit 2 of Jinfu PRC's case brief). In particular, Jinfu PRC notes that the "Receipt for Legal Services" shows that the U.S. attorney charged Jinfu USA for legal services that were paid for on January 22, 2003, including preparation of the "Certificate of Stocks Transfer."

In light of the above, Jinfu PRC contends that the date set forth on the "Certificate of Transfer of Stocks" reflects only a mistake. Jinfu PRC further contends that all parties involved understood that the original owner of Yousheng USA transferred his interest to Jinfu PRC's CEO on October 25, 2002, as proven by (1) the receipt given by the original owner on that date, shown to the Department's verifiers during the Jinfu PRC verification, (2) the verified record in the instant proceeding includes documentation that supports its contention (*e.g.*, Corporate Resolution of Yousheng USA dated October 28, 2002), and (3) Jinfu USA's 2002 U.S. Corporation Income Tax Return identifies the CEO of Jinfu PRC as the owner of Jinfu USA.

In addition to the stock transfer agreement, Jinfu PRC asserts that the Department's decision to rescind its new shipper review was based on its subsidiary finding that "a company named Jinfu Trading (USA), Inc. did not exist until November 12, 2002." Based on official incorporation documents in the State of Washington, Jinfu PRC claims, however, that Jinfu USA was incorporated on October 4, 2002, a date that precedes both its sale of honey to Jinfu USA and Jinfu USA's resale to its unaffiliated U.S. customer. According to Jinfu PRC, the Department ignored the fact that the change of Yousheng USA's name to Jinfu Trading (USA), Inc. does not alter the date of incorporation because the corporation already existed. Therefore, Jinfu PRC argues that because Jinfu USA had a legal corporate existence as of October 4, 2002, the Department cannot properly contend that Jinfu USA did not exist before the subject transactions were consummated.

Based on general contract principles,[7] including the law of the State of Washington and prior "date of sale" determinations made by the Department, Jinfu PRC states that the fact that the document memorializing the sale of Yousheng USA from the original owner to its CEO was not signed by the parties on October 25, 2002, does not negate the fact that the sale was in fact consummated on that date.

[7] Jinfu PRC notes that its citations to contract law support the general principle that "where a signature is not required by statute or by express provision of the agreement, assent may be shown in other ways" (*see Commercial Standard Ins. Co. v. Garrett*, 70 F.2d 969, 974 (10th Cir. 1934)).

Citing various cases, Jinfu PRC asserts that its CEO became the owner of Yousheng USA in October 2002, notwithstanding the fact that the "Certificate of Transfer of Stock" was not signed at that time. For example, Jinfu PRC cites *Genesco, Inc. v. Joint Council 13, United Shoe Workers of America, AFL-CIO*, 341 F.2d 482, 486 (2nd Cir. 1965) for the proposition "that the parties plan later to sign an agreement does not preclude prior formation of the contract by signifying assent to an unsigned paper; the issue is one of intention." Jinfu PRC also cites to *Landham v. Lewis Galoob Toys, Inc.*, 27 F.3d 619, 624 (6th Cir. 2000), stating that "parties may be bound by the terms of an unsigned contract when their actions demonstrate assent to the agreement."

Citing *H.W. Gay Enterprises Inc. v. John Hall Electrical Contracting Inc.*, 792 So.2d. 580, 581 26 Fla. L. Weekly D1878 (Fla. 2001), Jinfu PRC claims that the Court upheld an arbitration clause in a written contract which had not been signed because "the parties' assent to the terms of the written contract was established by their words and conduct." In particular, Jinfu PRC notes that the Court found that the parties "did their best to comply with the terms of the agreement" and that all of the parties were "paid in accordance with the unsigned contract."

With respect to the law of the State of Washington, Jinfu PRC argues that it expressly provides that a signed, written contract is not required to enforce an agreement to sell securities. *See* Wash. Rev. Code § 62A.8-113, Wash. Rev. Code § 62A.8-104(1)(a), and Wash. Rev. Code § 62A.8-301(1)(b).

Moreover, Jinfu PRC claims that the Department, in its final determination of sales at less than fair value of *Gray Portland Cement and Clinker from Mexico*, 55 FR 29244 (July 18, 1990) at Comment 10 (citing the Uniform Commercial Code) has relied on these basic principles of contract law in its "date of sale" determinations. Jinfu PRC asserts that in *Certain Forged Steel Crankshafts from the Federal Republic of Germany; Final Determination of Sales at Less than Fair Value*, 52 FR 28170 (July 28, 1987) (*Crankshafts from Germany*) at Comment 1, the Department's date of sale determination was based on the earliest written evidence of an agreement in that case.

Thus, Jinfu PRC argues that application of these principles to the facts and circumstances, including (1) the Department's verification reports, verified business records (*i.e.*, Jinfu USA's U.S. Corporation Income Tax Return, corporate resolutions transferring ownership of Yousheng USA to the CEO of Jinfu PRC, correspondence between Jinfu PRC's CEO and U.S. individual one, proof of payment of legal fees) and (2) receipt of payment for the original owner's interest in Yousheng USA dated October 25, 2002 and the course of dealings between the parties, whereby U.S. individual one changed the name of Yousheng USA to Jinfu USA per the instructions of Jinfu PRC's CEO and obtained approval from the CEO of Jinfu PRC prior to consummating the resale of honey in the United States, in the instant proceeding, compels a conclusion that Jinfu PRC's CEO acquired ownership of Yousheng USA in October 2002.

Jinfu PRC asserts that the only document previously examined by the Department, which

arguably called into question the fact that the CEO of Jinfu PRC acquired Yousheng USA, later named Jinfu USA, in October 2002 was the "Certificate of Transfer of Stocks." Jinfu PRC, however, claims that now that it has corrected this clerical error, there can be no doubt that the ownership of Yousheng USA was transferred to the CEO of Jinfu PRC in October 2002, notwithstanding the fact that the "Certificate of Transfer of Stocks" was not signed when the sale took place. In summary, Jinfu PRC argues that a decision by the Department to ignore the "earliest written evidence of an agreement," which is reconfirmed by (1) the October 19, 2002, Resolution of the Jinfu PRC Board to set up an affiliated U.S. company, (2) the receipt of payment from Jinfu PRC's CEO by the original owner of Yousheng USA, (3) the October 28, 2002, Corporate Resolutions of Yousheng USA and Jinfu USA confirming that the stock had been transferred, and (4) substantial additional evidence of record (*e.g.*, verification interviews, proof of payment, course of dealing between parties, affidavits, *etc*.) would be contrary to its practice in *Crankshafts from Germany*. Thus, Jinfu PRC argues that as was the case in *Crankshafts from Germany*, in the instant proceeding, "the fact that {Jinfu USA was} delivered and paid for {in October 2002} indicates the existence of an agreement for sale."

Petitioners assert that the evidence provided by Jinfu PRC in this review wholly supports the Department's preliminary results that Jinfu PRC and Jinfu USA were not affiliated at the time of the sale because (1) independent documentation only establishes the incorporation of Yousheng USA on October 4, 2002, and the actual existence of Jinfu USA after November 2, 2002; (2) the "Certificate of Transfer of Stocks" on its face requires signatures in order to be operative; and (3) the documents on the record do not indicate the date on which Jinfu PRC's CEO took control of Jinfu USA.

First, according to petitioners, Jinfu PRC has submitted a number of documents for the record that are not notarized, and there are no independent means to verify that the documents were actually generated on the date shown. Petitioners claim that because Jinfu PRC's and Yousheng USA's officers have admitted that they back-dated certain documents, it cannot be automatically assumed that the dates on other documents are authentic. Petitioners assert that the record does contain documents generated by third parties, and the Department would be able in those instances to review the original source and verify that the dates on the documents submitted on the record had not been altered. Those documents, however, petitioners argue, only establish that a corporation unaffiliated with Jinfu PRC (*i.e.*, Yousheng USA) was incorporated on October 4, 2002. *See* Jinfu PRC's SQR at Exhibit 7. Petitioners also argue that the first third-party recognition of the existence of Jinfu USA was date-stamped on November 8, 2002, when the State of Washington recorded the name change of Yousheng USA to Jinfu USA.

Notwithstanding, petitioners state that the recording of the name change does not prove that there was an actual transfer of control of the corporation to the CEO of Jinfu PRC, and there are no official third-party documents on the record showing who owned the stock of Yousheng USA or Jinfu USA, until its U.S. Corporation Income Tax Return, which indicates that Jinfu PRC's CEO owned the stock as of December 31, 2002. *See* Jinfu CEP Verification Exhibit 2. Therefore, petitioners claim that the only person unequivocally associated with either company

until the time of the U.S. Corporation Income Tax Return is U.S. individual one, who incorporated the company on October 4, 2002, and it was not affiliated with Jinfu PRC at that time.

Secondly, petitioners note that Jinfu PRC cites to court cases and legal textbooks on contracts, which all state that a signature is not necessary for a valid contract, "unless the parties pretty clearly show that such signing is a condition precedent to legal obligation." *See Smith v. Onyx Oil and Chemical Co.*, 218 F.2d 104, 107-108 (3d Cir. 1955). Petitioners argue that because the Certificate of Transfer of Stocks has the following language: "THIS CERTIFICATE TRANSFER IS EFFECTIVE UPON EXECUTION BY THE UNDERSIGNED," that this language clearly shows that the parties intended the contract to not be effective until October 25, 2003. Further, petitioners note that according to the affidavits attached as Exhibits 1 and 2 of Jinfu PRC's brief, the stock transfer agreement was not actually signed until December 2003.

Thirdly, petitioners state that Jinfu PRC relies upon the October 4, 2002 Certificate of Incorporation of Yousheng USA and Jinfu USA's U.S. Corporation Income Tax Return as proof that its CEO owned Jinfu USA in October 2002. However, petitioners claim that these documents do not by themselves establish that the CEO of Jinfu PRC owned Jinfu USA in October 2002, but rather, only show that he did not own Jinfu USA on October 4, 2002, and that he acquired ownership at some indeterminate date by, at best, December 31, 2002. Petitioners further claim that the only documents that purport to tie ownership prior to the November 2, 2002, sale are the admittedly back-dated Certificate of Transfer of Stocks, and the hand-written receipt – a document whose true date cannot be independently authenticated, and thus, could have been generated at any time.

Petitioners assert that the October 19, 2002, Jinfu PRC Board Resolution merely records that the Board agreed "that offshore affiliated company should be set up when appropriate." *See* Jinfu PRC's December 30, 2003 SQR at Exhibit 3. With regard to the Corporate Resolutions of Yousheng USA and Jinfu USA, petitioners state that the resolutions are simply on plain pieces of paper, with no notarization or any other independent confirmation that they have not been back-dated. Furthermore, even if taken at face value, petitioners argue that these documents indicate the continued existence of Yousheng USA as of October 28, 2002.

According to petitioners, another document that questions the veracity of Jinfu PRC's claim of affiliation with Jinfu USA is the Master License filed with the State of Washington. *See* Jinfu CEP Verification Exhibit 1.

B. Jinfu PRC and Jinfu USA Were Under "Common Control" in October 2002

Jinfu PRC argues that even if the Department determines that it did not "own" Jinfu USA at the time Jinfu PRC made the sale of subject merchandise to the United States, nevertheless, its relationship with Jinfu USA meets the requirements defined by section 771(33)(F)-(G) of the Act, as amplified by the Court in *Ferro Union, Inc. v. United States*, 44 F.Supp 2d 1310, 1316 (CIT 1999), in that the term "affiliated parties" was expanded to encompass parties with

"operational control," notwithstanding the absence of "legal ownership . . . in order to address the realities of the marketplace." Based on the above, Jinfu PRC contends that the Department's conclusion that its CEO "was not in a position to exercise control over Jinfu USA at the time of the sale from Jinfu to Jinfu USA" ignores the critical modification of U.S. antidumping law set forth in *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 1999 WL 1001 194, 12-14 (CIT 1999) (*Ta Chen*) and evidence on the record of the instant proceeding. In *Ta Chen*, Jinfu PRC claims that the Court concluded that Ta Chen and one of its U.S. distributors, Sun, were affiliated parties notwithstanding the absence of traditional indicia of affiliation (*i.e.*, stock ownership and familial relationship).

Because the Department did not address the question of whether the requisite control existed at the time of the sale that formed the basis for the review request, *i.e.*, Jinfu USA's sale of honey to an unaffiliated U.S. customer on December 17, 2002,[8] Jinfu PRC claims that the appropriate question is whether Jinfu PRC and Jinfu USA were affiliated at the time of the sale from Jinfu USA to an unaffiliated U.S. customer on December 17, 2002. In particular, Jinfu PRC asserts that because Jinfu USA was controlled by its CEO and thereby, Jinfu PRC at the time of that sale, he was, at a minimum, "operationally in a position to exercise restraint or direction over {Jinfu USA}, the other person . . .," as provided for under section 771(33) of the Act. According to Jinfu PRC, the record evidence confirms that these companies were affiliated, even if the Department concludes that its CEO was not the "legal" owner of Yousheng USA/Jinfu USA in October 2002, by way of (1) the relationship between U.S. individual one and the original owner of Yousheng USA, (2) the relationship between U.S. individual one and the CEO of Jinfu PRC and Jinfu USA, and (3) Jinfu PRC's role in the resale between Jinfu USA and the unaffiliated U.S. customer.

Jinfu PRC explains that through a mutual friend, U.S. individual one became involved with an individual in the PRC interested in creating a U.S. branch for its company involved in the sale and distribution of baby strollers, which ultimately U.S. individual one established, with the assistance of a U.S. attorney on October 4, 2002. Jinfu PRC further explains that by that time, the owner of the newly formed Yousheng USA changed his mind and offered to reimburse U.S. individual one for the expenses incurred to incorporate the company. Jinfu PRC notes that the owner of Yousheng USA decided to leave the newly formed corporation intact for possible future use.

Shortly thereafter, Jinfu PRC notes that its CEO was introduced to U.S. individual one by another mutual friend, a businessman in Kunshan, PRC. In early October 2002, Jinfu PRC states that its CEO explained his desire to have representation in the United States for his honey trading business with U.S. individual one. During this conversation, Jinfu PRC claims that U.S.

[8] Jinfu PRC notes that its sale to Jinfu USA was made on November 2, 2002, prior to the new shipper review period (*i.e.*, December 1, 2002, through May 31, 2002).

individual one suggested that the CEO of Jinfu PRC purchase Yousheng USA because it was already incorporated in the State of Washington. Subsequently, Jinfu PRC states that its CEO contacted the owner of Yousheng USA, and the two men discussed the sale of Yousheng USA in Shanghai, PRC. Jinfu PRC states that, after that meeting, its CEO contacted U.S. individual one to inform him that he intended to buy Yousheng USA and offered to hire U.S. individual one to help run the company in the United States.

Additionally, based on information contained in the Jinfu CEP Verification Report, Jinfu PRC claims that it is clear that from its inception its CEO was exercising effective control over the actions of its Secretary (*i.e.*, U.S. individual one) as he filed the necessary documents with the State of Washington to change the corporate name from Yousheng USA to Jinfu USA at his directive. Jinfu PRC notes that at verification the Department was given the October 19, 2002, "Resolution of Jinfu PRC's Board," authorizing its CEO to establish an affiliated company in the United States. *See* Jinfu PRC's December 30, 2003, SQR at Exhibit 3. Moreover, Jinfu PRC also notes that U.S. individual one explained to the Department's verifiers the nature of his employment with Jinfu PRC and compensation. In particular, Jinfu PRC states that its CEO agreed to pay U.S. individual one a beginning monthly salary, with a promise of a bonus if the business proved successful.

Petitioners argue that the record does not show that Jinfu PRC and Jinfu USA were under "common control," but rather the record shows nothing more than the standard cooperation between an unaffiliated buyer and seller. First, petitioners note that Jinfu PRC's claim that the appropriate question is whether there was evidence of common control at the time of Jinfu USA's sale of honey to its U.S. customer, which it argues took place on December 17, 2002. Petitioners claim that this is not the proper date of sale because if Jinfu USA was not affiliated with Jinfu PRC at the time of sale between Jinfu PRC and Jinfu USA, then that sale was the sale to the first unaffiliated purchaser in the United States. Therefore, petitioners contend that any subsequent resale by Jinfu USA is legally irrelevant.

Petitioners state that, from the narrative, it appears that U.S. individual one incorporated Yousheng USA in anticipation of doing business with its PRC owner, but nothing ever arose from that business. Petitioners assert that there is no indication that the original owner of Yousheng USA ever provided any consideration for U.S. individual one's efforts, and there are no documents regarding the incorporation of Yousheng USA showing that the "PRC owner" actually ever received the shares of the corporation. Moreover, petitioners note that U.S. individual one himself was responsible for the legal expenses for the incorporation, although the PRC owner verbally told U.S. individual one that he would reimburse him for those expenses. In the end, petitioners assert that he never did, and U.S. individual one paid the legal bill out of the proceeds from the sale to the ultimate buyer.

With respect to Jinfu PRC's claim that U.S. individual one was a salaried employee of Jinfu USA, petitioners contend that Jinfu USA's 2002 Income Statement and general ledger show that U.S. individual one simply took a commission and that he did not conduct himself as merely an employee. In particular, petitioners argue that U.S. individual one was careful never

to tell the CEO of Jinfu PRC the identity of the potential customer, because, he explained at verification, "he does not want {Jinfu PRC's CEO} to be directly accessible by Jinfu USA's U.S. customers because of the possibility that Jinfu would sell directly to the customers." *See* Jinfu CEP Verification Report at 8. Therefore, petitioners argue that U.S. individual one was not acting as an employee, but rather as an independent trader who is concerned that his supplier will by-pass him and sell directly to his customer. If U.S. individual one eventually became merely an employee, petitioners contend that he did not have such status at the time of the sale.

Petitioners note that the record contains several documents written in Chinese that are purported to be an exchange of facsimiles between U.S. individual one and the CEO of Jinfu PRC, although neither document has the standard facsimile transmission information at the bottom or top. *See* Jinfu CEP Verification Report at 6-7. Petitioners further note that the facsimiles are dated November 13, 2002, although the date on the first document appears to be a written-in afterthought. Petitioners explain that these documents indicate the per metric ton price that Jinfu USA's customer in the United States was willing to pay, which was approved by Jinfu PRC's CEO. The contract with the ultimate U.S. buyer is signed on November 15, 2002, and petitioners note that the terms do not change between then and shipment to the ultimate buyer. Petitioners assert that the honey, however, had already been sold to U.S. individual one's company, and was en route to the United States, with the sales confirmation dated November 1, 2002, and the invoice dated November 2, 2002. Petitioners state that the terms of this sale also did not change between contract and receipt and payment.

There is, in short, petitioners argue, no indication of "common control" between Jinfu PRC and Jinfu USA at the time of the sale at issue. Instead, petitioners contend that it appears that U.S. individual one took steps, pursuant to verbal discussions, to change the name of his company to Jinfu USA in preparation for a later, more formal arrangement, but he got ahead of himself, and changed the name before the CEO of Jinfu PRC obtained actual control of the company.[9]

Department's Position:

We disagree with Jinfu PRC, and continue to find in these final results that Jinfu PRC and Jinfu USA were not "affiliated" within the meaning of section 771(33) of the Act at the time of the relevant new shipper sale. In the preliminary results, we determined, based on information on the record, that Jinfu PRC and Jinfu USA were not affiliated at the time of Jinfu PRC's first sale to the United States, which occurred on November 2, 2002.[10] In making this determination, we noted that the evidence on the record suggested that Jinfu PRC did not actually own Jinfu USA until after the POR. Specifically, Jinfu PRC's CEO and the owner of Jinfu USA's

[9] Petitioners note that the name became formally changed after November 2, 2002, after Jinfu PRC had sold the honey to U.S. individual one's company and put the container on a ship bound for the United States.

[10] More specifically, Jinfu PRC and Jinfu USA executed the sales contract on November 1, 2002. Jinfu PRC then issued the sales invoice to Jinfu USA on November 2, 2002.

predecessor (*i.e.*, Yousheng USA) did not actually execute the stock transfer agreement (*i.e.*, the "Certificate of Transfer of Stocks") until October 25, 2003, approximately five months after the POR and over a year after Jinfu PRC's first sale to the United States. In addition, the Department further noted in the preliminary results that Jinfu USA's predecessor (*i.e.*, Yousheng USA) did not "officially" become Jinfu USA until ten days after the new shipper sale.[11] Thus, the Department concluded that Jinfu PRC and Jinfu USA were not affiliated at the time of the new shipper sale, nor were they affiliated at any time during the POR.

For purposes of these final results, we continue to find that Jinfu PRC and Jinfu USA were not affiliated based on our analysis of record evidence demonstrating that Jinfu PRC did not own Jinfu USA at the time of the relevant U.S. sale. Second, we also find that Jinfu PRC has failed to demonstrate that either its CEO or Jinfu PRC was otherwise in a position to exercise control over Jinfu USA within the meaning of section 771(33) of the Act as discussed below.

With regard to the instant case, the affiliation provisions of section 771(33) of the Act, which define affiliated persons, are controlling.

Section 771(33) of the Act states that affiliated persons include:

(A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.
(B) Any officer or director of an organization and such organization.
(C) Partners.
(D) Employer and employee.
(E) Any person directly or indirectly owning, controlling, or holding with power to vote, five percent or more of the outstanding voting stock or shares of any organization and such organization.
(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
(G) Any person who controls any other person and such other 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. In determining whether control over another person exists within the meaning of section 771(33) of the Act, the Department considers the following factors, among others: corporate or

[11] With respect to our analysis of the existence of Jinfu USA in the State of Washington, we find that the company named Jinfu Trading (USA), Inc. did not exist until November 12, 2002, after the invoice was issued for the relevant sale. The fact that Jinfu USA was not legally in existence until after the invoice was issued, further demonstrates that the Jinfu PRC and Jinfu USA were not affiliated at the time of the new shipper sale. *See Final Results of New Shipper Review: Petroleum Wax Candles from the People's Republic of China*, 67 FR 41395 (June 18, 2002) and accompanying Issues and Decision Memorandum at Comment 1.

family groupings; franchise or joint venture agreements; debt financing; close supplier relationships. *See* 19 CFR 351.102(b). The Department will not find affiliation on the basis of these factors unless the relationship has the potential to affect decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. *Id*. *See also Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From Malaysia*, 69 FR 34128 (June 18, 2004) and accompanying Issues and Decision Memorandum at Comment 11.

When, as in this case, the Department is faced with a commercial relationship between the foreign producer and a U.S. entity, and there is a question as to whether the producer has legal or operational control over the U.S. entity, or *vice versa*, the Department will examine the facts and circumstances to determine whether the parties are affiliated. The Department's affiliation analysis is based on the facts and circumstances of a given relationship. *See Preliminary Determination of Sales at Less Than Fair Value and Postponement of the Final Determination: Magnesium Metal From the People's Republic of China*, 69 FR 59187, (October 4, 2004) (*Magnesium Metal from the PRC*).

In accordance with these requirements, we examined all of the facts and circumstances surrounding the relationship between Jinfu PRC, Jinfu PRC's CEO, and Jinfu USA. After reviewing all of the information on the record, we do not find the existence of an affiliation, as defined by the statute or our regulations, between Jinfu PRC or its CEO, and Yousheng USA/Jinfu USA. First and foremost, Jinfu PRC and its CEO had no stock or other ownership interests in Jinfu USA at the time of the relevant sale of honey was shipped to the United States. Nor did the two companies share managers or common familial ownership. Second, Jinfu PRC provided no compelling record evidence otherwise demonstrating an indicia of "control" by Jinfu PRC or its CEO over Jinfu USA at the time of the sale in question.

Ownership Considerations

In considering whether Jinfu PRC was affiliated with Jinfu USA under section 771(33) of the Act, we considered whether the purchase of Jinfu USA by the CEO of Jinfu PRC, as delineated in the stock transfer agreement, resulted in an ownership or common control relationship between Jinfu USA and Jinfu PRC at the time of Jinfu PRC's single sale of subject merchandise to Jinfu USA during the POR.

As noted in the *Preliminary Results*, record evidence indicates that neither the CEO of Jinfu PRC nor Jinfu PRC actually owned Jinfu USA (or its predecessor, Yousheng USA) until well after the sale at issue. The stock transfer agreement or "Certificate of Transfer of Stocks" was executed and signed by the relevant parties on October 25, 2003, well after the invoice date and shipment date of the merchandise from Jinfu PRC to Jinfu USA. *See* Jinfu PRC's December 30, 2003 SQR at Exhibit 3. In other words, the material terms of the sale between Jinfu PRC to Jinfu USA had been established prior to the effective date of the stock transfer agreement, and prior to any payment or transfer of ownership between Jinfu PRC and Jinfu USA.[12]

[12] We note that the stock transfer agreement does not provide Jinfu PRC's CEO with any legal or operational authority to exercise restraint or direction over Jinfu USA with regard to the sale at issue in this new shipper review.

Jinfu PRC argues that, notwithstanding the date actually appearing on the stock transfer agreement, the document was in fact executed prior to that time, and that the date appearing on the "Certificate of Transfer of Stocks" was due to a "clerical" error. Jinfu PRC seeks to support this contention by arguing that, again notwithstanding the dates on the stock transfer agreement, or the actual signature date, the stocks were transferred in October 2002, and payment was made at that time. In support of its claim that the "Certificate of Transfer of Stocks" was prepared in October 2002, and not in 2003, Jinfu PRC cites the following record evidence: (1) the receipt for legal services rendered by Yousheng USA's/Jinfu USA's attorney; (2) Corporate Resolution of Yousheng USA, dated October 28, 2002; (3) Jinfu USA's 2002 U.S. Corporation Income Tax Return; and (4) State of Washington Certificate of Existence/Authorization.

Jinfu PRC's arguments on this point are wholly without merit. With regard to Jinfu PRC's argument concerning the alleged "clerical" error, for all the reasons discussed above in response to comment 1, we have determined that the date appearing on the stock transfer agreement is not the result of a "clerical" error. Moreover, as explained below in more detail, the evidence and explanations proffered by Jinfu PRC in an effort to explain away its failure to execute the stock transfer agreement are neither credible nor reliable.

First, the receipt for legal services rendered by Yousheng USA's/Jinfu USA's attorney (receipt for legal services) is neither credible nor reliable evidence supporting Jinfu PRC's affiliation arguments. The services listed on the receipt, in the amount of $2,600, are as follows: (1) Amendment of Articles of Incorporation and Bylaws; (2) Corporation resolution; (3) Issuance of company stock; and (4) Certificate of stock transfer. *See* Jinfu PRC's December 30, 2003 SQR at Exhibit 16. While on the face of the receipt these services appear to be related to the establishment of Jinfu USA, statements made at verification and the "Certificate of Transfer of Stocks" indicate that the expenses were actually related to the original establishment of Yousheng USA. At verification, U.S. individual one explained that the original owner of Yousheng USA verbally agreed to reimburse him at some point in the future for incurred legal expenses in the amount of $2,600 related to the initial formation of Yousheng USA. The "Certificate of Transfer of Stocks" references $2,600 in legal fees incurred in the formation of Yousheng USA. Therefore, the legal services rendered appear to be related to the original formation of Yousheng USA, not any subsequent transfer of ownership or establishment of Jinfu USA.

Second, the "Corporate Resolution of Yousheng USA," dated October 28, 2002, does not support, but rather contradicts the terms allegedly agreed to by the parties in the "Certificate of Transfer of Stocks." As discussed in detail below, the amount of shares allegedly transferred to the CEO of Jinfu PRC on October 25, 2002 is different from the amount of shares listed in Jinfu USA's "Amended Articles of Incorporation" dated March 24, 2003. The Corporate Resolution

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Moreover, the absence of an actual investment or transfer of ownership to Jinfu PRC's CEO during the POR, further supports a conclusion that Jinfu PRC's CEO was not in a position to exercise control over Jinfu USA at the time of the sale from Jinfu PRC to Jinfu USA.

of Yousheng USA, dated October 28, 2002, states that its 9,500 shares of common stock were authorized to be transferred to the CEO of Jinfu PRC. However, the Amended Articles of Incorporation of Jinfu USA signed after October 28, 2002, reference a different amount of shares of common stock, thereby raising questions as to whether in fact the 9,500 shares of Yousheng USA common stock were in fact transferred pursuant to the alleged ownership agreement.

Further, we note that the alleged corporation resolutions of Yousheng USA and Jinfu USA, both dated October 28, 2002, were not filed by Jinfu PRC in its December 30, 2003 SQR. Given the nature of these documents, Jinfu PRC should have included these documents in order to fully respond to the Department's request for all relevant documentation on the establishment of Jinfu USA. *See* Jinfu PRC's December 30, 2003 SQR at 5-6 and at Exhibit 3. Instead, Jinfu PRC presented these documents to Department officials during its verification of Jinfu USA in March 2004, raising additional concerns about their credibility and existence at an earlier point in time. As discussed below, the Department has concerns as to the credibility of other documents allegedly prepared by Yousheng USA's/Jinfu USA's attorney in 2002 (*i.e.*, "Certificate of Transfer of Stocks," Receipt for Legal Services, and Amendment of Articles of Incorporation and Bylaws), and we find that our examination of these documents further support our contention that these documents are not reliable and not corroborated by third-party evidence.

We also find that Jinfu USA's application for a master license with the State of Washington supports our determination that Jinfu PRC and Jinfu USA were not affiliated at the time of the relevant U.S. sale and during the POR. Due to the proprietary nature of this document, the Department's detailed analysis of Jinfu USA's Master License is discussed in the BPI Memo at 2.

Third, contrary to Jinfu PRC's argument, we do not find that because Jinfu USA's 2002 U.S. Corporation Income Tax Return identifies the CEO of Jinfu PRC as the owner of Jinfu USA it supports a reversal of the Department's finding of no affiliation between Jinfu PRC and Jinfu USA at the time of the relevant U.S. sale of honey. The tax return dated June 2003, well after the relevant sale and after the POR, is not signed by any party (signature lines are left blank), and therefore, raises the question as to whether or not the return was, in fact, filed with the IRS.

Fourth, we note that the "Certificate of Incorporation" dated October 4, 2002 referenced in the "State of Washington Certificate of Existence/Authorization" was, in fact, issued to Yousheng Trading (USA) Co., Ltd. not Jinfu USA. *See* Jinfu PRC's December 30, 2003, SQR at Exhibit 7. Therefore, contrary to Jinfu PRC's claim, the "State of Washington Certificate of Existence/Authorization" does not corroborate its statement that Jinfu USA was incorporated on October 4, 2002.

Fifth, there is no reliable evidence on the record to support the fact that the original owner of Yousheng USA received payment for his interests in Yousheng USA from any entity/individual including the CEO of Jinfu PRC. Rather in its case brief dated July 7, 2004,

Jinfu PRC provided a hand-written "receipt of payment" that states, "I receive {$1,100} from {the CEO of Jinfu PRC} for transfer of the stock ownership in the U.S. Corp." This document, submitted for the first time in the briefing phase of this proceeding, was neither provided to the Department in any questionaire response nor presented at verification. Further, the receipt is allegedly signed by the same gentlemen that admits to back-dating the "Certificate of Transfer of Stocks." As such, the Department has serious concerns as to the reliability of this receipt of payment as proof that ownership from the original owner of Yousheng USA was transferred to the CEO of Jinfu PRC.

Finally, the only term of the stock transfer agreement that appears to have been actually executed is the name change from Yousheng USA to Jinfu USA, which according to documents filed with the State of Washington, was executed by U.S. individual one on November 12, 2002, 10 days after the date of the relevant sale of honey from Jinfu PRC to Jinfu USA.

Lastly, we find that Jinfu PRC's argument that, under general contract principles and the state law of Washington, the Department should find that Jinfu PRC nevertheless "owned" Jinfu USA at the time of sale, October 2002, on the basis of (1) court decisions regarding contract law; (2) contract law in the State of Washington; and (3) the Department's reliance on these basic principles in its "date of sale" determinations, is wholly without merit. In administering the antidumping laws, the Department is neither bound by, nor required to consider, state or other general common law principles on contracts. *See Toho Titan Co., Ltd. v. United States*, 743 F. Supp. 888, (CIT 1990) (*Toho Titan*). Rather, the Department makes its antidumping findings in accordance with the dictates of the antidumping laws, its antidumping regulations, and its established antidumping practice. In this particular case, and as mentioned above, the Department is governed by section 771(33) of the Act, and the definition of affiliated parties within the meaning of that statute, and within the meaning of section 351.102(b) of its regulations. While the Department may consider the reasoning or general applicability of common law or state law provisions governing contracts, it is not obligated to do so. *See Toho Titan* at 891.

In this case, we have reviewed the authorities cited by Jinfu PRC and determine that they are not relevant in determining whether Jinfu PRC was "affiliated" with Jinfu USA within the meaning of section 771(33) of the Act. Many of the cases cited by respondent relate to general contract issues that have not arisen in the context of the antidumping laws. Other cases relate only to date-of-sale issues, rather than affiliation issues. While some of the cases cited by Jinfu PRC do shed light on when an agreement might be considered executed for various purposes, none of the cited cases address the situation presented in this case, involving an affiliation determination in the context of the execution of a stock certificate transfer. Accordingly, we decline to apply the reasoning of those decisions to the facts of this case.[13]

[13] In any event, as noted by petitioners, the "Certificate of Transfer of Stocks" itself contains language indicating that the certificate of transfer is not effective until execution by the parties (*i.e.*, Jinfu PRC's CEO and the original owner of Yousheng USA). The "Certificate of Transfer of Stocks" specifically states, "This certificate transfer is effective upon execution by the parties."

In summary, we find that the record evidence submitted by Jinfu PRC is neither credible, nor supports its contention that Jinfu PRC and Jinfu USA were affiliated at the time of the relevant sale under review.

Other Indicia of Control

With respect to Jinfu PRC's argument that it exercised "control" over Jinfu USA, we find no record evidence to that effect. As noted above, in determining whether control over another person exists, we normally look for such factors as corporate or family groupings, franchise or joint venture agreements; debt financing; close supplier relationships, *etc*. *See* 19 CFR 351.102(b). Jinfu has not provided any credible evidence of any such type of control.[14] Rather, Jinfu PRC appears to argue that such "control" exists in this case simply by virtue of the fact that U.S. individual one was involved personally and commercially with Yousheng USA and its original owner, and with Jinfu PRC and its CEO. This argument is neither credible nor persuasive.

First, we note that the level of U.S. individual one's involvement with Yousheng USA and its original owner is not dispositive of the Department's analysis as to whether or not Jinfu PRC and Jinfu USA were affiliated parties at the time of sale. In particular, we note that this information is only relevant to how and why Yousheng USA was established in October 2002. More importantly, as noted by petitioners, Jinfu PRC's narrative appears to demonstrate that Jinfu PRC and Jinfu USA had an ongoing, arm's-length commercial relationship established for the mutual benefit of each party. We do not find evidence of any type of control by one party over the other.

In addition, documents from the State of Washington appear to indicate that U.S. individual one was at all times acting independently of Jinfu PRC or its CEO (*see, e.g.,* application filed to form Yousheng USA with the State of Washington, dated October 4, 2002, indicating U.S. individual one as the owner of that company; and November 8, 2002 amendment to the company name from Yousheng USA to Jinfu Trading (USA) Co., Ltd. signed by U.S. individual one).

With respect to Jinfu PRC's argument that a finding in this case that Jinfu PRC and Jinfu USA are not affiliated will create a harmful precedent for future cases, we disagree. We reiterate our position that each "affiliation" decision is fact specific, and must be done on a case-by-case basis. Our findings here are based on the unique fact pattern of this case. In particular, we note

[14] Moreover, the Department does not find affiliation on the basis of these factors unless the relationship has the potential to affect decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. *Id*. Jinfu PRC has not provided credible evidence demonstrating such types of control over Jinfu USA. Nor has Jinfu provided evidence of other types of control recognized by the Department in other proceedings. *See, e.g., Magnesium Metal from PRC* (looking at principal/agent relationships as element of control); *Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan; Final Results of Administrative Review*, 65 FR 2116 ((January 13, 2000) (considering, *inter alia*, computer access and control of disbursements).

that much of the factual information submitted by Jinfu PRC both during the information-gathering phase of this proceeding, as well as the new information provided in Jinfu PRC's case brief, is fraught with inconsistencies and hence neither credible nor reliable. We note further that some of Jinfu PRC's own information suggests that the involved parties engaged in efforts to back-date corporate documents.

Thus, for all reasons discussed above, we find that Jinfu PRC and Jinfu USA were not "affiliated" within the meaning of section 771(33) of the Act at the time of the relevant sale for purposes of this review. Accordingly, the Department has determined that Jinfu PRC's sale of honey to Jinfu USA was the first sale to an unaffiliated customer in the United States. Therefore, consistent with the *Preliminary Results*, we are rescinding this review for Jinfu PRC because Jinfu PRC failed to submit the required new shipper certifications for the relevant U.S. sale.[15]

Comment 3: *Bona Fides* of the Relevant U.S. Sale

Jinfu PRC argues that the record clearly establishes that Jinfu USA's sale to its unaffiliated U.S. customer was a *bona fide* sale and should be used to calculate a constructed export price (CEP)-based U.S. price. Jinfu PRC claims that the Department has repeatedly recognized that "new shipper" sales constitute *bona fide* transactions, notwithstanding the fact that they differ, in certain respects, from commercial sales of experienced traders of a particular commodity. Jinfu PRC further claims that the Department has also recognized that the fact that a new shipper had only one U.S. sales transaction does not suggest that the transaction is not *bona fide*. Citing *Salmon from Norway*, Jinfu PRC states that the Department may conduct a dumping analysis based upon a single sale, even where the sale is designed for the express purpose of reducing the cash deposit rate. *See Fresh and Chilled Atlantic Salmon From Norway; Final Results of New Shipper Antidumping Duty Administrative Review*, 62 FR 1430 (January 10, 1997) (*Salmon from Norway*).

Citing *New Shipper Review of the Antidumping Order on Fresh Garlic from the People's Republic of China*, 67 FR 72139 (December 4, 2002) (*Fresh Garlic from the PRC*) and accompanying Issues and Decision Memorandum at Comment 1, Jinfu PRC notes that the Department normally examines the totality of the circumstances surrounding the sale(s) in question in determining whether sales are *bona fide* commercial transactions. Jinfu PRC contends that the Department, in the final results of the new shipper review of certain in-shell raw pistachios from Iran, addressed many of the issues which petitioners in the instant review may decide to raise, including (1) the limited number of shipments and small quantity of merchandise sold; (2) the legitimacy of the new shipper as a commercial enterprise; (3) the time lag between initial shipment and additional commercial shipments; and (4) the pricing between the manufacturer and new shipper, and new shipper and its unaffiliated U.S. customer. *See Final Results of the Antidumping Duty New Shipper Review of Certain In-Shell Raw Pistachios from*

[15] Jinfu PRC's argument that the Department should not rescind this review because it has nevertheless submitted certain documentation regarding the EP transaction is irrelevant. The Department is rescinding this review because Jinfu PRC failed to submit all new shipper certifications for this sale at the time it requested this review, as required by 19 CFR. 351.214(b).

Iran, 68 FR 353 (January 3, 2003) (*Pistachios from Iran*) and accompanying Issues and Decision Memorandum at Comment 2. Jinfu PRC states that in *Pistachios from Iran*, the Department determined that the U.S. sale was a *bona fide* transaction and that rescission of the review was unwarranted.

Similarly, in *Crawfish from the PRC*, Jinfu PRC explains that the Department considered the following issues, which led to the determination that the sale was *bona fide* for that case (1) the legitimacy of price negotiations between the new shipper and its unaffiliated customer; (2) the quantity shipped; (3) the price paid by unaffiliated customer; (4) the comparison to prices and quantities of subsequent sales; and (5) the overall business operations of the exporter and importer. *See Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty New Shipper Review and Final Rescission of Antidumping Duty New Shipper Review*, 68 FR 1439 (January 10, 2003) (*Crawfish from the PRC*) and accompanying Issues and Decision Memorandum at Comment 1.

Jinfu PRC claims that the application of the above principles to the evidence of record in the instant review leads to the conclusion that the transaction between Jinfu USA and its unaffiliated customer constitutes a *bona fide* sale, which, according to Jinfu PRC, the Department is required to examine for the purpose of calculating CEP. In support of its claim, Jinfu PRC cites the following: (1) the quantity of its initial shipment, which Jinfu PRC states was consistent with the quantities of subsequent shipments (*see* Jinfu PRC's September 17, 2003 AQR at Exhibit 8, Jinfu CEP Verification Exhibits 5 and 13, and Jinfu PRC's December 30, 2003 SQR at Exhibit 9); (2) the pattern and number of shipments before and after the initial resale, which Jinfu PRC states is consistent with the manner in which new shippers enter a new market; (3) the manner in which Jinfu PRC established its resale price for the initial shipment to its unaffiliated U.S. customer, which Jinfu PRC states was consistent with normal commercial practices (*see* Jinfu CEP Verification Report at 6-7, Jinfu CEP Verification Exhibits 3, 13, and 15, and Jinfu PRC's SQR at Exhibit 4); (4) the manner in which Jinfu PRC was paid by the U.S. customer, which Jinfu PRC states was consistent with normal commercial practices (*see* Jinfu PRC's AQR at Exhibit 7 and Jinfu CEP Verification Exhibit 13); (5) the legitimacy of Jinfu PRC and Jinfu USA as commercial enterprises (*see* Jinfu PRC Verification Exhibits 24 at 1 and 26 at 3, Jinfu CEP Verification Exhibit 15 at 2, and Jinfu CEP Verification Report at 11); and (6) the manner in which Jinfu PRC and Jinfu USA conducted their business operations, which Jinfu PRC states is consistent with how new shippers attempt to enter the U.S. market after an antidumping order is in place.

Jinfu PRC states that, in setting the price of its initial sale to Jinfu USA, its CEO considered the same factors as any legitimate businessman would, including Jinfu PRC's purchase costs, freight and duty expenses, the price at which Jinfu PRC was selling honey to Japan (*see* Jinfu PRC Verification Report at 6-7), and Jinfu USA's potential profit. According to Jinfu PRC, this price was established in the same manner as other companies establish prices when entering a market for the first time, especially a market which requires payment of a substantial cash deposit of estimated antidumping duty. Jinfu PRC notes that the price paid by the U.S. customer was based solely on market conditions. Citing *Pistachios from Iran*, Jinfu

PRC claims that the Department has recognized that the critical factor in the analysis of the *bona fides* of a new shipper sale is the price paid by the first unaffiliated customer in the United States, rather than the intra-company price between affiliated parties.

Moreover, according to Jinfu PRC, it is not surprising that Jinfu PRC waited until the final quarter of 2003 to resume shipments and sales of honey to the United States. Jinfu PRC states that in *Pistachios from Iran*, the Department noted that it is not unreasonable that a new shipper formed solely for the purpose of selling subject merchandise to the United States would await the outcome of the Department's review before proceeding with additional sales to the U.S. market. Jinfu PRC argues that, similarly, it was not unreasonable for it to resume shipments to the United States only after it obtained new shipper status and was able to post bond for estimated antidumping duty, rather than pay the prohibitive 183.80 percent cash deposit for shipments of honey from PRC new shippers at time of entry. Jinfu PRC further argues that the new shipper process was designed to allow companies to act in the same manner as Jinfu PRC and Jinfu USA have acted in the instant review, and that the fact that these procedures facilitated Jinfu PRC's entry into the U.S. market cannot be a reason to deny Jinfu PRC its right to new shipper status.

Jinfu PRC maintains that the Department's verification reports constitute compelling evidence that both Jinfu PRC and Jinfu USA are legitimate business enterprises whose initial sale to the United States was *bona fide*. Jinfu PRC claims that the verifications conducted by the Department were unprecedented in that not only did the Department verify Jinfu PRC's new shipper sales in 2002, but also conducted a complete verification of all of Jinfu PRC's sales in 2003. Jinfu PRC alleges that the Department's verifications were complete and that the Department found no discrepancies. For all of the reasons above, Jinfu PRC asserts that the Department cannot reasonably conclude that the sale between Jinfu USA and the unaffiliated U.S. customer was anything other than a *bona fide* commercial transaction. Therefore, according to Jinfu PRC, the Department should determine that rescission of this review is unwarranted.

Petitioners argue that all in all, the many glaring inconsistencies in the record point to U.S. individual one, the CEO of Jinfu PRC, and the ultimate U.S. buyer setting up a sale of honey from the PRC to the United States before they had fully prepared all the necessary paperwork and legal business structures. After which, the individuals, petitioners claim, reviewed these documents with an eye to the antidumping order, and prepared documentation to give the appearance of a CEP sale during the POR. For this reason alone, the *bona fides* of the transaction between Jinfu PRC and Jinfu USA may be questioned, as the Department did in the *Preliminary Results*.

Department's Position:

We disagree with Jinfu PRC's contention that the Department should conduct a *bona fide* analysis of the transaction between Jinfu USA and its U.S. customer. As explained above, the Department has determined in these final results that Jinfu PRC and Jinfu USA were not affiliated at the time of the sale of honey between Jinfu PRC and Jinfu USA. Accordingly, the

Department has determined that Jinfu PRC's sale of honey to Jinfu USA was the first sale to an unaffiliated customer in the United States.[16] Therefore, the underlying transaction between Jinfu USA and its U.S. customer is not the relevant sale for purposes of this new shipper review, and hence no *bona fides* analysis of that sale is warranted.

Further, because the Department has determined to rescind this new shipper review based on Jinfu PRC's failure to establish its eligibility for a new shipper review in its initial request, the issue of whether Jinfu PRC's sale to Jinfu USA is *bona fide* is moot.

Comment 4: Calculation of the Surrogate Value for Raw Honey

Petitioners state that instead of using a "conservative" price of 65 *rupees* (*Rs.*) per kilogram (kg.) as a surrogate value for raw honey, as was done during the preliminary results, the Department should follow its practice from previous proceedings for this review. Petitioners point out that this "conservative" price is the lowest price from an article in *The Tribune (of India)*, dated December 15, 2003. Petitioners refer to the Department's memorandum, "Preliminary Results of New Shipper Review of the Antidumping Order on Honey from the People's Republic of China: Factors of Production Valuation for Cheng Du," dated May 26, 2004, (Factor Valuation Memo), where the Department stated that it was using the 65 *Rs.*/kg. price instead of the other price in the article, in the amount of 105 *Rs.*/kg, because the Department was not certain specifically when the price of raw honey in India was at a high or low price, and that there was no evidence contradicting that the raw honey price was 65 *Rs.*/kg. during the POR. Petitioners argue that the article is dated December 15, 2003, which is six and a half months after the end of the POR, and that the article states that the fall in price for raw honey occurred in "the past few months" from a high of 105 *Rs.*/kg. Petitioners interpret the article as stating that the raw honey price declined to 65 *Rs.*/kg. some time after May 2003, which means, according to petitioners, that the 65 *Rs.*/kg. price was effective after the POR, and therefore, is not contemporaneous.

Furthermore, according to petitioners, the article states that the price of raw honey reached 105 *Rs.*/kg. "during the past one year," which petitioners interpret as meaning at some time between December 2002 and December 2003. Petitioners argue that the 105 *Rs.*/kg. price is more likely to be within the POR than the 65 *Rs.*/kg. price. Petitioners also argue that there is no record information to support the assumption that the price of raw honey spiked to 105 *Rs.*/kg. after May 2003 and then plunged to 65 *Rs.*/kg.). Additionally, according to petitioners, the article would not have used the time frame of "during the past one year" if the 105 *Rs.*/kg. price had occurred "within the past few months," as was stated in the article for the 65 *Rs.*/kg. price. Therefore, petitioners contend that, it is reasonable to conclude from the totality of the

[16] For purposes of these final results the Department has determined that Jinfu PRC's first sale to an unaffiliated purchaser, *i.e.*, Jinfu USA, in the United States occurred on November 2, 2002. *See* Jinfu PRC's September 17, 2003 AQR at Exhibit 7.

information that the high price reported in *The Tribune* article was from the first half of 2003, and more likely very early in the first half of 2003.

Petitioners state that the Department's practice in prior reviews of honey from the PRC has been to adjust the values for raw honey to make them more accurately contemporaneous, and should do so with this review. Petitioners argue that when the Department did not have perfectly contemporaneous price data for raw honey in previous reviews, it did not simply pick the lowest price that was available. Petitioners further argue that the point of determining a valuation for the factors of production is to be as accurate as possible (*i.e.*, "the best available information" (*see* section 773(c)(1) of the Act)), not to be as "conservative" as possible.

Referring to a prior new shipper review, involving Wuhan Bee Healthy Co., Ltd. (Wuhan) (a PRC producer/exporter of honey) and covering the period of December 2001, through May 2002, petitioners state that the Department also used an article from *The Tribune (of India)*, dated March 1, 2000, as the raw honey price source. Petitioners add that the Department also used the same article as the raw honey price source in the first administrative review of the antidumping duty order on honey from the PRC, covering the period February 10, 2001, through November 30, 2002. Petitioners state that in both of these reviews, the Department did not simply use the lowest price in that article but made a number of adjustments, including computing a simple average of the two prices in the article as a base price, using the Indian Wholesale Price Indices to account for inflation, and then calculating percentages of monthly price increases, to be applied to the inflation adjusted price from the 2000 *Tribune of India* article. Petitioners state that the Department did the last adjustment, despite respondents' complaints, because it could not ignore the significant rate at which two Indian honey processors' (Tiwana's and Jallowal's) documented raw honey purchase costs increased from December 2001, through May 2002. Similarly, petitioners assert that in the instant review, the information on the record shows that the cost of raw honey in India increased, which the Department had noted in the first administrative review occurred in the first half of 2002, and continued to increase very significantly until a peak of 105 *Rs.*/kg. was reached between December 2002 and the early first half of 2003. Petitioners stress that an increase from 58 *Rs.*/kg. in May 2002 to 105 *Rs.*/kg. some time after or around January 2003 cannot be ignored.

Petitioners cite the *Final Results of the First Administrative Review of the Antidumping Duty Order on Honey from the People's Republic of China*, 69 FR 25060 (May 5, 2004) (*Zhejiang Final Results*) and accompanying Issues and Decision Memo at Comment 4, where it stated that "due to the variability of these prices, we must consider the entire range of the pricing information . . . using either end of the range without knowing the underlying reasons for the differences between the high and low values would be distortive of countrywide prices, and therefore, is unreasonable." *See Zhejiang Final Results* and accompanying Issues and Decision Memorandum at Comment 4, page 16. Petitioners argue that, by the same reasoning, the Department does not know the exact times at which the 105 *Rs.*/kg. and 65 *Rs.*/kg. prices were applicable, except that the latter price was more applicable to after the POR and the former price was more applicable to the time of the POR, and that using the low end of the range (*i.e.*, the 65 *Rs.*/kg. price) in the final results of the instant review should be considered distortive and

unreasonable. Therefore, petitioners maintain that the Department should continue, in this review, to follow the methodology that it had used in prior reviews (and is defending in *Wuhan Bee Healthy Co. Ltd. v. United States*, USCIT Court No. 03-00806), and thereby, account for the raw honey price increases in India during the POR.

Petitioners maintain that the methodology presented in their March 30, 2004, submission most accurately calculates a POR-specific surrogate raw honey value. Petitioners point out that in that submission they had made the reasonable assumption that the 105 *Rs*./kg. price occurred in January 2003 and the 65 *Rs*./kg. price occurred in December 2003. In order to derive the POR raw honey average prices of 97.96 *Rs*./kg., petitioners explain that they first calculated the monthly price increase from the Department's calculated price of 58.03 *Rs*./kg. in May 2002 (based on pricing information from a prior honey proceeding) to January 2003. Then, petitioners stated they calculated the average monthly price decrease between January 2003 and December 2003, which was used to calculate an average price for each month before calculating the average of the raw honey prices for each month of the POR to arrive at the average price of 97.96 *Rs*./kg. *See* Attachment 3 of Petitioners' March 30, 2004 submission. Petitioners reiterate that this calculation represents the "best available information" with which to derive the surrogate value of raw honey for the POR.

Petitioners state that the Department's sole stated reason for not using their methodology was that it was not certain specifically when the price of raw honey was 105 *Rs*./kg. or 65 *Rs*./kg during the past year. Petitioners reiterate that it is reasonable to conclude that the 105 *Rs*./kg. price was applicable from around December 2002 to January 2003, and the 65 *Rs*./kg. price was applicable to around December 2003, when the article was published. Petitioners argue that the Department cannot, consistent with prior decisions, ignore the evidence that there was a substantial price increase, during the POR, on the grounds that it does not have "specific certainty." According to petitioners, the Department must often make reasonable assumptions under the statutory mandate that it apply the best information. Petitioners maintain that the Department must employ some type of averaging and/or indexing methodology to obtain the best information available as to the surrogate values during the POR, and that petitioners' proposed methodology is reasonable.

If the Department elects not to use petitioners' proposed indexing methodology, then according to petitioners, the Department could follow the methodology applied in the first administrative review and use the simple average of the range of prices available in the article (in this case, the 2003 *Tribune* article). However, petitioners state that a simple average would not completely take into account the evidence of the price increase during the POR from a high price of 105 *Rs*./kg to a low of 65 *Rs*./kg., indicated in the 2003 *Tribune* article. Petitioners refer to Exhibit 1 of their January 5, 2004 submission, which included a declaration from a market research company in India and provided prices from a number of honey producers, and state that the declaration shows that raw honey prices in India increased between February 2001, and November 2002 (the month before the POR), and then increased dramatically again between November 2002, and June 2003 (the month after the POR). Petitioners state that the Department did not use these prices in the declaration because the Department determined that they were not

contemporaneous, even though the declaration contained pricing information from the month before and the month after the POR, and because the Department stated that it prefers not to use non-public data from individual producers. Petitioners argue that even though the Department did not use petitioners' pricing information in the first administrative review, it noted the price increases that occurred around the time of this POR. *See Zhejiang's Final Results* and accompanying Issues and Decision Memorandum at Comment 4.

Petitioners argue that the pricing information in their declaration shows that none of the prices in June 2003 were as low as 65 *Rs.*/kg. (the lowest price in *The Tribune* article), and that many of the prices were still higher than the peak price of 105 *Rs.*/kg. Petitioners argue that it is inconceivable that prices remained stable or lower between November 2002 and May 2003, and then suddenly jumped up to the level in June 2003, as reported in petitioners' declaration. Petitioners speculate, referring to *The Tribune* article, that prices increased between November 2002 and the early part of 2003, and that the June 2003 raw honey price levels in the declaration may represent a decline from the peak at the beginning of 2003. Furthermore, according to petitioners, the June 2003 prices also support the conclusion that the decline of prices to the 65 *Rs.*/kg. Indian raw honey value did not take place until after the POR.

Petitioners explain that the average value of the raw honey prices reported in their declaration for June 2003 was 91.10 *Rs.*/kg., calculated by adding the 14 different raw honey prices and then dividing the sum by 14. *See* Exhibit 2 of Petitioners' July 7, 2004 case brief. Petitioners recommend that this value be regarded as the end of the POR price. Therefore, petitioners assert that the raw honey surrogate value can be determined by calculating a simple average of the 105 *Rs.*/kg. price that, according to petitioners, *The Tribune* indicates was the peak price during the POR and the end of POR raw honey price of 91.10 *Rs.*/kg. based on petitioners' market research, resulting in a POR-average price for raw honey of 98 *Rs.*/kg. Petitioners point out that this 98 *Rs.*/kg. raw honey price is nearly identical to the 97.96 *Rs.*/kg. average raw honey price that petitioners calculated in their March 30, 2003, submission. As such, petitioners urge the Department to revise its methodology for the final results.

Cheng Du states that the Department should value raw honey using the 65 *Rs.*/kg. value reported in *The Tribune* article. Cheng Du states that the article does not identify exactly when the price of raw honey was 105 *Rs.*/kg., and that the Department correctly determined not to rely on this price as the POR value. Furthermore, Cheng Du argues that, contrary to petitioners' claims, the Department did not simply pick the lowest price that was available. Cheng Du explains that the Department did not use the 105 *Rs.*/kg. price proffered by petitioners or the 30-45 *Rs.*/kg. price proffered by the other in this proceeding (*i.e.*, Jinfu PRC). Instead, Cheng Du argues that the Department weighed its options as to what was the best information available with which to calculate the surrogate raw honey values during the POR, and then selected the value of 65 *Rs.*/kg. Cheng Du contends that petitioners have not provided anything to support their claims, and that the Department correctly found no record evidence to contradict its position and decision in the preliminary results. Therefore, according to Cheng Du, the Department should continue to value the raw honey input using the 65 *Rs.*/kg. price.

Cheng Du asserts that the Department should continue not to rely on the raw honey price information from certain producers/processors, including several cooperatives submitted by petitioners on January 5, 2004, because this information is not contemporaneous and it is the Department's practice not to rely on privately-obtained price quotations. Cheng Du argues that such price quotations are typically self-serving and invariably incomplete, and their accuracy is not as reliable as data available from more public sources. In support of its argument, Cheng Du refers to the current antidumping investigation of certain frozen and canned warmwater shrimp from the PRC, and state that, in that case, the Department contacted a source identified in a similarly submitted declaration provided by petitioners and found the declaration to be false. *See Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China*, 69 FR 42654, 42668 (July 16, 2004). Cheng Du concludes that in this review because petitioners' information (1) is based on privately-obtained price quotations from Indian producers/processors, (2) is not contemporaneous with the POR, (3) includes information from cooperatives, and (4) was gathered by a source unverifiable by other interested parties in this review, the Department should not use that information in the final results to value raw honey.

Jinfu PRC did not comment on this issue.

Department's Position:

We agree with petitioners, in part, that the Department should revise its methodology from the preliminary results to more accurately reflect the raw honey price fluctuations that occurred in India during the POR.

In the preliminary results of this review, the Department determined that an article published in *The Tribune (of India)* on December 15, 2003, entitled, "Honey sweet despite price fall" (*The Tribune*), represented the "best available information" for valuing the raw honey input. In choosing the most appropriate value, the Department considers several factors, including the quality, specificity, and contemporaneity of the data. *See*, *e.g.*, *Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty New Shipper Review*, 67 FR 72139 (December 4, 2002) and accompanying Issues and Decision Memorandum at Comment 6. *See also* Cheng Du Final Analysis Memo at Attachment 2. We note that, in their case and rebuttal briefs, the parties did not dispute the use of *The Tribune* article as the "best available" surrogate source for valuing the raw honey input.

The Department further determined in the preliminary results to value raw honey using the conservative value (*i.e.*, 65 *Rs*./kg.) appearing in *The Tribune* article. For purposes of these final results, the Department has reconsidered this decision, and has determined that it is more accurate to base the raw honey surrogate value on a simple average of the raw honey values appearing in the 2003 *Tribune* article.

In revising the raw honey value for purposes of these final results, we recognize that *The Tribune* article does not specify precisely values for any given month of the POR, but rather

provides a range of raw honey values during the calendar year of 2003, 5 months of which overlap the new shipper POR. Nevertheless, it is evident from *The Tribune* article that the high-end 105 *Rs*./kg price specified in the article, in fact, occurred at some time during the POR, and therefore must be considered for valuing the raw honey input. As stated in *Zhejiang Final Results*, "due to the variability of the raw honey prices in India, and in order to fairly capture the variability of these prices, we must consider the entire range of the pricing information . . . Thus, using either end of the range {*i.e.*, 65 *Rs*. or 105 *Rs*.} without knowing the underlying reason for the difference between the high and low values would be distortive of countrywide prices, and therefore, is unreasonable." *See Zhejiang Final Results* and accompanying Issues and Decision Memorandum at Comment 4 (page 16, footnote 13). *See also Honey from the People's Republic of China: Final Results of Antidumping Duty New Shipper Review*, 68 FR 62053 (October 31, 2003) (*Wuhan Final* Results) and accompanying Issues and Decision Memorandum at Comment 2. Consistent with our practice in the new shipper review of Wuhan and the administrative review of Zhejiang, for the final results of the instant new shipper review, the Department is basing its raw honey surrogate value on a simple average of the raw honey price range (*i.e.*, 65 *Rs*. + 105 *Rs*./2 = 85 *Rs*./kg.) from the 2003 *Tribune* article.

With respect to petitioners proposal that the Department revise its raw honey methodology by calculating a raw honey price based on the assumption that the price of Indian raw honey peaked in January 2003 at 105 *Rs*./kg., we do not find it necessary or appropriate. The time period of *The Tribune* article is contemporaneous with the POR in this new shipper review, and therefore, we do not find it necessary to index the average prices as suggested by petitioners. Moreover, petitioners provide no factual support whatsoever for their underlying assumptions that raw honey prices in India decreased from January 2003 to December 2003 in the manner they suggest. Therefore, it would be pure speculation for the Department to index the raw honey values as suggested by petitioners.

Regarding the other articles on the record of this review, (1) the *Hindu Business Line*, dated April 2003, entitled, "Girijan co-op targets Rs 135-cr turnover," which quotes prices of 30 to 45 *Rs*./kg. for raw honey for the Andhra Pradesh region of India, and (2) the *Indian Express* dated February 17, 2003, entitled, "In Jharkhand, it's all about honey, honey," which quotes prices of 50 to 60 *Rs*./kg. for raw honey in Ranchi, India, the Department finds that these articles are not the best available source for raw honey values. *See* Jinfu PRC's January 5, 2004 and June 23, 2004 surrogate value submissions. While these articles are contemporaneous with the POR, we have determined that they are not reliable because they provide information based on data provided by Girijan Cooperative Corporation Ltd., an Indian cooperative and by one individual beekeeper in Ranchi, respectively. Consistent with the less-than-fair-value investigation and with our normal practice, we have rejected this data because it was not obtained from publicly available sources and may not be representative of country-wide prices in India. As noted in the preamble, "a single input price reported by a surrogate producer may be less representative of the cost of that input in the surrogate country." *See* 19 CFR 351.408. Rather, the Department prefers to use a publicly available price that reflects numerous transactions between many buyers and sellers, because the experience of a single producer is less representative of the cost of an input in the surrogate country. *See Preamble* at 31-32. *See also Wuhan Final Results* and accompanying Issues and Decision Memorandum at Comment 2. This is also consistent with our approach in the less-than-fair-value investigation, where we rejected raw honey data based on an Indian honey-processing cooperative because we determined that

such data represented the experience of a single processor of honey in a particular region of India. *See Final Determination of Sales at Less Than Fair Value; Honey from the PRC*, 66 FR 50608 (October 4, 2001) (*Final Determination of AD Investigation*) and accompanying Issues and Decision Memorandum at Comment 3.

Additionally, the Department agrees with Cheng Du's argument that petitioners' submission, dated January 5, 2004, containing information from 14 different producers/processors, including several cooperatives (*see* Exhibit 1 of Petitioners' submission dated January 5, 2004) is not as reliable as the raw honey pricing information from *The Tribune* article. The Department rejected this same raw honey pricing information presented by petitioners in the instant review in prior proceedings. In particular, the Department determined that petitioners' data consisted mainly of undocumented pricing/cost information derived from unsubstantiated market research. We also note that petitioners' raw honey pricing information is not contemporaneous with the instant POR. Moreover, the Department has also determined that when faced with a choice between unsubstantiated company-specific data selected by one party, and countrywide publicly-available data, the Department prefers to rely on publicly-available country-wide data when selecting surrogate values. *See Yantai Oriental Juice Co. v. United States*, Slip Op 02-56 at 11, 26 CIT (June 18, 2002).

In summary, the Department finds that *The Tribune* article is a reliable surrogate value source for the raw honey input and has relied upon the pricing information in this article for these final results. *See* Cheng Du Final Analysis Memo at Attachment 2 for calculation details.

Comment 5: Calculation of the Surrogate Financial Ratios

Petitioners state that while it should continue to use the 2002-2003 financial statement of Mahabaleshwar Honey Producers Cooperative Society Ltd. (MHPC), the Department should revise its calculations of the overhead expense; selling, general & administrative (SG&A) expense; and profit ratio based on petitioners' calculations. *See* Petitioners' June 23, 2004, surrogate value submission. In their June 23, 2004, surrogate value submission, petitioners argue that the Department should treat the "Service Charges" expenses as an overhead expenses, rather than a as a direct material, labor or energy inputs in the final results of this review. Petitioners state that the "Service Charges" represent expenses paid to outside parties for services that enable MHPC to operate its honey processing facilities.

According to petitioners, the expense translated as "Tax" in MHPC's profit and loss statement is in fact Sadil or incidental expenses, correctly translated in MHPC's 2001-2002 financial statements. Petitioners note that in a prior proceeding on honey the Department included the Sadil (incidental expenses) in its calculation of factory overhead expenses. Thus, petitioners assert that the Department should include these expenses in its factory overhead calculation for the final results. In its final calculation of SG&A, petitioners claim that the Department should account for expenses that were not captured in its preliminary SG&A calculation, including: (1) Space Rent, (2) Bank Interest, and (3) Audit Fee.

In their June 23, 2004, surrogate value submission, petitioners assert that the Department should revise its calculation of MHPC's 2002-2003 cost of raw honey consumption because (1) the Department's methodology does not consider the cost increases for raw honey during the POR and (2) the record contains the MHPC 2002-2003 opening and closing stock values not previously available to the Department. Based on information from the 2003 *Tribune* article, petitioners state that the value of raw honey was at a historical high of 105 *Rs*./kg. at the beginning of calendar 2003, which corresponds to the last quarter of MHPC's 2002-2003 financial statement. Based on MHPC's raw honey purchases in fiscal year 2001-2002, petitioners claim that the value of raw honey in 2001-2002 was nearly less than half the value in 2003. Because MHPC drew down "34814 kg 150 gms honey left over" from the prior cost/fiscal year, petitioners assert that the raw honey opening stock value (*i.e.*, value of raw honey purchases) was on average 58.68 *Rs*./kg., while purchases during 2003 would have been at higher unit values, leaving the closing value of raw honey stocks also at higher unit values than the opening values. *See* Jinfu PRC's January 5, 2004, surrogate value submission at Exhibit A.

Through foreign research, petitioners claim to have obtained MHPC's 2002-2003 opening and closing stock values. *See* Petitioners' June 23, 2004, research submission. With these data, petitioners state that the Department can calculate the value of raw honey materials consumed in accordance with generally accepted accounting principles as follows: (a) opening raw material stock + (b) fiscal year material purchases – (c) closing raw material stock. Using the MHPC 2002-2003 opening and closing stock values to derive the total cost of raw honey consumed in MHPC's production of honey, petitioners calculated revised surrogate values of 2.29 percent for overhead, 20.10 percent for SG&A, and 11.14 for profit. *See* Exhibit 3 of Petitioners' July 7, 2004, case brief.

Cheng Du states that the Department should continue to calculate the surrogate SG&A ratio using the financial information contained in the 2002-2003 MHPC annual report. However, according to Cheng Du, the Department should make certain corrections to the calculations identified in Exhibit 3 of petitioners' July 7, 2004, case brief. Cheng Du claims that in their calculation of the surrogate SG&A ratio, petitioners included "Honey Sale Commission" as one of MHPC's SG&A expenses. Cheng Du states that although the Department typically does not tailor surrogate SG&A rates to match the circumstances of PRC producers, it does make exceptions when necessary to ensure that proper comparisons are made. Cheng Du states that where it is possible to distinguish expenses directly related to packing, freight, discounts and rebates, brokerage, and commissions from other expense categories in the surrogate financial statements, the Department excludes those expense items from the SG&A calculation.

According to Cheng Du, the Department should follow this practice in the instant review with regard to the commission expenses separately identified in MHPC's financial statements. Cheng Du argues that it did not pay commissions on sales of honey during the POR, and therefore, it would be inappropriate to include this expense in its normal value cost build-up. Cheng Du states that, in order to avoid inequitable comparisons, the Department should exclude honey sales commissions from the SG&A expenses used to calculate MHPC's SG&A rate.

Regarding the calculation of the surrogate profit ratio, Cheng Du states that the Department should use the profit figure shown on MHPC's income statement (*i.e.*, the profit and loss statement), and not use the calculated profit figures from Exhibit 3 of petitioners' case brief

(identified as "H"). Cheng Du claims that, unlike the calculated profit figure, the profit figure identified on MHPC's income statement reflects the company's actual profit amount, and considers all expenses that the Department might exclude because such expenses may be included elsewhere in the Department's net U.S. price and factor-of-production calculations.

Jinfu PRC did not comment on this issue.

Department's Position:

We disagree with petitioners, in part. We have continued to apply the methodology used in the preliminary results to calculate the cost of raw honey consumed by MHPC in its production of processed honey. *See* Cheng Du Final Analysis Memo at Attachment 8. We also have continued to include expenses associated with "Service Charges" in our calculation of direct manufacturing costs, rather than factory overhead. However, we have included "Sadil (incidental expenses)" in calculating the surrogate cost of factory overhead. We also adjusted our calculation of SG&A expenses to include the following expenses: (1) Space Rent, (2) Bank Interest, and (3) Audit Fee.

With respect to petitioners' argument that expenses for "Service Charges," reported in MHPC's 2002-2003 financial statements should be treated as factory overhead expenses rather than direct manufacturing costs, we find that there is no record evidence to support petitioners' assertion that these expenses are "expenses paid to outside parties for services that enable MHPC to operate its honey processing facilities." Therefore, the Department will continue to treat "Service Charges" as direct manufacturing costs, consistent with the treatment of such expenses in previous proceedings of this case. *See e.g., Wuhan Final Results* and accompanying Issues and Decision Memorandum at Comment 3; *Preliminary Results of Antidumping Duty New Shipper Review: Honey from the People's Republic of China*, 68 FR 67832 (December 4, 2003); *Preliminary Results of First Administrative Antidumping Duty Review: Honey from the People's Republic of China*, 68 FR 69988 (December 16, 2003).

In addition, we find that the MHPC opening and closing stock value information obtained by petitioners through foreign market research is unsubstantiated. In *Wuhan Final Results*, the Department did not rely on information obtained by petitioners in a similar manner to value the raw honey input because we determined it was "unsubstantiated market research." *See Wuhan Final Results* and accompanying Issues and Decision Memorandum at Comment 3. Additionally, we find that petitioners' claim that the raw honey pricing information from the December 2003 *Tribune (of India)* article indicates that MHPC's cost of raw honey should be higher than the cost calculated using the Department's methodology is speculative, and unsupported by substantiated record evidence. Petitioners only support for this claim is based on petitioners' self-funded, unsubstantiated market research, with no independent corroboration or supporting documentation. Therefore, the Department has continued to calculate MHPC's cost of raw honey using the methodology established in prior segments of this proceeding. *See e.g.*, *Final Determination of AD Investigation* and accompanying Issues and Decision Memorandum at Comment 3 and *Wuhan Final Results* and accompanying Issues and Decision Memorandum at Comment 3.

We also disagree with Cheng Du's assertion that the Department should exclude commissions from the calculation of the surrogate SG&A ratio because Cheng Du does not incur these expenses. In *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of 1996- 1997 Antidumping Duty Administrative Review and New Shipper Review and Determination Not To Revoke Order in Part*, 63 FR 63842 (November 17, 1998) (*TRBs*) at Comment 18, the Department determined that because sales commissions are standard selling expenses, rather than a reduction to sales revenue like discounts, commission expenses should be included in the surrogate SG&A calculation even if the company under review does not regularly incur commissions on its sales of subject merchandise. *See TRBs* at Comment 18. The Department determined in that case that whether or not a PRC producer (*e.g.*, Cheng Du) has commissioned sales staff is irrelevant because the Department normally does not tailor surrogate financial ratios to match the circumstances in the NME country. *See TRBs* at Comments 17 and 18. Therefore, consistent with our determination in that case, the Department is not excluding commissions from the surrogate SG&A calculation for purposes of these final results.

With respect to the calculation of the surrogate profit ratio, we do not agree with Cheng Du that the Department should use the actual profit figure reported in MHPC's profit and loss statement. In the *Wuhan Final Results*, the Department determined that profit for MHPC as a whole, which includes other sources of profit and/or loss (*e.g.*, fruit canning division and interest/dividend income), should not be applied to expenses pertaining only to MHPC's honey processing division. Additionally, the Department found that "the net profit value listed in MHPC's financial statement appears to reflect a disbursement of gross profit and accruals recorded in a special profit and loss 'reserve account,' indicating that the amounts recorded in this account are not actual expenses. Inclusion of these amounts from the profit and loss 'reserve account' in our profit calculation would cause us to understate MHPC's actual profit for its honey processing operations." *See Wuhan Final Results* and accompanying Issues and Decision Memorandum at Comment 3. *See also Final Determination of AD Investigation* and accompanying Issues and Decision Memorandum at Comment 3. Similarly, the 2002-2003 MHPC profit and loss statement contains profit and/or loss accounts from sources other than honey processing operations and a reserve account, which as in a previous proceeding, appears to be unrelated to the cost of processing honey. Consistent with the *Wuhan Final Results* and previous proceedings covering honey from the PRC, we are calculating a profit ratio without reference to the absolute profit figure listed in the MHPC financial statement. *See* Cheng Du Final Analysis Memo at Attachment 8 for calculation details.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final antidumping margin and the final results and final partial rescission of this new shipper review in the *Federal Register*.

_____ _____

Agree Disagree

_____

James J. Jochum
Assistant Secretary
for Import Administration

_____

Date