REDETERMINATION
PURSUANT TO COURT REMAND
YANTAI ORIENTAL JUICE CO., ET AL.
V. UNITED STATES AND COLOMA FROZEN FOODS, INC., ET AL.
Court No. 00-07-00309

SUMMARY

The Department of Commerce ("Commerce" or "the Department") has prepared these results of redetermination pursuant to the remand order of the U.S. Court of International Trade ("the Court") in Yantai Oriental Juice Co., et al. v. United States and Coloma Frozen Foods, Inc., et al., Slip Op. 02-56 (June 18, 2002) ("Yantai"). This remand pertains to the selection of a surrogate country; the valuation of juice apples, steam coal, and East Coast freight; and the calculation of selling, general and administrative ("SG&A") expenses, overhead, and profit.

Pursuant to the analysis followed by the Court, we have concluded that the record does not support our determination in the investigation that India was a significant producer of non-frozen apple juice concentrate ("AJC"). (See Notice of Final Determination of Sales at Less Than Fair Value: Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China, 65 FR 19873 (April 13, 2000), as amended in Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Order: Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China, 65 FR 35606 (June 5, 2000) (collectively, "Final Determination")). Instead, the Department has determined that Turkey is a more appropriate surrogate country for the People's Republic of China ("PRC") because it is the country most economically comparable to the PRC that is also a significant producer of AJC. Therefore, the Department has amended its calculations using Turkish data to value juice apples, SG&A expenses, overhead, and profit. The Department has also changed its valuations of steam coal and East Coast freight.

If the Court approves this redetermination on remand, Yantai Oriental Juice Co., Ltd., ("Oriental"), Qingdao Nannan Foods Co., Ltd., ("Nannan"), Sanmenxia Lakeside Fruit Juice Co., Ltd., ("Lakeside"), Shaanxi Haisheng Fresh Fruit Juice Co., Ltd., ("Haisheng"), and Shandong Zhonglu Juice Group Co., Ltd., ("Zhonglu") will be excluded from the antidumping duty order on AJC from the PRC because their antidumping rates are zero. The PRC-wide rate will be unchanged from the Final Determination. The rate for Xian Yang Fuan Juice Co., Ltd. ("Fuan"), Xian Asia Qin Fruit Co. ("Asia"), Ltd., Changsha Industrial Products & Minerals Import & Export Corporation ("Changsha Industrial"), and Shandong Foodstuffs Import & Export Corporation ("Shangdong Foodstuffs") will be 28.33 percent.

BACKGROUND

The Department's investigation of AJC from the PRC was initiated on July 6, 1999, based on a petition filed by Coloma Frozen Foods, Inc., Green Valley Packers, Knouse Foods

Cooperative, Inc., Mason County Fruit Packers Co-op, Inc., and Tree Top Inc. ("the petitioners"). This investigation covered the period October 1, 1998, through March 31, 1999. The plaintiffs in this remand redetermination are Oriental, Nannan, Lakeside, Haisheng, Zhonglu, Fuan, Asia, Changsha Industrial, and Shangdong Foodstuffs. In addition to the plaintiffs in this litigation, the Department investigated Yantai North Andre Juice Co. Ltd., which received a zero margin.

In its remand order of June 18, 2002, the Court identified five issues for the Department to address:

Issue 1: Selection and application of the appropriate surrogate country

The Court directed the Department to explain fully the reasoning for its selection of India as the surrogate country and, in particular, (1) the steps it took to corroborate the information in the market study submitted by the petitioners; (2) the connection between the information and conclusions found in the market study and Commerce's conclusion that India was a significant producer of AJC, particularly with respect to (a) AJC production and (b) AJC production and single strength apple juice production; and (3) the connection between the information in Himachal Pradesh Horticultural Produce Marketing & Processing Corp.'s ("HPMC") annual report and the Department's conclusion that India was a significant producer of AJC. The Court apparently rejected the Department's determination in the investigation that the fact that India is a significant producer of apples was relevant to the Department's treatment of India as a significant producer of comparable merchandise. In the event Commerce concluded that it could not develop sufficient credible evidence of India's suitability as the surrogate market economy country for AJC production, Commerce was directed to select another suitable country to complete its review, after alerting the Court of its decision.

Issue 2: Effects of the market intervention scheme on apple prices

The Court instructed the Department to provide an explanation of why the distortions caused by the Government of India's market intervention scheme ("MIS") did not disturb the fair market value of Indian apples. The Court also directed the Department to explain why it treats government subsidies that enable producers to lower their prices as market distorting, but does not apply the same treatment to such subsidies that raise prices. Furthermore, the Court requested that the Department explain why the price paid by HPMC, a government controlled entity, should be considered a market-derived price.

Issue 3: Domestic steam coal

The Court instructed the Department either to recalculate normal value using Indian domestic prices for steam coal, or explain why the use of domestic prices for steam coal was not appropriate during the period of investigation ("POI").

Issue 4: Use of HPMC's financial data

The Court directed the Department to recalculate normal value using HPMC's financial data, or to explain fully why the Department departed from its normal practice of relying on nonproprietary information gathered from producers of identical or comparable merchandise in a surrogate country for purposes of valuing SG&A expenses and overhead ratios.

Issue 5: Calculation and use of certain freight rates

Finally, the Court instructed the Department to explain its reasoning for not calculating a separate Detroit freight rate and to explain why it did not weigh its calculation to reflect accurately the volume of merchandise actually shipped to each destination.

DISCUSSION

In the underlying investigation, the Department identified India as a significant producer of AJC based on the level of production in India of AJC and single strength apple juice, and on the fact that India was a significant producer of the major input, apples. In its remand instructions, the Court appears to have limited the Department's considerations to countries that are significant producers of AJC, thereby constraining the Department from considering alternative, broader definitions of "comparable merchandise." Thus, our analysis encompasses only significant producers of AJC.

In response to the Court's order, the Department examined the record from the investigation and concluded that it could not determine, based on the record, that India was a significant producer of AJC. On August 14, 2002, the Department informed the Court of its conclusion and requested that the Court grant a 60-day extension of time, to and including November 15, 2002, in which to file the remand determination. During that period, the Department stated that it intended to gather further information to determine what countries were significant net-exporters of AJC. The Court granted the Department's request for the extension of time.

After determining that India was not a significant net-exporter of AJC and also not a major exporter to the U.S. and, hence, not a significant producer of AJC, the Department requested that the parties submit information on the appropriate surrogate country to be used for valuing PRC producers' factors of production. The Department further requested that the parties submit surrogate values from their recommended country. See October 4, 2002, letter to the plaintiffs and the petitioners. Responses were received from the parties on October 15, 2002, and rebuttals were received on October 21, 2002.

In the petitioners' October 15 response, they requested that the Department extend its deadline for submitting valuation information from their proposed surrogate country. The Department granted the extension. On October 22, 2002, the Department received surrogate valuation information for Poland from the petitioners and a rebuttal from the plaintiffs on

October 28, 2002.

In reviewing the parties' submissions, the Department noted that both the plaintiffs and the petitioners provided argument and facts regarding the level of acidity in apples and the relationship of acidity to the value of juice apples. This was not an issue during the investigation. On October 31, 2002, the Department invited the parties to submit any further factual information and arguments addressing only this issue. Both parties submitted comments on November 4, 2002.

On November 6, 2002, the Department released its draft results of redetermination to plaintiffs and the petitioners. On November 12, 2002, the Department received comments to the draft results from the plaintiffs and petitioners.

ANALYSIS

Issue 1: Selection and application of the appropriate surrogate country

Section 773 (c)(4) of the Act directs the Department to value the nonmarket economy ("NME") producers' factors of production in a market economy country that is both (1) economically comparable to the NME and (2) a significant producer of comparable merchandise, to the extent possible. Thus, it is the Department's policy to select a surrogate country that meets both of these requirements, when it is possible to do so.

In the underlying investigation, the Department concluded that India was both economically comparable to the PRC and a significant producer of comparable merchandise. Hence, the Department selected India as its primary surrogate in this proceeding.

In response to the concerns raised by the Court in its remand order, the Department reexamined closely the investigation record. Based on its reexamination, the Department reasoned that India could be a significant producer of comparable merchandise given its high level of apple production. However, the Department concluded that it lacked appropriate benchmarks for determining what constitutes significant production. Thus, the Department proposed two measures of significant production and attempted to apply them using the information in the investigation record. Unfortunately, the record did not contain sufficient information pertaining to alternative surrogate possibilities because once the Department had accepted India as an appropriate surrogate for AJC production in the investigation, there was no need or cause for parties to supply further comments on the record regarding other potential surrogate countries.

Consequently, as a result of the Court's underlying determination and analysis, the Department developed two measures of significant production: Whether India (or any other country economically comparable to the PRC) was a significant net-exporter of AJC and whether

any was a major exporter of AJC to the United States.

To do this, the Department examined the following sources of information: India's Department of Commerce website; Monthly Statistics of the Foreign Trade of India; the United Nations Food and Agriculture Organization ("FAOSTAT") database on their website; External Trade Statistics book published by the Sri Lanka Customs Department; World Trade Atlas database accessed by the Foreign Agricultural Service at the Department of Agriculture; and the Foreign Agricultural Service GAIN (Global Agriculture Information Network) Report entitled Poland, Fresh Deciduous Fruit, Apples and Concentrated Apple Juice.

The only source of information that consistently provided export and import information for India and the other comparable economies identified by the Department in the investigation (as well as all other worldwide exporters of AJC) was the FAOSTAT. FAOSTAT data is collected by the United Nations Food and Agriculture Organization directly from each country's government.

The following table lists the top 10 significant net-exporters of AJC in 1998 as taken from the FAOSTAT, as well as the U.S. imports of AJC in 1998 for these same countries from the USITC dataweb.

Rank	**Country**	**Exports (MT)**	**Imports (MT)**	**Net-Exports (MT) (Exports-Imports)**	**U.S. Imports (MT)**
1)	Poland	104,497	3,254	101,243	260
2)	Argentina	54,732	1,447	53,285	53,407
3)	Turkey	51,275	58	51,217	3,391
4)	Italy	79,392	33,227	46,165	19,378
5)	Austria	58,253	22,566	35,687	2,123
6)	Chile	33,756	41	33,715	24,889
7)	Moldova	18,630	0	18,630	2,779
8)	Switzerland	9,060	303	8,757	0
9)	Spain	6,651	1,770	4,881	49
10)	Armenia	2,900	600	2,300	0

The countries in the top 10 for 1999 are almost identical to 1998. Thus, the information spans both years covered by the October 1, 1998, through March 31, 1999, period of investigation.

As the chart shows, neither India nor any country identified by the Department in the investigation as being economically comparable to the PRC is a significant net-exporter or a major exporter to the United States. In fact, during the relevant period, India was a net importer

of AJC.

Based on these results, the Department invited the parties to this remand proceeding to submit comments on the appropriate surrogate country to be used for valuing the PRC producers' factors of production. The Department further requested that parties submit surrogate values from their recommended country.

In response to the Department's request, the plaintiffs recommended that the Department select Turkey as the primary surrogate country. According to the plaintiffs, information already on the record established that Turkey was a significant producer of AJC. Further, the plaintiffs claimed that of the top10 significant net-exporters of AJC in 1998, Turkey had the most comparable per capita gross domestic product to that of the PRC. The plaintiffs also noted that Turkish juice apple prices were a reliable value for PRC juice apples because both Turkey and the PRC produced low-acid AJC.

Regarding surrogate value information for Turkey, the plaintiffs referred the Department to the record of the investigation which included weighted-average juice apple prices from three regional Turkish markets, contemporaneous with the POI, as well as a contemporaneous audited financial report of a Turkish AJC producer, complete with auditor's statement and footnotes. The plaintiffs claimed that this publicly available information could be used to value juice apples and to calculate factory overhead, SG&A and profit ratios. For other less significant factors, the plaintiffs suggested that the Department could "fill-in" as needed with data from India.

The petitioners recommended that the Department select Poland as the surrogate country. The petitioners claimed that according to the FAOSTAT list, Poland was the largest net-exporter of AJC in 1998. The petitioners also noted that Poland's net exports of AJC were twice those of Argentina, the second leading net-exporter. Thus, the petitioners claimed that Poland was the most significant market economy producer of comparable merchandise. In addition, the petitioners contended that of the top 10 significant net-exporters of AJC, the per capita gross national products ("GNP") of Turkey and Poland were both similarly close to the PRC's GNP.[1] The petitioners claimed that the difference in per capita GNP between Poland and Turkey was insignificant and concluded that Poland was the appropriate surrogate country for the PRC. The petitioners further pointed to the growth rates of per capita GNP in Poland, Turkey and the PRC, contending that the PRC and Poland were similar in this respect (5-6 percent), while Turkey experienced negative growth. The petitioners also argued that there is no evidence on the record that the acidity level of apple varieties distorts the prices, or should cause the Department to determine that Poland is an inappropriate surrogate country.

For surrogate value information for Poland, the petitioners provided the average purchase

[1] In the Department's October 4 letter, the Department attached the 1998 GNP per capita information for the countries identified as significant net-exporters of AJC. The GNP data is reported in the 2000 and 2001 annual World Development Reports published by the World Bank.

price of industrial apples for the contemporaneous period. The purchase price was provided to the petitioners by a market researcher. The petitioners claimed that the market researcher had derived the purchase price from certain published pricing data that the Polish Independent Department of Horticulture Economics had compiled from a polling of cooperatives, warehouses, and processors in Poland. Random samples of the published pricing data were provided by the petitioners. The petitioners also provided summary financial data for five Polish companies.

As noted above, the Department attempts to select a surrogate country that meets both of the statutory criteria, i.e., a country that is economically comparable to the NME and is a significant producer of comparable merchandise. In this proceeding, we are able to identify countries that are economically comparable to the PRC and countries that are significant producers of comparable merchandise. However, these two sets of countries do not overlap. Consequently, we must determine whether to place relatively more weight on the economic comparability criterion or on the significant production criterion.

The preamble to the Department's proposed regulations states that the Department may assign more weight to the significant producer criterion in situations where important inputs are not traded, i.e., where the inputs must be acquired locally. Antidumping Duties; Countervailing Duties; Proposed Rule, 61 Fed. Reg 7307,7344 (Feb 27, 1996). In this case, there is no information indicating that the major inputs for AJC, juice apples, are traded over long distances or across borders. Given their relatively low value, we would expect that juice apples are usually acquired locally. Consequently, we are placing greater emphasis on the significant producer criterion and we have selected the surrogate country from those countries identified in the chart above as being significant producers of AJC.

We have selected Turkey as the appropriate surrogate. First, we consider all countries listed in the chart to be significant producers of comparable merchandise. From the list of the top 10 significant net-exporters of AJC provided to the parties in by the Department in its October 4, 2002, letter, although Poland was a larger net-exporter than Turkey, both Poland and Turkey are listed among the top significant net-exporters of AJC. That information also shows that imports of AJC into the United States from Turkey were significantly greater than those from Poland. Using these measures to identify significant producers of AJC, both Turkey and Poland fulfill the requirements of section 773(c)(4)(B) of the Act that the country selected to value the factors of production is a significant producer of comparable merchandise. We note that the Act does not specify that the market economy country selected to value the factors of production be "the most" significant producer, only that it is "a" significant producer of comparable merchandise.

In a footnote to their draft remand comments, the petitioners point to information from the U.S. Foreign Agricultural Service GAIN reports for Poland and Turkey regarding the amount of processing apples processed in these countries. On this basis, the petitioners contend that Poland produce 7.5 times more processing apples than Turkey.

The fact that Poland may produce more processing apples than Turkey does not alter our

finding that Turkey is a significant producer of AJC. The focus of our inquiry is AJC production, not apple production. Moreover, the Poland GAIN report states that processed apple products include concentrated juice, fruit beverages, wine and jam.

We also noted an anomaly in the data. According to the Poland GAIN report, it takes 10 kg. of processing apples to make 1 kg. of AJC. Applying this conversion rate to the reported amount of processing apples processed in Turkey would yield total AJC production in Turkey of 12,500 MT, considerably less than the amount of AJC exported from Turkey (according to FAOSTAT data and a FAS fax (See Memorandum to the file dated November 15, 2002)). In light of this, we contacted the FAS office in Ankara and were informed that the "processing apples processed" component of the GAIN report is based on a fixed percentage that is applied each year with little change. (See Memorandum to the file dated November 15, 2002.) (We note that in the years 1996, 1997, and 1998, the percentage was consistently five percent of total apple production.) Consequently, even if the Department found information on the volume of processing apples processed to be relevant to our determination of significant production, we do not believe that the numbers cited by the petitioners provide a reliable measure.[2]

Second, while we have not been able to find a surrogate that is economically comparable to the PRC, we still believe that this second statutory criterion is important, and Turkey is more comparable to the PRC than is Poland. The per capita GNP in the PRC was $750 in 1998 and $780 in 1999, while Turkey's per capita GNP was $3160 in 1998 and $2900 in 1999. Poland's per capita GNP was $3900 and $3960 for the same periods. The petitioners have argued that the difference between the per capita GNPs in Poland and Turkey is not large. However, where we have to choose between two countries that are not comparable to the NME, we believe it is better to choose a country that is closer in economic terms unless there are other factors militating against that selection.

One such factor is the quality of the surrogate data. In this case, we believe that the Turkish data regarding juice apple prices is marginally better. It is rich in detail because it includes many prices, and they can be weighted by the volumes sold at the various prices. Although Turkey experienced inflation during this period, the prices have been reported on a monthly basis and can be converted to U.S. dollars at average monthly exchange rates, thereby limiting the distorting effect that inflation can have.[3] The Polish juice apple price provided by

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[2]Since the GAIN reports are not currently on the record of the remand, we are attaching the GAIN Reports for Poland for 1999 and 2000, and the GAIN Reports for Turkey for 1998, 1999 and 2000 to be incorporated into the record as Attachment 1.

[3] Based on information obtained by the Department, it appears that the price for juice apples in Turkey fluctuated dramatically over the three-year period 1997 - 1999. Specifically, in September 1998 (generally corresponding to the POI), the juice apple price was TL 9,500/kg. In September 1997, it was TL 12,500/kg and in September 1999, it was TL 33,500/kg (See Attachment 2). Using the average exchange rates for the month of September, these Turkish Lira

the petitioners appears to be based on a more limited sampling.[4]

Regarding the financial data used to calculate surrogate ratios for factory overhead, SG&A, and profit, the Turkish information is again of a higher quality than the available financial data from Poland. It clearly pertains to a Turkish company that produces AJC. The financial statement is audited and contains notes that yield reliable ratios. In contrast, it is not clear what the Polish companies produce. Nor are their results presented in sufficient detail to allow calculations of reliable surrogate values.

Regarding the acidity level of juice apples, the parties do not dispute that the acidity levels of AJC produced in Turkey and the PRC are generally comparable, or that the acidity level of AJC produced in Poland is generally higher than the acidity levels of AJC produced in either Turkey or the PRC. However, the evidence relating to the effect of apple acid content on the prices of juice apples does not support a finding that the price of juice apples is determined exclusively by their acidity level. Rather, the evidence supports a finding that variations in the price of juice apples are due to the quality of the apples, as well as the supply and demand of the types of apples needed to achieve a particular effect in a batch of apple juice concentrate, i.e., brix level, color, clarity, flavor, or acidity. Accordingly, we have not considered the relative acid levels of juice apples in the PRC, Turkey, and Poland as a determinative factor in selecting a surrogate country

Finally, we have not relied on comparable growth levels in per capita GNP as a factor in surrogate selection. We acknowledge that the Department has included this information in its surrogate selection memoranda, along with other economic indicators, but, pursuant to section 351.408(b) of the Department's Regulations, its primary emphasis is most commonly focused on

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prices convert to $73.00/MT in 1997, $34.40/MT in 1998 and $73.50/MT in 1999. At the same time, information in Attachment 1 indicates that the 1998 apple crop in Poland fell 20 percent from the prior year and, consequently, that the quantity of apples delivered to processors declined. The Department was concerned that the price and crop fluctuations could be indicative of aberrational pricing and the Department invited parties to submit any new factual information or arguments pertaining to these fluctuations in Turkey or Poland in their responses to the Department. The Department considered the information and arguments in this Final Remand Redetermination. See Comment 7.

[4] We note that information obtained by the Department tends to corroborate the price reported by the plaintiffs and the petitioners. (See the Foreign Agricultural Service GAIN (Global Agriculture Information Network) Report entitled Poland, Fresh Deciduous Fruit, Annual, 1999, which is appended to this redetermination on remand as Attachment 1, and the faxed information provided by the U.S. Department of Agriculture, Foreign Agricultural Service at the U.S. Embassy in Ankara at Attachment 2).

the per capita GDP.[5] As noted above, the GNP data used by the Department shows that Turkey is closer in GNP to the PRC than is Poland.

Issue 2: Effects of the market intervention scheme on apple prices

The Court instructed the Department to provide an explanation why the distortions caused by the Government of India's market intervention scheme did not disturb the fair market value of Indian apples. Because the Department is using Turkish juice apple prices, this issue is now moot.

Issue 3: Domestic steam coal

In the Final Determination, the Department calculated the value for steam coal using Indian import statistics because the Department concluded that the import statistics were the "best available information." In Yantai, the Court found that the Department's conclusion was not supported by the record because there was no evidence that the Indian domestic prices were distorted.

In the Final Determination, the Department used the import statistics to value steam coal because they were more contemporaneous with the POI than the data submitted by the plaintiffs on domestic prices in India for steam coal. While we continue to believe that contemporaneity is an important consideration in selecting valuation data, we have reviewed the information in this case and have concluded that both the import statistics and the domestic prices preceded the POI and, hence, neither was contemporaneous with the POI. Moreover, there is no evidence suggesting that the domestic Indian prices were distorted. (See Creatine Monohydrate from the People's Republic of China: Final Results of Antidumping Duty Review, 67 FR 10892 (March 11, 2002) and accompanying Issues and Decision Memorandum at Comment 1, and Certain Preserved Mushrooms from the People's Republic of China: Final Results of Third New Shipper Review and Final Results and Partial Rescission of Second Antidumping Duty Administrative Review, 67 FR 46173 (July 12, 2002) and accompanying Issues and Decision Memorandum at Comment 7, where the Department determined that if no price distortion existed, the Department would use only domestic prices for valuing all inputs). Therefore, we have used the domestic price in India to value steam coal.

Issue 4: Use of HPMC's financial data

The Court directed the Department to recalculate normal value using HPMC's financial

[5] While the Department's regulation refers to per capita GDP, the Department relies upon the generally available per capita GNP data from the World Development Reports published by the World Bank.

data, or to explain fully why the Department departed from its normal practice of relying on nonproprietary information gathered from producers of identical or comparable merchandise in a surrogate country for purposes of valuing SG&A expenses and overhead ratios. Because the Department is using information from a Turkish company to determine the factory overhead, SG&A and profit ratios, this issue is moot.

Issue 5: Calculation and use of certain freight rates

In the Final Determination, the Department included freight to Detroit in calculating the East Coast average freight rate. The Court remanded this issue to the Department to explain why a separate Detroit rate should not be calculated.

The Department agrees with the Court that Detroit should not be included in the calculation of East Coast average freight rate in this case, given that the record evidence does not show that Detroit shippers were transporting goods by way of the East Coast. Therefore, the Department has calculated an East Coast rate, a West Coast rate and a separate Detroit rate. Because we have calculated different rates for the different destinations, the weighting issue raised by the Court does not arise.

COMMENTS

Comment 1: The Department's efforts to reopen and expand the administrative record are unlawful.

Plaintiffs' Argument: The plaintiffs object to what they consider as the Department's continuing efforts to introduce new information into the record. Specifically, the plaintiffs object to the Department's requests during this remand proceeding for parties to comment on the appropriate surrogate country selection and surrogate values, the effects of the acidity on the price of juice apples, and whether certain price and crop fluctuations in Poland and Turkey were aberrational.

The plaintiffs contend that the Department's remand results demonstrated that the investigation record was sufficient for the Department to complete its determination since all surrogate values used by the Department in the remand were part of the original administrative record. The plaintiffs argue that statutory authority and Court precedent support the exclusive use of information in the original administrative record, citing 19 U.S.C. § 1516a(b)(2), which states that "the administrative record for review by the Court shall consist of 'all information obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding.'" The plaintiffs also claim that the legislative history of the "scope and standard of review" for judicial review of antidumping determinations confirms that the record to be reviewed should be limited to the information that was originally before the agency.

The plaintiffs maintain that it is neither customary nor appropriate for the administrative record to be reopened to allow the addition of supplemental information that is unrelated to the Department's original findings and conclusions, citing as an example, Neuweg Fertigung GmbH v. United States, 797 F. Supp. 1020, 1022 (CIT 1992), which states that "{t}he case law of this Court is very clear that the administrative record 'is limited to the information that was presented to or obtained by the agency making the determination during the particular review proceeding for which section 1516 authorizes judicial review' (internal quotations omitted)." The plaintiffs argue that a Court will only allow the reopening of the administrative record for new information under rare and unusual circumstances, and in those rare instances, the Court would clearly state in its instructions its intent to permit the reopening of the administrative record for new information, citing as an example, American Silicon Technologies v. United States, 110 F. Supp. 2d 992, 1003 (CIT 2000), which states that "the Court remands this issue for reconsideration and instructs Commerce to reopen the administrative record and collect additional evidence concerning Electrosilex's claimed inability to respond to the supplemental questionnaires."

The plaintiffs charge that the Department has interpreted the Court's instructions in this remand proceeding too broadly. They also contend that the Court never authorized the Department to reopen the administrative record on remand, but only authorized the Department to select another country to complete its review if the Department was unable to support its use of India as the primary surrogate country. The plaintiffs assert that reopening the record for new surrogate information might be justified had the original record contained nothing but Indian surrogate information and the Department found that India was not an appropriate surrogate country. The plaintiffs claim that the remand results show that this was clearly not necessary. Therefore, the plaintiffs conclude that the Department's efforts to reopen the administrative record in this proceeding were unlawful and unwarranted.

Petitioners' Argument: The petitioners did not comment on this issue.

Department's Position: We disagree with the plaintiffs' claim that the Department's efforts to gather further information on potential surrogate countries are unlawful and unwarranted. In its remand order, the Court determined that the Department's use of the market study provided by the petitioners was not in accordance with law and that the Department's finding that India was a significant producer of AJC was not supported by substantial evidence. The Court further stated that if the Department was unable to develop sufficient credible evidence of India's suitability as the surrogate market economy country for AJC production, the Department "should select another suitable country to complete its review and timely alert the Court of its decision to do so."

When a Court orders the Department to provide a particular analysis on remand, the Department commonly must gather some data that may not be on the record to successfully draft the remand redetermination. As plaintiffs note, the Department does not usually seek to gather a great deal of information from the parties and outside sources, unless the circumstance is "unusual." This case is "unusual" in that the Court's order indicated if the Department found that

the underlying surrogate country was inappropriate, under the Court's analysis, then the Department must inform the Court and make the necessary changes to its calculations and methodology.

The petitioners in this investigation argued for the Department to use India, and once the Department indicated that it would use India as a surrogate, the petitioners had no further reason to provide further surrogate information on the record. The Court has now indicated India is not an appropriate surrogate, and the plaintiffs would have the Department limit its analysis, under this finding, to only the information the plaintiffs placed on the record. This would be unfair and deprive the domestic industry of an opportunity to argue affirmatively for an appropriate surrogate under this new analysis. Thus, we reject plaintiffs' argument that the Department could not review other possible surrogate information in light of the Court's order and analysis.

The Department has attempted to implement the Court's order in the most accurate manner it believed possible. Thus, the Department informed the Court in a timely fashion when it developed alternative measures to signal production, and clearly indicated to the Court that it desired further time to seek information from the parties to address the Court's concerns. In an October 4, 2002, letter to parties to this remand proceeding, the Department provided the parties with information identifying the ten significant net-exporters of AJC, the volume of their imports of AJC to the United States, and their GNP per capita. The Department advised the parties that since India was neither a significant net-exporter of AJC nor a major exporter to the United States, its preliminary analysis indicated that India could not be viewed as a significant producer of AJC under the Court's analysis. The Department then invited parties to submit comments on the appropriate surrogate country to be used for valuing the PRC producers' factors of production for this redetermination on remand. The Department further noted that the record contained little or no surrogate information for most of these countries and that, as such, the parties should submit surrogate values from their recommended country.

The Court granted the Department its request for an extension of time. We believe that in doing so, the Court signaled to the parties that it did not believe that petitioners were barred from participating affirmatively in this process. The Department requested information equally from all parties, which even included the "acidity" argument which plaintiffs argued in great detail pursuant to this remand, although they hardly mentioned this issue during the investigation. We appreciate all of the comments and information we received during this remand process and we have considered all information provided by both parties in making our redetermination.

Comment 2: Recalculation of the margin for companies that were only required to respond to the separate rates questionnaire.

Plaintiffs' Argument: The plaintiffs disagree with the Department's recalculation of the weighted-average margin for four companies that responded to the Department's separate rates questionnaire, but did not respond to the full antidumping questionnaire because they were not

selected to respond. The plaintiffs argue that the Department's weighting of the calculated margins of zero with the PRC-wide rate of 51.74% (which was based on "facts available") is inappropriate because the calculated margin for all individual plaintiffs is now zero, and the Department has an established practice of not using a "facts available" in calculating a margin for companies that have been cooperative. Accordingly, they claim that under these circumstances, and because these companies were fully cooperative, it is appropriate to assign these plaintiffs an average of the calculated margins, which would result in a margin of zero.

Petitioners' Argument: The petitioners did not comment on this issue.

Department's Position: We disagree with the plaintiffs that it is appropriate to assign an average of the calculated margins to the four non-selected but responsive companies. In the Final Determination, we determined that these four companies and each of the selected mandatory respondents met the criteria for application of separate antidumping duty rates. See 64 FR at 65677-78. We further stated that the responding companies in the investigation were assigned individual dumping margins and that for the four companies that responded to our separate rates questionnaire, we were calculating a weighted-average margin based on the rates calculated for the fully-examined responding companies. We did not include rates that were zero (i.e., North Andre's rate), based entirely on facts available (i.e., the PRC-wide rate), or the rates calculated for voluntary respondents. Thus, for these four companies, the Department followed the methodology in section 735(c) of the Act for determining the estimated all-others rate.

As all the dumping rates in this redetermination on remand are now either a calculated rate of zero or based entirely on facts available, we have applied the methodology of section 735(c)(5)(B) which is consistent with that used in determining the "all-others" rate (i.e., the rate applied to companies not individually investigated) in a market economy case under the same circumstances. Section 735(c)(5)(B) of the Act states that in situations where the estimated weighted-average dumping margins established for all exporters and producers individually investigated are zero or *de minimis*, or are determined entirely under section 776, "the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the weighted-average dumping margins determined for the exporters and producers individually investigated." The Statement of Administrative Action ("SAA") states that in using any reasonable method to calculate the all-others rate, "the expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available." See SAA accompanying the Uruguay Round Agreements Act, H. Doc. 316, Vol 1., 103d Cong. (1994) (SAA) at 203. Thus, consistent with section 735(c)(5)(B), we have determined the separate rates for these companies which were not individually investigated by weight-averaging the zero margins and margins determined pursuant to facts available.

We further note that section 351.204(e) of the Department's regulations states that "the Secretary will exclude from an affirmative final determination under ... section 735(a) ... of the

Act, any exporter or producer for which the Secretary determines an individual weighted-average dumping margin ... of zero or *de minimis*." Since the Department did not select these four companies as mandatory or voluntary respondents to the investigation and, thus, did not determine an individual weighted-average dumping margin of zero or *de minimis* for these companies, there is no basis for assigning them a margin of zero and excluding them from the final affirmative determination. Also, since the Department has now completed its first administrative review of the antidumping order on AJC from the PRC, (See Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China: Final Results of 1999-2001 Administrative Review and Partial Rescission of Review, 67 FR 68987 (November 14, 2002)), these four companies are subject to a new cash deposit rate based upon the Department's findings in that review.

Comment 3: Correlation between the acidity levels of juice apples and their price.

Plaintiffs' Argument: The plaintiffs disagree with the Department's position on the relationship between the acidity level of apples and their prices. The plaintiffs argue that the issue is not whether the price of juice apples is determined "exclusively" by their acidity level, but whether the acidity level has an effect on the price of juice apples. The plaintiffs cite to evidence they submitted that proved that there was a correlation between acidity levels and the price of juice apples. Therefore, they argue, the Department should reconsider this issue and determine that acidity level does affect the price of juice apples.

Petitioners' Argument: The petitioners did not comment on this issue.

Department's Position: The "evidence" referred to by the plaintiffs is a newspaper article that indicates a higher market price for high-acid apples in an area of the United States where low-acid apples are predominant. This evidence contrasts with information provided by the petitioners indicating that in areas of the United States where high-acid apples are predominant, there is no price distinction based on the acidity level of the apples. Thus, the evidence provided by the parties on this point is conflicting. However, the information provided by both parties support the finding that variations in the price of juice apples are due to the particular market situation, and are based on the quality of the apples, as well as the supply and demand of the types of apples needed to achieve a particular effect in a batch of AJC, i.e., brix level, color, clarity, flavor, or acidity. Further, there is no evidence of any differences within Poland or within Turkey in prices for high-acid and low-acid varieties of juice apples by reason of their acidity. Therefore, for purposes of this remand determination, we have not relied upon the different acidity level of apples in Turkey and Poland in selecting the appropriate surrogate country for the PRC.

Comment 4: Whether Turkish apple prices are distorted by subsidies.

Petitioners' Argument: The petitioners refer to information they placed on the record of the

investigation as evidence that Turkish juice apple prices are distorted by subsidies.

Plaintiffs' Argument: The plaintiffs did not comment on this issue.

Department's Position: We reviewed the information submitted by the petitioners in the investigation. The subsidy they identified was an export subsidy for apples. Because we are not using export prices from Turkey and because there is no information to indicate that juice apples (as opposed to table apples) would be exported, we do not believe this alleged subsidy would distort the Turkish apple prices used for our valuation. There is no allegation or evidence of a Turkish domestic subsidy on apples or apple juice concentrate.

Comment 5: Turkish price data submitted by plaintiffs is selectively confined to certain regions of Turkey.

Petitioners' Argument: The petitioners claim that the Turkish price data are not 'marginally better' than the Polish price data, as stated by the Department in the draft remand, since the Turkish price data on the record represent prices from only three areas of Turkey that were self-selected by plaintiffs. The petitioners contend that the plaintiffs did not provide price information from other Turkish apple-producing areas such as Denizli and Mersina.

Plaintiffs' Argument: The plaintiffs did not comment on this issue.

Department's Position: Aside from stating their view that the Turkish price data are not 'marginally better' than the Polish price data, the petitioners did not provide any evidence to undermine the quality and reliability of the Turkish juice apple price data on the record, nor did they provide juice apple pricing for other regions of Turkey. Further, we agree that self-selection can be a problem when the Department solicits information from parties with an interest in the outcome. Therefore, we sought to corroborate these submitted values. Based on information provided to the Department by the U.S. Department of Agriculture, Foreign Agricultural Service at the U.S. Embassy in Ankara ("FAS Ankara"), we believe that the Turkish prices are accurate. See Attachment 2.

Comment 6: Polish financial data is better because it covers several producers of AJC.

Petitioners' Argument: The petitioners claim that the financial data they provided for several producers of AJC in Poland is better than the alternative financial data on the record for a single producer of AJC in Turkey. Further, the petitioners state that even though the financial information they provided for the companies in Poland did not specifically identify these companies as producers of AJC, the Department could easily have identified the line of business of these companies by using information they subsequently provided to the Department.

Plaintiffs' Argument: The plaintiffs did not comment on this issue.

Department's Position: We agree with the petitioners that we would have sought this information, however; in light of the relatively poor quality of the data, we did not do so. As we explained, the Polish financial data is not presented in sufficient detail to allow the Department to calculate the relevant surrogate value financial ratios.

Comment 7: There is no evidence that Turkish juice apple prices are aberrational.

Plaintiffs' Argument: The plaintiffs reject the concern raised by the Department in the draft remand that Turkish juice apple prices on the record from the investigation might be aberrational. They contend that the additional information obtained from FAS Ankara, which was first brought to the attention of parties in the draft remand, is highly limited in scope, unpublished and not demonstrated to be representative of Turkish prices in general. They further assert that there is no credible evidence to rebut the accuracy of the Turkish juice apple prices on the record.

Instead, they claim that information already on the record establishes that juice apple prices are subject to wide fluctuations from year to year, and as support they point to an article in Exhibit 9 of their October 28, 2002 submission which shows that in November 1998 prices for juice apples in the United States ranged from $10 to $30 a ton, while the same article indicates that most juice apples were sold at $70 a ton in the previous year. The plaintiffs also submitted information from the "World Apple Review, 2000 Edition," a publication which discusses world-wide trends in apple production and consumption, indicating that price volatility has been a characteristic of processing apple prices for decades. Thus, they maintain that the Turkish juice apple prices on the record are representative of the contemporaneous price for juice apples. Further, they claim that the price information obtained by the Department from FAS Ankara corroborates the accuracy of the Turkish prices on the record from the investigation. Therefore, they maintain that the Turkish juice apple prices during the POI are accurate.

Petitioners' Argument: The petitioners argue that the fluctuations in Turkish juice apple prices are indicative of aberrational prices, while the Polish juice apple prices are relatively consistent over a similar period and, thus, are not aberrational. Specifically, they argue that the prices obtained from FAS Ankara show that Turkish prices fluctuated dramatically over the three-year period 1997-1999 and that, as such, the Turkish price on record for the POI was aberrational. In contrast, the petitioners argue that Polish juice apple prices remained steady from 1996-1998.

Citing to the Preamble to the Final Rule 62 FR 27296 (May 19, 1997), the petitioners contend that "aberrational surrogate input values should be disregarded." They also point to Notice of Final Determination of Sales at Less Than Fair Value: Silicomanganese From Kazakhstan, 67 FR 15535 (April 2, 2002) and accompanying Issues and Decision Memorandum at Comment 1, which states that the Department can exercise its discretion by rejecting aberrational or distortive surrogate values. They further cite Heavy Forged Hand Tools, Finished

or Unfinished, With or Without Handles from the PRC; Final Results of Antidumping Duty Review, 60 FR 49251 (September 22, 1995) and accompanying Issues and Decision Memorandum, which states that "prices which are aberrational should not be used to value the factors of production."

Department's Position: We agree with the plaintiffs that the information on the record supports the conclusion that juice apple prices are subject to considerable fluctuation from year to year and that the observed fluctuations in the prices of Turkish juice apples do not render these prices aberrational. Other than observing that the juice apple prices in Turkey in 1998 (the period generally corresponding to the POI) differed significantly when compared to the juice apple prices in 1997 and 1999, the petitioners have not provided any information or arguments or cited to any information on the record as to why fluctuating prices should be considered aberrational.

We note that the record in this remand determination contains evidence of fluctuations in the prices of juice apples in the U.S. and Poland in the years surrounding the POI. For example, in the newspaper article cited by the plaintiffs shows that in1998 the price of juice apples in the United States was in the $10-30 per ton range, while in the previous year the price was $70 per ton. The Polish prices in 1996-1998 also exhibited a similar pattern to that of Turkey, although not of the same magnitude. Thus, we do not find that fluctuations in the prices of juice apples in Turkey should be considered aberrational.

As noted in comment 5, we find that the Turkish juice apple prices on the record are a reliable indication of the juice apple price in Turkey during the POI.

Comment 8: The Department's conclusions and reasoning support the use of Poland, and not Turkey, as the surrogate country.

Petitioners' Argument: The petitioners disagree with the Department's selection of Turkey as the surrogate country in this remand proceeding. They argue that the Department's conclusions and reasoning in selecting Turkey as the surrogate country actually support selecting Poland as the surrogate country. Specifically, the petitioners state that the Department claimed to place a greater emphasis on the significant producer criterion and then, used economic comparability as the determinative criterion in selecting Turkey as the surrogate country. They claim that the Department ignored the fact that Poland is a more significant producer of AJC than Turkey by 100% (101,243 MT for Poland and 51,217 MT for Turkey in 1998). Thus, they contend that instead of selecting Poland as the surrogate country based on significant production, the Department abandoned its emphasis on the significant producer criterion and selected Turkey because it is closer to the PRC in economic terms, even though the Department admits that neither Poland nor Turkey is economically comparable to the PRC. Therefore, the petitioners conclude that the Department's reasoning in placing greater emphasis on the significant production criterion in selecting a surrogate country is not congruent with its selection of Turkey as the surrogate country just because Turkey is slightly closer to the PRC in terms of economic

comparability. The petitioners urge the Department to select Poland as the surrogate using significant production as the primary criterion.

Plaintiffs' Argument: The plaintiffs did not comment on this issue.

Department's Position: We disagree with the petitioners and continue to find that Turkey is the appropriate country in which to value the significant factors of production for AJC from the PRC.

Absent information on the record that India and other countries identified by the Department as comparable economies to the PRC were significant producers of AJC concentrate, the Department first sought to identify countries that were significant producers of AJC. As previously discussed, in the absence of worldwide production information for AJC, the Department developed two benchmarks for identifying significant production of AJC, i.e., significant net-exporters of AJC and significant exporters of AJC to the United States. (The significant net-exporters were identified in the Department's October 4, 2002, letter to the parties. Poland and Turkey were both identified as significant net-exporters.) We also provided the AJC exports of these countries to the United States. Using this second measure of significant production, Turkey is a more significant producer than Poland (3,391 MT for Turkey and 260 MT for Poland). However, we do not believe that the Act directs the Department to select "the most" significant producer. Instead, it directs only that the Department select "a" significant producer of comparable merchandise, to the extent possible. Based on the two measures of significant production identified by the Department in this case, both Turkey and Poland are significant producers of AJC.

Having identified countries that were significant producers of AJC, the Department looked to other factors to determine the appropriate surrogate country. While we have not been able to identify a surrogate that is economically comparable to the PRC, we still believe that this second statutory criterion is important. Using the per capita GNP data applied by the Department to identify comparable economies, Turkey is clearly more comparable to the PRC than is Poland. The per capita GNP in the PRC was $750 in 1998 and $780 in 1999, while Turkey's per capita GNP was $3160 in 1998 and $2900 in 1999. Poland's per capita GNP was $3900 and $3960 for the same periods. Where we have to choose between two countries that are not comparable to the NME country, we believe it is better to choose a country that is closer in economic terms unless there are other factors militating against that selection. In this case, Turkey is the more comparable economy.

In addition, we considered the quality of the available surrogate data. In this case, for reasons noted in the previous comments we believe that the Turkish surrogate value data regarding juice apple prices and the financial ratios obtained from a Turkish producer of AJC are superior to those available from Poland.

RESULTS OF REDETERMINATION

As a result of this remand, we have recalculated certain company-specific margins for this investigation. The weighted-average margin percentages are as follows:

Company

Yantai Oriental Juice Co., Ltd.	0.00%
Qingdao Nannan Foods Co., Ltd.	0.00%
Sanmenxia Lakeside Fruit Juice Co., Ltd.	0.00%
Shaanxi Haisheng Fresh Fruit Juice Co., Ltd.	0.00%
Shandong Zhonglu Juice Group Co., Ltd.	0.00%
Xian Yang Fuan Juice Co., Ltd.	28.33 %
Xian Asia Qin Fruit Co.	28.33%
Changsha Industrial Products & Minerals Import & Export Corporation	28.33%
Shandong Foodstuffs Import & Export Corporation	28.33%

The "PRC-Wide" rate for this investigation of 51.74% is not affected by this remand determination.

For those producers/exporters that responded to the Department's separate rates questionnaire (i.e., Fuan, Asia, Changsha Industrial, and Shandong Foodstuffs) but did not respond to the full antidumping questionnaire because they were not selected to respond, we have calculated a separate weighted-average margin. Given the unique situation in this investigation where all of the calculated margins are zero, the weighted-average margin was obtained by weighting the calculated margins of zero with the PRC-wide rate of 51.74%. See "AD Rate Applied to Non-Selected Respondents," dated November 15, 2002.

_____

Richard Moreland
Acting Assistant Secretary
for Import Administration

_____

Date

ATTACHMENTS

1) Foreign Agricultural Service GAIN (Global Agriculture Information Network) Report entitled Poland, Fresh Deciduous Fruit, Annual, 1999 and 2000, and Foreign Agricultural Service GAIN (Global Agriculture Information Network) Report entitled Turkey, Fresh Deciduous Fruit, Annual, 1998, 1999 and 2000

2) Faxed information provided by the U.S. Department of Agriculture, Foreign Agricultural Service at the U.S. Embassy in Ankara

ATTACHMENT 1

ATTACHMENT 2