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June 27, 2005

MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results in the 2002/2003 Administrative Review of Honey from the People's Republic of China

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SUMMARY:

We have analyzed the briefs and rebuttal briefs of interested parties in the 2002/2003 administrative review of honey from the People's Republic of China ("PRC"). As a result of our analysis, we have made certain changes from the *Preliminary Results*. *Honey from the People's Republic of China: Preliminary Results, Partial Rescission, and Extension of Final Results of Second Antidumping Duty Administrative Review*, 69 FR 77184 (December 27, 2004) ("*Preliminary Results*"). We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this administrative review:

Changes from the Preliminary Results

General Issues

Company-Specific Issues

Jinfu-Related Issue:

Shanghai Eswell-Related Issues
Comment 9: Calculation of the Assessment Rate for Shanghai Eswell
Comment 10: Classification of Shanghai Eswell's U.S. Sales
Wuhan Bee-Related Issues
Comment 11: Classification of Wuhan Bee's U.S. Sales
Comment 12: Use of EP sales for Wuhan Bee
Comment 13: Application of Adverse Facts Available to Wuhan Bee

Background

We published the preliminary results in the 2002/2003 administrative review in the *Federal Register* on December 27, 2004. *See Preliminary Results*. The period of review ("POR") is December 1, 2002 through November 30, 2003. We received a case brief from respondents Zhejiang Native Produce and Animal By-Products Import & Export Group Corp. ("Zhejiang"), Shanghai Eswell Enterprise Co., Ltd. ("Eswell"), Wuhan Bee Healthy Company, Ltd. ("Wuhan Bee"), and Jinfu Trading Co., Ltd. ("Jinfu") (collectively, "respondents") on May 4, 2005. We also received case briefs from the American Honey Producers Association and the Sioux Honey Association (collectively, "petitioners"), on May 4, 2005. The Department rejected respondents' case brief on May 5, 2005, because the brief contained untimely submitted new information. *See* Letter from James Doyle to Bruce Mitchell dated May 5, 2005. Respondents re-filed their case brief on May 9, 2005. The Department rejected respondents' case brief again on May 9, 2005, because the brief contained untimely submitted new information. *See* Letter from James Doyle to Bruce Mitchell dated May 9, 2005. Respondents re-filed their case brief on May 10, 2005. We received a rebuttal brief from the petitioners on May 13, 2005. The Department also requested comment on a number of issues including the verification of Wuhan Bee's claimed U.S. affiliate, the methodology for constructing an export price ("EP") database for Wuhan Bee and Shanghai Eswell, additional information with respect to the surrogate value of raw honey, and calculation of a per-unit assessment and cash deposit rate for the final results. We received comments from parties on each of these issues.

DISCUSSION OF THE ISSUES:

Changes from the Preliminary Results

Based on the discussions below, we have made revisions to the data used for the final results. For further details, please see the Zhejiang Final Analysis Memorandum; Eswell Final Analysis Memorandum; Wuhan Bee Final Analysis Memorandum; and Jinfu Final Analysis Memorandum, all dated June 27, 2005, which are on file in Import Administration's Central Records Unit, room B-099 of the Department of Commerce building.

Comment 1: Appropriate Surrogate Value for Honey

Respondents argue in their case brief[1] that, for the *Preliminary Results*, the Department improperly selected, as the surrogate value for honey, data from an article entitled "Honey sweet despite price fall," published by the *Tribune (of India)* on December 15, 2003 ("*Tribune*

[1] *See* Respondents' 2nd Refiling of Case Brief dated May 10, 2005 ("Respondents' Case Brief").

Article"). Respondents assert that, contrary to the Department's conclusion in the *Preliminary Results*, the *Tribune Article* contains internally inconsistent information. For example, respondents cite to the fact that the *Tribune Article* quotes raw honey prices of between Rupees ("Rs.") 65 and Rs. 105 per kilogram ("kg."), while also stating that retail honey varies in price between Rs. 60 to 100 per kg. Respondents argue that these factors suggest that the true price of raw honey (per the *Tribune Article*) ranges between Rs. 40 and Rs. 60 per kg.[2] Respondents argue that the price used in the *Preliminary Results* of Rs. 85 per kg. leads to aberrational results. Respondents claim that the Department also ignored these inconsistencies in the *Tribune Article* in *Honey from the People's Republic of China; Notice of Final Results of Antidumping Duty New Shipper Reviews*, 70 FR 9271 (February 25, 2005) ("*NSR Anhui Final Results*").

Further, respondents argue that the *Tribune Article* provides a price for raw honey for exporters from only one region of India, Punjab, and does not contain any information on the price conditions in the country as a whole. Respondents assert that the *Tribune Article* price cannot be a countrywide price because the lower price of Rs. 65 per kg. is higher than the raw honey prices listed in the following sources: "Girijan co-op targets 135-cr turnover" from *Hindu Business Line*, dated April 2003 ("*Girijan Article*"), "Prospects of Bee Keeping in Rubber Plantations of Kerala" from India Infoline ("*Kerala Article*"), "In Jharkhand, it's all about honey, honey" from *The Indian Express*, dated February 2003 ("*Jharkhand Article*"), and data from EDA Rural Systems Pvt Ltd., at http://www.litchihoney.com, dated 2002-2003 ("EDA Data"). Respondents note that the Department stated in *Honey from the People's Republic of China; Notice of Final Results of Antidumping Duty New Shipper Reviews*, 70 FR 9271 (February 25, 2005), and accompanying Issues and Decision Memorandum at Comment 1 ("*NSR Anhui Decision Memo*") that the *Tribune Article* is not regional because an email from the author indicates he is familiar with other regions. However, respondents maintain that this claim is contradicted by the Department's assertion in the instant review that information on the record from the author of the *Tribune Article* does not address the *Tribune Article*.[3] Respondents argue that the *Tribune Article* clearly relates only to prices in Punjab for one period of time rather than a POR, nation-wide price, as the prices from Northern India contained in the North India Beekeeper's Society ("NIBS") data demonstrate. Therefore, respondents argue, the Department's conclusion in the *Preliminary Results* that the *Tribune Article* is representative of countrywide prices is unsupportable.

Respondents also argue that the prices in the *Tribune Article* have not been corroborated, and that the Department's failure to follow up with its initial conversations with the author of the *Tribune Article* to confirm its accuracy renders the *Tribune Article* suspect as a surrogate value. Further, respondents argue that the prices quoted in the *Tribune Article* are directly contradicted by other POR raw honey prices from publicly available sources whose accuracy has not been called into question. Respondents also maintain that the *Tribune Article* is contradicted by the Department's own research. Respondents disagree with the Department's assertion in the *NSR*

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[2] Respondents base this assertion on their claim that the article states that beekeepers can make money at Rs. 40 per kg., that beekeepers are complaining of low prices for raw honey, and that retail honey sells for as low as Rs. 60 per kg. *See* Respondents' Case Brief at 2.

[3] *See* Memorandum to the File from Case Analysts through James Doyle: Factors of Production Valuation Memorandum for the Preliminary Results, Partial Rescission, and Extension of Final Results of Second Antidumping Duty Administrative Review of Honey from the People's Republic of China, dated December 15, 2004 ("Prelim FOP Memo") at page 4.

Anhui Decision Memo at Comment 1 that Mahabaleshwar Honey Producers Co-Operative Society Ltd. ("MHPC") honey purchases are comparable to the *Tribune Article*. Respondents note that the MHPC annual report states that MHPC pays its members "the maximum rate," and that MHPC also purchases honey from its own "Managing Committee," asserting that these facts establish that MHPC raw honey prices do not constitute a reliable basis for comparison purposes. Respondents further argue that MHPC prices represent purchases made at inflated prices and are therefore not a reliable benchmark, as the Department has determined in prior decisions.[4]

Respondents further argue that the prices in the *Tribune Article* are contradicted by Indian export prices from World Trade Atlas, European import prices from World Trade Atlas, and prices paid for Indian shipments to various markets from Infodriveindia. Respondents assert that these prices consist of processed, packed honey, which would include all processing and overhead and sales, general and administrative ("SG&A") expenses, and also may include charges from middlemen. Respondents further note that the Infodriveindia data represent 73% of all Indian exports under HTS 04090000, which has a weighted average unit value of Rs. 98,309.6 per metric ton ("MT") (Rs. 98.31 per kg.). Respondents argue that this value, when adjusted by costs of processing, packing, overhead, SG&A, profit and freight, can be used to determine a raw honey price to Indian beekeepers (using the MHPC financial ratios in a manner consistent with *NSR Anhui Final Results*) of Rs. 55 per kg.,[5] and is a value comparable to the average of respondents' data sources, and therefore more reflective of India-wide prices.

Respondents argue that the use of the *Tribune Article* is contradictory to the Department's decision in prior reviews to reject a March 2002 article from *The Tribune (of India)* ("March 2002 article") written by the same author because the prior article was region specific and unreliable.[6] Respondents further argue that the *Tribune Article* contains the same deficiencies as the March 2002 article and that the Department's decisions regarding the earlier article cannot be reconciled with the decision to use the *Tribune Article* for these final results. Respondents also argue that the *Tribune Article* should not be used to value raw honey because it does not reflect the costs respondents would incur if they were to operate in a market economy, consistent with the principle expressed in *Air Products and Chemicals, Inc. v. United States*, 22 CIT 433, 435 (1998) ("*Air Products*"). Respondents argue that the author of the *Tribune Article* states, in the *Tribune Article* and in an email, that there had been a spike in prices as a result of the ban on Chinese exports, noting that this ban would have the opposite effect on Chinese beekeepers. Respondents argue that, because the use of the higher prices in the *Tribune Article* include a 162.5% profit on the honey, the more accurate raw honey price in the article is Rs. 40 per kg.

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[4] *See 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) and accompanying Issues and Decision Memorandum at Comment 3 ("*Honey 1st AR Decision Memo"*); *Final Results of the New Shipper of the Antidumping Duty Order on Honey from the People's Republic of China*, 68 FR 62053 (October 31, 2003) and accompanying Issues and Decision Memorandum at Comment 2 ("*NSR Wuhan Decision Memo*"), where the Department rejected data from cooperatives because "pricing data may be distorted by non-market forces."

[5] Respondents also argue that the total average from Indiainfoline of Rs. 98.31 per kg. (or USD 2078 per MT) can be used as an alternate normal value pursuant to section 773(c)(2) of the Tariff Act of 1930, as amended ("the Act"),

[6] *See NSR Wuhan Decision Memo* at Comment 2, where the Department stated that the raw honey price in the March 2001 article appears to be limited to the northern part of India and had internal inconsistencies, and *1st AR Final Results* at Comment 3, where the Department stated the March 2001 article was based on data from one region.

Respondents argue that the only reliable raw honey data on the record of this proceeding is the raw honey surrogate value data respondents provided. In their case brief, respondents note that the overall average of the raw honey prices from the *Girijan Article*, the *Kerala Article*, the *Jharkhand Article*, and EDA Data, is Rs. 50 per kg. Respondents disagree with the Department's decision in the *Preliminary Results* to reject the *Girijan Article*, because, contrary to the Department's position, there are no countrywide prices on record and the *Tribune Article* is internally inconsistent.[7] Regarding the *Kerala Article*, respondents argue that the Department's decision in the *Preliminary Results* that the article is unreliable because of its author's qualifications is unfounded.[8] Respondents argue that the Department cannot reject the *Kerala Article* because: 1) it has accepted Indiainfoline prices in past reviews; 2) the information is corroborated by other sources; 3) the fact it was published by a graduate student does not on its face undermine its reliability; and 4) the Department never attempted to contact the author of the *Kerala Article* to verify its reliability. Respondents argue that the Department should, for these final results, value honey using the average price derived from respondents' raw honey surrogate value data, because no evidence has been cited that calls into question its veracity.

Respondents also assert that, should the Department continue to use the *Tribune Article* for the final results, prices in the article should be averaged with the prices in the respondent-provided data, because the prices in the *Tribune Article* are also from one region, and the most reasonable method to derive a country-wide price is to calculate an average of all the data on the record. Respondents argue that averaging all five data sources on the record to derive a raw honey value is consistent with the Department's goal to find the most representative value, and the resulting price is corroborated by the Department's own research and prices paid by importers during the POR, when adjusted for manufacturing costs.[9]

In their rebuttal brief,[10] petitioners argue that respondents' claim that the *Tribune Article* is unusable is unsupported by the record and that the Department should continue to rely on the *Tribune Article* to value raw honey. Petitioners argue that it is unchallenged that the *Tribune Article* is contemporaneous and from a reliable source, noting that *The Tribune* is a national publication that often publishes articles on agricultural prices and issues.

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[7] *See Certain Frozen and Canned Warm Water Shrimp from the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value*, 69 FR 42654 (July 16, 2004) ("*China Shrimp Prelim*") and *Certain Preserved Mushrooms from the People's Republic of China: Final Results of Sixth Antidumping New Shipper Review and Final Results and Partial Rescission of the Fourth Antidumping Duty Administrative Review*, 69 FR 54635 (September 9, 2004) ("*Mushrooms 6th NSR and 4th AR Final*") (supporting the use of Hindu Business Line as a source for surrogate values).

[8] *See Automotive Replacement Glass Windshields from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 69 FR 25545 (May 7, 2004) ("*ARG Prelim*") and *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Preliminary Results of 2001-2002 Administrative Review and Partial Rescission of Review*, 68 FR 7500 (February 14, 2003) ("*TRBs 01-02 Prelim*") (supporting the use of Indiainfoline as a source for surrogate values).

[9] *See Certain Preserved Mushrooms from China Final Results of First New Shipper Review and First Antidumping Duty Administrative Review: Certain Preserved Mushrooms From the People's Republic of China*, 66 FR 31204 (June 11, 2001), and accompanying Issues and Decision Memorandum at Comment 5 ("*Mushrooms 1st Review Decision Memo*"). *See also, Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty New Shipper Review*, 63 FR 3085 (January 21, 1998), and accompanying Issues and Decision Memorandum at Comment 6 ("*Magnesium Decision Memo*"), where the Department used an average of Metal Bulletin and Iron and Steel data.

[10] *See* Petitioners' Rebuttal Brief dated May 16, 2005 ("Petitioners' Rebuttal Brief").

Petitioners argue that the *Tribune Article* is not internally inconsistent or contradictory in nature. Petitioners assert that the retail prices quoted in the article refer to one city in Northern India, Doraha, and state that this fact does not call into question the accuracy of the national raw honey prices, as the *Tribune Article* quotes a range of raw honey prices over the course of a year and a range of retail prices at one point in the year. Petitioners assert that the Rs. 40 per kg. figure cited in the article was a hypothetical number rather than the actual price at which beekeepers sold honey at any time during the POR. Also, petitioners argue that respondents are making an incongruent comparison by comparing ranges of national prices to ranges of retail prices in one location and to a price at which beekeepers can make money. Petitioners argue that respondents have conceded that the Department has rejected these arguments in the past, and note that there is no additional evidence on the record that would necessitate a reversal of the Department's decision.

Petitioners agree that the author and one of his sources are from the largest honey-producing region in India, Punjab. However, petitioners argue that the *Tribune Article* clearly provides national Indian prices, as the *Tribune Article* references "Indian beekeepers, especially those in Punjab," (emphasis added) which indicates that the article discusses the national market, while noting that the Punjab region is representative of the Indian market. Petitioners argue that the range of prices relied upon by the Department in the *Preliminary Results*, when read in context, clearly refers to the price of raw honey for export for all of India. Petitioners cite a chart and an email from Sarbjit Dhaliwal as evidence that the author of the *Tribune Article* was referring to raw honey prices in multiple states and the Indian market in general. Petitioners argue that information on the record further indicates that the *Tribune Article* prices are national prices. Petitioners note that, in the *NSR Anhui Decision Memo* at Comment 1, the Department also reached the conclusion that these are national prices.

Petitioners further argue that the Department obtained information which confirms the nature and accuracy of the data in the *Tribune Article*, contrary to respondents' claims. Petitioners note that the emails between Department personnel and the author confirm the national nature of the article, and that the author is a professional journalist who provided consistent information in each of these contacts.[11] Further, petitioners assert that the Department's research showed that no additional published sources of information are available. Petitioners also argue that, contrary to respondents' requests for further confirmation, the Department may determine the manner in which it conducts its investigation and the nature of any verification, and that the Department was not required to conduct any further research. Petitioners note that the handwritten note referred to by respondents is not informative, as it is not dated, and that the Department was not required to disclose information on its deliberative process. Petitioners further argue that respondents' claim that other information obtained by the Department regarding raw honey (contained in the Prelim FOP Memo at Attachment 19), does not contradict the *Tribune Article*. Petitioners note that, what respondents allege is "contradictory evidence," is from the author of another article on Indian honey who states that his knowledge was limited to a specific market in Madras in 2000, and, petitioners argue, his data was merely speculative. Petitioners also assert that the price range this author quotes from September 2003 in fact overlaps with the range in the *Tribune Article* and is therefore not necessarily inconsistent with the *Tribune Article* prices.

[11] *See* Prelim FOP Memo at Attachment 19.

Petitioners also argue that export prices provided by respondents do not contradict the *Tribune Article*. Petitioners argue that respondents' calculation of a raw honey price from these data using an export price is incorrect. Petitioners propose an alternative methodology. Petitioners note that, if the same methodology were applied using financial ratios derived from Apis financial statements as respondents request (*see* Comment 2, below), the resulting price would be Rs. 88.28 per kg., which is higher than the price in the *Tribune Article*. Further, petitioners argue that, because the Infodriveindia data covers only 73 percent of exports, and because it includes an unknown number and type of additional expenses, it is not possible to determine whether these data would ultimately support or contradict the *Tribune Article*, and they therefore should not be used in place of the *Tribune Article*.

Petitioners also argue that the Department's rejection of an earlier article by the author of the *Tribune Article* is irrelevant to the utility of the *Tribune Article* for these final results. Petitioners note that the earlier article was rejected because it referred only to prices in Northern India, whereas in this case the Department found that the *Tribune Article* referred to India-wide prices, and that authorship by the same individual is irrelevant. Petitioners also assert that the decision to utilize the *Tribune Article* was not made in a manner that discriminates against respondents, and that the record does not support respondents' claim of bias.

Petitioners further argue that respondents' allegation that the use of a Rs. 85 per kg. raw honey value includes "artificially high" profits is improper. Petitioners argue that respondents' alleged profit figure is overstated as it results from comparing Rs. 40 per kg. to the highest price in the *Tribune Article*. Petitioners also argue that respondents' request that the Department discount *Tribune Article* prices is contrary to the statute, which states that the Department must value factors of production on the "prices or costs in one or more market economy countries," (*see* 19 U.S.C. 1677b(c)(4)), and that the Department must rely on the best information available as to the actual prices during the period. Petitioners argue that the Department has properly selected actual prices in India, and that it cannot ignore Indian experience based on potential non-market economy ("NME") prices, noting that normal value must be based on surrogate values, rather than on prices in the PRC. *See Id.* Further, petitioners claim that the assumption that prices would have fallen in the PRC is faulty, as the centralized economy in the PRC could have prevented such a result. Petitioners argue that markets other than India would have experienced similar price changes. Therefore, petitioners argue, respondents' objection to using a price series that reflects high prices is unfounded on both a factual and a legal basis.

Petitioners further assert that none of the articles on the record contradict the *Tribune Article* or demonstrate that it is incorrect, contrary to respondents' assertion. Petitioners claim that the *Girijan Article*, the *Kerala Article*, and the *Jharkhand Article* are unreliable and represent prices at the wrong level of trade. Petitioners claim that the prices in these sources appear to be prices paid to villagers or honey farmers, and not the price paid by honey processors for the honey, and therefore are not at the same level of trade as purchases by the Chinese producers. Arguing that the price paid by the processor would be higher due to the middlemen present in the market,[12] petitioners assert that, even if the *Girijan Article*, the *Kerala Article*, and the *Jharkhand Article* were based on reliable and countrywide data (and asserting that these data are neither), they are

[12] Petitioners cite to EDA Data.

still unusable as appropriate surrogate values for raw honey.

Petitioners argue that, because the *Kerala Article* quotes prices from one of the smaller honey producing areas, it cannot be considered to be representative of the national price of honey in India. Petitioners assert that the *Kerala Article* volume includes "sting less bee honey" with an average price of Rs. 300 per kg., which overstates the quantity of comparable commercial honey. Petitioners argue that the *Kerala Article* states that the state of Kerala is "providing training and Beekeeping inputs at subsidized rates to farmers," which would likely undervalue these beekeepers' sales and result in prices unrepresentative of nationwide prices, claiming that it is not the Department's practice to use subsidized prices as surrogate values. Petitioners also note that the *Kerala Article* appears to be a business school report, as the Department pointed out in its *Preliminary Results*, and that the Department is not questioning the reliability of Infodrive India generally – but only that of this source. Petitioners argue that the article was also rejected because it was based on prices of a single cooperative, from a small production region, and is not necessarily representative of nation-wide prices.

Petitioners further argue that the Department has in previous honey proceedings rejected the use of the *Girijan Article* as limited to a single region,[13] and that this decision is supported by other record evidence. Petitioners argue that the *Girijan Article* itself states that Girijan honey is of poor quality and collected in forests, and argue that it is not comparable to Chinese honey. Further, petitioners assert that the prices quoted are for only one company, the Girijan Co-operative Corporation ("GCC") from a very small state, and therefore clearly are not national prices.[14] Petitioners argue that consistent with *NSR Anhui Decision Memo* at Comment 1, the Department should continue to reject the *Girijan Article*

Petitioners further assert that the two additional sources placed on the record by respondents, the *Jharkhand Article* and the EDA Data, are also unreliable as surrogate values for honey. Petitioners note that the *Jharkhand Article* quotes a price paid to a single producer and the Department has repeatedly rejected such articles.[15] With respect to the EDA Data, petitioners note that the prices are from one area of India, but overlap the range in the *Tribune Article*, noting that this is likely due to the presence of middle men discussed in the distribution system detailed in the EDA Data. Thus they argue, the EDA Data are comparable to those in the *Tribune Article*.

Petitioners argue that the flaws contained in each of respondents' data sources make the sources unacceptable for valuing honey for the final results, and that, therefore, these data do not represent quality and reliable data (*see Honey 1st AR Decision Memo* at Comment 3). Petitioners allege that respondents' raw honey data supports the use of the *Tribune Article*, noting that once middleman markups are added, the respondents' articles would be at the appropriate level of trade. Petitioners assert that, when respondents' claimed middleman markup of 39 percent (*see*

[13] In support of their position, petitioners cite *Honey from the People's Republic of China: Notice of Final Results and Final Rescission, In Part, of Antidumping Duty New Shipper Review*, 69 FR 64029 (November 3, 2004) ("*Honey 3rd NSR Final*"), and the Prelim FOP Memo at 4.
[14] Respondents also argue that the *Tribune Article* states that Punjab produces 42,000 MT of honey and Bihar produces 4,000 MT, though the Department, as discussed below, believes this assumption to be incorrect.
[15] *See* Prelim FOP Memo and included case citations.

Respondents' Case Brief at 12) is added to the prices in the *Kerala Article*, *Girijan Article*, and *Jharkhand Article*, the results are prices from Rs. 65 to Rs. 142, corroborating the *Tribune Article* prices. Petitioners argue that the Department is required to base its determinations on the weight of substantial record evidence,[16] irrespective of the possibility of multiple interpretations of this evidence,[17] noting that the Department has considered and rejected the *Girijan Article* and *Kerala Article*, and the *Jharkhand Article*, and further argue that the EDA Data are no more reliable. Petitioners further assert that the Department therefore cannot use respondents' data for the final results in place of the *Tribune Article* because these data do not detract from the substantial evidence relied upon in the *Preliminary Results*. Moreover, they argue, an inconsistency would not compel a different outcome.

Petitioners also argue that respondents' raw honey data are not appropriate independent sources for valuing raw honey because they are regional in nature and the *Tribune Article* is a reliable national raw honey price. Petitioners argue that respondents' data should not be averaged with the *Tribune Article*, as averaging does not alleviate its flaws and the Department's acceptance of the *Tribune Article* as a national price removes the need for averaging. Therefore, petitioners argue that the Department should continue to rely on the *Tribune Article* exclusively for the final results.

In response to the Department's placing on the record additional factual information with respect to the EDA Data,[18] petitioners argue in their comments[19] that the EDA Data are not national in scope and cannot be used by the Department to derive a surrogate value for raw honey, as they are from only three districts in one state in India, Bihar. Petitioners do maintain that EDA Data may be used to verify the accuracy of the *Tribune Article* price.[20] Petitioners also note that, because the EDA prices are those paid to the beekeeper (*i.e.*, without middleman markups), the prices paid by the processor purchasing from middlemen would be even higher, and therefore consistent with the value relied upon in the *Preliminary Results*.

Respondents argue in their rebuttal comments to the EDA Data Memo that the EDA Data should be used in conjunction with their other data to derive a raw honey value. Respondents further argue that petitioners' analysis of the production and sale time periods is incorrect, arguing that the prices of Litchi Honey in 2003 were Rs. 45 per kg. rather than Rs. 76 per kg. Respondents claim that petitioners' method of averaging the raw honey prices in EDA Data is incorrect in that it ignores the price of Rs. 62 per kg., whereas a correct methodology would incorporate this price yielding an average of Rs. 75 per kg. Respondents also argue that petitioners' claim that the

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[16] *See Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978,985 (Fed. Cir. 1994) ("*Suramerica*") (quoting *Universal Camera Corp v. NLRB*, 340 U.S. 474, 488 (1951), which states "the substantiality of evidence must take into account whatever in the record fairly detracts from its weight").

[17] *See Suramerica* quoting *Universal Camera Corp*, 340 U.S. at 487; *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) ("*Matsushita"*); and *Mitsubishi Heavy Indus., Ltd. v. United States*, 275 F.3d 1056, 1062 (Fed. Cir. 2001) ("*Mitsubishi 2001*") (citing *Matsushita*, 750 F.2d at 933).

[18] *See* Memorandum to the File from Anya Naschak, dated May 23, 2005 ("EDA Data Memo").

[19] *See* Petitioners' Comments Regarding Use of the New Factual Information on Raw Honey Prices Incorporated by the Department, dated May 25, 2005 ("Petitioners Honey Comments").

[20] Petitioners constructed two charts supporting their claim, one that lists prices ranging from Rs. 62 to Rs. 87 per kg. for each month of the POR, based on the dates and types of raw honey included in the EDA Data Memo at Attachment 1, and one demonstrating that the weight averaged price would be Rs. 78.20 per kg.

prices in EDA Data should be inflated to account for middleman costs is incorrect.

Department's Position:

We agree with respondents, in part, that the Department should revise its valuation of raw honey for the final results and no longer rely upon an average of the values contained in the *Tribune Article*. We find that the EDA Data placed on the record by respondents constitutes the best available information with which to value raw honey for this POR. Accordingly, we find that an average of the POR prices appearing in the EDA Data is the most reflective of raw honey prices in India during the POR. We explain these findings below.

In valuing factors of production, section 773(c)(1) of the Tariff Act of 1930, as amended ("the Act") instructs the Department to use "the best available information" from the appropriate market economy country. In choosing the most appropriate surrogate value, the Department considers several factors, including the quality, specificity, and contemporaneity of the source information. *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 ("*Garlic Decision Memo*"). Stated differently, the Department attempts to find the most representative and least distortive market-based value in the surrogate country. *See Mushrooms 1st Review Decision Memo* at Comment 5. The Department undertakes this analysis on a case-by-case basis, carefully considering the available evidence in light of the particular facts of each industry. As further noted in the *Garlic Decision Memo*, the Department prefers, whenever possible, to use countrywide data, and only resorts to company-specific (or regional) information when countrywide data is not available. In addition, the Department prefers to rely on publicly available data. *See Freshwater Crawfish Tail Meat from the PRC: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews, and Final Partial Rescission of Antidumping Duty Administrative Review*, 66 FR 20634 (April 24, 2001) and accompanying Issues and Decision Memorandum at Comment 2 ("*Crawfish 2001 Decision Memo*").

In the *Preliminary Results*, in accordance with its established practice and consistent with previous segments of this honey proceeding, the Department determined that the *Tribune Article* constituted the best information available for purposes of valuing raw honey. Although we continue to find the *Tribune Article* a reliable source for valuing raw honey, we find that the EDA Data, placed on the record by respondents after the *Preliminary Results*, constitute a more appropriate surrogate value source for this POR.[21] In selecting the EDA Data, the Department determines that the raw honey pricing data in this article is the best information currently available because it is publicly available, quality data, specific to the raw honey beekeeping industry in India, and contemporaneous with the POR.

We note that the EDA Data are from a published, publicly-available source, the website, www.litchihoney.com. With respect to quality, we find that the EDA Data source is highly

[21] Although the Department received extensive comments by respondents on reasons why the *Tribune Article* is not an appropriate source for surrogate values, a premise with which the Department does not agree, we are not addressing their comments in this memorandum. Because we are not using the *Tribune Article* for these final results, we find respondents' arguments to be moot as to this POR.

documented, including numerous specific price points over a six year period for multiple types of honey from many suppliers, and includes detailed information on production, inputs, and beekeepers. Regarding specificity, we note that the prices quoted in the EDA Data are specific to the raw honey beekeeping industry in the state of Bihar in India. The *Tribune Article* as well as independent honey research conducted by the Department included in the Prelim FOP Memo at Attachment 19 indicate that Punjab is the largest honey producing state in India, followed by Bihar. The *Tribune Article* appears to include a typographical error in terms of honey production in various Indian states where it notes that Punjab produces "42,00 tonnes" of honey. Based on other correspondence with the author of the *Tribune Article* in which he indicates that Punjab produces about 5,000 tonnes, it is clear that the *Tribune Article* should have read "4,200 tonnes." Thus, we infer that the *Tribune Article* states that Punjab produces 4,200 MT of honey and Bihar produces 4,000 MT, out of a total Indian production of around 50,000 MT. *See Tribune Article*. Bihar is therefore a significant producer of honey in India. With regard to contemporaneity, we find that EDA Data is contemporaneous to this administrative review, because it is based on correspondence with a staff member at EDA Rural Systems Pvt. Ltd.,[22] and it includes monthly data points over a majority of the POR.

With respect to petitioners' argument that the EDA data is not the best information available because it does not represent complete countrywide data, we note that the Department's decision as to which information constitutes the "best available information" is case specific and turns on the facts of each case.[23] The Department may not always be able to find surrogate values that satisfy each of the preferences listed above. Nevertheless, it is the Department's practice to choose among the available surrogate value options and select that which is the best. *See Crawfish 2001 Decision Memo* at Comment 2. We note that petitioners have not asserted that the EDA Data are in any way inaccurate or unreliable, and in fact they state that the EDA Data can be used to verify the accuracy of their own article. Respondents also support the use of the EDA Data. In addition, the prices quoted in the EDA Data are clearly from the second-largest honey producing region in India, and are corroborated by other data on the record.[24] Therefore, the Department finds the EDA Data to be representative of raw honey prices in India.

Although petitioners argue that the *Tribune Article* represents a countrywide price in India, in this instance (and as stated in *NSR Anhui Final Results*) we note that the *Tribune Article* does not state conclusively whether it refers to an India-wide price or the price for Punjab alone (as respondents have alleged). Although the Department notes that the author indicated that he collects raw honey pricing information from a broader area than the state of Punjab and is familiar with honey production in India as a whole (*see* Prelim FOP Memo at Attachment 19),

[22] We note, however, that there is no requirement that the Department contact the author of potential surrogate sources.

[23] Although we have determined, in prior segments of this proceeding, that prices in a single region of India are less representative than country-wide prices (*see Honey from the PRC: Issues and Decision Memorandum of the Final Determination of Sales at Less than Fair Value*, 66 FR 50608 (October 4, 2001) and accompanying Issues and Decision Memorandum at Comment 3 ("*Honey Investigation Decision Memo*") at Comment 4, we note that the Department makes an independent determination of what constitutes the "best information available" during each segment of a proceeding.

[24] In the Prelim FOP Memo at Attachment 19, K. Sarangarajan quotes raw honey prices up to Rs. 75 per kg., and Ms. Phookan quotes raw honey prices in India of Rs. 110 per kg., and the *Tribune Article* quotes prices of between Rs. 65 and Rs. 105 per kg.

there is no concrete evidence to indicate what particular states or regions the prices quoted in the *Tribune Article* represent. The Department finds it conceivable that the raw honey prices in the *Tribune Article* were obtained from the same source as the March 2002 article written by the author, which was based on prices from one market in Punjab.[25] While the Department agrees with respondents that the data in the *Tribune Article* may be regional data, the Department does not agree with respondents that the *Tribune Article* is unusable as a source for valuing raw honey. Instead, we have determined that the EDA Data, on the record for the first time in this proceeding, are a more appropriate source.

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

The Department has evaluated the other potential sources for valuing raw honey placed on the record of this proceeding. None of these other potential sources is as reliable or otherwise as appropriate for surrogate value purposes as the raw honey values appearing in the EDA Data. Specifically, the *Girijan Article*, while contemporaneous with the POR, is not reliable because: 1) the information is based on data provided by GCC, an Indian cooperative, and represents the experience of only one producer; and 2) the Department has rejected this data in previous segments of this proceeding because it was "not obtained from publicly available sources and may not be representative of country-wide prices in India." *See NSR Anhui Decision Memo* at Comment 1. As noted in the Prelim FOP Memo, "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 Antidumping Duties; Countervailing Duties: Final Rule*, 62 FR 27296, 27340 (May 19, 1997) ("*Final Rule*"). In the instant review, respondents have placed on the record no new compelling evidence that would indicate that the Department's conclusions in the preliminary results of this review, and in prior reviews, were unfounded with respect to the *Girijan Article*, and we find no compelling reason to reverse our decision reached in the *Honey 3rd NSR Final* and *NSR Anhui Final Results* that the *Girijan Article* is unreliable as a source for valuing raw honey.

Regarding the *Kerala Article*, in the *Preliminary Results*, the Department found it unreliable. *See* Prelim FOP Memo. Specifically, we noted that the *Kerala Article* appears to be nothing more than a school paper written by a first-year business student and posted on the "Business School" section of the website with no additional information on the author's qualifications or

[25] *See* Prelim FOP Memo at Attachment 19 at 3.

the sources of his information. Although respondents argue that the Department should accept this article as being as probative as the EDA Data with respect to the price of raw honey in India during the POR, respondents did not place any information on the record of this review addressing the Department's concerns regarding the *Kerala Article's* origins. While the *Kerala Article* may be of some probative value, the considerations above result in the Department according it less weight than the EDA Data, which were collected and published by a business entity based on the experience of numerous beekeepers in a state with a large volume of honey production. Therefore, consistent with the results of *Honey 3rd NSR Final* and *NSR Anhui Final Results*, the less-than-fair-value investigation, and with our normal practice, we continue to reject the raw honey data in the *Kerala Article* because there is no information on the record in this proceeding regarding the article's reliability, and because the EDA Data are a better source with respect to the quality and specificity of data.

With respect to the *Jharkhand Article*, the Department notes that the article on its face states that the prices quoted are limited to a single beekeeper that only produces 1.5 MT of honey per year, and that the *Jharkhand Article* was rejected as unreliable in *Honey 3rd NSR Final*. Although respondents argue that the Department should accept this article as being as probative as the EDA Data with respect to the price of raw honey in India during the POR, the exceptionally limited nature of these data renders them unrepresentative of Indian prices as a whole in comparison with the broader EDA Data. Therefore, consistent with the results of *Honey 3rd NSR Final* and *NSR Anhui Final Results*, the less-than-fair-value investigation, and with our normal practice, we continue to reject the raw honey data in the *Jharkhand Article* because they are not representative of countrywide prices in India, and because there is no information on the record in this proceeding regarding the article's reliability.

Respondents argue that the Department should average the values contained in all of their raw honey source data, including the *Girijan Article*, the *Kerala Article*, the *Jharkhand Article*, and the EDA Data. As noted above, the Department finds that the EDA Data are the most reliable information on the record, and adequately represent prices for the country. Averaging prices from an article that is reliable with those from potentially unreliable sources would undermine the integrity of the prices quoted in the EDA Data. We note that the *Girijan Article*, the *Kerala Article*, and the *Jharkhand Article* either quoted prices from single producers, or contain data from unknown origins, which should not be considered comparable to those of the EDA Data. Because the EDA Data represent raw honey prices in the Indian state with the second largest honey production in India, averaging the EDA Data average price with those of a single producer or of unknown origin would improperly bias the average toward the experience of the single producer.[26] Further, the Department previously determined in *Honey 3rd NSR Final* and *NSR Anhui Final Results* that such an average was "not reliable." In the instant review, we continue to find that the *Girijan Article*, the *Kerala Article*, and the *Jharkhand Article* are unreliable sources for valuing honey. Diluting the efficacy of the EDA Data by averaging its prices with those contained in the *Girijan Article*, the *Kerala Article*, and the *Jharkhand Article* would result in less, rather than greater, accuracy in these final results, and, therefore, we decline to do so.

Finally, with respect to the level of trade arguments raised by the parties, we note that the

[26] We also note that a weight averaged price would not be feasible or recommended in this case, as we do not have reliable data on the record which would provide a basis for the weighting of the different articles' prices.

Department does not have sufficient information available to address either the substance or relevance of these arguments with respect to the articles on the record. There is no clear information on the level of trade reflected in the prices listed in the articles on the record, and we note further that some of the respondents claim to purchase raw honey from both beekeepers and honey traders,[27] therefore precluding any meaningful level of trade comparison analysis. Therefore, for these final results, we are not able to construct a level of trade analysis with respect to the surrogate value for raw honey and respondents' actual purchasing experiences, nor do we believe it appropriate to do so.

In deriving a methodology by which to calculate the appropriate raw honey surrogate value using the EDA Data, we reviewed parties' comments on the issue. Petitioners note raw honey prices for Tori for December 2002 – January 2002, prices for Litchi for March 2003 – April 2003, and Karanj from May 2003 – June 2003, and from this basis calculate both a simple and weighted average POR honey value. Respondents, on the other hand, claim that the prices in fact correspond to a period one year later than petitioners allege. The Department notes that respondents' claim that the Rs. 87 per kg. price for Karanj is in fact for May 2004 – June 2004 is in direct conflict with their request in their case brief at 14, where they suggest that the Department should use these figures in the POR average. A plain reading of the email from Ashok Kumar, contained in the EDA Memo, indicates that the figures listed for 2002 – 2003 on the chart for Tori honey would be December 2002 – January 2003. Therefore, the Department agrees that petitioners' reading of the data is consistent with the EDA Data Memo.

In conclusion, because we find that the EDA Data are the best available information for valuing the factor of raw honey, we have utilized a weight averaged price, using the price and quantity for each type of honey contained in the EDA Data, adjusting for inflation when necessary (as in the case of the October 2002 Sarguja honey price point) to value raw honey for these final results.[28] We based the time periods and types of honey on the information contained in EDA Data Memo from the website and the information provided by the EDA Rural Systems staff member, arriving at a POR average raw honey value of Rs. 74.90 per kg.

Comment 2: Appropriate Surrogate Value for Financial Ratios

Respondents contend that for the final results the Department should base the surrogate financial ratios only upon the 2003-2004 financial statements of Apis (India) Natural Products ("Apis"). Respondents note that in the *Preliminary Results* the Department relied upon the 2002-2003 financial statements from MHPC because there were no other financial statements on the record. Respondents explain that after the *Preliminary Results* they placed both the Apis financial statements and the 2003-2004 MHPC financial statements on the record.

Respondents contend that the MHPC financials lack critical information necessary for the Department's ratio calculation. Specifically, respondents contend that the MHPC financials do not provide a figure for raw materials or a credible profit figure. Respondents claim that the Department and all interested parties have had difficulty with the unconventional format of

[27] *See* Shanghai Eswell's Supplemental Questionnaire Response dated May 13, 2004, at page 4.
[28] For a detailed discussion of the calculation of this surrogate value *see* Memorandum to the File from Case Analysts: Factors of Production Valuation Memorandum for the Final Results, dated June 27, 2005.

MHPC's financial statements in past honey proceedings, and that as a result, the Department has made certain assumptions in order to ascertain the raw honey consumed and the profit figure.

Respondents contend that MHPC's financial statement does not provide a closing inventory value and the methodology used by the Department assumed that MHPC had no ending inventory at all. Respondents argue that, the use of a "last in, first out" ("LIFO") inventory methodology makes no sense in the case of a perishable product like honey. Respondents assert that the lack of information about the closing inventory renders the entire financial statement unusable. Respondents state that, in a previous case, the Department rejected the use of a financial statement that did not allow for the calculation of raw materials cost. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from the People's Republic of China*, 63 FR 72255 (December 31, 1998) ("*Mushrooms Final Determination*"). Respondents explain that in the mushrooms case the Department rejected financial statements because packing information was included in the materials consumption figure.

Additionally, respondents contend that the profit used by the Department in the *Preliminary Results* was not based on the profit in MHPC's financial statement. Respondents state that the Department has calculated a "hypothetical" profit by deducting the cost of production, packing and transportation from the reported net sales value. Respondents claim that the calculated profit figure is further distorted by the fact that it is based on an extrapolated raw honey consumed figure. Respondents state that, in almost all other cases involving NMEs, the Department calculates the profit ratio based on the profit actually reported in the surrogate company's financial statements.

Furthermore, respondents argue that MHPC's financial statements should not be used as the basis for the surrogate financial ratios because MHPC is a cooperative and does not operate as a true market entity. Respondents contend that MHPC's payments to its members for raw honey are inflated and its loans to its members are not always repaid on time. Respondents also assert that the MHPC financial statements are distorted by the costs associated with the fruit canning and processing division. Respondents claim that in the past the Department has rejected the use of surrogate companies that produced a significant amount of non-subject merchandise. *See e.g. Mushrooms Final Determination.*

Finally, respondents argue that the financial statements of Apis are the most representative of the financial experience of the Chinese honey producers. Respondents contend that the Apis financial statements are free from distortions. Respondents also maintain that the Apis financial statements are based only upon its honey operation and that Apis is a true market economy honey producer. Respondents state that Apis produces and sells significant quantities of export quality honey and publishes an Annual Report, which conforms to the standard format of Indian financial statements that the Department relies upon in other NME proceedings. Respondents argue that the Department should rely on the Apis financial statements exclusively, but that if the Department continues to use the MHPC financials, it should average the MHPC ratios with the financial ratios based on the Apis financials.

Petitioners argue that the Department should use the 2003-2004 MHPC financial statements

exclusively for the final results. With respect to respondents' concern about the use of an extrapolated raw materials cost, petitioners claim that the Department has calculated a denominator that pertains only to subject merchandise and reflects only the market value of raw honey. Petitioners further argue that the value of the raw honey in the *Tribune* article corroborates the reasonableness of the Department's use of a LIFO analysis of MHPC's raw material consumption.

Petitioners also assert that the Department calculated an actual profit for MHPC Honey Sales and not a hypothetical profit as claimed by respondents. Petitioners argue that the Department's profit calculation is consistent with section 773A(f)(1)(A) of the Act, which permits the Department to allocate costs and make adjustments where the reported costs do not reasonably reflect the costs associated with the subject merchandise. Additionally, petitioners argue that the MHPC results are not distorted by non-market forces. Petitioners insist that respondents are incorrect in their assertion that members of a cooperative are affiliated. Petitioners assert that the value that any cooperative members receive is based on the Indian market economy. Petitioners further argue that the respondents have not quantified the degree to which loans to the members would distort the financial ratios and that almost all companies have provision for bad loans.

Petitioners disagree with respondents' claim that the MHPC annual report is flawed due to the inclusion of the fruit canning division's financial performance. Petitioners assert that the Department's methodology includes profits only from the honey processing division and excludes all joint costs, including fruit processing costs, of which there are only a few. Petitioners assert that, even if the fruit processing depreciation costs were higher than that for honey processing, applying any joint costs only against honey profit, rather than total profit, would result in an increased underestimation of honey processing profit. Finally, petitioners contend that the Department could allocate shared costs between fruit and honey, but that this would create only slightly lower honey-only fixed overhead and SG&A numerators, which would increase the honey-only profit ratio.

With respect to the use of the Apis data, petitioners argue that the Apis data are not publicly available and represent a partially disclosed annual report from a privately held company. Petitioners state that it is the Department's policy to only use publicly available data and therefore the Apis data should not be used for the surrogate financial ratios.

Petitioners contend that the Apis data are incomplete and include no notes, auditors' report, shareholder's report or complete schedules which were placed on the record. Petitioners argue that the Apis data are unreliable for purposes of calculating surrogate values, because the values would likely be distorted without using the full report. Petitioners also argue that, without the full data for Apis, the difference in the data for subject and non-subject merchandise cannot be fully accounted for. Furthermore, petitioners claim that Apis is primarily an exporter, and that, as such, Apis is not representative of the surrogate market or a preferable surrogate. Petitioners assert that domestic Indian honey sales, and their associated overhead, SG&A, and profit level, are the elements that are important when creating surrogate financial ratios. Petitioners argue that profits should be based on sales of honey in India and therefore the Apis data should not be used.

Department's Position:

We agree with petitioners that the 2003/2004 MHPC financial statements are the best source for valuing the surrogate financial ratios in this review. Under NME methodology, when these are deemed reliable, it is the Department's established practice to select the most contemporaneous surrogate values to value the factors-of-production and financial ratios. *See Preliminary Determination of Sales at Less Than Fair Value: Tetrahydrofurfuryl Alcohol from the People's Republic of China*, 69 FR 3887, 3892 (January 27, 2004). Moreover, for valuing factory overhead, SG&A, and profit, the Secretary normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country. *See* 19 CFR 351.408(c)(4). For the reasons discussed below, we find that the 2003/2004 MHPC financial statements are the best available information for valuing financial ratios.

In the *Preliminary Results*, the Department relied on the 2002/2003 MHPC financial statements. On January 18, 2005, respondents placed on the record of this review the 2003-2004 MHPC financial data. On January 27, 2005, respondents placed on the record of this review the Apis financial data. The last page of respondents' submission includes a letter from Apis to an international trade consultant responding to the consultant's request for the Apis financial data that is included in respondents' submission.

As an initial matter, the Department agrees with petitioners that the surrogate source proposed by respondents (*i.e.*, the Apis financial statement) is not a reliable source for calculating the surrogate financial ratios because it is neither complete, nor sufficiently detailed to provide a reliable source for surrogate values. In valuing factors of production, section 773(c)(1) of the Act instructs the Department to use "the best available information" from the appropriate market economy country. In choosing the most appropriate surrogate value, the Department considers several factors, including the quality, specificity, and contemporaneaity of the source information. *See*, *e.g.*, *Garlic Decision Memo* at Comment 6. Stated differently, the Department attempts to find the most representative and least distortive market-based value in the surrogate country. *See Mushrooms 1st Review Decision Memo* at Comment 5. The Department undertakes this analysis on a case-by-case basis, carefully considering the available evidence in light of the particular facts of each industry.

With respect to quality, we find that MHPC is a better source of data than Apis because the MHPC materials include a complete annual report, an auditors report, and complete profit and loss and business statements that segregate MHPC's honey and fruit canning businesses. With respect to specificity, we note that MHPC is a honey processor in India, and the financial statements include details on MHPC's costs and revenues related to its honey processing business. The MHPC statement is also contemporaneous to the POR, as discussed below. In contrast, we find that the Apis statement does not include any auditor notes, nor does it appear to include complete schedules or details on Apis' operations. Therefore, we are not using the Apis data because we determine that it is not as reliable or detailed as that of MHPC, and because we have other publicly available information which meets the Department's criteria for data on which to base the surrogate financial ratios.

Regarding the use of the MHPC data, we disagree with respondents' assertions that these data

are unusable. Although we do not contest respondents' assertions that the Department has made certain assumptions in order to ascertain the raw honey consumed figure and the profit figure, we do not find that these factors alone make the data unusable. In calculating the raw honey consumption value and the profit figure, the Department relied on the same methodology used in prior honey proceedings (the initial investigation, the first review, and multiple new shipper reviews) to derive the surrogate financial ratios from the MHPC financial data. The profit value referenced in MHPC's financial statements is the profit for MHPC as a whole, includes other sources of profit and/or loss (*e.g.*, fruit canning division and interest/dividend income), and thus it would be improper to apply it to expenses that pertain only to MHPC's honey processing division. Further, we note that the Court of International Trade ("CIT") has upheld the Departments' calculation of the surrogate profit ratio for MHPC in *Final Results of the New Shipper of the Antidumping Duty Order on Honey from the People's Republic of China,* 68 FR 62053 (October 31, 2003), noting there are no "restrictions on Commerce's decision to analyze profit figures and make a single adjustment" and that "it was reasonable for Commerce to recalculate MHPC's profit based on its examination of the financials." *See Wuhan Bee Healthy Co., Ltd v. United States*, Slip Op 05-65 (CIT 2005), at 19. Thus, consistent with our prior practice, we calculated a profit value without reference to the absolute profit figure listed in the financial statement. This methodology is consistent with section 773A(f)(1)(A) of the Act, which permits the Department to allocate costs and make adjustments where the reported costs do not reasonably reflect the costs associated with the subject merchandise.

As noted by respondents, the MHPC financial statement does not include a raw material cost for honey. Accordingly, it was necessary for the Department to extrapolate the raw material honey cost. This raw material cost was derived by dividing the total cost of honey by the quantity purchased and then multiplying this figure by the sum of the quantities sold and lost during production. Respondents charge that the Department's methodology improperly assumes a LIFO inventory methodology, which respondents maintain is unreasonable given that honey is a perishable product. However, respondents themselves acknowledge that the MHPC's financial statements provide no indication of the inventory valuation method used by MHPC. Moreover, respondents have cited no specific evidence that the derived MHPC raw material cost of honey is distortive. In fact, as noted by petitioners, the average value of the raw honey in the *Tribune Article* (Rs. 85 per kg.) corroborates the reasonableness of the Department's use of a LIFO analysis of MHPC's raw material consumption, where the average value of raw honey is Rs. 88.28 per kg. Accordingly, we continue to find that the methodology used by the Department to determine a raw material cost for honey is reasonable.

Because MHPC is in the business of buying raw honey from its members and selling processed honey to its customers, we also find that MHPC's financial statement is specifically reflective of the production experience of an Indian honey producer. Moreover, we determine that MHPC's financial statements are narrowly tailored to subject merchandise. Respondents suggest that, because MHPC's business includes non-subject operations, the data should be discredited. In the Mushrooms case cited by respondents, contrary to respondents' claim, the Department rejected two out of three available financial statements because one financial statement included a higher proportion of non-subject operations than the other financial statements, and in the other the materials total included an amount for packing materials that was nearly as large as raw materials. In this case, in contrast, the total asset value of non-subject operations accounts for

only 16.71 percent of MHPC's total asset value,[29] and packing materials are separately itemized. Moreover, as noted above, the Department has calculated a profit only from the honey processing division. Finally, with respect to respondents' assertion that MHPC does not operate as a true market entity because it is a cooperative, we disagree. Other than to note that loans to its members are not always repaid on time, which is not unusual in that many companies have provisions for bad loans, respondents have not cited evidence that supports their claim that MHPC's results are distorted by non-market forces.

Thus, we continue to find that MHPC meets the criteria relied on by the Department in selecting appropriate Indian surrogate data with which to value financial ratios. Although we have both MHPC 2002/2003 and 2003/2004 financial data on the record, we determine the 2003/2004 financial data are more contemporaneous because they cover eight months of the POR, whereas the 2002/2003 financial statements cover only four months of the POR. Therefore, in accordance with section 773(c)(1)(B) of the Act, we determine that MHPC's 2003/2004 financial statements are the best available information on the record of this review. Accordingly, we will rely on MHPC's 2003/2004 financial statements in calculating the surrogate ratios for factory overhead expenses, SG&A expenses, and profit in these final results.

Comment 3: Calculation of the MHPC Financial Ratios

Respondents argue that, if the Department uses the MHPC data to value the financial ratios, the Department should revise its calculation of the ratios for the final results. Respondents argue that the Department improperly included "honey sales commissions," in the calculation of the SG&A ratio, asserting that the Department has a statutory mandate to deduct the commissions. *See* section 772(d)(1)(A) of the Act. Respondents note that, in market economy cases, the Department adjusts both CEP or export price ("EP"), and constructed value ("CV") for commissions to avoid double counting.[30] Respondents argue that the Department is required to apply the same "reasonable" methodology in NME proceedings based on the CIT decisions in *Hebei Metals & Minerals Import & Export Co. v. United States*, 2004 Ct. Intl. Trade LEXIS 89 ("Hebei") and *Holmes Products Corp. v. United States*, 795 F. Supp. 1205 (CIT 1992) ("*Holmes*"). Respondents note that the Department has deducted expenses from the surrogate SG&A value in prior proceedings.[31] Respondents note that, in previous honey cases, the Department determined that certain transportation expenses had been double counted.[32] Additionally, respondents note that the Department has consistently excluded packing, freight, discounts, rebates and brokerage from overhead and SG&A calculations in order to avoid double

[29] This figure is based on the MHPC 2002/2003 data, as the consolidated balance sheet for MHPC 2003/2004 was not placed on the record of this review.
[30] *See* Antidumping Policy Manual, Chapter 8, Normal Value, at 35–43 (commissions) and 55–66 (constructed value).
[31] *See 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 63842-01, (November 17, 1998) and accompanying Issues and Decision Memorandum at Comment 18 ("*1997 TRBs Decision Memo*"), where the Department deducted transportation expenses because they were already accounted for in the normal value calculation.
[32] *See Honey Investigation Decision Memo* at Comment 3.

counting.[33] However, respondents acknowledge that the Department did not exclude commissions from the SG&A ratio in the *NSR Anhui Final Results*. Respondents note that, in the past honey new shipper reviews, the Department applied findings from the *1997 TRBs Final* in refusing to exclude sales commissions, stating that "whether or not a PRC producer had sales commissions is irrelevant to the Department's SG&A calculation, because the Department does not tailor surrogate financial ratios to match the particular circumstances in the NME country." *See* the *NSR Anhui Decision Memo* at Comment 3.

Respondents claim that sales commissions should be excluded, because the Department has already assessed that expense against respondents in its calculation of net U.S. price. Respondents stress that the issue is not whether a commission is a discount, but whether the amount has already been deducted from the U.S. gross price. Respondents argue that comparing a normal value including commissions with a U.S. net price excluding commissions is double counting. Respondents further stress that these commissions should be treated in a manner consistent with the Department's treatment of transportation expenses and consistent with the deduction of U.S. affiliate expenses. *See 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 Decisions Memorandum at comment 5 ("*Garlic Decision Memo*"). According to respondents, it is irrelevant that this commission is seen as a "standard selling cost" because the "cost" has already been assessed against respondents. In conclusion, respondents argue that, just as the Department is required to adjust constructed value for commissions in a market economy proceeding, it must also adjust the surrogate constructed value for commissions in an NME proceeding.

Respondents also argue that the Department should include MHPC's expenses for jars, corks, and honey machines as costs for direct materials in the calculation of the denominator. Respondents argue that, because "jars and corks" are essential to marketing retail honey, the Department should treat these expenses as costs for direct materials consistent with the Department's practice.[34] Respondents also assert that the calculation of the surrogate ratio must reflect the "surrogate company's experience as a whole."[35] Respondents state that "jars and corks" are listed as expenses in the annual report and argue MHPC sells its processed honey in these jars. Furthermore, respondents argue that the cost of "jars and corks" should be deducted from MHPC's net revenue. Respondents claim that MHPC is not a trader of empty "jars and corks," noting that the MHPC Annual Report does not show income from the resale of these goods. Regardless of the Department's decision with respect to the calculation of the denominator, respondents contend the Department should still deduct these amounts from net revenue, since MHPC sells retail honey packaged in jars. Respondents also claim that the Department should treat MHPC's honey machine purchases as direct materials, as these

[33] *See 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 63842-01, (November 17, 1998) ("*1997 TRBs Final*").
[34] *See Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 68 FR 6712 (February 3, 2003) and the accompanying Issues and Decision Memorandum at Comment 9 ("*Persulfates Decision Memo*").
[35] *Honey from the People's Republic of China: Final Results of the First Antidumping Duty Administrative Review*, 69 FR 25060 (May 5, 2004), and accompanying Issues and Decision Memorandum at Comment 19 ("*Honey 1st AR Decision Memo*").

machines actually process the honey for sale. Finally, respondents contend that the Department should deduct "honey box purchases" as a packing expense from the net revenue to calculate the net profit, noting that "packing expenses" were deducted from the profit ratio calculation in the *Preliminary Results*.

In their reply brief, petitioners argue that the Department should reject respondents' request to exclude MHPC's honey sale commissions from its calculation of the SG&A ratio, consistent with the Department's decision in *NSR Anhui Final Results*[36] and Department practice. Quoting *1997 TRBs*, petitioners note that the Department categorized these expenses as standard selling costs, and thus as SG&A expenses irrespective of whether the PRC producers had commissioned sales staff. Petitioners contend that this policy is not limited to commissions, but also applies to circumstance-of-sale adjustments. Petitioners argue that the Department has a long-standing practice of not adjusting surrogate producer's ratios in an attempt to reflect the actual experiences of the NME exporter/producer.[37] Petitioners further argue that, because the calculations in a market economy case and a non-market economy case are inherently different, it is inappropriate to make comparable adjustments, contrary to respondents' claims. According to petitioners, foreign sales in China are not the basis for normal value, and therefore no individual sales exist to use for making circumstance-of-sale adjustments, including those for commissions. Petitioners contend that, because commissions are selling expenses, they should properly be considered part of SG&A, and that no double-counting would occur even for those respondents that reported commissions. Petitioners stress that commissions are selling expenses whether paid to sales employees or outside salesmen, and argue that the Department should continue to reject respondents' request, consistent with its determination in *NSR Anhui Decision Memo* at Comments 17 and 18.

Regarding corks and jars, petitioners argue that the Department should continue its past practice and not find "jars and corks" to be a component of direct materials.[38] Petitioners note that respondents failed to address the inclusion of these items in the sales section of the profit and loss statements, and that the Department had previously viewed these sales figures as an indication that these items are likely resold. Petitioners also contend that corks and jars were not included in the direct material factor buildup, and do not reflect the physical factor composition of the subject merchandise, as sales of honey sold in jars were not reported by respondents under U.S. sales. Regardless, petitioners argue that their inclusion in the Materials, Labor and Energy ("MLE") denominator would be incorrect because the value of any packaging could be included only if the overhead, SG&A and profit ratios are applied to a packaging-inclusive per-unit factor build up. Petitioners note that the Department practice is to add packing after the application of the ratios.[39] In the event the Department does incorporate these costs, petitioners contend they should only be used to calculate net profit. In relation to the honey machines, petitioners argue that the machinery would be a production asset, and these machines are not used, but are resold. Petitioners argue that the sales column of the MHPC Main Journal Business Statement shows

[36] *See NSR Anhui Decision Memo* at Comment 3.
[37] *See Certain Color Television Receivers From the People's Republic of China: Final Results of Sales at Less than Fair Value and Negative Final Determination of Critical Circumstances* 69 FR 20594 (April 16, 2004), and accompanying Issues and Decision Memorandum at 73 ("*CTVs Decision Memo*").
[38] *See NSR Anhui Decision Memo* at 3.
[39] *See* Memorandum on Eurasia Bee's Product Co. (Eurasia) Program Analysis for the Preliminary Results of Review at 10. (November 23, 2004).

honey machine sales and total honey machine purchases. In this respect, they cite respondents' January 18, 2005 submission at Exhibit 3.

Petitioners argue the Department should reject respondents' claim that honey box purchases are a production expense. Petitioners contend that honey "boxes" are not packing materials at all, but actually refer to the rectangular wooden hive structures which MHPC purchases and resells, and petitioners argue that this is demonstrated in the sales column of the MHPC Main Journal Business Statement. *See* Respondent's 2nd Surrogate Submission.

Department's Position:

We disagree with respondents that honey sales commissions should be excluded from the calculation of the surrogate SG&A ratio. In *NSR Anhui Final Results*, the Department determined, consistent with the *1997 TRBs Final*, that because sales commissions represent standard selling expenses, these commissions should be included in the surrogate SG&A calculation, irrespective of any sales commissions the respondents incurred on the sale of subject merchandise. The Department found that whether or not a PRC producer actually incurred sales commissions is irrelevant to the Department's surrogate SG&A calculation, because the Department does not modify surrogate financial ratios to match the particular circumstances of the NME country. *See, e.g., 1997 TRBs Decision Memo* at Comments 17 and 18; *Honey 3rd NSR Final*, and accompanying Issues and Decision Memorandum at Comment 5 ("*Honey 3rd NSR Decision Memo*"); and *NSR Anhui Decision Memo* at Comment 3.

The Department disagrees with the respondents' contention that, because the Department adjusts constructed value for commissions in market-economy proceedings, it must make a parallel adjustment to the surrogate constructed value for commissions in an NME proceeding. Adjustments for commissions in the context of a market economy proceeding are classified as circumstance-of-sale adjustments; however, the Department does not make circumstance-of-sale adjustments in NME proceedings. *See, e.g., 1997 TRBs* at Comment 12. Instead, as explained above, the Department includes all standard selling expenses in the surrogate SG&A calculation. The Department has noted in prior cases that it is not possible to deconstruct surrogate financial ratios at the level of detail that would be necessary to make such adjustments, because it is not known whether there is an exact correlation between the NME producer's and the surrogate producer's expenses. Therefore, "the Department normally bases normal value…on factor values from a surrogate country on the premise that the actual experience in the NME cannot meaningfully be considered." *See Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the Republic of Romania; Final Results and Rescission in Part of Antidumping Duty Administrative Review,* 61 FR 51427, 51429 (October 2, 1996).

We also disagree with respondents' claim that the Department normally tailors the surrogate SG&A calculation to a specific NME producers' experience, as the Department is not required to "duplicate the exact production experience of the Chinese manufacturers."[40] We further note that, in *Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty*

[40] *See Bulk Aspirin from the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 68 FR 48337 (August 13, 2003), and accompanying Issues and Decision Memorandum at Comment 2, *citing Nation Ford Chem. Co. v. United States*, 166 F.3d. 1373,1377 (Fed. Cir. 1999).

New Shipper Review, 67 FR 72139 (December 4, 2002) ("*Garlic NSR Final*"), the Department removed the line item "Selling & Administrative Expense -USA office," because the Department found that it was not appropriate to include surrogate expenses for a U.S. (foreign) office in the surrogate producer's SG&A ratio. While the Department removed a foreign expense from the surrogate financials, the Department did not tailor the domestic experience of the surrogate company to the experience of the PRC producer. In the current review, the sales commissions are an aspect of the surrogate company's home market standard sales expense and therefore their inclusion is consistent with the Department's past practice. Therefore, we will continue to include honey sales commissions in the surrogate SG&A calculation for the final results.

The Department also disagrees with respondents' claims that "jars and corks" and honey machine expenses should be included as direct material costs, and that honey "boxes" should be deducted from revenues and considered a packing expense. Consistent with *NSR Anhui Decision Memo* at Comment 3, the Department notes that "jars and corks," honey machines, and honey "boxes" each appear separately in both the "Sales" and "Purchase" columns, independent of the "Honey Collection" and "Honey Sale" line items of the 2003/2004 MHPC surrogate financial statement. *See* Respondents' 2nd SV Submission at Exhibit 1. Respondents failed to provide any evidence in the 2003/2004 MHPC financial statements that these items are used in the manner in which respondents claim, or any evidence that these items are part of the finished product. The Department does note, however, that the costs and revenues associated with the aforementioned items are independently itemized on the MHPC financial statements—specifically apart from the lines items labeled "honey sales" and "packaging." Without supporting evidence to suggest that the items are associated with or incorporated into the sale of subject merchandise, the Department must treat the financial statement line items as they have been reported in the MHPC financial statement—independent of sales and packaging. Therefore, in the application of the surrogate financials, the Department will continue to deduct only those packing expenses identified in the line item "packing" in the MHPC annual report, consistent with previous segments of this review, will not adjust the surrogate revenue and will not adjust the MLE denominator to include the expenses for "jars and corks" or honey machines. *See* Memorandum to the File from Candice Kenney Weck: Factors of Production Valuation Memorandum for the Final Results, dated June 27, 2005 ("Final FOP Memo").

Comment 4: Brokerage and Handling

Respondents argue that the Department should value brokerage and handling using the value from *Certain Hot Rolled Carbon Steel from India: Final Results of Antidumping Duty Investigation*, 66 FR 50406 (October 3, 2001) ("*India Hot Rolled Final*"). Respondents contend this is the usual Department practice and cite to numerous cases including: *China Shrimp Prelim*, and accompanying Factor Valuation Memorandum; and *Certain Preserved Mushrooms from the People's Republic of China: Preliminary Results for the Seventh New Shipper Review*, 69 FR 45012 (July 28, 2004) ("*Mushrooms 7th NSR Prelim*"). Respondents argue that, when compared to a price quote from a single shipment, the Department has considered *India Hot Rolled Final* data to be more contemporaneous and the best available information.[41] Respondents state that

[41] *See Notice of Final Determination of Sales at Less Than Fair Value: Lawn and Garden Steel Fence Posts From the People's Republic of China*, 68 FR 20373 (April 25, 2003), and accompanying Issues and Decision Memorandum at Comment 5 ("*Fence Posts Decision Memo*").

petitioners' surrogate data, used in the *Preliminary Results*, consisted of only price *quotes* from two days in November three years before the POR for shipment of ball-bearings. Respondents believe the Department should use the *actual prices* for brokerage and handling of a similar steel product provided in *India Hot Rolled Final*.

In their rebuttal brief, petitioners argue that the information used in the *Preliminary Results* is equally contemporaneous, and should be used for consistency. Petitioners note that the Department used the same information in each of the last two new shipper reviews, sharing the same time period with this review, without any past objection from respondents.

Department's Position:

We agree with respondents that the Department should use the more contemporaneous and more representative surrogate data for brokerage and handling. We note that the Department can reach different determinations in separate administrative reviews, but it must employ the same methodology or give reasons for changing its practice. *See Cinsa, S.A. de C.V. v. United States*, 966 F. Supp. 1230, 1238 (CIT 1997). We find that the brokerage and handling data taken from the *India Hot Rolled Final* is more contemporaneous and representative than the data the Department used in the *Preliminary Results*. The value is more contemporaneous because it covers shipments between October 1, 1999, and September 30, 2000, as compared to two shipments of tapered roller bearings from November 12, 1999. Finally, as respondents note, this value has been used in the past by the Department. Therefore, given the Department's preference for using the best available information in valuing factors of production, in these final results, the Department has used the brokerage and handling value from the *India Hot Rolled Final*.

Comment 5: Recalculation of Constructed Export Price Profit

Respondents assert that in the *Preliminary Results* the Department departed from its past practice in calculating CEP. Respondents contend that the Department's practice is to calculate CEP profit based on a profit ratio derived from the surrogate producer's books and records.

Respondents cite to the Department's Policy Bulletin 97.1, which respondents state requires the Department to calculate the CEP profit in NME cases based on a profit ratio derived by using the financial data of the surrogate producer. Respondents also argue that, in the 2002-2003 honey new shipper review, the Department confirmed its policy of basing CEP profit on the surrogate producer's profit ratio. *See NSR Anhui Decision Memo* at Comment 5. Respondents argue that the Department should correct the CEP profit calculation for Shanghai Eswell, Wuhan Bee, and Zhejiang using the profit ratios derived from the surrogate company ratio calculations.

Petitioners argue that the Department used the surrogate producer's profit in previous cases to calculate CEP profit because it would have been inappropriate to use the financial data of an NME respondent to establish CEP profit. Petitioners assert that the Department's policy bulletin allows for use of surrogate financial data when the alternative is the financial data of an NME respondent. Petitioners further assert, however, that in this case the use of the actual U.S. profit for the affiliated entities is reasonable because it reflects U.S. economic activities, whereas the

use of the surrogate producer's data reflects foreign economic activity.

Petitioners argue that the Courts have extended significant latitude to the Department to make its determinations, so long as they are reasonable and supported by evidence on the record. Petitioners argue that the U.S. affiliates' financial statements and tax returns constitute substantial evidence on the record of this review with respect to CEP profit and their use is in accordance with the law. Petitioners further argue that even if the U.S. profit was only as reasonable or even less reasonable than the use of the surrogate company profit, the Courts have held that the Department need only apply a reasonable interpretation and need not use the most reasonable interpretation. *See, e.g., U.S. Steel Group v. United Sates*, 225 F.3d. 1284, 1287 (Fed. Cir. 2000).

Department's Position:

We agree with respondents that it is the Department's practice to calculate CEP profit based on the surrogate producer's profit ratio, and we have recalculated CEP profit in this manner for the final results in accordance with the Department's standard practice. *See, e.g., NSR Anhui Decision Memo* at Comment 5; *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Wooden Bedroom Furniture from the People's Republic of China*, 69 FR 35312 (June 24, 2004) ("*Furniture Preliminary Determination*"), and accompanying Factor Valuation Memorandum. As noted in *NSR Anhui Decision Memo*, the Department finds it inappropriate to use financial report data of an NME respondent in calculating CEP profit, and it is the Department's well-established practice to base its calculation of CEP profit on the income and expense information provided by the surrogate producer(s). Therefore, we determine for these final results that the CEP profit calculation should be revised to reflect the surrogate profit ratio (as described above in Comment 3 and the Final FOP Memo).

Comment 6: Calculation of the Surrogate Wage Rate

Respondents argue that the Department should recalculate the surrogate wage rate. First, respondents argue that, for the revised NME labor rate released around November 1, 2004, the Department deviated from its methodology without explanation by combining data from 2001 and 2002. Respondents contend that the 2002 revised wage rate calculation, posted on the Department's website on November 15, 2004, should have utilized only 2002 data which was available from the stated information sources, rather than a mixture of 2001 and 2002 data.

Respondents also argue that the Department should use the country-wide range rate for India to value labor, rather than its current practice of using regression analysis based on multiple countries. Respondents state that data for India should be used, based on section 773(c)(4) of the Act, because India is "economically comparable," and is a significant producer of comparable merchandise.[42] Respondents note that the calculated wage rate of $0.93/hour is more than 600% higher than India's published, country–wide labor rate of $0.15/hour.

Respondents assert that the Department's justification for using a regression analysis is that: (1) using a larger number of countries yields a more accurate result, (2) the process is more fair

[42] *See Preliminary Results*, 69 FR 77184, 77182 (December 27, 2004).

because the valuation of labor does not depend on the Department's selection of a surrogate country, and (3) the results are more predictable.[43] Respondents argue that this is incorrect. Respondents contend that the Department excluded many low-wage countries from its regression analysis, and included non-comparable source countries. Thereby, it violated the statute's instructions that surrogate values be derived from both economically comparable countries and countries that are significant producers of comparable merchandise.[44] Respondents contend that the Department's position that a regression analysis is more accurate does not justify disregarding the statute.[45] In addition, respondents claim that a complicated regression analysis may result in clerical errors, and is therefore less predictable than a regularly published country–wide labor rate from the primary surrogate country. Finally, respondents argue that the Department's use of China's per-capita Gross National Income ("GNI") in its regression analysis is contradictory to the Department's NME methodology, because NME methodology is based upon the theory that prices and other economic data from China are not market driven, and are therefore unusable and unreliable. As a consequence, respondents argue that the GNI data from China, which is an integral part of the regression calculation, should also be viewed as unreliable.

Respondents also argue that the wage rate should be recalculated because errors in the calculation have not been corrected and use of a combination of 2001 and 2002 data violates the Department's regulations. By not using the most current data available,[46] respondents claim the Department is failing to use the "best available information."[47] Also, respondents argue recycling old 2001 wage and GNI data, and then applying the result to China's 2002 GNI data is incorrect, and asserts that such a comparison is arbitrary,[48] nor is accuracy, fairness or predictability enhanced.

Respondents state that the Department's calculation is further flawed because it arbitrarily excludes relevant available data. Respondents note that data for an additional 22 countries was available from the sources used by the Department, and excluding data from these countries from the wage calculation is contradictory to the Department's position that "more data is better than less data."[49] Respondents argue that the Department had no basis for excluding available country data, and that 19 USC 1516a(b)(1)(A) of the Act does not permit the Department to act in an arbitrary manner. Furthermore, respondents contend that the omission of the 22 countries from the regression analysis leads to a biased and distorted result.[50]

In conclusion, respondents claim that, if the Department continues to use a regression-based labor calculation, it should include all market economy counties for which, (1) per-capita GNI

[43] *See Final Rule*, 62 FR at 27367.
[44] *See* 19 U.S.C. 1677b(c)(4)(A).
[45] *See Chevron USA, Inc. v. Natural Resources Defense Council*, 467 US 837, 842-43, *reh'g denied* 468 US 1227 (1984), stating that a regulation cannot stand if it is "arbitrary, capricious, or manifestly contrary to the statute."
[46] *See* 19 CFR 351.408(c)(3).
[47] *See Shanghai Foreign Trade Enterprises, Ltd. v. United States*, 318 F. Supp. 2d 1339 (CIT 1994).
[48] *See Allied Tube & Conduit Corp. v. United State*, 24 CIT 1357, 1370 (2000) (stating that "Commerce may not act arbitrarily").
[49] *See Final Rule*, 62 FR at 27367.
[50] *See* Elements of Econometrics by Jan Kmenta, at 341-344 (1971) in the respondents' Second Surrogate Value Submission at Exhibit 5, Attachment 3.

data is available from the *World Development Indicators*, and (2) wage data is available from the ILO for any year between 1996 and 2002.

In their reply brief, petitioners argue that the Department should continue to use the wage rate calculation used in the *Preliminary Results*. Petitioners argue that Department should not modify its policy, because the wage rate was calculated in accordance with 19 CFR 351.408(c)(3), and the Department is not required to choose a single rate from single countries pursuant to section 773(c)(4) of the Act. Petitioners state that the NME wage rate used by the Department is a country-wide, all-industry universal surrogate value which relates China's labor market to the free labor market as a whole, and therefore must be based on more than one country. Petitioners claim that even higher wage countries, such as Germany, have broad and developed agricultural and industrial bases that provide a broad representation of wage rates and therefore should be included in the regression analysis. In order for the Department to have one rate for all NME industries and nations, petitioners insist that regression analysis is necessary. Petitioners argue that respondents were incorrect to claim the Department's methodology violates the requirement that surrogate values be taken from countries that are significant producers of comparable merchandise, and that the analysis is unnecessarily complicated. Petitioners note that China's GNI is based on actual physical output by China, which the World Bank values in a market currency.

Petitioners further argue that the regression analysis methodology is reasonable and fully disclosed by the Department. According to petitioners, data from 56 countries are utilized, exceeding the sample of 53 countries required to produce results with a 95% confidence interval. Furthermore, petitioners argue that, in conducting statistical sampling, in accordance with legitimate statistical practices, the Department may identify outliers and anomalies in the sample that may lead to biased results. They argue that this selectivity would not amount to "cherry-picking," but rather is a necessary process in the Department's analysis. Petitioners note that the Department has stated that it intends to review its practice of valuing labor costs using data from a regression-based analysis, but petitioners urge the Department to proceed with that process outside the bounds of this case.

Department's Position

Regarding respondents' argument that the Department should use India's average wage rate of $0.15/hour as a surrogate value for Chinese labor, we disagree. Use of such data would be contrary to 19 CFR 351.408(c)(3), which directs the Department to value labor in cases involving NME countries as follows:

> For labor, the Secretary will use regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries. The Secretary will calculate the wage rate to be applied in non-market economy proceedings each year. The calculation will be based on current data, and will be made available to the public.

In accordance with 19 CFR 351.408(c)(3), the Department has calculated the regression-based expected wage rate for the PRC and has used this wage rate in its calculations of the final

margins in this proceeding.

Furthermore, we disagree with respondents that the Department should recalculate the surrogate wage rate. For purposes of these final results, the Department has continued to calculate the regression-based expected wage rate for the PRC in accordance with 19 CFR 351.408(c)(3) and has used this rate to value labor in its margin calculations. This wage rate is listed on the Import Administration web site under "Expected Wages of Selected NME Countries." *See* http://ia.ita.doc.gov/wages/index.html. This is the same PRC regression-based wage rate used in the *NSR Anhui Final Results*.

The Department is reviewing its regression-based wage rate calculation, as recently articulated in *NSR Anhui Final Results*; however, comprehensively re-examining each country in the existing dataset and recalculating the wage rate regression using GNI requires more time than is currently available. To revise the data here would be impracticable given the time constraints of this review. The Department is fully satisfied that the current figures are reasonable and correct, and will use them unless and until they are changed as a result of a thorough review. Recalculating the regression analysis using a significantly different basket of countries would amount to a significant change in the Department's methodology; such a change should be subject to comment from the general public. Thus, it would be inappropriate to restrict this public-comment process to the context of the instant review. Consequently, the Department will invite comments from the general public on this matter in a proceeding separate from the current review of this order.

For these final results, the Department will continue to use the 2004-revised expected wage rate of $0.93/hour as a surrogate for Chinese labor costs, in accordance with its regulations and long-standing practice.

Comment 7: Calculation of Assessment and Cash Deposit Rate

Respondents argue in their assessment rate brief[51] that the Department should not modify its calculation of the assessment and cash deposit rates to a per-unit basis for the final results. Respondents note that they requested in their initial case brief that the Department modify its assessment methodology with respect to Shanghai Eswell (*see* Comment 9, below), a modification to which petitioners objected. Respondents argue that, although petitioners stated in the Petitioners' Rebuttal Brief that the Department should not change its assessment methodology, petitioners then reversed their opinion in a May 19, 2005, submission by advocating that the Department should apply a per-unit assessment and cash deposit rate. Respondents maintain that the Department should not acquiesce to this methodology, especially since respondents were allowed only two days in which to submit comments on petitioners' proposal.

Respondents also argue that the Department's proposed revision would result in cash deposits and assessment rates with no relationship to actual market conditions. Respondents further assert that this methodological change is significant and differs from the "normal" rule specified in the

[51] *See* Respondents Comments on a Proposal to Revise the Cash Deposit and Assessment Methodology on Honey from China, dated May 27, 2005 ("Respondents' Assessment Brief").

Department's regulations. In conclusion, respondents argue that this argument was untimely raised by petitioners and the Department has not provided interested parties with sufficient time to brief the issue, and therefore the Department should not pursue this change for the final results.

Petitioners argue that the Department should calculate a per-unit assessment and cash deposit rate for these final results. Petitioners allege in their assessment rate brief[52] that the creation of an affiliate in the United States has been used by PRC honey producers to avoid antidumping duties. Petitioners cite to the Memorandum to the File: Verification of Sales of Shanghai Eswell Enterprise Co., Ltd. and of Factors of Production for Nanjing Lishui Changli Bees Product Co., Ltd. in the Antidumping Duty Administrative Review of Honey from the People's Republic of China, dated April 15, 2005 ("Eswell PRC Verification Report") at pages 1 and 7, in support of their allegation that Shanghai Eswell negotiates a price with their affiliate, then lowers that price to account for duties, reporting the lower price as the entered value. Petitioners note that respondents are aware that the Department has in the past calculated an *ad valorem* antidumping margin based on the affiliates' downstream price, which is then applied to the lowered entered value price. Petitioners argue that the application of an *ad valorem* rate to a lowered entered value price reduces the absolute amount of dumping duties collected, allowing importers to avoid full payment of duties and undermines the efficacy of the antidumping duty order. Petitioners further argue that respondents are routinely taking advantage of the different transactions on which the Department and U.S. Customs and Border Protection ("CBP") calculate and assess duties, and note that Shanghai Eswell has admitted that it engages in this practice.

Petitioners argue that the Department's proposed methodology of dividing potentially uncollected dumping duties ("PUDD") by the total quantity sold is warranted by the facts of this case and yields a correct result if the total quantity sold includes quantities of subject merchandise actually sold. Petitioners argue, however, that if blending is undertaken by the U.S. affiliate (as in the case of Wuhan Bee), the PUDD should only be divided by the quantity of subject merchandise sold, and the quantity of non-subject merchandise should be excluded to avoid dilution of the rate of duty.[53]

Petitioners maintain that the use of a per-unit rate is permitted by both the statute and regulations. Petitioners note that the statute requires duties to be assessed at a rate "equal to the amount by which the normal value of the merchandise exceeds the export price (or the constructed export price)," and requires that the Department must publish its determination that "shall be the basis for assessment of antidumping duties on entries of merchandise." *See e.g.*, section 736(a)(1) of the Act; section 736(c)(3) of the Act. Petitioners acknowledge that the regulations indicate that an *ad valorem* rate is preferred in most cases, but argue that use of an *ad valorem* rate is not mandated or required, citing to 19 CFR 351.212(f). Petitioners argue that respondents have also acknowledged in their case brief at 72 that the *ad valorem* methodology

[52] *See* Petitioners' Comments Regarding Use of A Specific Rate of Duty for Assessment and Duty Deposit, dated May 26, 2005 ("Petitioners' Assessment Brief").

[53] Petitioners note that, if the Department utilizes an export price ("EP") methodology for Wuhan Bee, this complication will not be at issue, but if the Department utilizes a CEP methodology the Department should divide the PUDD by the volume of honey sold to the U.S. affiliate (less remaining inventory).

has not been required by the courts.[54] Petitioners also assert that the Department has used a per-unit rate in past cases where it was concerned about accurate assessments,[55] and changes to the standard *ad valorem* methodology have been upheld by the courts. *See Thai Pineapple Canning Industry Corp. v. United States*, 273 F.3d 1077, 1085 (Fed. Cir. 2001) ("*Thai Pineapple*"). Petitioners argue that, because the application of a per-unit methodology is more reasonable than an *ad valorem* methodology in this case, it should be used for the final results.

In their assessment rate rebuttal,[56] petitioners argue respondents' arguments should be rejected. Petitioners maintain that, contrary to respondents' suggestion, they only objected to Shanghai Eswell's proposed assessment methodology that divided PUDD by the entered value of all shipments, which is different than the Department's proposal. Petitioners also argue that, although respondents object to the two-day time limit to submit comments, they were given the same amount of time as petitioners, and in any event should have been aware of the potential impact of antidumping margin liabilities in setting up affiliated resellers. Finally, petitioners allege that respondents provide no support for their claim that calculating cash deposits on a per-unit basis would result in cash deposits and assessment rates which did not correspond to market conditions.

Department's Position:

The Department has determined that, with respect to the antidumping duty order on honey from the PRC, per-kilogram antidumping duty cash deposit and assessment rates are appropriate.

The Department has analyzed the comments received and the information on the record of this review. Based on this analysis, the Department has found that there can be a substantial difference between the U.S. sales price for honey and the average entered value reported to U.S. Customs and Border Protection ("CBP"). While this does not prevent the Department from calculating appropriate assessment rates, the Department is unable to calculate *ad valorem* cash deposit rates that will ensure the collection of the total antidumping duties due.

We note that section 736(a)(1) of the Act states that the Department shall direct "customs officers to assess an antidumping duty equal to the amount by which the normal value of the merchandise exceeds the export price (or the constructed export price) of the merchandise…." This indicates that Congress' concern was with collecting the duties corresponding to the amount of the dumping margin, not with the method of collection. Section 351.212(b)(1) of the Department's regulations provides that the Department "*normally* will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered

[54] *See Koyo Seiko Co., Ltd. v. United States*, 258 F.3d 1340, 1347 (Fed. Cir. 2001) ("*Koyo*") *quoting Torrington Co., v. United States*, 44 F.3d 1572, 1578 (Fed. Cir. 1995) ("*Torrington*"), discussed below at Comment 9.

[55] *See, e.g., Certain Preserved Mushrooms from the People's Republic of China: Final Results and Partial Rescission of the New Shipper Review and Final Results and Partial Rescission of the Third Antidumping Administrative Review*, 68 FR 41304, 41310 (July 11, 2003) ("*Mushrooms 3rd Admin Review*") and *Certain Preserved Mushrooms from India: Final Results of Antidumping Duty Administrative Review*, 67 FR 43172, 46173 (July 12, 2002) ("*India Mushrooms*").

[56] Petitioners also argue that Respondents' Assessment Brief should be rejected as untimely, as it was filed one day after the deadline. *See* Petitioners' Response to Respondents' Comments on Assessment Methodology, dated May 31, 2005 ("Petitioners' Assessment Rebuttal").

value of such merchandise for normal customs duty purposes" (emphasis added). However, in the instant case, we have found that the entered values of CEP sales are being systematically understated, which can result in the undercollection of duties.

Normally, the difference between entered value and U.S. price is relatively small. In the instant review, however, there is evidence that the entered value reported to the Department and to CBP has little or no relation to the ultimate U.S. sales price and, in fact, certain respondents have explicitly told the Department that they undervalue goods for Customs valuation purposes in order to limit their antidumping duty liability.[57] Indeed, the average U.S. price for two of the respondents is nearly double the average entered value. For example, using the publicly ranged data from Zhejiang and Shanghai Eswell, the U.S. sales price (upon which the Department calculates a CEP margin) for both companies during the POR was approximately $2.20 - $2.30 per kg., whereas the entered value for the same sales was approximately $1.05 - $1.50 per kg.[58] Therefore, if the Department determines that the margin on a product sold in the United States for $2.20 per kg. is 25 percent, then $0.55 in cash deposits should be collected per kg. by CBP. However, if this 25 percent rate were applied to an entered value of only $1.05, only $0.26 would be collected. Thus, in this example, because there is a gap between entered value and the U.S. price, if U.S. price is used to calculate the cash deposit rate, there will be an undercollection of duties. The undercollection will increase as the gap between entered value and U.S. price increases.

While the Department normally directs CBP to collect cash deposits and liquidate entries on an *ad valorem* basis, we are not required to do so by statute or our regulations, and have in the past used quantity-based rates. *See, e.g., Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 19546, 19549 (April 22, 2002); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part*, 66 FR 36551 (July 12, 2001). The Department has also made a determination to revise its assessment and cash deposit rates to a per-unit value recently in *Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 70 FR 34082 (June 13, 2005). In addition, the courts have upheld prior determinations where the Department has made changes to the standard *ad valorem* methodology. *See Thai Pineapple*, 273 F.3d at 1085.

With respect to respondents' assertion that the Department's consideration of this issue is in response to petitioners' arguments in their May 19, 2005, submission, we note that the May 19, 2005, submission to which respondents refer was rejected as containing unsolicited information on May 24, 2005, and therefore has not been considered for these final results.[59] Therefore, with respect to respondents' assertion that the Department has not provided

[57] *See* Eswell PRC Verification Report at 9.
[58] *See e.g.*, Shanghai Eswell's 2nd Supplemental Questionnaire Response (Public Version), dated November 1, 2004 ("Eswell's Public 2nd Supp"); Zhejiang's 3rd Supplemental Questionnaire Response (Public Version), dated November 12, 2004 ("Zhejiang Public 3rd Supp").
[59] The Department also does not agree with petitioners that Respondents' Assessment Brief should be rejected as untimely, as the Department was informed of respondents' difficulty in filing by the deadline and granted an extension to the following Monday. *See* Memorandum to the File from Anya Naschak, dated May 27, 2005.

adequate time with which to comment on this issue, we note that both petitioners and respondents received equal time in which to comment, and that this is not an adverse facts available decision or a punitive measure being taken against the respondents in this proceeding. This measure should only result in the proper collection of deposits and assessment of duties, and will not, as respondents claim, result in the collection of deposits and assessment of duties with no relation to the market. It cannot result in an assessment rate higher than would be calculated at an *ad valorem* rate for sales during a period of review. In other words, the total duties due will not change; they will only be allocated over quantity instead of over entered value.

Finally, it should be noted that this is not a determination regarding only the particular sales currently under review. While the analysis above demonstrates that there is a substantial difference between the average sales price of honey in the United States and the average entered value, obviously some companies may, and do, have sales prices matching entered value.[60] This change in methodology should have no impact on such companies. Moreover, it would be extremely burdensome and confusing to determine whether to apply an *ad valorem* or a quantity rate on a company-specific basis. Thus, this change in methodology should be made for all respondents in this and all future reviews of this order.

As the above analysis indicates, the Department is unable to calculate *ad valorem* cash deposits or antidumping duty assessments that will ensure the collection of the total antidumping duties due. We will therefore direct CBP to collect cash deposits and assess antidumping duties on a per-kilogram basis for entries of subject merchandise from the PRC. This quantity-based collection and assessment method will begin upon completion of these final results, and will be employed thereafter for all future reviews of this order.

Company-Specific Issues

Jinfu-Related Issue:
Comment 8: Classification of Jinfu's U.S. Sales

Respondent claims that Jinfu Trading (USA) Inc. ("Jinfu USA") and Jinfu Trading Co., Ltd. ("Jinfu PRC") (collectively "Jinfu"), were affiliated as of October 2002 and should be considered affiliated for the entire POR of December 1, 2002, through November 30, 2003. Jinfu's margin, therefore, should be based on a comparison of normal value to CEP rather than a comparison of normal value to EP, which the Department used to calculate Jinfu's margin in the *Preliminary Results*.

Respondent states that this instant proceeding is a sequel to Jinfu's New Shipper Review for the period December 1, 2002, though May 31, 2003, where the Department rescinded the review with respect to Jinfu because it concluded that Jinfu PRC and Jinfu USA were not affiliated parties in November 2002, the month in which Jinfu PRC made its first honey sale to Jinfu USA, and that Jinfu PRC failed to demonstrate that it or its CEO were in a position to exercise control over Jinfu USA within the meaning of section 771(33) of the Act. *See Honey 3rd NSR Final*.

[60] We note that Zhejiang in the instant review has reported entered values on its sales classified as EP that closely resemble the sales price. *See* Zhejiang Public 3rd Supp.

These conclusions, respondent argues, were based on the Department's belief that a Certificate of Transfer of Stocks ("CTS"), transferring ownership of Jinfu USA to Jinfu PRC's CEO, was not executed and signed by the relevant parties until October 25, 2003, and that documentation submitted by Jinfu supporting its affiliation claim was not credible or reliable due to inconsistencies.

Respondent maintains that it believed it had satisfactorily answered all of the Department's outstanding questions regarding affiliation during the instant review. Respondent claims that the information it provided demonstrated that Jinfu PRC and Jinfu USA acted in an affiliated manner regarding the sales process, both in China and the United States. Furthermore, respondent states that, in its new shipper case brief, it provided the Department with affidavits from the parties involved in the sale of Jinfu USA to Jinfu PRC's CEO, including the lawyer who drew up the papers, establish that Jinfu PRC's CEO purchased Jinfu USA in October 2002.

Because of the determination the Department made in the *3rd NSR Final Results*, respondent states that it realized for this instant review that it would need to place additional documents on the record supporting its claims, which it did in its November 19, 2004, 2nd supplemental questionnaire response ("2nd supplemental response"). These documents were accompanied by four affidavits from related persons, according to respondent, and responded to the alleged inconsistencies in Jinfu's business documents.

Respondent summarizes the four affidavits as follows: 1) Affidavit I, from Jinfu PRC's CEO, stated that this person assumed ownership and control of Jinfu USA on October 25, 2002, and that this person incorrectly dated the CTS October 25, 2003; 2) Affidavit II, from the sole owner of Yousheng Trading (USA) Co., Ltd. ("Yousheng USA"), stated that this person sold Yousheng USA (which later became Jinfu USA) to Jinfu PRC's CEO as of October 25, 2002; that this person had no participation in the company after this date; and that this person dated the document according to the date, namely October 25, 2003, that Jinfu PRC's CEO had placed on the CTS; 3) Affidavit III, from the employee of Jinfu USA both prior to and after the sale of Yousheng USA to Jinfu PRC, described the steps that this person took to help transfer the ownership during the sale; how certain discrepancies in documents filed with the state of Washington regarding the sale were due to this person filing the documents without the assistance of an attorney; that this person never owned the company; and that Jinfu PRC's CEO controlled Jinfu USA as of the first sale of honey between the two entities; 4) Affidavit IV, from the lawyer who assisted in the formation of Yousheng USA and Jinfu USA, stated that he was hired to help in the ownership transfer and the changing of Yousheng USA's name to Jinfu USA and that he was paid a fee for his services and listed the documents this lawyer prepared on behalf of the two companies.

Respondent states that it also submitted documents that support the affidavit claims prior to the *Preliminary Results*. These include the following documents, followed by respondent's description of each document's contents:

- "Application to Form a Corporation," which the Yousheng USA/Jinfu USA employee filed with Washington state on October 4, 2002, listing himself as the registered agent, incorporator, and secretary of Yousheng USA

- "Certificate of Transfer of Stocks," which states that Yousheng Trading (U.S.A.) Co. Ltd. is to be changed to Jinfu Trading (U.S.A.) Inc., and is signed by both the Yousheng USA owner and Jinfu PRC's owner and dated October 25, 2003
- A form filed with Washington state dated November 8, 2002, in which the Yousheng USA/Jinfu USA employee, listing himself as the contact person, changes the name of Yousheng Trading (U.S.A.) Co. Ltd. to Jinfu Trading (U.S.A.) Co., Ltd.
- A form filed with Washington state dated November 12, 2002, in which the Yousheng USA/Jinfu USA employee, listing himself as the contact person, changes the name of Jinfu Trading (U.S.A.) Co., Ltd. to Jinfu Trading (U.S.A.) Inc.
- A certificate from the state of Washington, dated November 12, 2002, stating that Jinfu Trading (U.S.A.) Inc. had been incorporated, effective October 4, 2002
- Master Application to conduct business in Washington, filed on November 18, 2002, by the Yousheng USA/Jinfu USA employee, listing himself as secretary of Jinfu USA
- A delinquency notice from Washington state stating that the Yousheng USA/Jinfu USA employee was informed when he filed the master application that he was required to file the company's annual report as of February 3, 2003, which he failed to do
- Jinfu USA's Annual Report, signed by the Yousheng USA/Jinfu USA employee and filed on March 12, 2003, stating that Jinfu PRC's CEO was the president of Jinfu USA
- 2nd Annual Report, signed by the Yousheng USA/Jinfu USA employee and filed on October 3, 2003, stating that Jinfu PRC's CEO was the president of Jinfu USA
- Jinfu USA's 2003 corporate tax return, prepared on June 13, 2003, which lists Jinfu PRC's CEO as 100 percent owner of Jinfu USA
- Jinfu USA's amended 2002 tax return, prepared on September 2, 2003, which lists Jinfu PRC's CEO as 100 percent owner of Jinfu USA

Respondent points out two issues with regard to these documents. First, it claims that, because on November 12, 2002, the Yousheng USA/Jinfu USA employee changed the name of the corporation from Jinfu Trading (U.S.A.) Co., Ltd. to Jinfu Trading (U.S.A.) Inc., the same name as found on the CTS but with the words "is to be changed" on it, "it is clear that {this certificate} was drafted prior to November 8 and that Yousheng USA had been acquired by the {Jinfu PRC's CEO} before the date the name of the company was changed to Jinfu USA."[61] Second, respondent notes that the majority of the documents submitted to the Department were prepared and/or filed with the federal government or state of Washington prior to August 2003, the date on which the initial inter-company sales subject to the instant review began and before the end of the POR. Respondent argues that in its *Preliminary Results* the Department ignored these facts and erroneously concluded that Jinfu PRC's CEO had "had no stock or other ownership interests in Jinfu USA until October 25, 2003."[62]

Respondent then discusses the arguments set forth in the Jinfu Affiliation Memo. First, respondent disagrees that the CTS, as executed and signed on October 25, 2003, conclusively

[61] *See* page 52, Respondent May 10, 2005, Case Brief.

[62] *See* page 3, Memorandum to James Doyle from Kristina Boughton and Anya Naschak: "Administrative Review of the Antidumping Duty Order on Honey from the People's Republic of China (PRC): Analysis of the Relationship and Treatment of Sales between Jinfu Trading, Co., Ltd. and Jinfu Trading (USA) Inc." (December 15, 2003) ("Jinfu Affiliation Memo").

demonstrates on its face that Jinfu PRC's CEO did not own Jinfu USA until October 25, 2003.[63] Respondent points to the contents of the affidavits as supporting its claim that the document was dated incorrectly, and claims that since the phrase "is to be changed to Jinfu Trading (U.S.A.) Inc." is on the certificate and the name was changed on November 12, 2002, the certificate must have been created before October 25, 2003; and states that Jinfu's justification for the incorrect date is reasonable. Respondent further claims that as a matter of law, the fact that the document memorializing the sale was not signed on October 25, 2002, does not negate the fact that the sale actually occurred on that date.

Respondent cites several legal cases,[64] asserting that contracts do not have to be signed to be in effect and enforceable, including a Washington state law that provides that a signed, written contract is not required to enforce an agreement to sell securities.[65] Respondent also cites Departmental decisions concerning "date of sale" issues, where it claims the Department has relied on the principles underlying unsigned contracts and their enforceability.[66] Particularly, respondent cites *Final Determination of Sales at Less Than Fair Value, Gray Portland Cement and Clinker From Mexico*, 55 FR 29244 (July 18, 1990) ("*Cement*") and *Final Determination of Sales at Less Than Fair Value: Certain Forged Steel Crankshafts From the Federal Republic of Germany*, 52 FR 28170 (July 28, 1987) *("Germany Steel Crankshafts").* In both cases, the Department determined that it was inappropriate to rely on the formal document's date of sale.

Respondent argues that these principles apply to Jinfu's situation in the instant review in that all documents[67] submitted to the Department compel a conclusion that Jinfu PRC's CEO acquired ownership of Yousheng USA/Jinfu USA in October 2002. The only document that calls this into question, respondent continues, is the CTS, submitted to the Department on December 30, 2003. Jinfu states that, if the Department decides to ignore that the parties meant to sign the stock agreement in October 2002, then the Department should rely on the "earliest written evidence of an agreement" of the sale. Respondent contends that this is the October 19, 2002, Jinfu PRC board resolution to establish an affiliated U.S. company; the October 25, 2002, receipt of payment by Yousheng USA's owner from Jinfu PRC's CEO; and the October 28, 2002, corporate resolutions of Yousheng USA and Jinfu USA confirming the stock transfer. If the

[63] *See Id*, page 3.

[64] Law cases cited, *see* pages 54-57 of Respondents Case Brief, include: *Operating Engineers Local 139 Health Benefit Fund v. Gustafson Const. Corp.*, 258 F3d 645,649 (7th Cir.2001); *Vic Supply Co., Inc.*, 227 F.3d 928,932 (7th Cir. 2000); *Smith v. Onyx Oil and Chemical Company*, 218 F.2d 104, 107 (3d Cir. 1955); *Commercial Standard Ins. Co. v. Garrett*, 70 F.2d 969, 974 (10th Cir. 1934); *American Ry Express Co. v. Lindenburg*, 260 U.S. 584, 591 (1923); *Girard Life Insurance, Annuity & Trust Co v. Cooper*, 162 U.S. 529, 543 (1896); *Genesco, Inc. v. Joint Council 13, United Shoe Workers of America, AFL-CIO*, 341 F.2d 482, 486 (2nd Cir. 1965); *Landham v. Lewis Galoob Toys, Inc.*, 27 F.3d 619,624 (6th Cir. 2000); *Consarc Corp. v. Marine Midland Bank, N.A.*, 996F.2d 568,572 (2d Cir. 1993); *H.W. Gay Enterprises Inc. v. John Hall Electrical Contracting Inc.*, 792 So.2d 580,581 (Fla.Dist.Ct. App. 2001); and Washington Rev. Code Sections 62A.8-113, 62A.8-104(1)(a), and 62A.8-301(1)(b).

[65] *See* Respondents' Case Brief, pages 54-57.

[66] *See Id*, page 57-58.

[67] Respondent cites to the following documents not previously mentioned in its arguments in addition to those already outlined in the body of this summary: corporate resolution transferring ownership of Jinfu USA to Jinfu PRC's CEO; correspondence between Jinfu PRC's CEO and Jinfu USA's employee; proof of payment of legal fees to the lawyer who submitted the affidavit; receipt of payment for corporate shares by Yousheng USA's owner dated October 23, 2005; documents memorializing the course of dealing between the parties, including change of name instructions for Jinfu USA and approval from Jinfu PRC's CEO regarding a Jinfu USA resale.

Department ignores this evidence, respondent warns, the potential for respondents to manipulate the Department's investigations would exist, as the Department feared in *Germany Steel Crankshafts*. Accordingly, respondent argues, the Department should find Jinfu PRC and Jinfu USA affiliated as of October 25, 2002.

Respondent also takes issue with the Department's statement in the Jinfu Affiliation Memo that the claim by the owner of Yousheng USA and Jinfu PRC's CEO that they intentionally backdated documents calls into question the overall integrity of the documents submitted to the Department by Jinfu. Respondent claims that these concerns are not sufficient for the Department to reject all submitted documents. It goes on to state that the Department must be aware that business transactions in China are not conducted with the precision that is customary in the United States. Respondent claims that there was no intent by Jinfu or Jinfu PRC's CEO to commit wrongdoing. Jinfu PRC's CEO believed he was acting properly, respondent contends, by intending to backdate the document to the date when he purchased the company and his candid admission of why this did not happen is evidence that the actual company purchase took place in 2002.

Respondent also refutes the Department's suggestion in the Jinfu Affiliation Memo that an unsigned 2002 federal tax return has limited probative value, regardless of the affidavits submitted to explain the discrepancy. Respondent states that there was no signature because a copy of the tax return was made before the Jinfu USA employee signed it and submitted it to the Internal Revenue Service ("IRS"). The Department could, respondent argues, seek confirmation from the IRS that the information on the tax return was indeed filed as Jinfu submitted it to the Department. The 2003 Jinfu USA tax return that was submitted to the Department had the employee's signature on it, respondent continues, and both tax returns listed Jinfu PRC's CEO as 100 percent owner. Based on these documents alone, respondent argues, the *Preliminary Results* should be reversed.

Respondent also addresses the Department's failure to rely on the affidavits submitted as probative evidence. Respondent contends that the lawyer who signed one of the affidavits has no vested interest in the outcome of this proceeding and that the affidavits were signed in November 2004 because respondent was trying to address the concerns that the Department had expressed in the *Honey 3rd NSR Final*. Respondent contends that, when the Department calls the affidavits "self-serving," it seems less concerned with seeking the truth than justifying its new shipper decision. Respondent also argues that the Department did not elaborate on the "internal inconsistencies" it found in the two affidavits, giving Jinfu no opportunity to reasonably explain the inconsistencies.

Respondent also takes issue with the Department's statement in the Jinfu Affiliation Memo that the documents filed with the state of Washington seem to indicate that Jinfu USA's employee acted independently of Jinfu PRC and its CEO. Respondent claims that the Department is incorrect when it asserts that Jinfu USA's employee listed himself as owner when Jinfu USA's employee filed the document to form Yousheng USA with the state. Rather, according to respondent, Jinfu USA's employee listed himself as "registered agent" and "incorporator," among others, but never as owner. Jinfu USA's employee did the same when filing both company change of name forms with the state, respondent states. Respondent claims that the

company's name changes reflected a change in ownership. Respondent also charges that the Department ignores the fact that documents filed with state of Washington on March 13, 2003, and October 3, 2003, state that Jinfu PRC's CEO was president of Jinfu USA and Jinfu USA's employee was secretary and list Jinfu PRC as an affiliated party. These documents serve to support Jinfu USA's employee's affidavit, according to respondent.

Finally, respondent contests the Department's statement in the Jinfu Affiliation Memo that Jinfu PRC's narrative responses appear to demonstrate an ongoing, arm's length commercial relationship between Jinfu PRC and Jinfu USA. Respondent argues that the record clearly shows that Jinfu PRC and Jinfu USA conducted business as affiliated parties. In its March 11, 2004, Section A questionnaire response, respondent states, Jinfu reported that Jinfu PRC approves all Jinfu USA sales transactions and that Jinfu PRC's CEO sets all prices and authorizes Jinfu USA's employee to sign sale documents. Respondent contends that Jinfu USA's sole employee acted under the assumption that Jinfu USA and Jinfu PRC were affiliated and Jinfu PRC's CEO acted under this assumption as well. Respondent claims that the record shows that Jinfu USA did not purchase honey from any company other than Jinfu PRC and Jinfu PRC did not ship to any other U.S. company than Jinfu USA. Furthermore, respondent argues, the record holds no evidence that a company or individual other than Jinfu PRC or its CEO exercised control over Jinfu USA.

Overall, respondent argues that the Department cannot support its preliminary finding that there is no evidence of any type of control by one party over the other with regard to Jinfu USA and Jinfu PRC. Even if, respondent contends, the parties did not complete all the "legal niceties" of transferring ownership prior to the sales transactions at issue, there can be no doubt that Jinfu PRC's CEO attempted to acquire 100 percent ownership of Jinfu USA and that Jinfu USA and Jinfu PRC acted under the assumption that Jinfu PRC's CEO owned Jinfu USA. If Jinfu PRC's CEO did not own Jinfu USA, respondent queries, then who did, and why was the company's name changed to Jinfu USA? If Jinfu PRC's CEO did not own Jinfu USA, respondent continues, why did Jinfu USA's employee seek Jinfu PRC's CEO's approval for sales transactions and why was Jinfu PRC's CEO reported as Jinfu USA's owner in Jinfu USA's tax return? The Department should find that Jinfu PRC and Jinfu USA were affiliated parties during the entire POR, based on all the circumstances discussed above, and should calculate Jinfu's margin on Jinfu USA's resale prices to its U.S. customers, respondent concludes.

Petitioners respond that the Department should continue to find Jinfu PRC and Jinfu USA unaffiliated until October 25, 2003, the date on which the relevant parties signed and executed the stock transfer. Petitioners claim that the Jinfu Analysis Memo presents compelling reasons to find that the companies were not affiliated and the Department was correct to find Jinfu's affidavits unreliable. Regarding the CTS, petitioners state that the document speaks for itself and even Jinfu admits it was not signed on October 25, 2002. Furthermore, petitioners claim that Jinfu admits in its case brief that the document was not signed "until the end of 2003."[68] The document itself, petitioners argue, contains a clause that states that "this certificate of transfer is effective on execution by the undersigned,"[69] meaning that the CTS was not effective until signature date. The October 25, 2002, affiliation date advocated by Jinfu, petitioners argue, is

[68] *See* Respondents' Case Brief at 60.
[69] *See* Petitioners' Rebuttal Brief at 49.

the only date that has no credible evidence supporting it and is contradicted by the document itself and by Jinfu's admission. Jinfu's admission, according to petitioners, also makes it clear that the issue is not merely a clerical error.

The legal cases[70] that Jinfu cites as supporting its position that the contract was effective in 2002 despite being executed later, petitioners argue, all support the opposite conclusion. These cases, according to petitioners, "state that where execution of a written instrument is specified to make the contract effective, that event must take place to bind the parties."[71] In this case, petitioners contend, Jinfu's CTS contained an express signature provision. The other general contract case law cited by Jinfu, according to petitioners are all cases in which an express signature provision was not present. Petitioners also claim that the citation Jinfu makes to the state of Washington securities law is misapplied, because the law states that a contract to sell a security is enforceable without a "writing." Petitioners state that, under this statute, Jinfu could have forced Jinfu USA to transfer the shares based on the agreement to sell but that this statute does not establish the date of sale. The Department's date of sale precedents are also misapplied to this case, according petitioners. If anything, they argue, the *Cement* and *Germany Steel Crankshafts* cases show that the Department's general practice is to rely on invoice date, or document date, as the date of sale, and that only in particular cases does the Department rely on other dates if the circumstances of that particular case merit.

Petitioners also argue that the Department was correct to doubt the integrity of Jinfu's responses after its parties admitted to backdating documents. They claim that the facts show that, when Jinfu was forced to present a signed document to substantiate its affiliation claim, it is clear no such document exited. Only when Jinfu's counsel requested one, claim petitioners, was such a document executed. The record does not show candor by Jinfu, petitioners argue, but a pattern of post-hoc rationalizations and self-serving statements.

Regarding the unsigned and undated 2002 IRS tax return on the record, petitioners claim that it is Jinfu's obligation to make its own record, not the Department's responsibility to seek one from the IRS. The 2003 return, petitioners note, does not indicate when the transfer of ownership took place. Furthermore, the Department should not put more stock in the statements Jinfu has made to other U.S. government agencies, petitioners argue. Petitioners claim that Jinfu has ignored that the Master License filed with the state of Washington on November 12, 2002, did not mention any ownership change in Jinfu USA, indicating that the change in ownership had not yet occurred. There was no check in the change of ownership box on this form, according to petitioners, and no person from Jinfu PRC listed as an owner in the appropriate space. Other documents filed by Jinfu USA with the state, petitioners contend, do not list Jinfu PRC or its CEO as the owner of Jinfu USA in 2002. The name change of the company, petitioners claim, may indicate intent to affiliate but does not establish that the affiliation was effective as of the date of the name changes. The Department should rely on the transfer of stocks agreement dated October 25, 2003, petitioners argue, because it is the next document that conclusively established the ownership of Jinfu USA.

[70] *See, e.g., Smith v. Onyx Oil and Chemical Company*, 218 F.2d 104, 107 (3d Cir. 1955) and *Commercial Standard Ins. Co. v. Garrett*, 70 F.2d 969, 974 (10th Cir. 1934).
[71] *See* Petitioners' Rebuttal Brief at 50.

Regarding the Department's reluctance to rely on Jinfu's submitted affidavits, petitioners contend that the Department must weigh the evidence before it and is entitled to find that the affidavits lack credibility or probative value because of the self-interest of the respondent. Petitioners state that, the Department's decision must be supported by substantial evidence to be upheld, but the existence of conflicting evidence on the record does not overturn the Department's findings or the evidence it relied upon to make those findings.[72] At most, petitioners argue, the affidavits offer evidence of a possible alternative finding, but this does not mean that whatever conclusion the Department reaches is wrong or contrary to record evidence. Petitioners conclude that the Department's *Preliminary Results* finding that Jinfu PRC and Jinfu USA were not affiliated until October 25, 2003, is supported by substantial evidence and should be affirmed in the final results.

Department's Position:

Jinfu PRC was established by a small number of stockholders in September 2002. The largest stockholder was subsequently named to the position of CEO and general manager of Jinfu PRC. Yousheng USA was established in October 2002. Yousheng USA's sole employee handled the paperwork to change the name of Yousheng USA to Jinfu USA on November 12, 2002.

Although the purchase of Jinfu USA by Jinfu PRC's CEO occurred some time in December 2003, the parties involved backdated the CTS for that transaction to October 25, 2003. *See* Exhibits 4(1) and 4(2) of the 2nd supplemental response. Therefore, at an unspecified point in December 2003, Jinfu PRC's CEO acquired a 100 percent interest in Jinfu USA from the sole owner of that company. Because the record does not reflect a specific date of acquisition by Jinfu PRC's CEO of Jinfu USA, the Department has determined to use October 25, 2003, as the date when Jinfu PRC's CEO obtained sole ownership of Jinfu USA.[73] Thus, as of October 25, 2003, the Department deems that Jinfu USA and Jinfu PRC were affiliated within the meaning of section 771(33)(F) of the Act because they were under the common control of Jinfu PRC's CEO.

Respondents have argued that this affiliation existed earlier, as of October 25, 2002. They base this claim upon the statement that they intended to backdate the CTS to October 25, 2002, instead of October 25, 2003. They further allege that the weight of evidence suggests they were affiliated within the meaning of section 771(33) by October 25, 2002. The Department does not agree. For the reasons given below, we continue to find that evidence on the record regarding Jinfu PRC's relationship with Jinfu USA indicates that Jinfu PRC's CEO was not in a position to exercise control over Jinfu USA, prior to October 25, 2003. We fully discuss all the reasons for which we do not find an affiliated relationship between Jinfu PRC and Jinfu USA prior to October 25, 2003, in our Jinfu Affiliation Memo. We summarize these findings and address the additional issues raised in the briefs below.

In considering at what point Jinfu PRC became affiliated with Jinfu USA pursuant section 771(33)(F) of the Act, we considered whether the purchase of Jinfu USA by Jinfu PRC's CEO,

[72] Petitioners cite *Mitsubishi Heavy Indus., Ltd. v. United States*, 275 F3d 1056, 1062 (Fed. Cir.. 2001), *see* Petitioners Rebuttal Brief at 53.

[73] Because we do not have a conclusive date on the record of this administrative review, we will continue to examine this issue for the next review.

as described in the CTS, resulted in a common control relationship between Jinfu USA and Jinfu PRC at the time of Jinfu PRC's sales of subject merchandise to Jinfu USA during the POR.

As in the *Honey 3rd NSR Final*, record evidence indicates that Jinfu PRC's CEO did not own Jinfu USA or Yousheng USA prior to October 25, 2003. The CTS was dated on October 25, 2003, by the relevant parties – well after the date that Jinfu claims Jinfu PRC's CEO purchased what was then Yousheng USA, *i.e.*, October 25, 2002. We note that the CTS does not provide Jinfu PRC's CEO with any legal or operational authority to exercise restraint or direction over Jinfu USA prior to the date of execution of this agreement. As a primary matter, we note that the CTS states on its face that "THIS CERTIFICATE TRANSFER IS EFFECTIVE UPON EXECUTION BY THE UNDERSIGNED." We find that the CTS represents the transfer of full ownership of Jinfu USA from Jinfu USA's sole owner to Jinfu PRC's CEO by means of a capital contribution.

The effective date of the CTS is critical to our determination of the date of affiliation. Irrespective of any claims by Jinfu that the signature date appearing on this document was erroneous, and that the signatories intended to backdate it to read October 25, 2002, we continue to find that the CTS conclusively demonstrates on its face that Jinfu PRC's CEO did not own Jinfu USA prior to October 25, 2003.[74] Further we note that the claims by Jinfu PRC's CEO and Jinfu USA's pre-sale sole owner that they intentionally backdated documents related to the establishment of a company call into question the overall integrity of the documents that have been provided to the Department.

In its case brief, respondent claims that, because the phrase "is to be changed to Jinfu Trading (U.S.A.) Inc." is on the CTS and the name was changed on November 12, 2002, and the name used for Jinfu USA until November 8, 2002, was different, the CTS must have been created before October 25, 2003. The Department does not contest that the language appears on the CTS as respondent indicates and agrees with respondent that it cannot establish when the CTS was first drafted. However, since the name used in the CTS did not exist until November 12, 2002, and the name used previously was different (and thus logically should have been used for the CTS if it was drafted when Jinfu claims), this raises questions as to the credibility of Jinfu's claims. Moreover, the Department does have evidence as to when the document was signed and when it was considered effective, via the execution statement quoted above and the actual date listed on the document. Respondent offers no new information to discount the document itself. We also note that the number of shares in the CTS is not consistent with the March 2003 Amended Articles.

Also in its brief, respondent cites several legal cases, which assert that contracts do not have to be signed to be in effect and enforceable, including a state of Washington law that provides that a signed, written contract is not required to enforce an agreement to sell securities. In administering antidumping laws, the Department is neither bound by, nor required to consider, state or other general common law principles on contracts.[75] Rather, the Department makes its antidumping findings in accordance with the dictates of the antidumping laws, its antidumping

[74] As noted above, we note that Jinfu PRC's CEO has attested that he and the former owner of Jinfu USA did not actually sign the certificate until December 2003. *See* Exhibits 4(1) and 4(2) of the 2nd supplemental response.
[75] *See Toho Titan Co., Ltd. v. United States*, 743 F. Supp. 888, (CIT 1990) ("*Toho Titan*").

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.[76]

In this case, we have reviewed the authorities cited by Jinfu and determine that they are not relevant in determining whether Jinfu PRC was affiliated with Jinfu USA within the meaning of section 771(33)(F) 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 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 transfer. Accordingly, we decline to apply the reasoning of those decisions to the facts of this case.[77]

Regarding respondent's statements in its brief that the Department must be aware that business transactions in China are not conducted with the precision that is customary in the United States, we note that Jinfu has participated in Departmental proceedings prior to this one and is represented by counsel who have extensive experience in antidumping duty cases and their procedures. Jinfu, therefore, is aware of the standards that the Department has for reported information. The Department declines to apply the reasoning that Jinfu is a Chinese company and that Chinese companies should be accorded special treatment when it comes to complying with Departmental reporting standards. Furthermore, regarding respondent's statement that there was no intent by Jinfu PRC or Jinfu PRC's CEO to commit wrongdoing, the Department cannot know what the motivations of Jinfu PRC's CEO were with regard to this matter. Rather, the Department can only rely on evidence that is provided on the record and the documentary record evidence points to either October 25, 2003, or some other unspecified date in December 2003, as being the effective date of the CTS. Again, as respondent offers no new information to discount the document itself (aside from having noted that the parties admit that they actually signed it on an indeterminate date in December 2003), the Department finds that there are no special circumstances in the instant proceeding that compel the Department to consider that the effective date of the affiliation fell in 2002.

Jinfu argues that the attempt by Jinfu PRC's CEO to acquire Jinfu USA by October 25, 2002, along with the explanations submitted in the form of affidavits, and additional documentation, is sufficient to determine that Jinfu PRC and Jinfu USA were affiliated as of October 25, 2002. Jinfu's arguments on this point are without merit. An attempt to obtain ownership does not demonstrate either ownership or control. To the contrary, such an attempt, when unsuccessful, demonstrates the lack of both ownership and control. With regard to Jinfu's argument concerning the alleged error with respect to the date of signature, we find this explanation not credible and find there is no reason to overturn the determination reached in *Honey 3rd NSR*

[76] *See Toho Titan*, 743 F. Supp. at 891.

[77] In any event, as noted by petitioners and mentioned above, 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).

Final that the date appearing on the CTS is not the result of a "clerical" error.[78] Moreover, the evidence and explanations proffered by Jinfu in an effort to explain away its failure to execute the CTS are neither credible nor reliable.

We note that Jinfu has also submitted on the record other documents that purport to bolster its claims regarding date of affiliation between Jinfu PRC and Jinfu USA. Regarding the Master License filed with the state of Washington on November 18, 2002, there is no mention of Jinfu PRC's CEO. In fact, this document lists another person, Jinfu USA's sole employee, as the owner. There is no mention of change in ownership whatsoever, nor any indicia of an affiliation. This document contradicts Jinfu's claims.

Regarding Jinfu USA's unsigned and undated 2002 tax return,[79] respondent states in its brief that there was no signature because a copy of the tax return was made before Jinfu USA's sole employee signed it and submitted it to the IRS and that the Department could corroborate the tax return's information with the IRS. However, it is Jinfu's responsibility to compile its own record, not the Department's responsibility. Even assuming, for the purpose of argument, that the information on the unsigned 2002 tax return is exactly what Jinfu USA submitted to another U.S. government agency, the fact remains that neither the 2002 nor the 2003 tax returns establish the date upon which ownership was transferred from Jinfu USA's original owner to Jinfu PRC's CEO. Although the tax returns provide some evidence in support of Jinfu's claim that the affiliation may date from 2002, the Department determines that the CTS, which deals more specifically with the legal question of ownership, provides the better evidence of these conflicting sources.

Also, we continue to find that the submitted hand-written "receipt of payment," signed by Yousheng USA's owner and dated October 25, 2002, which states that the owner of Yousheng USA received payment from Jinfu PRC's CEO for the purchase of Yousheng USA, is unpersuasive. The information on the receipt is vague and no information exists on the record to further corroborate it other than an affidavit. 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 Jinfu PRC's CEO, prior to the issuance of the CTS. Moreover, the fact that, by the parties own admissions, the CTS was not executed until December 2003 casts significant doubt on the reliability of documents purporting to show that the sale of the company actually took place over a year earlier.

Regarding the affidavits submitted in this case, which seem to be the primary evidence relied upon by respondent to explain the significant discrepancies in Jinfu's documentation of affiliation with Jinfu USA, we continue to find that three of the four affidavits – from Jinfu PRC's CEO, Jinfu USA's sole employee, and Jinfu USA's original owner – are statements from parties who have a vested interest in the outcome of this matter, and this factor must be weighed in assessing their credibility in the face of the considerable discrepancies on the record. Despite respondent's contention, Jinfu USA's sole employee clearly has a stake in the continued operation of his employer's business.

[78] *See Honey 3rd NSR Final* at Comment 1.
[79] The Department notes that 2003 tax return was submitted to the Department signed.

Regarding the affidavit from the lawyer for Yousheng USA, the Department has no way of knowing how substantial a portion of business Jinfu USA represents to the lawyer in question. However, even if we accept respondent's argument that this lawyer is not an interested party to this proceeding, there is no information in the lawyer's affidavit that calls into question the date that the CTS was executed. For instance, the lawyer's affidavit merely states when (in "late October 2002") he drafted the CTS, "at {Jinfu USA's sole employee's} request."[80] There is no claim in the lawyer's affidavit as to when the agreement was executed. The closest the lawyer comes to establishing a date at which Jinfu PRC's CEO owned Jinfu USA is when he states "To the best of my knowledge, at the time that the Certificate of Existence/Authorization of Jinfu Trading (USA) Inc. was approved by the Secretary of State of Washington, on November 12, 2002, the corporation was owned by {Jinfu PRC's CEO}."[81] Clearly, the lawyer was not a party to the actual ownership exchange. Moreover, the lawyer's statement is contradicted by the Master License Application and the March 2003, Amended Articles. He attempts to explain the discrepancies in the name and the amount of shares allegedly transferred. However, even he admits that there is the possibility for confusion. *See* Exhibit 4(3) of the 2nd supplemental response. We find the assertions in the affidavit unconvincing.

The fact remains that the evidence offered by respondent is insufficient to outweigh the evidence – particularly the CTS – on the record. Overall, we find that the three affidavits constitute otherwise unsupported statements by interested parties, and none of the affidavits[82] contains information sufficient to call into question our decision regarding the date on which Jinfu PRC and Jinfu USA became affiliated within the meaning of section 771(33)(F) of the Act.

We noted in the Jinfu Affiliation Memo that the affidavits submitted to the Department on November 18, 2004, were signed and dated on November 16, 2004, nine business days after the publication of the *Honey 3rd NSR Final*. We stated that this fact was further evidence of their self-serving nature because the affidavits seemed to be provided to the Department for the instant proceeding in direct reaction to decisions reached in the *Honey 3rd NSR Final*. In fact, respondent replies in its brief that it submitted these affidavits primarily to address the concerns that the Department had expressed in the *Honey 3rd NSR Final*. We do not find that that Jinfu's arguments, as represented in the submitted affidavits, for why the date on the CTS should be considered incorrect are reasonable or consistent when considering all of the evidence on the record.

Finally, with respect to Jinfu's argument that Jinfu PRC's CEO exercised "control" over Jinfu

[80] *See* pages 1-2 of the affidavit by Yousheng USA's lawyer in the November 19, 2004, supplemental questionnaire response by Jinfu at Exhibit 4(4).
[81] *See id.*
[82] Regarding the Department's statement in the Jinfu Affiliation Memo that certain affidavits contained "internal inconsistencies," the Department notes that one such inconsistency is Jinfu USA's sole employee's reference in section 9 of his affidavit to filing a document regarding the name change from Yousheng to Jinfu USA on "November 8, 2004." In an affidavit being used to establish the date of ownership in the year 2002, the Department finds such an inconsistency troubling regarding the accuracy of the document. Other examples are inconsistencies with the Jinfu USA company name, and the number of shares needing to be transferred. However, the Department has not relied exclusively on any such internal inconsistencies in these affidavits in making its overall determination regarding Jinfu PRC's affiliation with Jinfu USA in the instant review. *See* page 1 of the affidavit by Jinfu USA's sole employee in the November 19, 2004, supplemental questionnaire response by Jinfu at Exhibit 4(3).

USA, prior to October 25, 2003, we continue to find no record evidence to that effect. When 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; and close supplier relationships, *etc*.[83] Jinfu has not provided any credible evidence of any such type of control until at least October 25, 2003.[84]

We note that the level of Jinfu USA's sole employee'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 during the POR. In particular, we note that this information is only relevant to how and why Yousheng USA was established in October 2002. More importantly, Jinfu'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 both parties. We do not find evidence of any type of control by one party over the other. A mere business relationship does not demonstrate control. *See TIJID, Inc. v. United States*, 366 F. Supp. 2d 1286 (CIT 2005) ("*TIJID*").

In addition, we continue to find that the documents from the state of Washington appear to indicate that Jinfu USA's sole employee was acting independently of Jinfu PRC or Jinfu PRC's CEO, despite respondent's claims in its brief that Jinfu's narrative responses clearly show that Jinfu USA's sole employee was acting with authorization from Jinfu PRC and its CEO. We note that Jinfu USA's sole employee alone filed the documents to form Yousheng USA on October 4, 2002, and later listed himself as the owner, and that he amended the company name himself from Yousheng USA to Jinfu Trading (USA) Co., Ltd. In addition, we note that Jinfu USA's Master License Application, filed with King County, Washington on November 18, 2002, was signed by Jinfu USA's sole employee. We note that under the "Purpose of Application" section, which instructs the applicant to "Please check all boxes that apply," the only checked box is "Open/Reopen Business." The next box, "Change Ownership," is left blank. In addition, under "List all owners: Sole proprietor, partners, officers, and LLC members," Jinfu USA's sole employee only lists himself as the secretary. There is no mention of any owner of Jinfu USA, other than this employee asserting that he is the owner. We note that we continue to regard the explanations given by Jinfu USA's sole employee with skepticism, as they are, again, statements from a party with a vested interest in the outcome of this matter and not supported by formal, written documents, such as the ones mentioned above.

Overall, respondent points to no new evidence that successfully contradicts any of the determinations we made in the *Preliminary Results*. In sum, we find that the record evidence submitted by Jinfu with respect to its claim that Jinfu PRC was affiliated with Jinfu USA prior to

[83] *See* 19 CFR 351.102(b).

[84] 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 has not provided credible evidence demonstrating that Jinfu PRC's CEO exerted such types of control over Jinfu USA prior to October 25, 2003. Jinfu has also failed to provide 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 an 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).

October 25, 2003, is not credible and does not support its contention that Jinfu PRC and Jinfu USA were affiliated prior to October 25, 2003. Thus, we continue to find that Jinfu PRC is "affiliated" with Jinfu USA as of October 25, 2003, within the meaning of section 771(33)(F) of the Act. Therefore, for these final results, we have treated any sales made between Jinfu PRC and Jinfu USA prior to October 25, 2003, on an EP basis, while all sales made after this date have been treated as CEP sales. *See* Jinfu Analysis Memorandum for more details. We plan to further examine the affiliation status for Jinfu PRC and Jinfu USA in the next administrative review.

Shanghai Eswell-Related Issues:

Comment 9: Calculation of the Assessment Rate for Shanghai Eswell

Respondents argue in their case brief that the Department should recalculate Shanghai Eswell's assessment rate for the final results using the entered value of all shipments of subject merchandise entered for consumption into the United States during the POR by Shanghai Eswell regardless of whether or not such merchandise was re-sold during the POR. Respondents maintain that the denominator in the Department's assessment rate calculation for Shanghai Eswell in the *Preliminary Results* is improperly limited to only those entries that were resold by Eswell America during the POR. Respondents note that sections 731 and 751(a) of the Act require the Department to impose and assess duties "in an amount equal to the amount by which the normal value exceeds the export price (or constructed export price)." Respondents claim that the Department's suggested methodology would assess duties in excess of the difference between the normal value ("NV") and the CEP, contrary to the meaning of the statute, because the assessment rate would be applied to all entries of subject merchandise.

Respondents maintain that the Department has discretion in its assessment of duties,[85] and that the Department's past decisions to calculate assessment rates using entered value of sales during the POR have been upheld.[86] Respondents claim that the decisions by the court were based on an assumption that a methodology must not be unreasonable when "a more accurate methodology is available and has been used in similar cases." *See Thai Pineapple*, at 1085. Respondents further argue that the Department has discretion to vary the assessment rate calculation when an importer can trace its sales to entries[87] and that the Department should exercise its discretion in the final results.

Moreover, respondents argue that the Department cannot justify the assessment rate methodology used at the *Preliminary Results* on the basis that the additional entry information has not been placed on the record. Respondents explain that Shanghai Eswell provided the information on the entered value and entry number of all shipments entered during the POR but

[85] *See Torrington* 4F.3d 1578, which notes that the statute does not "specify a particular divisor when calculating assessment rates…rather, the statute merely requires that…the difference between foreign market value and United States price serve{s} as the basis" for the assessment rate.
[86] *See Torrington*, 4 F.3d 1572; *Koyo*, 258 F.3d 1340, and *Thai Pineapple*.
[87] *See* 19 CFR 351.212(b), which states that the Department will "normally…calculate the assessment rate by dividing the dumping margin…by the entered value of such merchandise," and *Final Rule* which states "where a respondent *can* tie its entries to its sales, we potentially can trace each entry to subject merchandise made during a review period to the particular sale or sales of that same merchandise to unaffiliated customers, and we conduct the review on that basis."

sold after the POR in a December 29, 2004, submission, but that on January 4, 2005, the Department determined to reject these data as new information. Respondents argue that the Department's determination to reject this information was improper. Respondents assert that the Department should accept this entry information because the Department has discretion to do so and its decision to reject this information was contrary to the Department's practice. Respondents maintain that the Department should reverse its decision to reject this information because respondents' failure to submit this information prior to the deadline for submitting new information can be considered a clerical error under the test codified in *Certain Fresh Cut Flowers from Columbia: Final Results of Antidumping Duty Administrative Review*, 61 FR 42833-02 (August 19, 1996) ("*Columbia Flowers*"). Under this test, an error should be corrected by the Department when the following criteria 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 Id.*, 61 FR at 42834.

Respondents claim that Shanghai Eswell first submitted its list of entered values before the record was closed for new factual information prior to verification. Moreover, applying the *Columbia Flowers* test, respondents allege the impact of the Department's rejection of the entry information is the same as that of a clerical error, in that it results in an inaccurate calculation. Respondents maintain that the Department has verified the majority of the information in the corrective documentation and that the entry information is not new information because this information could be obtained from U.S. Customs and Border Protection ("CBP"). Respondents further claim that Shanghai Eswell provided the Department with the entry information at the earliest opportunity (December 29, 2004), noting that the Department did not ask Shanghai Eswell for this information. Respondents assert that the documentation to correct the clerical error has been appropriately submitted with the case brief, that this information does not entail a substantial revision of the response, and that the Department verified that Shanghai Eswell's submissions were complete and accurate. Finally, respondents argue that the entry information that Shanghai Eswell wishes to add to the record does not contradict information collected at verification, arguing the Department verified that the Shanghai Eswell invoice values are the same as the entered values.

Respondents maintain that the Department must consider this additional entry information consistent with longstanding practice, with determinations by the CIT, and with international obligations. In support of their claim, respondents cite a number of CIT cases, including *World Finer Foods v. United States*, 24 CIT 541 (CIT 2000) ("*World Foods*"), in which the court found that the Department had abused its discretion in refusing to allow a correction of an unintentional error, and *Bowe Passat v. United States*, 17 CIT 335, 343 (CIT 1993) ("*Bowe Passat*"), in which the court stated that the Department should not penalize a respondent for deficiencies not specified because these deficiencies were discovered after the preliminary determination.

Further, respondents argue Article 6 and Appendix II of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement") requires that "all interested parties shall be given…ample opportunity to present in writing all evidence which they consider relevant…" (*see* AD Agreement at Article 6.1), and that the Department must take into account "all information that is verifiable, which is appropriately submitted so that it can be used…without undue difficulties, which is supplied in a timely fashion." *See* AD Agreement at Annex II, Paragraph 3.

Petitioners argue in their rebuttal brief that Shanghai Eswell's claim that the Department should modify its assessment rate methodology is moot because it rests on new factual information that has been rejected and redacted from the case brief. Petitioners argue that the Department's decision to not accept information on Shanghai Eswell's additional entries during the POR was a methodological choice rather than a clerical error.

Petitioners also argue that, even if the entry information at issue were on the record, the Department should not change the assessment rate methodology for the final results. Petitioners argue that granting respondents' request would require a change in the Department's normal practice and is not supported by law, and that respondents have not cited to any instance where the Department has increased the denominator in the assessment rate. Petitioners assert that, in any case involving CEP transactions for which there are entries not re-sold during the POR, those entries are liquidated using the margin from the POR, consistent with the statute. Petitioners further argue that the statute requires duties to be assessed on the difference between normal value and EP or CEP, and requires the Department to publish a determination of its calculation that "shall be the basis for assessment of antidumping duties or entries of merchandise." *See* section 736(c)(3) of the Act. Further, petitioners allege that the statute also requires the Department to determine dumping margins for each entry and to calculate the assessment rate by dividing the absolute dumping margin found on the subject merchandise by the entered value of such merchandise.

Petitioners further assert that the Department normally calculates the margin on the sales for the period and applies the rate to all entries during the period and does not try to tie sales and entries, citing *Final Rule*, 62 FR at 27314. Petitioners argue that to follow respondents' methodology would require the linking of sales and entries and require any remaining unmatched entries to be reported in subsequent reviews. Petitioners note that this would necessitate a change in the Department's standard liquidation instructions and a change in the reporting period of the next administrative review, effectively eliminating any assessment on any un-reviewed shipments that entered in the current POR.

Petitioners further argue that Shanghai Eswell is attempting to dilute the margins by dividing the total value of dumping found on the reviewed sales by the total entered value of reviewed and un-reviewed entries during the period, thereby increasing the denominator and improperly reducing the percent margin. Petitioners also assert that respondents have failed to cite to any instance where the Department pursued this methodology. Petitioners argue that Shanghai Eswell's proposed methodology incorrectly assumes that un-reviewed entries would have no dumping margins, and that it results in no duties being assessed on the additional entries. Petitioners argue that the Department's regulations reasonably assume that entries during the

POR with un-reviewed sales to unaffiliated customers will have dumping margins comparable to those for the reviewed sales. Petitioners note that the Eswell PRC Verification Report at 4 states that prices in the United States were falling during the POR. They claim that this indicates that the un-reviewed entries were likely to have greater margins, arguing that the Department's methodology therefore does not harm Shanghai Eswell. Petitioners argue that the Department's *Preliminary Results* methodology is therefore the most accurate methodology.[88]

Department's Position:

As an initial matter, as discussed in Comment 7, above, the Department has determined to revise its calculation of assessment rates for all respondents, including Shanghai Eswell, to a per-unit basis. Moreover, even assuming that the Department were to agree that an ad-valorem assessment rate was appropriate in this instance, which it does not, the Department also finds that Shanghai Eswell's proposed methodology would be inaccurate. Finally, the Department continues to find that the information contained in the December 29, 2004, submission on additional entries during the POR constitutes unsolicited new information provided after the deadline for submitting such information had passed, and that the Department's decision to exclude this submission from the record of this proceeding does not constitute a "clerical error" within the meaning of 19 CFR 351.224(f).[89]

Section 751(a)(2)(A) of the Act states that a dumping calculation should be performed for each entry during the POR. Section 351.213(e) of the Department's regulations gives the Department some flexibility in this regard by stating that the review can be based on entries, exports, or sales. For purposes of this review, which was the first review of Shanghai Eswell, Shanghai Eswell reported its U.S. sales database on the basis of CEP sales with invoice dates during the POR. Accordingly, in the *Preliminary Results*, the Department relied on all U.S. sales reported by Shanghai Eswell in its October 29, 2004, U.S. sales database to calculate Shanghai Eswell's cash deposit rate and assessment rate. *See* Memorandum to the File: Shanghai Eswell Enterprise Co., Ltd Program Analysis for the Preliminary Results of Review, dated December 15, 2004, at Attachment II. After the release of disclosure documents, Shanghai Eswell alleged that an error had been made in the Department's calculation of the assessment rate for Shanghai Eswell because the Department had used as the denominator in the assessment rate only those entries during the POR that were resold. With its submission Shanghai Eswell sought to amend the record by adding the entry information for all entries of subject merchandise from Shanghai Eswell during the POR, regardless of whether the merchandise was resold during the POR. The Department rejected this submission on January 4, 2005, on the basis that it constituted new factual information untimely submitted.

With respect to Shanghai Eswell's claim that the Department's calculation of the assessment rate in the *Preliminary Result*s constitutes a clerical error, we disagree. The Department calculated

[88] Petitioners also note that, if the Department were to align entries and sales, it would necessitate the collection of a U.S. database on all entries during the POR and of each of the sales associated with these entries, requiring a much larger POR window to permit contemporaneous matching.

[89] *See e.g.*, Letter from James C. Doyle to Shanghai Eswell: Untimely Submitted New Information, dated January 4, 2005; Letter from James C. Doyle to Grunfeld, Desiderio, et. al.: Rejection of Case Brief, dated May 5, 2005; Letter from James C. Doyle to Grunfeld, Desiderio, et. al.: 2nd Rejection of Case Brief, dated May 9, 2005.

the assessment rate as the sum of the total positive antidumping duties on sales invoiced to unaffiliated customers during the POR divided by the entered value of each of these sales. As noted above, Shanghai Eswell reported its U.S. sales universe based on CEP sales invoiced during the POR. In fact, the Department's normal practice for CEP sales made after importation (which is how Eswell America reported all of its sales) is to request respondents to report each transaction that has a date of sale within the POR. *See* section 351.212 of the Department's regulations and the preamble to that section of Antidumping Duties; Countervailing Duties; *Final Rule*, 62 FR at 27314-15. Prior to the *Preliminary Results*, Shanghai Eswell did not approach the Department concerning the basis for reporting U.S. sales nor did the Department direct Shanghai Eswell to revise its U.S. sales database on an entry basis. Thus, the Department properly calculated Shanghai Eswell's assessment rate using sales invoiced to unaffiliated customers during the POR in the *Preliminary Results*.

Shanghai Eswell now seeks a change in methodology, alleging a potential distortion in the assessment rate calculation. Although we agree with Shanghai Eswell that there is a possibility that the amount of duties assessed may differ depending on whether sales or entries are reviewed, we disagree that there is a distortion. Although the Act requires the Department to "determine" the dumping margin for each entry, it does not preclude the Department from doing so based on analysis of sales during the POR. And while it calls for this "determination" to be the basis for assessment, it does not otherwise specify how the Department should calculate the amount of duties to be assessed. *See Torrington Co.* v. *United States*, 44 F.3d 1572, 1578 (Fed. Cir. 1995). Also, as the CIT has recognized in upholding the Department's assessment rate methodology, a review of sales, rather than entries, "appears not to be biased in favor of, or against, respondents." *FAG Kugelfischer Georg Schafer KgaA v. United States*, 1995 Ct. Int'l. Trade LEXIS 209, *10 (1995), *aff'd*, 1996 U.S. App. LEXIS 11544 (Fed. Cir. 1996).

Moreover, Shanghai Eswell only seeks to expand the universe of entries used in the denominator of the assessment rate calculation; it does not seek to expand the universe of U.S. sales for which a dumping calculation is performed. Accordingly, Shanghai Eswell seeks to have the Department calculate dumping duties on only those U.S. sales with a date of sale to an unaffiliated party during the POR, yet seeks to have the Department calculate the total entered value on a larger universe of sales (*i.e.*, all entries during the POR). Shanghai Eswell's proposed assessment rate methodology would effectively assume that none of the post-POR sales were dumped. The Department has no way to determine whether these sales were made at less than fair value absent the reporting of such sales. In fact, we note that respondents did not cite to any circumstance where the Department has calculated assessment rates by dividing the antidumping duties due on one universe of sales by total entered value of a different universe of sales. Accordingly, even if the Department were to agree that the assessment rate should be based on entries during the POR, in this instance the Department does not have the necessary sales data to calculate such a rate, nor has Shanghai Eswell ever offered to provide this additional sales data. Shanghai Eswell only informed the Department of a concern about the assessment rate after the preliminary results (288 days after the receipt of the first questionnaire response). Accordingly, even if the Department were to calculate an assessment rate based on the entered value for the final results, Shanghai Eswell's requested methodology for doing so would not be appropriate or in accordance with the Department's regulations.

Finally, we disagree with respondents that the information contained in the December 29, 2004, submission containing additional entry information during the POR should be accepted. First, respondents' claim that the new entry information can be inferred from existing documentation on the record is without merit.[90] As discussed in the Department's January 4, 2005, letter, 19 CFR 351.301(b)(2) states that the deadline for submitting new information in administrative reviews is 140 days after the last day of the anniversary month, which in this case was May 19, 2004. Respondents attempted again in their case brief to submit this additional entry information that the Department had classified as untimely new information pursuant to 19 CFR 351.301(b)(2), and the Department again rejected this information. In the Department's letter of May 9, 2005, rejecting respondents' case brief the Department provided respondents with an opportunity to substantiate their claim that this entry information was on the record of this proceeding, requesting that respondents "add a specific page citation to the record of this review substantiating that…{the information} is on the record of this proceeding." Respondents failed to cite to any portion of the record of this proceeding which would substantiate Shanghai Eswell's claim that the Department "verified" the additional entry information. Therefore, we continue to find the entered values of additional entries into the United States which Shanghai Eswell submitted in its December 29, 2004, submission and again in its case briefs, to be new information pursuant to 19 CFR 351.301(b)(2).

Respondents also allege that their failure to provide this entry information prior to the deadline for submitting new information amounts to a clerical error. Section 351.224(f) of the Department's regulations deals with actions by the Department, including correction by the Department of "ministerial" errors in a determination, as defined in subsection (f), the Department's regulations define a ministerial error 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" (emphasis added). The Department finds that Shanghai Eswell's decision not to report the entered values for all of its sales while the record of this review remained open for new information was not an error of a clerical or unintentional nature. Moreover, the Department's decision to reject such information, when it was untimely provided, was also not an error, clerical or otherwise. Therefore, the Department finds that the omission by Shanghai Eswell of the additional entries made by Eswell America does not meet the first criterion of the standard set in *Columbia Flowers* that the error must be a clerical error rather than a methodological error, substantive error, or error in judgment. Moreover, the Department's decision not to accept corrections to the administrative record after the record has been closed is also not a clerical error, and this information was not considered for these final results.

Comment 10: Classification of Shanghai Eswell's U.S. Sales

Respondents argue in their case brief that the Department should continue to calculate Shanghai Eswell's margin on a CEP basis for the final results, consistent with its decision in the *Preliminary Results*. Respondents assert that the Department's verification established that Shanghai Eswell and Eswell America correctly reported information necessary to calculate antidumping margins, with only minor discrepancies found.

[90] *See* Respondents' case brief at page 70.

Respondents argue that the Department's findings at the verification of Eswell America confirm the accuracy of the information submitted.[91] Respondents argue that the Department's assertions that information subject to verification was not properly prepared should be disregarded based on the fact that the requested information was supplied, as demonstrated by the Department's verification reports.[92] Respondents argue, with respect to the Department's findings related to the role of Eswell America's commission agent in Eswell America's sales process and the lack of documentation of sales calls,[93] that these findings are consistent with Eswell America's business model. Respondents assert that the Department verified that Eswell America reported accurately the responsibilities of the commission agent and that no records of sales calls were found because Eswell America conducted its sales negotiations in person and through its commission agent.

Respondents also argue that the Department's finding that Eswell America's incorporation funds were not fully deposited at the time of incorporation and the funds that were deposited were derived from sales revenue of Eswell America is incorrect. Respondents argue that the investment funds for Eswell America's founding were deposited, though not until after the POR, and that the funds used to deposit the investment were actually from Eswell America's owners' other business and that the date these funds were deposited is not relevant. Respondents also argue that it is clear that Shanghai Eswell and Eswell America are affiliated companies, noting that Shanghai Eswell owns a percentage of Eswell America, introduced Eswell America to its commission agent, and gave Eswell America preferential payment terms.

Respondents also assert that, although terms of delivery were not correctly identified on Eswell America's invoices and Eswell America paid marine insurance in U.S. dollars, the terms of delivery were correctly reported to the Department based on actual expenses, and Eswell reported non-market economy insurance to the Department because it could not confirm the origin of the actual provider of the insurance. Respondents agree with the Department's conclusion that Eswell America incorrectly reported certain inland freight expenses.[94] Respondents also note that the additional fee paid to Eswell America's commission agent was not incurred during the POR.

Respondents also argue that the absence of the lead accountant at the Shanghai Eswell verification did not impede the verification. With respect to the Department's finding that Eswell America was "founded to import honey in order to obtain a low antidumping duty rate,"[95] respondents assert that the fact that Eswell America was set up to incur the risk of the cash deposits on antidumping duties supports Shanghai Eswell's claim that its U.S. sales should be treated as CEP sales, noting that the low inter-company prices are consistent with Eswell America's assumption of responsibility for antidumping duties. Further, respondents argue that the Department's verification confirms that Shanghai Eswell's margins should be calculated based on Eswell America's resale price, less adjustments. Respondents argue that, although the

[91] *See* Memorandum to the File: Verification of Sales of Eswell America, Inc. in the Antidumping Duty Administrative Review of Honey from the People's Republic of China, dated April 15, 2005 ("Eswell U.S. Verification Report").
[92] *See e.g.*, Eswell U.S. Verification Report; Eswell PRC Verification Report.
[93] *See* Eswell U.S. Verification Report at 2.
[94] *See* Eswell U.S. Verification Report at 2.
[95] *See* Eswell PRC Verification Report at 2.

Department found that Shanghai Eswell had two charts of accounts,[96] the Department verified that Shanghai Eswell correctly reported its income and expenses, and the consolidated chart initially supplied to the Department ties to the internal accounts found at verification. Finally, respondents argue that none of the Department's findings call into question Shanghai Eswell's reported data, or demonstrate that its margin calculation should be based on CEP.

Respondents argue in their EP methodology brief[97] that, if the Department were to calculate Shanghai Eswell's margins on an EP basis, the Department should use the quantity and value of all sales by Shanghai Eswell to Eswell America during the POR. Respondents argue that the Department should use the quantities and values contained in the Eswell PRC Verification Report at Exhibit 5, deducting home market inland freight as reported in Shanghai Eswell's section C database.

Respondents also argue in a separate submission that the Department should not have rejected as sur-rebuttal comments its original submission on EP sales comments. *See* Respondents' May 25, 2005, Submission. Respondents assert that their case brief focused on specific comments in the Department's verification reports and did not address the issue of whether the Department should calculate Shanghai Eswell's margins on an EP basis. Respondents further claim that, since petitioners' case brief also did not address the basis for calculating Shanghai Eswell's margins, respondents assumed that, in accordance with section 351.309(c)(2) of the Department's regulations, petitioners accepted that Shanghai Eswell's margins should be calculated on a CEP basis. Respondents further argue that petitioners violated the letter and intent of section 351.309 by arguing for the first time in their rebuttal brief that Shanghai Eswell's margins should be on an EP basis. Respondents argue that since the information the Department rejected as sur-rebuttal comments was the only submission by respondents directly related to the EP issue, it should be readmitted to the record unless the Department also rejects Petitioners' Rebuttal Brief.

Petitioners argue in their rebuttal brief that the record shows that Eswell America is either a sales facilitator or a "sham sales organization" which was set up to enable Shanghai Eswell's sales to be reviewed on a CEP basis and to avoid dumping duties. Petitioners argue that Eswell America did not act as the sales agency for subject merchandise, based on the significant role of the commission agent. Petitioners further argue that Eswell America's role was to act as a duty absorption entity, rather than a CEP company conducting independent marketing and making independent pricing decisions. Petitioners assert that the nature of Eswell America's activities is evident in that its owner claims that she contacted Shanghai Eswell to import a product and was offered an Exclusive Dealing Agreement, regardless of the fact that she had no prior knowledge of the import business, had not incorporated Eswell America, had never been in the honey business, did not know any customers in the honey business, and could not speak English. *See* Eswell U.S. Verification Report at 3-4, 8.

Petitioners argue that the establishment of Eswell America was not concluded by transfer of funds until after the POR, citing to the Eswell U.S. Verification Report at 2, which states that "the majority of funds were not deposited until well after the POR," and that Shanghai Eswell

[96] *See* Eswell PRC Verification Report at 2.

[97] *See* Respondents' Comments on Calculating Margins for Wuhan Bee and Shanghai Eswell Based on EP rather than CEP, dated May 25, 2005 ("Respondents' EP Brief").

therefore did not establish its ownership interest in Eswell America until after the POR. Petitioners assert that the failure to finalize the incorporation of Eswell America has a bearing on the timing of the commercial considerations that provide the basis for the claimed affiliation. Petitioners also assert that the role of the commission agent is fundamental to Shanghai Eswell's commercial operations, which demonstrates that, from its inception, Eswell America played a limited role in Shanghai Eswell's U.S. sales.

Petitioners argue that the record does not demonstrate that Eswell America is Shanghai Eswell's sales affiliate, noting that Eswell America's business contacts were made, and other assistance was provided by, a commission agent who had done business with Shanghai Eswell in the past. Petitioners assert that, because the commission agent provided Eswell America with U.S. prices, and because the Department could not find any record of sales negotiations between Eswell America and Shanghai Eswell, the U.S. prices originated from Shanghai Eswell. Citing extensively to the Eswell PRC Verification Report at 7, where the Department described discussions with Mr. Xu of Shanghai Eswell and the sales process with Eswell America, petitioners argue that Eswell America is merely a paper forwarding importer of record and that Shanghai Eswell's sales should be classified as EP sales.

Petitioners also argue that Eswell America's claims that Ms. Qingzi Shi, the owner of Eswell America, negotiated prices with certain U.S. customers is suspect, as there is no record of such negotiations, Ms. Shi does not speak English, and prices and contacts were provided for this customer by the commission agent. Petitioners also argue, based on the timing of commission payments, that the commission agent was not paid by Eswell America. With respect to the terms of delivery indicated on the invoice, petitioners argue that the fact that the terms of delivery on the invoice do not reflect the actual terms of sale indicates that Shanghai Eswell controlled the sale, arguing that Eswell America was dependent on the commission agent to such an extent that it did not attempt to establish correct delivery terms on the document which Shanghai Eswell selected to establish the date of sale.[98]

Petitioners argue that, in addition to not establishing ownership, Shanghai Eswell has not established affiliation based on an agency relationship consistent with the Department's decision in *Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from South Africa:* 60 FR 22550, 22552 (May 8, 1995) ("*Furfuryl Alcohol*").[99] Petitioners maintain that Shanghai Eswell was unable to provide proof of a close marketing relationship. Petitioners also assert that the exclusive contract alleged by Eswell America to exist was not honored, as Shanghai Eswell explored potential sales to U.S. companies other than Eswell America,[100] arguing that Shanghai Eswell did not provide "consideration" for its shares of Eswell America. Petitioners argue that the U.S. sales were in actuality sales by Shanghai Eswell, not Eswell America.

[98] *See* Eswell U.S. Verification Report at 2.
[99] The criteria for agency affiliation as cited are: (1) Whether the foreign manufacturer participates in the marketing of the product to the U.S. customers; (2) whether the foreign manufacturer participates in setting prices and in the negotiation of other terms of sales to U.S. customers; (3) whether U.S. customers look to the U.S. importer or the foreign manufacturer for product testing and quality control; and (4) whether the foreign manufacturer interacts directly with U.S. customers.
[100] *See* Eswell PRC Verification Report at 4.

Petitioners also claim that Eswell America is structured to evade antidumping duties.[101] Petitioners maintain that, if Eswell America and Shanghai Eswell are affiliated companies, the lowering of transfer prices amounts to customs fraud, as the entered value does not represent the true value of the merchandise. Petitioners note that the Department could, under 19 CFR 351.402(f), treat the lowering of prices by Shanghai Eswell to Eswell America as improper reimbursement, requiring the Department to reduce the U.S. price by the amount of the offset.

Petitioners maintain that, if the Department continues to find that CEP is the appropriate classification for Shanghai Eswell's U.S. sales, it should correct items that failed to verify, including marine insurance for certain invoices, and an error in inland freight. Petitioners further argue that, if the Department accepts the post-POR deposit of incorporation funds, the total amount of fees paid to the commission agent after the POR should also be treated as commissions on all POR sales rather than as general indirect selling expenses.

Petitioners also argue in their EP methodology brief[102] that the Department should apply adverse facts available ("AFA") rather than constructing EP sales from Shanghai Eswell's responses.[103] Petitioners argue that, consistent with *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) ("*Nippon Steel*"), where the court stated that "an adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made," Shanghai Eswell failed to cooperate to the best of its ability in that it misrepresented (whether intentionally or not) the nature of its operations, affiliations, and sales transactions. Petitioners assert that it was Shanghai Eswell's responsibility to build a record that would have allowed for EP or CEP sales classification to avoid potential application of facts available. Petitioners maintain that using Shanghai Eswell's invoice prices would have the same result as if Shanghai Eswell had cooperated fully, thereby necessitating a margin calculation based on an unverified response, and would put petitioners at a disadvantage. Further, petitioners argue that the Department should not use the information collected at verification to construct an EP sales database because it is new factual information. Petitioners maintain that for the Department to construct an EP response would be burdensome to the Department and would place the Department in the role of a respondent, contrary to what the courts and the Department have held is necessary when respondents do not supply the necessary information.[104]

Petitioners argue that the Department should therefore apply the rate of 183.80 percent in accordance with section 782(d) and (e) of the Act for all entries during the POR. Petitioners assert that the Department was unable to verify the nature and role of Shanghai Eswell or the scope of its sales, the Department did not verify or trace the EP information, and that Shanghai Eswell failed to provide accurate data with respect to sales transactions. Petitioners also argue that Shanghai Eswell's U.S. sales database is inherently inaccurate because it was constructed on

[101] *See* Eswell PRC Verification Report at 1, which states that "{Shanghai Eswell} lowers its transfer price to Eswell America in order to compensate for antidumping duties."
[102] *See* Petitioners' Redaction and Resubmission of EP Case Brief, dated May 25, 2005 ("Petitioners' EP Case Brief").
[103] Petitioners first raised this point in Petitioners' Rebuttal Brief, but elaborated on it in their EP methodology brief.
[104] *See Mannesmanrohren-Werke AG v. United States*, 120 F. Supp. 2d 1075, 1085 (CIT 2000) ("*Mannesmanrohren*"), where the court held that the respondent has the burden of creating an adequate record and supporting the Department's conclusion that respondent did not respond to the best of its ability.

a CEP basis. Petitioners further argue that an adverse inference is appropriate because the data provided was significantly inaccurate, incomplete, or otherwise unreliable pursuant to 776(b) of the Act, and consistent with prior determinations.[105]

Petitioners also assert that, if all the necessary data to calculate a margin on an EP basis is not on the record, the Department should not attempt to calculate a margin on this basis. However, petitioners acknowledge that, although they believe that the use of total AFA is more appropriate, the use of estimated EP sales is preferable to using an incorrect CEP sales database. Petitioners argue that it should be assumed that Shanghai Eswell had knowledge of the differing margins for EP and CEP,[106] as well as that its CEP data and affiliation claims were flawed, and that Shanghai Eswell should not be allowed to benefit from its misrepresentation of these facts. In their rebuttal EP methodology comments,[107] petitioners argue that, if the Department decides to create an EP sales listing for Shanghai Eswell, it should be based on all POR invoices issued by Shanghai Eswell.

Department's Position:

The Department finds, consistent with its decision in the *Preliminary Results*, that Shanghai Eswell and Eswell America are affiliated entities, and the Department will continue to calculate Shanghai Eswell's antidumping duty margins on a CEP basis, using the price to the first unaffiliated customer in the United States, consistent with section 772(b) of the Act. We will address separately, below, changes made to certain sales and factors of production based on our verification findings.

Regarding the claim of affiliation between Shanghai Eswell and Eswell America, 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. To find affiliation between companies, the Department must find that at least one of the criteria listed above is applicable to the respondents.

In its questionnaire responses to the Department, Shanghai Eswell reported that it had an ownership interest in a U.S. company, Eswell America, which exceeded five percent.[108]

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[105] *See Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*, 62 FR 53808, 53818 (October 16, 1997) (*"Thailand Pipes*").
[106] *See, e.g., D&L Supply Co. v. United States* 113 F 3d 1220, 1223 (Fed. Cir. 1997) and *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990).
[107] *See* Petitioners' Redaction and Resubmission of EP Rebuttal Comments, dated May 26, 2005 ("Petitioners' EP Rebuttal").
[108] *See* Shanghai Eswell's Section A Questionnaire Response, dated March 11, 2004, at Exhibit 6.

Shanghai Eswell also reported that all of its U.S. sales were made through Eswell America. Accordingly, Shanghai Eswell reported sales of subject merchandise to the first unaffiliated customer in the United States on a CEP basis.[109] In the *Preliminary Results,* the Department calculated antidumping duty margins for Shanghai Eswell based on CEP, in accordance with section 772(b) of the Act. The Department conducted verifications of Shanghai Eswell and Eswell America after the *Preliminary Results*.

At the verification of Shanghai Eswell, the Department found that Shanghai Eswell had been issued stock certificates totaling more than five percent of Eswell America's total stock issuance, in return for an Exclusive Dealing Agreement, the key provision of which was that Shanghai Eswell agreed to make U.S. sales only through Eswell America. This formed the basis of the agreed valuation of Shanghai Eswell's stock in Eswell America.

The record shows that the owner of Eswell America and Shanghai Eswell signed the Exclusive Dealing Agreement in late 2003. Subsequent to the agreement, the owner of Eswell America incorporated Eswell America in the state of California. Immediately after Eswell America was established through capital contribution by the owner of Eswell America, Eswell America transferred stock certificates totaling more than five percent of Eswell America's total stock issuance to Shanghai Eswell. One individual, the owner of Eswell America, held the remaining stock in Eswell America.

The Department also found that the Exclusive Dealing Agreement and transfer of stock were completed prior to the issuance of the first invoice from Shanghai Eswell to Eswell America.[110] These findings were corroborated at the verification of Eswell America. At Eswell America's facility in Diamond Bar, California, the Department examined Eswell America's original incorporation documents, and verified that Eswell America was duly incorporated in the state of California prior to the first sale of subject merchandise. Eswell America's incorporation documents noted that Eswell America was incorporated based upon a monetary contribution by the owner of Eswell America, and a non-monetary contribution valued at a dollar amount by Shanghai Eswell. At verification, the Department found that the monetary contribution of the owner of Eswell America had not been fully deposited at the time of incorporation.[111] We also found that the non-monetary contribution corresponded to the Exclusive Dealing Agreement between Shanghai Eswell and Eswell America.

Regarding whether the initial capital for shares was required to have been paid in full prior to issuance of shares, California law appears to allow for the payment of shares "partly paid and subject to call for the remainder of the consideration to be paid therefore." Cal. Corp. Code, Section 409. *See also*, Cal. Corp. Code, Section 410; *R. H. Herron Co. v. Shaw*, 165 Cal. 668, 133 P 488 (1913). Thus, the fact that the initial incorporation funds were not deposited in full by

[109] *See* Shanghai Eswell's Section C Questionnaire Response, dated March 25, 2004, at Exhibit 1.
[110] *See* Eswell PRC Verification Report at 4. We note that the sales contract for the first purchase of subject merchandise between Shanghai Eswell and Eswell America was also issued on the same day as the stock transfer.
[111] Contrary to Shanghai Eswell's claim in its case brief at 83, the Department found no evidence at verification that Eswell America's incorporation funds had been fully deposited at the time the Department conducted verification (*see* Eswell U.S. Verification Report at Attachment 1), nor did Shanghai Eswell cite to any information that substantiated its claim that these funds were deposited by that date.

the date of incorporation does not appear to have been contrary to law or to have invalidated the original date of incorporation.

In examining the value of the non-monetary contribution made by Shanghai Eswell, we note that in prior proceedings the Department has found that it is not necessary that investments be made in cash. *See Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 19546 (April 22, 2002), and accompanying Issues and Decision Memorandum at Comment 18. In this case, the Department also found that the terms of the exclusive sales contract between Shanghai Eswell and Eswell America were adhered to by both parties during the POR.[112] While the Department finds that an exclusive sales arrangement may not necessarily be sufficient to constitute a basis for affiliation between two parties, it can represent reasonable consideration in exchange for stock. *See* Cal. Corp. Code, Section 410. We therefore find it reasonable in this case. Thus, given that an exclusive sales right constituted legal consideration provided by Shanghai Eswell in return for shares of Eswell America, the Department finds that the stock certificates issued by Eswell America to Shanghai Eswell have a value exceeding five percent of Eswell America's total stock.

Based on the above considerations, the Department finds that Shanghai Eswell does have an ownership interest in Eswell America greater than five percent within the meaning of section 771(33)(E) of the Act. Therefore, Shanghai Eswell and Eswell America are affiliated.

With respect to petitioners' claim that Eswell America is not a legitimate sales entity, and that the sales in question were therefore EP sales made by Shanghai Eswell, rather than CEP sales made by Eswell America, we note that the Department found at verification that Eswell America assumes title for subject merchandise as well as issues invoices and receives payment for these invoices from unaffiliated U.S. customers. The Department also found at verification that Eswell America, consistent with Shanghai Eswell's questionnaire responses, was incorporated in the state of California in September 2003, negotiates sales directly or through a commission agent with U.S. customers, and issues payment to Shanghai Eswell and freight and brokerage companies in the United States. These facts are inconsistent with petitioners' claims that Shanghai Eswell is the controlling entity, rather than Eswell America, in the sales to the unaffiliated U.S. customers.

Regarding petitioners' allegation that Eswell America played only a limited role in the sales negotiations of subject merchandise, we find that the weight of evidence demonstrates that Eswell America conducts sales negotiations independent of Shanghai Eswell. The Department interviewed also Eswell America's commission agent extensively at verification. While the Department agrees that the commission agent played a significant role in developing contacts and providing Eswell America with market information, we find no evidence, nor did petitioners point to any documentary evidence on the record, that Shanghai Eswell was coordinating Eswell America's sales activities through this commission agent. In addition, in considering the other resources of the company, we note that whether or not Qingzi Shi, the owner of Eswell America, speaks English is immaterial to the company's overall ability to negotiate and execute sales in

[112] *See* Eswell PRC Verification Report at Exhibit 1.

the United States.[113] Further, with respect to the terms of sale on the invoice, we note that we found at verification that Eswell America reported to the Department the expenses actually incurred on each sale during the POR,[114] and these expenses were fully verified, irrespective of the terms listed on the invoice.

The Department agrees with petitioners that Shanghai Eswell's statement in the Eswell PRC Verification Report at 9 that it "calculates the transfer price to Eswell America based on the desired profits for both Shanghai Eswell and Eswell America, net of any antidumping duties collected at customs" is troubling. However, as discussed above in Comment 7, the Department is revising its cash deposit collection methodologies to avoid an artificial lowering of transfer prices, thereby ensuring that CBP will collect the appropriate cash deposits irrespective of these transfer prices.

Because we have determined that Shanghai Eswell and Eswell America are affiliated, and that the sales made to Eswell America are valid sales, as are those made by Eswell America to its unaffiliated U.S. customers, we also determine that these sales should be treated as CEP sales. Therefore, for U.S. price we will continue to examine the sales by Eswell America to the first unaffiliated U.S. customer on a CEP basis, in accordance with section 772(b) of the Act. For a description of the margin calculation on this basis for the final results, *see* Memorandum to the File from Anya Naschak, dated June 27, 2005: Shanghai Eswell Enterprise Co., Ltd ("Shanghai Eswell") Program Analysis for the Final Results of Review ("Shanghai Eswell Final Analysis Memo").

As a result of the Department's determination that Shanghai Eswell's sales should properly be evaluated based on their submitted CEP database, we find that petitioners' allegation that we should use AFA in calculating a margin based on inadequate EP data is moot, and will not therefore address their assertions with respect to this issue. Similarly, we find respondents' claim in their May 25, 2005, submission that the Department should reject Petitioners' EP Case Brief to be moot.

Finally, with respect to certain discrepancies found at verification, the Department has made the following determinations. First, we have revised the marine insurance adjustment for these final results to use Eswell America's actual market economy purchases for those invoices on which marine insurance expenses were incurred. Because the quantity of the market economy purchases of marine insurance expenses was significant, we will use the average per-metric ton value as a proxy for those invoices for which no data was collected. *See* Eswell U.S. Verification Exhibit 5 and Memorandum to the File: Shanghai Eswell Enterprise Co., Ltd ("Shanghai Eswell") Program Analysis for the Final Results of Review, dated June 27, 2005 ("Eswell Final Analysis Memo"). Second, the Department will adjust the home market supplier freight distances based on its verification findings. *See* Eswell PRC Verification Report at 27. For a further discussion of these and all other company-specific changes to the margin calculation, *see* Eswell Final Analysis Memo. Third, with respect to the additional fees the commission agent received after the POR, we note that "this payment was made at the end of

[113] We note that Eswell America's secretary speaks English and has experience in the import/export industry, and that its commission agent is similarly situated.
[114] *See* Eswell U.S. Verification Report at 10.

2004 for the information and assistance he had given to Eswell America in developing its customer contacts, market information, and business information," (*see* Eswell U.S. Verification Report at 14). Therefore, it was not a direct expense related to the sales during the POR. Because this was a post-POR expense, we have not taken it into account for purposes of these final results.

Wuhan Bee-Related Issues

Comment 11: Classification of Wuhan Bee's U.S. Sales

Petitioners argue that Wuhan Bee's claim of affiliation with Presstek Inc. ("Presstek"), Pure Sweet Honey Farm Inc. ("PSH"), and Pure Food Ingredients Inc. ("PFI") should be denied and the Department should apply adverse facts available to all of Wuhan Bee's entries during the POR. At Wuhan Bee's March 2005 verification in China, according to petitioners, the Department examined Wuhan Bee's claim of affiliation with its U.S. customers based on a formalized written agreement with Presstek's owner in April 2003 and the claim of an equity ownership relationship affiliating the companies as of July 2003.

Petitioners first address the Department's examination of the "Exclusive Dealing Agreement," the formalized written agreement between Wuhan Bee's owner and Presstek's owner. As an initial matter, petitioners argue that sales made prior to the agreement date (April 23, 2003) should have been reported by Wuhan Bee as EP sales. Moreover, petitioners contend that the Department found evidence at verification that the agreement was ineffectual and not honored by Wuhan Bee or Presstek.[115] Petitioners state that Wuhan Bee made sales to a third party in the United States, for which Wuhan Bee claimed it had the permission of Presstek's owner. This proves that neither party treated the relationship as exclusive, petitioners argue. Moreover, according to petitioners, Wuhan Bee made sales to an additional third party prior to the written agreement that were reengineered into Presstek sales at a later point in time, for which the terms of sale appear to have conflicted with the terms of the "Exclusive Dealing Agreement." Therefore, petitioners claim that, even after April 23, 2003, the exclusive agency agreement was nominal, as the material terms of exclusivity and pricing were not observed on a *de facto* basis.

Petitioners also claim that Wuhan Bee failed to substantiate any other aspect that normally underpins agency affiliation. Petitioners state that, in *Furfuryl Alcohol*, the Department addressed affiliation based on an agency relationship. *See also Electrolytic Manganese Dioxide from Japan: Final Results of Antidumping Duty Administrative Review*, 58 FR 28551, 28555 (May 14, 1993), and *Final Determination of Sales at Not Less Than Fair Value: Certain Forged Steel Crankshafts from Japan*, 52 FR 36984, 36985 (October 2, 1987) ("*Japan Crankshafts*"). Petitioners claim that Wuhan Bee did not report, nor did the Department's verification report substantiate, participation by Wuhan Bee in Presstek's U.S. marketing, in Presstek's price negotiations with U.S. customers, in Presstek's quality control testing, or in direct interactions with Presstek's customers. None of the fundamental aspects of agency affiliation are in evidence, petitioners argue, and there is no record evidence that either party was in a legal or operational position to exercise restraint or direction of the other.

[115] *See* "Memorandum to the File through Carrie Blozy: Verification of U.S. Sales and Factors of Production for Respondent Wuhan Bee Healthy Co., Ltd (Wuhan Bee)" (April 14, 2005) ("Wuhan Bee PRC Verification Report").

Regarding affiliation through equity ownership, petitioners state that the Department's policy is to base its market economy determinations on records kept in the normal course of business, to the degree that such records are accurate, according to Section 773(f)(1)(A) of the Act.[116] Petitioners argue that the approval for the establishment of a joint venture between the parties was issued on July 28, 2003, by the local PRC municipal authority, with the ownership purchase by Presstek's owner being formalized on September 30, 2003, when the transaction was recorded in Wuhan Bee's capital ledger. Therefore, petitioners contend, the *de jure* equity affiliation began on this date. Further, petitioners claim, there was no evidence – because the nominal agency relationship established on April 23, 2003, was not implemented in material terms and no other basic agency relationship, such as joint customer support, existed – that a *de facto* basis for agency affiliation existed prior to this date either.

For these reasons, according to petitioners, Wuhan Bee should have known to report EP sales, at a minimum, prior to April 23, 2003; it should have provided all the facts about the execution of its "Exclusive Dealing Agreement;" and for the period between April 23, 2003 and September 30, 2003, it should have reported EP prices as an alternative. Because Wuhan Bee choose not to report this data, which it had over a year to do so, Wuhan Bee introduced a significant inaccuracy into the response, petitioners argue.

In addition, petitioners allege that Wuhan Bee failed verification on the issues of date of sale and date of shipment. Petitioners claim that the Department could not verify date of sale because the "invoice numbering convention changed throughout the POR"[117] and the Department could not find any consistent explanation for the exceptions found in Wuhan Bee's invoice numbering system. Furthermore, according to petitioners, the Department could not test the reliability of the computer-generated invoices at verification because the original computerized invoicing system was unavailable due to a fire that occurred the night before verification started. Petitioners also note that Wuhan Bee was unable to provide an example of a price or quantity change between sales contract and invoice at verification. Petitioners argue that for the above-referenced reasons Wuhan Bee should have reported EP sales based on sales contract date rather than invoice date. With respect to shipment date, petitioners maintain that the Department found at verification that Wuhan Bee did not maintain any records to substantiate the date the honey shipments left the factory. Petitioners argue that these failures on date of sale and date of shipment constitute substantive errors that undermine the reliability of the response *per se* and warrant the use of total adverse facts available.

Petitioners claim that because the record does not have any information regarding the actual transaction values between Wuhan Bee and Presstek and because Wuhan Bee failed verification on date of sale and date of shipment, the application of facts available in this case is warranted under sections 1677e(a)(1), (2)(A), (2)(C), and (2)(D), subject to the application of sections 1677m (d) and (e). According to petitioners, section 1677m(c)(1) of the Act requires that the Department provide assistance as is practicable to interested parties that encounter difficulties in responding to requests for information and who promptly notify the Department of their

[116] "… the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise."
[117] *See* Petitioners' Case Brief (May 4,2005).

difficulties, while section 1677m(d)(1) requires that respondents be given the opportunity to correct deficient submissions when practicable. Petitioners argue that these provisions do not apply in this case because Wuhan Bee unilaterally failed to disclose material facts to the Department so that the facts were not discovered until verification. Petitioners claim that Wuhan Bee's response has been verified as so incomplete and unreliable that it cannot be used as the basis for the required determination under 1677m(e) of the Act

According to petitioners, the Department can apply adverse facts available, under section 1677e(b) of the Act, if it determines that Wuhan Bee has not cooperated to the best of its ability in this proceeding. Petitioners contend that Wuhan Bee's response has been verified to be so incomplete and unreliable that it cannot be used as the basis for any determinations and is evidence of Wuhan Bee's lack of cooperation in this proceeding. Moreover, petitioners cite the failure by Wuhan Bee to disclose all the material facts about its alleged affiliation with Presstek. Yet, the Department gave Wuhan Bee numerous opportunities to submit complete and accurate data, petitioners state.

Petitioners contend that all of these factors should be considered obstructions to this proceeding and justify the Department's disregarding some or all of Wuhan Bee's data in this review and using adverse facts available. The Department should apply the NME/PRC-wide rate of 183.80 percent for all entries by Wuhan Bee during the POR, they state. If, however, the Department does not choose to apply adverse facts available, petitioners argue, the Department must at least apply facts available on a non-adverse basis under section 1677e(a).

Respondent argues that the Department should reject petitioners' request to apply adverse facts available in this review and continue to find that Wuhan Bee, Presstek, and PSH are affiliated parties, in accordance with section 771(33) of the Act.

In response to the petitioners' case brief arguments regarding the Chinese verification, respondent claims that it did not withhold substantial information from the Department regarding Wuhan Bee's U.S. sales and its affiliation with Presstek. Respondent points out that it mentioned in its May 19, 2004, supplemental response that Wuhan Bee and Presstek had a verbal agreement at the end of 2002, which was formalized in April 2003, and that it later submitted a copy of this agreement per the Department's request. The Department should reject all of the petitioners' arguments, respondent claims, because petitioners did not raise the "affiliation" issue in a timely manner and had 350 days prior to its allegations in its case briefs to bring the issue before the Department and did not.

Regarding petitioners' arguments that Wuhan Bee's affiliation claim should be denied because it "failed to substantiate any other aspect normally underpinning agency affiliation," respondent replies that its affiliation claim is based on a close supplier relationship, not agency affiliation. With regard to date of shipment and date of sale not being verified, respondent claims that the petitioners are distorting the record. Wuhan Bee's invoice numbering system during the POR is not relevant to the issue of whether Wuhan Bee reported all of its U.S. sales, respondent argues. Documentation in the verification exhibits collected by the Department confirms the accuracy of sales reported, according to respondent.

In determining the affiliation issue, respondent argues that the Department must be guided by the *Statement of Administrative Action* ("*SAA*") accompanying the URAA of 1995. Control, not ownership, is the essential characteristic of the relationship between affiliated parties under the statute, according to respondent.[118] The Department and the courts have found, according to respondent, that a "close supplier relationship" exists where "the supplier or buyer becomes reliant upon the other."[119] For example, respondent claims that the Department had found that where a supplier depends on the respondent for 50 percent or more of its sales for each of the last five years, the supplier is sufficiently reliant on the buyer such that the two have a close supplier relationship.[120] In another case, according to respondent, the CIT found that "Commerce's conclusion that the numerous connections between Ta Chen and Sun were indicative of control was reasonable. Commerce did not rely on any one factor in concluding that Ta Chen and Sun were affiliated parties, rather, it determined that the combination of factors was sufficient proof of affiliation."[121]

Respondent further claims that the Department has recognized that under appropriate circumstances it should consider additional, relevant factors when making affiliation calls. In *Hontex Enterprises, Inc. v. United States*, 342 F. Supp. 1225 (CIT 2004) ("*Hontex*"), according to respondent, even though the court found that a paying the antidumping legal fees of another person is not sufficient on its own to support a finding of affiliation, the Department maintained upon remand in this case that the act of paying legal fees "suggests a level of cooperation" supporting a conclusion that a close supplier relationship exists.[122] Application of all of these cases confirms that the relationship between Wuhan Bee, Presstek, and PSH constitutes a close supplier relationship and that affiliation between these companies exists, respondent maintains.

Citing to the history of the relationship between the principal owners of Wuhan Bee and Presstek, respondent maintains that the owners took certain actions that are evidence of a close supplier relationship. First, respondent states that Presstek/PSH's owner helped Wuhan Bee find U.S. legal counsel, discussed sales strategies for Wuhan Bee's entering the U.S. market, and decided that PSH would purchase Wuhan Bee's initial shipment of honey to the United States. After Wuhan Bee's new shipper review was initiated,[123] Presstek decided to act as importer of record for honey purchased from Wuhan Bee, respondent states. Both owners, respondent maintains, recognized that the only way they could succeed in importing Chinese honey into the United States in the face of a potential 183 percent duty would be for the companies to work together in a close supplier relationship. Respondent cites to a fax between the two parties, dated December 2002, as constituting written evidence of confirmation of an oral agreement, which the owners of Wuhan Bee and Presstek/PSH had entered into prior to the date of this fax.[124]

Respondent claims that the close suppler relationship between Wuhan Bee and Presstek during

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[118] *See* Respondent's Refiling of Wuhan Bee's Case Brief, dated May 24, 2005, at 1-2 ("Respondent's Wuhan Bee CEP Brief").
[119] *See* Respondent's Wuhan Bee CEP Brief at 3.
[120] *See Mitsubishi Heavy Industry, Ltd. v. United States*, 23 F. Supp. 2d. 1183, 1190 (CIT 1999) ("*Mitsubishi 1999*").
[121] *See Ta Chen Stainless Steel Pipe, Ltd. v. United States*, Slip Op. 99-117 (CIT 1999).
[122] *See* Respondent's Wuhan Bee CEP Brief at 4.
[123] *See Honey from the People's Republic of China: Initiation of New Shipper Antidumping Duty Reviews*, 67 FR 50862 (August 6, 2002).
[124] Respondent notes that the two owners normally conducted business via telephone.

the POR is also evidenced in the following ways: 1) the sharing of legal fees in the new shipper and administrative reviews; 2) the agreement that Presstek would act as the exclusive distributor of Wuhan Bee honey in the United States; 3) the circumstances surrounding the sales of subject merchandise that Wuhan Bee made to third parties in the United States other than Presstek; a joint attempt to convince CBP and the U.S. Food and Drug Administration ("FDA") to stop the importation of honey to the United States for which a foreign shipper fraudulently designated Wuhan Bee as the manufacturer.

Respondent claims that Wuhan Bee and Presstek have a close supplier relationship, exactly as contemplated by the U.S. antidumping duty laws as amended by the URAA in 1995. During the entire POR, respondent contends, Wuhan Bee and Presstek/PSH were reliant on one another as evidenced by their actions outlined above, and the companies consistently shared information normally withheld by parties engaged in an arm's length relationship. Accordingly, respondent argues that the record holds sufficient evidence for the Department to conclude that Wuhan Bee and Presstek/PSH were affiliated for the entire POR. If, however, this is not enough proof for the Department, respondent maintains, then the Department must find affiliation between the parties no later than April 23, 2003, because the Exclusive Dealing Agreement contains a clause that discusses an ownership option that was fulfilled later that year.[125]

Respondent also contests the Department's statement in Wuhan Bee's China verification report[126] that certain key terms of the Exclusive Dealing Agreement were not fulfilled during the POR. Respondent maintains that parties to the agreement are the only ones who can determine if the terms of the agreement are being fulfilled and that both Wuhan Bee and Presstek/PSH confirm that the key terms of the agreement have been fulfilled. Respondent further claims that the Department's findings at the U.S. verification should make it realize that Presstek/PSH's owner was operating under the assumption that his companies were affiliated with Wuhan Bee and that the documentation provided at that verification confirms that the companies' affiliation took place prior to April 23, 2003.

Regarding the Department's statements in its verification report, respondent first claims that the Exclusive Dealing Agreement does not form the basis of the alleged affiliation between Wuhan Bee and Presstek/PSH because the affiliation between these companies pre-dates this formal agreement. Second, respondent maintains that when both owners signed the Exclusive Dealing Agreement they were of the opinion that their respective companies had been operating under an exclusivity agreement since the beginning of the POR. Third, the Department's suggestion that the agreement was not being fulfilled because Wuhan Bee sold its honey to Presstek at higher prices than to customers in other markets ignores that facts that the critical terms of the agreement were that Wuhan Bee would not sell its honey to other companies in the United States and that Wuhan Bee would provide all the honey PSH needed for PSH's customers requirements. Respondent also argues that Presstek did not care about prices to Wuhan Bee customers' outside of the United States and that the prices Presstek paid were competitive with prices paid by PSH for honey from other sources. Finally, respondent asserts that only Wuhan Bee and Presstek are the only parties who should have a say in whether or not they believe the prices set were fair to buyer and seller.

[125] *See* Respondent's Wuhan Bee CEP Brief at 11.
[126] *See* Wuhan Bee PRC Verification Report.

In rebuttal, petitioners argue that there is no evidence on the record to support the claim that Wuhan Bee and Presstek/PSH have a closer relationship than one between any customer and supplier. Self-interested cooperation, petitioners contend, does not in and of itself establish control. Respondent's claims in both verification reports of having a verbal exclusivity agreement are not documentary evidence of such an agreement, petitioners argue. Furthermore, petitioners claim that the December 2002 fax cited by respondent does not show control by Wuhan Bee of PSH and does not demonstrate a written confirmation of an oral agreement, but merely indicates future plans to do business that would be common to any producer and supplier seeking to do so.

Petitioners contend that none of the arguments Wuhan Bee made with regard to affiliation show control by one party over the other. The sales made by Wuhan Bee to third parties during the POR prove, according to petitioners, that prior to the formal agreement each sale was discussed on a case-by-case basis between the two parties. PSH's agreement to bear some of Wuhan Bee's legal costs is not an unprecedented occurrence, petitioners claim, but such shared interests do not establish control. Wuhan Bee's and PSH's cooperation regarding "fraudulent " entries on subject merchandise also does not evidence control, they argue. Petitioners contend that Wuhan Bee did not inform the Department of these sales until late in the proceeding and that the majority of actions with the FDA occurred after the date the Exclusive Dealing Agreement was formalized. Even this agreement does not evidence control, petitioners argue, because its terms are such that it is clear neither buyer nor seller is reliant on one another, and the Department was correct that one of the agreement's key terms was not met.

Department's Position:

The Department finds that Wuhan Bee and Presstek do not meet the standards for affiliation based on a close supplier relationship, within the meaning of section 771(33)(G) of the Act. Therefore, we agree, in part, with petitioners that Wuhan Bee and Presstek were not affiliated throughout the entire POR. The Department also finds that these parties became affiliated on July 20, 2003, based on a common control relationship arising from a common ownership and management from that date, as defined by section 771(33)(F) of the Act.

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. To find affiliation between companies, the Department must find that at least one of the criteria listed above is applicable to the respondents.

Respondent claims that Wuhan Bee and Presstek have a close supplier relationship, exactly as

contemplated by the U.S. antidumping duty laws as amended by the URAA in 1995, which is evidenced in the following ways: 1) shared corporate history; 2) the sharing of antidumping legal fees in the new shipper and administrative reviews; 3) an "Exclusive Dealing Agreement" stating that Presstek would act as the exclusive distributor of Wuhan Bee honey in the United States; 4) the circumstances surrounding the sales of subject merchandise that Wuhan Bee made to third parties in the United States other than Presstek; and 5) a joint attempt to convince the CBP and FDA to stop the importation of honey to the United States in which a foreign shipper fraudulently designated Wuhan Bee as the manufacturer. Respondent further claims that this close supplier relationship is sufficient to establish affiliation between Wuhan Bee and Presstek for the entire POR.

In considering for purposes of these final results whether Wuhan Bee was affiliated with Presstek and whether Wuhan Bee was affiliated with PSH under section 771(33) of the Act, we analyzed all information on the record regarding the possible affiliation between these parties, including respondent's arguments as listed above.[127] In particular, we considered whether Wuhan Bee and Presstek were affiliated from the beginning of the POR and whether Presstek's owner's investment, which led to board membership in Wuhan Bee, resulted in a common control relationship between the parties at any time during the POR. An in-depth discussion of our findings can be found in "Memorandum to James C. Doyle: Administrative Review of the Antidumping Duty Order on Honey from the People's Republic of China (PRC): Analysis of the Relationship and Treatment of Sales between Wuhan Bee Healthy Co., Ltd. and Presstek Inc. and Pure Sweet Honey Farm Inc."[128] (June 27, 2005) ("Wuhan Bee Affiliation Memo"). However, we summarize our findings here.

First, we addressed Individual A's[129] relationship to Presstek and PSH.[130] As Individual A holds more than five percent stock ownership of both Presstek and PSH, Individual A is affiliated with PSH and Individual A is affiliated with Presstek, in accordance with section 771(33)(E) of the Act. At verification, the Department's verifiers also confirmed that Individual A is an active president of both Presstek and PSH. Because Individual A is an operationally active president of both Presstek and PSH, and has been so since before the beginning of the POR, we find that during the POR he was in a position to control Presstek and in a position to control PSH. Therefore, Presstek and PSH were affiliated parties during the entire POR because they were both under the common control of a third party, Individual A, within the meaning of section 771(33)(F) of the Act.

Next, we examined the affiliation status between Wuhan Bee and Presstek. We noted that the "close supplier relationship" upon which Wuhan Bee bases its claim of affiliation with Presstek is not in itself a statutory basis for claiming affiliation, as outlined above, although, as discussed

[127] We also considered whether PSH and Presstek were affiliated during the POR.
[128] We note that petitioners and respondent refer to Wuhan Bee's alleged affiliation with PFI. However, the Department does not address PFI in the Wuhan Bee Affiliation Memo because PFI was not involved in the production, sale, or distribution of the subject merchandise during the POR.
[129] Individual A is the central figure involved in the affiliation of these parties. Individual A's name is proprietary in this context. *See* Wuhan Bee Affiliation Memo.
[130] We note that the same facts regarding Individual A and Presstek and PSH also apply to his affiliation with PFI, and PFI's affiliation with Presstek and PSH, as Individual A is president of all three companies.

below, it is considered in our regulations. The closest statutory requirement that could determine affiliation in connection with a "close supplier relationship" for Wuhan Bee and Presstek is section 771(33)(G) of the Act, which provides for finding affiliation between "any person who controls any other person and such other person." Therefore, we analyzed whether the relationship between Wuhan Bee and Presstek meets the standards for constituting a "close supplier relationship," and whether this relationship leads to control of Presstek over Wuhan Bee. To determine if two companies have a close supplier relationship the Department must first determine whether the relationship involves actual reliance of one company upon the other, and, if the Department finds actual reliance, then it next must evaluate that reliant relationship for its "potential" to impact decisions relating to subject merchandise.[131]

As a practical matter, the Department found that Presstek and Wuhan Bee were not reliant upon each other, as evidenced by the fact that Presstek purchased honey from many countries during the POR and Wuhan Bee sold to additional U.S. partners. [132] Furthermore, there is no indication on the record that the honey in question was of such a specialized nature that it could only be sold to a single U.S. buyer or that Wuhan Bee was limited in its marketing of the product in any way other than by the alleged "Exclusive Dealing Agreement." As noted above, in making determinations regarding close supplier relationships, the Department's practice is to use the reliance test, which is based on the concept that the potential to control is not abstract or hypothetical but rather "linked to a present and actual capacity or ability to exercise control." [133] We find no evidence of such reliance in this case.

We also do not consider that one action that took place between Presstek and Wuhan Bee during the POR, namely the reengineered sales to Presstek, constitutes compelling evidence of Presstek's alleged control over Wuhan Bee. The Department cannot determine the motive behind this one action. Furthermore, Individual A himself suggested that, if extenuating circumstances had not been present, Wuhan Bee was not likely to have informed Presstek of the reengineered sales at all. In addition, neither company could produce documentation to support their claims of discussion of the initial third-party U.S. sales, which were supposedly made under joint agreement.

Moreover, the Court of International Trade has held that, even where there are exclusive sales contracts, the Department has properly found that such contracts alone were insufficient to support an affiliation finding. [134] In *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews,* 62 FR 18404 (April 15, 1997), for example, the Department held that "{t}he arrangements {respondent} has entered into with its home-market distributors are simply exclusive sales contracts which are a common commercial arrangement all over the world. These arrangements are typically made at arm's length and do not normally indicate control of one party over the other." Our analysis of the agreement in this case supports a finding that it is not a basis for establishing that Presstek has control over Wuhan Bee.

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[131] *See* 19 C.F.R. § 351.102(b); *TIJID*, 366 F. Supp. 2d, at 1299.
[132] *See* November 12, 2004, Supplemental Questionnaire Response of Wuhan Bee Healthy Co., Ltd. ("2nd supplemental response") at page 6 and Exhibit S-7.
[133] *See TIJID*, 366 F. Supp. 2d, at 1297
[134] *See Hontex*, 342 F. Supp. at 1243.

The documentation that Presstek supplied purporting to prove the existence of control based on a close suppler relationship also does not contain compelling evidence that anything more than close cooperation existed between the two parties. Nor do we find that that the sharing of legal fees in the new shipper and administrative reviews or the joint attempt to convince the CBP and FDA to stop the importation of honey into the United States, when a foreign shipper fraudulently designated Wuhan Bee as the manufacturer, are evidence of anything more than a normal buyer and supplier relationship. As importer of record, Presstek clearly had an interest in pursuing the matter with the CBP and FDA and sharing in the payment of legal fees. However, these actions do not demonstrate that Presstek was able to control Wuhan Bee, or vice versa. In fact, the Court of International Trade has held that payment of antidumping legal fees, specifically, does not give rise to an inference that the paying party had the potential to control respondent's U.S. sales activities during a POR. [135]

Finally, although respondent cites to the history of the relationship between the principal owners of Wuhan Bee and Presstek, the Department does not find such a relationship probative of control by one company over another. [136] Instead Wuhan Bee's and Presstek's corporate history is that Wuhan Bee has never been Presstek's sole supplier, and Presstek was not Wuhan Bee's sole customer during the POR, according to evidence on the record in this review. Therefore, the standard the court upheld in *Mitsubishi Heavy Indus. v. United States*, 54 F. Supp. 2d 1183, 1190-91(CIT 1999), sustaining the Department's determination that "any supplier that depended upon {buyer} for 50 percent or more of its sales during each year during a five year period {would} be potentially subject to the restraint or direction of {the buyer}" was a reasonable interpretation of the term "close supplier." Record evidence does not show that Wuhan Bee relied on Presstek for 50 percent or more of its sales for each of the five years prior to the POR, therefore, this decision does not apply to Wuhan Bee or Presstek.

In general, the Department cannot find that the actions that took place between Wuhan Bee and Presstek were anything more than acts of cooperation that could take place between any two entities, affiliated or not affiliated, which are engaged in a business relationship. Therefore, we find that neither Wuhan Bee nor Presstek was in fact reliant on the other for sales of the subject merchandise during the POR. Because neither Wuhan Bee nor Presstek relied on the other, the Department finds that respondent has not demonstrated that Presstek controlled Wuhan Bee, within the meaning of 19 U.S.C § 1677(33)(G).

However, there is evidence on the record that Wuhan Bee and Presstek became affiliated during the POR according to the same statutory provision under which we found Presstek and PSH to be affiliated during the POR. Individual A has ownership interests in both Wuhan Bee and Presstek, each exceeding five percent of the shares. As a consequence of his ownership interests in these two companies, Individual A also held positions that allowed him to exercise restraint or direction via management in each company. Thus, Individual A had the ability to directly control both companies during the POR, as of the date that control was established.

[135] *See id.*
[136] *See* Wuhan Bee U.S. Verification Report at 8.

We find that, as part owner and president and treasurer of Presstek during the POR, Individual A was in a position to control the business operations of Presstek. With respect to Wuhan Bee, Individual A became the vice-chairman of Wuhan Bee's Board of Directors through his purchase of Wuhan Bee shares. Based on his position as vice-chairman of Wuhan Bee, where he was responsible for the approval of management and the disposition of profits and which he gained as a direct result of his purchase of Wuhan Bee shares, Individual A was in a position to control Wuhan Bee during the POR. Based on Individual A's ability to exercise control over the business operations of both Presstek and Wuhan Bee, we find that Wuhan Bee and Presstek were affiliated during the POR based on common control within the meaning of section 771(33)(F) of the Act.

After finding Presstek and Wuhan Bee affiliated, we have next considered the date on which this affiliation came into being. Individual A's purchase of an ownership interest in Wuhan Bee can be tied to a July 17, 2003, deposit. However, we do not find that this deposit is sufficient to establish the date on which Individual A obtained the ability to control Wuhan Bee. For that date, we looked to the date Individual A's board membership became effective. Because Wuhan Bee's Joint Venture Agreement and Articles of Association, which were created to reflect Individual A's investment in Wuhan Bee, both state that "the official registration date of the Joint Venture is the date of its establishment," and it is only the joint venture's establishment which gives Individual A a seat on the board of directors, *i.e.*, the mechanism through which he is able to control Wuhan Bee, we find that the approval date of the Certificate of Approval, issued by Foreign Investment Office of Wuhan, July 20, 2003, best represents the joint venture's official registration date and the date on which Individual A's common control of the companies was established.

Therefore, as a result of our findings, we determine that the payment documents, as examined at verification and submitted on the record in this proceeding, confirm ownership by Individual A of a more than five percent ownership share in both Presstek and Wuhan Bee. This ownership purchase, in turn, directly led to Individual A's common control over both Wuhan Bee and Presstek within the meaning of section 771(33)(F) of the Act. In addition, because July 20, 2003, represents the date on which Individual A formally received his Wuhan Bee board membership, which in turn, gave him the ability to exercise control of Wuhan Bee, we find that this date represents the best date for the beginning of Wuhan Bee's and Presstek's affiliated relationship.

For all of the reasons discussed above, we find that Wuhan Bee and Presstek were not "affiliated" until Individual A's board membership became effective on July 20, 2003, at which point the requirements of section 771(33)(F) of the Act were first met due to the two companies both being under the common control of Individual A as of that date. For the same statutory reasons that we find affiliation between Presstek and PSH during the entire POR and between Wuhan Bee and Presstek for a part of the POR, we find that Individual A's ownership interests and management positions in Wuhan Bee and PSH result in Individual A being affiliated with both parties as of July 20, 2003, the date on which Individual A's ability to exercise control of

Wuhan Bee is established, and, in turn, those parties being affiliated with each other due to the two companies being under the common control of Individual A as of that date.[137]

In addition, we disagree with petitioners that Wuhan Bee failed its PRC verification based on issues of date of sale and date of shipment. While there were problems with how Wuhan Bee reported these data,[138] the Department confirmed, through its in-depth, completeness tests at verification,[139] that the universe of sales that Wuhan Bee reported as sold to Presstek or other U.S. customers was complete. The Department's verifiers found no evidence that the dates of the invoices in this universe of sales cannot be relied upon.

As discussed below in Comment 12, the Department finds that it has facts available on the record which it is compelled to use, under section 782(e) of the Act, to calculate a margin on an EP basis for Wuhan Bee's sales prior to July 20, 2003 (the date affiliation was established between Wuhan Bee and Presstek/PSH). The Department notified interested parties in a letter dated May 13, 2005, that it was considering using EP information to calculate a margin for Wuhan Bee. Because neither the Department nor Wuhan Bee had the opportunity to ask for or report, respectively, an EP sales database for Wuhan Bee during the POR, the Department cannot agree with petitioners that adverse facts available should be applied to sales during this time period. The Department's determination that Wuhan Bee and Presstek/PSH were not affiliated until July 20, 2003, rests on our analysis of the facts on the record. We do not find that Wuhan Bee withheld information concerning its affiliation or otherwise impeded the Department's review of Wuhan Bee's affiliation that would lead to a determination that Wuhan Bee failed to cooperate to the best of their ability. Therefore, the use of adverse facts available, as outlined in section 776(b) of the Act, is inappropriate. However, for the time period that the Department does find Wuhan Bee affiliated with Presstek and PSH, we find that adverse facts available is warranted due to their failure to cooperate to the best of their ability in identifying the exact quantity of subject merchandise contained in the CEP sales. *See* Comment 13 for an in-depth discussion of this finding.

Comment 12: Use of EP sales for Wuhan Bee

Respondent states in its EP methodology brief[140] that, if the Department decides that Wuhan Bee's margin should be based on EP, the Department should use the verified quantity and value of the sales from Wuhan Bee to Presstek as established in Wuhan Bee's verification exhibits 5 and 8. It further states that the only deduction to these prices should be domestic inland freight. If the Department decides that the Wuhan Bee-Presstek affiliation did not start until April 23, 2003, respondent argues, then it should limit the EP sales to either the quantity of honey sold by Wuhan Bee to Presstek prior to that date (as reported in verification exhibit 5) or entered before that date, as reported in Exhibit 1 of the February 7, 2005, response. In such a case, margins for sales made after April 23, 2003, should be calculated on a CEP basis, respondent claims.

[137] The same reasoning holds true for Wuhan Bee's affiliation with PFI for a part of the POR; Presstek's and PFI's affiliation during the entire POR; and PSH's and PFI's affiliation during the entire POR.
[138] *See* Wuhan Bee PRC Verification Report at 15-16.
[139] *See id.* at 18-21.
[140] *See* Respondents' EP Brief.

Petitioners argue[141] that it is not appropriate for the Department to construct an EP sales database from the information it obtained at verification, a step the Department announced it is considering in a letter to interested parties dated May 13, 2005.[142] The Department should not rely on the invoice information gathered at the verification of Wuhan Bee in China, petitioners contend, because Wuhan Bee and its alleged affiliates had an obligation to submit a proper and complete response in accordance with sections 351.401(a) and (b) of the Department's regulations. Petitioners state that Wuhan Bee was given numerous opportunities, including response extensions, to submit accurate information but failed to do so. Because Wuhan Bee withheld information about its affiliation that the Department did not discover until verification, Wuhan Bee prevented the EP record from being developed, petitioners claim. This constitutes a failure to cooperate and the Department can use adverse inferences, according to section 776(b) of the Act, under these circumstances, petitioners state. The CIT has affirmed,[143] according to petitioners, that the Department may use adverse facts available where a respondent has failed to provide necessary information that was within its own control. The CIT held in that case, according to petitioners, that the respondent not the Department has the burden of fully responding to the Department's questionnaires. Petitioners also argue that the application of adverse facts available to Wuhan Bee is appropriate consistent with *Nippon Steel*, 337 F.3d at 1382. Petitioners maintain that using Wuhan Bee's invoice prices would produce the same result as if Wuhan Bee had cooperated fully and would encourage future respondents to attempt similar deceptions in other proceedings. Petitioners assert that it should be assumed that Wuhan Bee had knowledge of the differing margins depending on whether the EP or CEP methodology was used.[144] Petitioners argue that the Department should therefore apply the rate of 183.80 percent, in accordance with section 782(d) and (e) of the Act, for all Wuhan Bee entries during the POR. Petitioners argue that this adverse inference is appropriate because the data provided were significantly inaccurate, incomplete, or otherwise unreliable within the meaning of 776(b) of the Act, and consistent with prior determinations.[145]

With respect to the invoice information obtained at verification that the Department proposes using, petitioners state that it was not subject to verification and was not traced to Wuhan Bee's ledgers. Further, petitioners claim that it is not clear that this information is adequate to calculate appropriate net prices for individual EP sales and that it would be burdensome for the Department to construct EP values. Petitioners state that although the use of total AFA is more appropriate, the use of estimated EP sales is preferable to using an incorrect CEP sales database. The Department must be certain it has complete and accurate sales data; otherwise it should not construct a database, petitioners argue. Petitioners maintain that, if the Department decides to create an EP sales listing for Wuhan Bee, it should be based on all POR invoices issued by Wuhan Bee.

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[141] *See* Petitioners' Case Brief Regarding Verification of U.S. Sales Data, dated May 19, 2005, at 10-13 ("Petitioners' Wuhan Bee CEP Case Brief"). *See also* Petitioners' EP Case Brief.
[142] *See* May 13, 2005, Letter to Interested Parties Regarding Use of EP data for Shanghai Eswell and Wuhan Bee.
[143] *See Mannesmanrohren*, 120 F. Supp. 2d at 1075 and Petitioners' May 19, 2005, case brief at 11-12.
[144] *See, e.g., D&L Supply Co. v. United States* 113 F. 3d 1220, 1223 (Fed. Cir. 1997), and *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990).
[145] *See Thailand Pipes*, 62 FR at 53808 and 53818.

Department's Position:

Section 776(a)(1) of the Act mandates that the Department use the facts available if necessary information is not available on the record of an antidumping proceeding, while subsection (c) states that, when the administering authority relies on secondary information rather than on information obtained in the course of a review, the administering authority, shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal. In addition, section 782(e) of the Act provides that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if (1) the information is submitted by the deadline established for its submission, (2) the information can be verified, (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority with respect to the information, and (5) the information can be used without undue difficulties.

As explained in Comment 11, the Department has revised its *Preliminary Results* classification of Wuhan Bee's U.S. sales from CEP to EP for the period prior to July 20, 2003, based on information from post-*Preliminary Results* verification findings. According to section 782(d) of the Act, if the Department determines it needs more information in a proceeding, it must promptly inform the party submitting the response of the nature of the deficiency and provide, to the extent practicable, that party with an opportunity to remedy or explain the deficiency within applicable time limits. It was during the PRC verification that the Department discovered certain discrepancies with regard to Wuhan Bee's affiliation claims.[146] Accordingly, it was not practicable for the Department to request that Wuhan Bee provide an EP sales database so late in the review and after verification. Therefore, because there is no EP sales database for Wuhan Bee available on the record of this proceeding, under section 776(a)(1) of the Act, the Department is mandated to use facts available for those sales for which EP treatment is necessary.

As discussed in depth in the Wuhan Bee Affiliation Memo,[147] the Department has on the record in this proceeding corroborated secondary information, as required by section 776(c) of the Act, which it can use to calculate a margin on an EP basis for the relevant Wuhan Bee sales. This information is contained in the "Wuhan Bee Invoice List" of U.S. export sales,[148] which lists all U.S. invoices in Wuhan Bee's accounting system that entered during the POR and includes the quantity, value, and invoice date for each sale. The Department verified the contents of this listing[149] at the Wuhan Bee verification in China and further verified, as respondent confirmed in its EP Methodology Brief, that the only deduction to be made to the EP prices on the invoice list is that for domestic inland freight. Therefore, under section 782(e)(2) of the Act and contrary to petitioners' arguments, the Department must use data on the record that can be verified, even if "it does not meet all the applicable requirements established by the administering authority."

[146] *See* Wuhan Bee PRC Verification Report at 3-8.
[147] *See* Wuhan Bee Affiliation Memo at 14-16.
[148] *See* Wuhan Bee PRC Verification Report at Exhibit 8.
[149] *See id.* at 20.

Therefore, the Department has relied on the information from the "Wuhan Bee Invoice List" of U.S. export sales as facts available in compiling an EP U.S. sales database for Wuhan Bee's invoiced sales prior to July 20, 2003. The Department does not agree with petitioners that this is unduly burdensome to the Department; in fact, in light of the statutory requirements, the Department finds itself compelled to use this verified information to calculate an EP margin for Wuhan Bee. Furthermore, the Department finds that Wuhan Bee did not fail to cooperate to the best of it ability in this matter, making the petitioners' call for use of adverse facts available, under section 776(b) of the Act, untenable. Therefore, the Department has determined for these final results that Wuhan Bee's universe of sales for the EP period will be based on all of Wuhan Bee's sales invoiced prior to July 20, 2003, as found on the "Wuhan Bee Invoice List" of U.S. export sales.

Comment 13: Application of Adverse Facts Available to Wuhan Bee

Petitioners argue that the Department's May 6, 2005, U.S. sales verification report for Wuhan Bee[150] shows such extensive and significant errors that the Department should conclude that Wuhan Bee failed its U.S. verification.[151] The net effect of these errors, petitioners argue, is to render Wuhan Bee's questionnaire responses completely unusable for calculating a dumping margin.

Citing to the Wuhan Bee U.S. verification report, petitioners identify 17 errors found at the U.S. sales verification. Petitioners claim that Wuhan Bee failed both to demonstrate for the most important elements that its calculations were correct and to provide adequate support documentation. Wuhan Bee could be determined to have failed verification for not providing adequate support documentation alone, petitioners contend. Yet more egregious, they argue, is that for almost every figure that Wuhan Bee provided that required it to trace an input and output of honey, the Department was unable to verify correct figures. Errors in the blend ratios affect a significant number of sales, petitioners argue, and are especially important because the ratios are the basis for the reported further manufacturing expenses. Of the invoices that the Department asked to review at verification, petitioners argue, 88 percent could not be verified as accurate. This alone, petitioners claim, means that the Department cannot rely on Wuhan Bee's blend ratios. Sale-by-sale calculations depend on the accuracy of these ratios, petitioners contend, noting that respondent agreed with this premise in a March 15, 2005, letter to the Department.[152] In this same letter, according to petitioners, Wuhan Bee also indicated that the data were easily verifiable. When respondent admitted at verification that its blending plans and daily processing reports do not specify the quantity or source of honey entering the production process, according to petitioners, Wuhan Bee's entire CEP response became unverifiable and the entire U.S. sales database was undermined. Petitioners question how Wuhan Bee could have calculated correct

[150] *See* "Memorandum to the File from Carrie Blozy and Kristina Boughton: Verification of U.S. Sales and Further Manufacturing Expenses for Respondent Wuhan Bee Healthy Co., Ltd (Wuhan Bee), as reported by Presstek Inc., Pure Sweet Honey Farm Inc., and Pure Food Ingredients" (May 6, 2005) ("Wuhan Bee U.S. Verification Report").
[151] *See* Petitioners' Wuhan Bee CEP Case Brief.
[152] Petitioners maintain that the Department's confirmation of the overall reported sales and quantity value is meaningless in light of the fact that the sale-by-sale quantities cannot be relied upon.

further manufacturing costs if the exact blend ratios were unavailable to it. Petitioners note that there are no data on the record that could be used to correct the blend ratio errors.

With respect to other aspects of the U.S. sales verification, petitioners claim that the Department found problems that permeate the entire U.S sales database, citing to freight revenue double counting as an example. Wuhan Bee also failed to provide support documents in numerous cases in which the Department requested such documents, petitioners contend. Failure to submit the requested documents means all of the data related to those documents must be assumed to be unverified, petitioners claim. Petitioners argue that this failure, along with Wuhan Bee's knowledge that its affiliation claim was improper, demonstrates that Wuhan Bee's U.S. sales database is unreliable and unsuitable for calculating export price. Because of this, according to petitioners, the Department has no choice but to calculate Wuhan Bee's margin on the basis of facts available.

Furthermore, petitioners claim, Wuhan Bee's failure to provide documentation at verification, its misrepresentation of its affiliation, and its reporting of blend ratios when it knew it did not have the records to support such ratios all show a lack of cooperation with the Department. This has impeded the instant review, petitioners contend, because the Department has had to consider before the deadline for its final determination in this review whether it can construct a new database from invoices collected at verification.

Petitioners argue that the circumstances of this review support its claim that Wuhan Bee has failed to cooperate to the best of its ability and that the application of total adverse facts available is therefore warranted consistent with *Nippon Steel*, 337 F.3d at 1382. Petitioners suggest that Wuhan Bee should have submitted more forthcoming responses, and that the magnitude of the misrepresentations and errors indicates that Wuhan Bee did not cooperate to the best of its ability. Therefore, petitioners argue that the Department should apply adverse facts available to Wuhan Bee for all of Wuhan Bee's entries during the POR (*see* Comment 12). If for some reason, petitioners contend, the Department does find Wuhan Bee affiliated with Presstek and PSH during the POR, then the Department must apply adverse facts available to Wuhan Bee and use the NME/PRC wide rate of 183.80 percent, because the Department would be left with no ability to calculate an accurate further manufacturing expense or CEP.[153]

Respondent argues in its Wuhan Bee CEP case brief[154] that the Department's verification findings confirm that it should calculate CEP based on the information provided by Presstek/PSH and the further manufacturing methodology submitted in Wuhan Bee's March 15, 2005, letter to the Department. Respondent claims that, at the U.S. verification, the Department confirmed that, overall, Wuhan Bee had accurately reported the quantity and value of all honey sold by Presstek, PSH, and PFI during the POR. Also, the Department verified the minor corrections that PSH submitted, including revised packing material costs, labor costs, the quantity of honey processed by PSH during the POR and minor corrections to certain invoices reviewed. Therefore, according to respondent, the Department has all the information it needs to accurately calculate PSH's further manufacturing costs for the POR. Wuhan Bee's suggested methodology for calculating further manufacturing costs conforms to Departmental precedents

[153] *See* Petitioners' Wuhan Bee CEP Case Brief at 9-10.
[154] *See* Respondent's Wuhan Bee CEP Brief.

and law, according to respondent.

Respondent also contends that the quantity of Wuhan Bee honey contained in the blend resold by PSH to its unaffiliated customers is the hardest variable to calculate with regard to CEP, because this information is derived from the sales quantity on the PSH resale invoices multiplied by a blend ratio. Respondent explains that a "precise one-to-one ratio relationship between the quantity blended to produce each invoice line item and the quantity sold in that line item generally does not exist."[155] The Department realizes from verification, respondent claims, that establishing an accurate blend ratio for each line item is time consuming, requires a manual review of the production reports, and requires the expertise of a limited number of employees. Respondent also takes issue with the fact that, in its view, the Department made the accuracy of the blend ratio the focus of the CEP verification. Respondent claims that the Department only briefly mentioned that it would be examining the issue in its verification agenda, and that the company officials attempted to comply with the Department's requests for supporting documentation for various blend ratios, but that the company advised the Department that it would be physically impossible for its officials to comply with all of the Department's requests by the end of the three-day verification. Because of these circumstances, the Department should not conclude that PSH did not establish the accuracy of its blend ratios, respondent maintains. Rather, respondent argues, the Department should find that PSH's calculation of the actual quantity of subject merchandise sold was reasonable, as was confirmed by the number of accurate blend ratios for which PSH was able to show the Department supporting documentation at verification within the limited time period.

Any errors in the remaining invoices would not materially affect the margin, respondent contends since PSH did not select honey to be blended based on origin, cost, or resale, as explained at verification. Furthermore, respondent argues that the manner in which PSH records its blend ratios conforms to industry food safety trace standards and that the Department should not expect that a company prepare documents merely for antidumping duty purposes. Finally, respondent claims, the Department should realize that any significant differences in the blend ratios were clerical errors and not an intentional effort on the respondent's behalf to skew margin results.

Respondent maintains that the other errors found at the Department's U.S. sales verification, including minor corrections, are the type of errors that normally occur when a company is asked to provide extensive documentation to the Department over a short time period and these errors do not make Wuhan Bee's submitted data incomplete or inaccurate. Respondent further argues that none of the errors found at verification call into question the veracity of Wuhan Bee's sales and further manufacturing databases or negate the fact that PSH cooperated with the Department to the best of its ability. Respondent claims that any failure to provide the Department with the requested documentation occurred because Wuhan Bee chose to concentrate on complying with all of the Department's requests concerning blend ratio information. The Department, respondent argues, should not punish Wuhan Bee for its inability to accomplish the impossible. Therefore, respondent concludes, the Department should calculate a CEP based margin for Wuhan Bee, based on the further manufacturing methodology provided in its brief and using the data supplied in Wuhan Bee's further manufacturing responses, as modified by the corrections

[155] *See* Respondent's Wuhan Bee CEP Brief at 18.

provided at verification.

In its rebuttal brief on this issue, petitioners argue that Wuhan Bee's claim that it should not be penalized for its inability to provide the Department with the requested documentation within the time constraints at verification should be dismissed, because the Department's verification outline serves as advance notice of all of the issues that will be covered at verification. Further, the Department specifically stated in the verification outline that the blend ratios would be verified, petitioners contend. In any event, petitioners claim, even without this notice Wuhan Bee should have realized how central these ratios were to its reported further manufacturing costs and that they would be subject to rigorous scrutiny at verification. Moreover, it was proper for the Department to request additional support documentation when it realized there was a problem with the blend ratios, petitioners argue. Wuhan Bee did not spend the time or effort, petitioners claim, to prepare an accurate response. Petitioners also argue that the Department should dismiss Wuhan Bee's claim that the CEP errors are minor. Petitioners contend that even a small percentage change in a blend ratio causes a significant overstatement of the value-added calculations.[156] Finally, the CIT has held, according to petitioners, that "there is no statutory mandate as to how long the process of verification must last,"[157] and where " it appears from the record that Commerce would have completed verification had it not been for {the respondent's} defective response," [158] the Department cannot be blamed for a failed verification. Further, according to petitioners, the court held that such a scenario supports the application of total facts available. Therefore, petitioners continue to advocate the application of adverse facts available in the instant proceeding to all of Wuhan Bee entries during the POR.

Department's Position:

Because Wuhan Bee's U.S. sales database was not accurate, the Department finds that the use of facts available is necessary for certain of Wuhan Bee's sales. Moreover, because, for the reasons given below, the Department finds that Wuhan Bee has failed to cooperate to the best of its ability to provide the information needed to calculate margins for these sales, the Department finds that the application of adverse facts available is warranted for the sales that could not be verified. These are the further manufactured CEP sales made through PSH during the period of the POR commencing July 20, 2003, in which Wuhan Bee was affiliated with Presstek and Wuhan Bee was affiliated with PSH. *See* Comment 11 above for the Department's findings regarding affiliation.

As discussed in Comment 11, we have determined that Wuhan Bee and Presstek and Wuhan Bee and PSH should be considered affiliated parties as of July 20, 2003. Therefore, for all sales invoices dated between July 20, 2003, and November 30, 2003, the Department continues to find that the proper classification of Wuhan Bee's U.S. sales through PSH[159] is CEP. For the reasons specified below, the Department has determined that it cannot rely on Wuhan Bee's reported

[156] *See* Petitioners' Rebuttal Brief Regarding CEP Verification of Wuhan Bee, dated May 24, 2005, at 22-23 ("Petitioners' Wuhan Bee CEP Rebuttal").
[157] *See id* at 24 and, *e.g.*, *Persico Pizzamiglio S.A. v. United States*, 18 CIT 299, 307 (1994) ("*Persico Pizzamiglio*").
[158] *See id*.
[159] We note that CEP sales made via Presstek during the POR occurred during the time period that we found Wuhan Bee to be unaffiliated with Presstek, PSH, and PFI.

CEP sales databases for sales by PSH and that Wuhan Bee has not fully cooperated to the best of its ability with the Department in this matter. Therefore, the Department has determined to apply adverse facts available to the portion of sales during the POR that are CEP sales by PSH, in calculating Wuhan Bee's overall margin in this segment of the proceeding.

At the verification of Presstek, PSH, and PFI in Wisconsin, the Department was unable to verify the quantity of subject merchandise in PSH's resales to unaffiliated parties, among other discrepancies in the U.S. sales database that were discovered.[160] We highlight the findings here:

1. At the beginning of verification, company officials identified two sets of previously unreported U.S. sales.[161]

2. At the beginning of verification, company officials declared that for two of the pre-selected sales, freight revenue was double-counted. Counsel stated that they were unable to determine whether freight revenue was double-counted for other invoices in the U.S. sales listing as well.[162]

3. Company officials declared that they had inadvertently reported the incorrect quantity of Chinese honey purchased from a producer other than Wuhan Bee. Moreover, the Department found that the blend ratios for those invoices that included honey from a Chinese producer other than Wuhan Bee were reported incorrectly.[163]

4. From a company prepared sales listing, which included sales of subject and non-subject merchandise during the POR, the Department selected 26 invoices for review. By the conclusion of verification, company officials were unable to provide supporting documentation for five of the invoices. Out of the remaining 21 invoices selected for review, the Department found discrepancies with respect to the reported blend ratios for three of the invoices.[164]

5. From a company prepared sales database, which was sorted based on the difference between the quantity of honey sold and the quantity blended, the Department selected 25 invoices for review. By the conclusion of verification, company officials were unable to provide supporting documentation for nine of the selected invoices. Out of the remaining 16 invoices selected for review, the Department found discrepancies with respect to the reported blend ratios/blend content for 13 of the reviewed invoices.[165]

6. By the conclusion of verification, Presstek/PSH had not provided supporting documentation accounting for the difference between the quantity sold and the quantity blended for any of the selected sales, despite the Department's request on day one of verification.[166]

[160] *See* Wuhan Bee U.S. Verification Report.
[161] *See id.* at 2-7.
[162] *See id.*
[163] *See id.*
[164] *See id.* at 2,3, and 17-22.
[165] *See id.*
[166] *See id.* at 3.

While there were numerous discrepancies found at verification, for purposes of determining whether facts available is appropriate, we focus on the problems with the reporting of the blend ratios.[167] The Department also notes that, in an attempt to fully understand the blend ratios, the Department asked in October 2004 for respondent to "{p}lease provide a calculation worksheet that shows how the blend ratio was derived" for selected invoices.[168] Wuhan Bee reported that PSH blends Wuhan Bee-produced honey with honey from other sources and then resells the resulting blend to unaffiliated U.S. customers. It further explained that, for purposes of its antidumping response, the blend ratio is the percent of subject merchandise in the blend.

For purposes of the *Preliminary Results*, the Department applied this blend ratio to Wuhan Bee's U.S. price, adjusted for further manufacturing expenses. After the *Preliminary Results*, petitioners proposed a revised method to determine further manufacturing expenses and argued that the blend ratio should be applied to the sales quantity to determine the quantity of subject merchandise. [169] In response, Wuhan Bee proposed an alternative methodology to calculate further manufacturing expenses, but agreed with petitioners that the blend ratios should be applied to the sales quantity.[170] Hence, by Wuhan Bee's own admission, the reported blend ratios are the crucial element with regard to the accuracy of the reported further manufacturing costs and to the margin calculation overall.

In its post-preliminary response, Wuhan Bee also accounted for the differences between the amount of honey sold on a particular invoice and the amount of honey blended for that order, where petitioners had pointed out quantity differences between the two. Respondent also maintained in this letter that "{b}ased on information contained in its 'Daily Processing Reports,' PSH was able to determine an accurate 'blend ratio' for all honey which it sold during the POR."[171] And, "{a}s noted, PSH's recordkeeping system as reflected in its 'Daily Processing Reports,' which were used to compile the blend ratios reported in Sections C and E, conform to stringent industry standards and are sufficiently precise to allow PSH to trace the source of honey in its blends for food safety recall purposes. They constitute accurate, reliable information as to the honey production and honey origin, used by PSH to record honey production and sourcing in the ordinary course of business."[172] Finally, respondent asserted that "the blend ratios reported by Wuhan Bee to the DOC in its U.S. sales and further manufacturing databases can be easily verified by examining Wuhan Bee's 'Daily Processing Reports'…"[173]

Regarding the Wisconsin verification, the Department informed Wuhan Bee on April 20, 2005,

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[167] Although the other errors discovered at verification are both numerous and affect the margin calculation, the blending ratios are the most significant because they affect whether or not a sale is classified as subject or non-subject merchandise, the quantity of a sale of subject merchandise, and the calculation of further manufacturing expenses.
[168] *See* the October 20, 2004, supplemental questionnaire sent to Wuhan Bee.
[169] *See* Letter to the Secretary from Collier Shannon "Re: Honey from the People's Republic of China," dated March 8, 2005, at 11 ("Petitioners' WB Further Manufacturing Letter").
[170] *See* Letter to the Secretary from Grunfeld , Desiderio "Re: Honey from China; Wuhan Bee's Response to Petitioners Letter of March 8, 2005," dated March 15, 2005, at 9 ("Respondent's WB Further Manufacturing Letter").
[171] *See id.* at 9.
[172] *See id.* at 11.
[173] *See id.* at 12.

via its verification outline that it would be verifying Presstek, PSH, and PFI, from April 27, 2005 through April 29, 2005. We also notified Wuhan Bee, on page 9 of this outline, that we would be examining their further manufacturing expenses, and specifically the company's reported blend ratios:

> " Please be prepared to discuss and present documentation concerning all aspects of further manufacturing in which Presstek and PSH are involved. Be prepared to provide information about which services are performed, by whom, and who pays for these services. Please be prepared to demonstrate the blend ratio for all sales (BLENDRATU) and provide support documentation for all costs associated with further manufacturing (FURMANU and all Section E database fields) as reported in your questionnaire responses."[174]

As detailed above, the Department found significant discrepancies with respect to the blend ratios at verification. Based on a database that included subject and non-subject merchandise, the Department found incorrect blend ratios for three of 21 invoices for which respondent was able to provide supporting documentation (a fail ratio of 14%). From a sales database that included only subject merchandise, the Department found errors in the blend ratios for 13 of 16 invoices, for which respondent was able to provide supporting documentation by the end of verification (a fail ratio 81%). Thus, of the invoices selected, and for which respondent provided supporting documentation, there was a fail ratio of 43%. Moreover, the actual fail ratio may be even higher as respondent was unable to provide supporting documentation for 14 invoices, or for 28% of invoices, selected by the Department. The nature of the blend ratio errors discovered by the Department ranged from pulling the wrong "Daily Processing Report" for a particular invoice to failing to account for an additional blend included in the invoice line item.[175]

In response to the issuance of the verification results, respondent makes of number of post-hoc rationalizations regarding the reporting of the blend ratios. First, respondent argues that the blend ratio is the hardest CEP variable to verify because there is not a one-to-one relationship between the quantity blended and the quantity sold. Moreover, respondent asserts that the Department became aware at verification that establishing an accurate blend ratio is very time consuming. Respondent also challenges the Department's determination to make the focus of the Wisconsin verification the accuracy of the blend ratios. Finally, respondent maintain that PSH's calculation of the quantity of subject merchandise was accurate, and that any errors in the blend ratios do not materially affect the margin because the honey used in a particular blend was selected without regard to cost, origin, or resale.

Regarding respondent's first point with respect to the difficulty of verifying the blend ratios, the Department does not accord less or more weight to the results of an item's verification depending on its "difficulty." The weight the Department accords to an item is based on its significance to the reliance on the data to calculate a margin. In this case, both respondent and petitioners agreed that the blend ratios should be used to establish the quantity of U.S. sales of

[174] *See* April 20, 2005, letter to Wuhan Bee Healthy Co., Ltd. from the Department, "Re: Second Administrative Review of the Antidumping Duty Order on Honey from the People's Republic of China: CEP Verification Outline."
[175] *See* Wuhan Bee U.S. Verification Report at 17-22 for specific examples of the blending ratio errors encountered at verification.

subject merchandise. The ability to rely on an accurate quantity is essential to a margin calculation. Moreover, in the *Preliminary Results*, the Department relied on the blend ratios to calculate a U.S. price, adjusted for further manufacturing expenses. In deducting for the cost of non-subject honey, Wuhan Bee relied on the average cost for each unique source and type of honey. Respondent now argues that, for purposes of the further manufacturing calculation, only processing costs should be deducted; however, the Department has not made such a determination. Additionally, if the Department were to consider a further manufacturing calculation, which is moot in this case because the quantity is unreliable, we would necessarily require accurate data for non-subject merchandise.

With respect to respondent's argument that there is not a one-to-one relationship between the quantity blended and the quantity sold, and that the Department itself found that the data was difficult to prepare, we note that Wuhan Bee stated in a letter to the Department that it had calculated accurate blend ratios that could be easily verified. If Wuhan Bee had concerns about its ability to support its calculation of the blend ratios, it was incumbent on Wuhan Bee to notify the Department. In this case, the Department only became aware of the concerns at verification, 15 months after the initiation of the instant review. Moreover, the Department was fully within its rights to focus extensively on the blend ratios at verification given their significance to the margin calculation. Based on Wuhan Bee's claim that the data could be easily verified, the Department had no expectation that the data would prove difficult or burdensome to verify. Regarding Wuhan Bee's assertion that its methodology was reasonable, we disagree. As noted above, for 43 percent of invoices for which it provided supporting documentation, the Department found that Wuhan Bee's blend ratios were incorrect. A methodology that produces such inaccurate results is clearly not reasonable.

Finally, we find respondent's argument that any errors in the calculation do not materially affect the margin to be baseless. Contrary to respondent's claim, there are significant differences in the cost of honey, depending upon the source and type of honey.[176] Because of the differences in the cost of honey, the percentage of subject honey to non-subject honey affects the margin results. Also contrary to respondent's claims, at verification the Department found that certain of PSH's U.S. customers would not accept Chinese honey. *See* Wuhan Bee US verification report at 12-13. Additionally, the fact that the Department verified the total quantity of PSH's sales of honey from all sources is irrelevant to a margin calculation where the Department relies on the "*quantity of subject merchandise*." Based on the foregoing reasons, the Department finds that the application of facts available to respondent's CEP sales through PSH is appropriate.

Application of Facts Available

Section 776(a)(2)(D) of the Act mandates that the Department, subject to section 782(d) of the Act, use the facts otherwise available in reaching its applicable determination if a respondent provides information that cannot be verified. Of the invoices that we reviewed at verification, 43 percent failed to be verified as accurate. Thus, the Department determines that Wuhan Bee's reported blend ratios cannot be verified. These ratios, in turn, undermine the accuracy of the reported quantity of CEP sales through PSH as well as the reported further manufacturing costs.

Section 782(d) of the Act states that, if a party submits further information that is unsatisfactory

[176] See Exhibit S-7 of the November 12, 2004, supplemental questionnaire response.

or untimely, the Department may, subject to subsection (e), disregard all or part of the original and subsequent responses. The Department finds that Wuhan Bee's blend ratios are so incomplete that they cannot serve as a reliable basis for calculating a dumping margin. The blend ratios are essential to the reported U.S. sales and further manufacturing databases because the ratios determine whether a particular honey sale is of subject or non-subject merchandise and the quantity of the sale of subject merchandise.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department shall promptly inform the party submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that party with an opportunity to remedy or explain the deficiency. Because Wuhan Bee did not inform the Department that its blend ratios were not accurate until the Department discovered the fact at verification, the Department did not have the opportunity to allow Wuhan Bee to correct its deficient data.

Therefore, the Department has determined to use facts otherwise available for Wuhan Bee's reported CEP sales, as specified under section 776(a)(2)(A), (C), and (D) of the Act, because respondent has submitted information that could not be verified as provided and because Wuhan Bee had sufficient opportunities to report that it could not substantiate its blend ratios, as required by section 782(d), but failed to do so.

Application of an Adverse Inference

Section 776(b) of the Act provides that, in selecting from among the facts available, the Department may use an inference that is adverse to the interests of the respondent if it determines that a party has failed to cooperate to the best of its ability. Adverse inferences are appropriate "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[177] In determining whether a respondent has failed to cooperate to the best of its ability, the Department need not make a determination regarding the willfulness of a respondent's conduct.[178] Furthermore, "an affirmative finding of bad faith on the part of the respondent is not required before the Department may make an adverse inference." [179] Instead, the courts have made clear that the Department must articulate its reasons for concluding that a party failed to cooperate to the best of its ability, and explain why the missing information is significant to the review. Acting to the best of its ability means that a respondent must fulfill the statutory mandate, which "requires the respondent to do the maximum it is able to do."[180]

In determining whether a party failed to cooperate to the best of its ability, the Department considers whether a party could comply with the request for information, and whether a party paid insufficient attention to its statutory duties.[181] Furthermore, the Department also considers the accuracy and completeness of submitted information, and whether the respondent has hindered the calculation of accurate dumping margins.[182]

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[177] *See Statement of Administrative Action ("SAA")* accompanying the URAA, H. Doc. No. 316, 103d Cong., 2d Session (1994) at 870.
[178] *See Nippon Steel*, 337 F.3d at 1382.
[179] *Final Rule*, 62 FR at 27340.
[180] *See Nippon Steel*, 337 F.3d at 1382.
[181] *See Tung Mung Dev. Co. v. United States*, 223 F. Supp. 2d 1336, 1342 (August 6, 2002).
[182] *See Thailand Pipes*, 62 FR at 53820.

In considering whether Wuhan Bee could comply with requests for information and whether it paid sufficient attention to its statutory duties, the Department finds that Wuhan Bee did not meet these standards in this case. As stated above, Wuhan Bee had sufficient opportunity to inform the Department that its blend ratios were not accurate, yet as late into the proceeding as March 15, 2005, respondent asserted on the record just the opposite – that its blend ratios were accurate and could be easily verified. Respondent asserts in its case brief that the Department only briefly mentioned that it would be examining the issue in its verification agenda, and that the company officials attempted to comply with the Department's requests for supporting documentation for various blend ratios, but that the company advised the Department that it would be physically impossible for its officials to comply with all of the Department's requests by the end of the three-day verification. However, respondent's own letters to the Department in December 2004 and March 2005, addressing various issues regarding the blend ratios and further manufacturing cost, make it clear that respondent knew how important and central these ratios were to the Department's ultimate margin calculations. Nevertheless, the Department gave respondent appropriate notice in its verification outline that it would be verifying respondent's blend ratios and that respondent should "be prepared to demonstrate the blend ratio for all sales (BLENDRATU) and provide supporting documentation for all costs associated with further manufacturing."

Furthermore, the CIT has held that "there is no statutory mandate as to how long the process of verification must last."[183] The court goes on to say that, where it appears from the record that the Department would have completed verification had it not been for respondent's defective response, respondent is at fault for the lack of verification of its response.[184] The Department's allocation of time for Wuhan Bee's Wisconsin verification was reasonable and it cannot be held responsible for respondent's lack of preparation at such verification. Furthermore, Wuhan Bee's failure to prepare for verification impeded the Department's efforts to verify the information reported by the company. For example, there were numerous instances in which the Department requested information, related to the blend ratios or other information, as listed above, which respondent did not provide. This included not having sufficient documentation to support its sales information for the sales the Department selected prior to verification.

The CIT also held in *Nippon Steel* that "{i}n cases where a respondent claims an *inability* to comply with {the Department's} requests for information, the Department may permissibly draw an adverse inference upon a reasonable showing that the respondent, in fact, could have complied." In this case, respondent never asked the Department for help because it had a problem in reporting accurate blend ratios. On the contrary, respondent maintained that the data on the blend ratios was accurate and easily verifiable. At verification, the Department discovered that the blend ratios were not accurate, at least not with the documentation that respondent was prepared to show the Department. Only at this time did respondent claim that the ratios could not be verified. Wuhan Bee hindered the calculation of accurate dumping margins in this review because it was not more forthcoming about the problems and issues surrounding the reporting of the blend ratios, even though the issue was discussed numerous times throughout this proceeding.

[183] *See Persico Pizzamiglio*, 18 CIT at 307.
[184] *See id*.

Finally, in considering the accuracy and completeness of Wuhan Bee's submitted U.S. sales and further manufacturing information, the Department finds that it cannot rely on Wuhan Bee's blend ratios due to its findings at verification regarding severe deficiencies in the data. Without confidence in the blend ratio data, we cannot accurately say whether all U.S. sales of subject merchandise were reported and, within individual sales, whether the correct quantity of subject merchandise was reported. Further, an adjustment for non-subject merchandise in the deduction of further manufacturing expenses would necessarily require accurate blend ratios. This makes calculating an accurate margin on Wuhan Bee's CEP database for sales through PSH impossible.

Therefore, for all the reason stated above, the Department finds, pursuant to section 776(b) of the Act, that Wuhan Bee has failed to cooperate to the best of its ability with regard to its reported CEP data. Because Wuhan Bee failed to fully cooperate with the Department in this matter, we find it appropriate to use an inference that is adverse to the interests of Wuhan Bee in selecting from among the facts otherwise available. By doing so, we ensure that the companies that fail to cooperate will not obtain a more favorable result by failing to cooperate than had they cooperated fully in this review. In accordance with the Department's practice, we have assigned the rate of 183.80 percent, as adverse facts available, to the portion of Wuhan Bee's sales sold on a CEP basis through PSH.[185] *See* Comment 12 and Wuhan Bee Final Analysis Memo for further discussion of the data being used to calculate Wuhan Bee's margin.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions, and adjusting the margin calculation programs accordingly. If accepted, we will publish the final results of the review and the final weighted-average dumping margins in the *Federal Register*.

AGREE_____ DISAGREE_____

_____
Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

_____
Date

[185] Because we cannot rely on the CEP sales quantity, since we have found the quantity of subject merchandise data to be unreliable as discussed above, we have used invoice quantity from Wuhan Bee invoices dated on or after July 20, 2003, as a proxy for sales quantity.