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MEMORANDUM TO: Faryar Shirzad
Assistant Secretary
for Import Administration

FROM: Susan Kuhbach
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Administrative Review of Fresh Garlic from the People's Republic of China

Summary

We have analyzed the case and rebuttal briefs of interested parties in the administrative reviews of Clipper Manufacturing Limited (Clipper), Golden Light Trading Company, Ltd. (Golden Light), and Taian Fook Huat Tong Kee Foods Co., Ltd. (FHTK), under the antidumping duty order on fresh garlic from the People's Republic of China (PRC). The period of review covers November 1, 2000, through October 31, 2001. As a result of our analysis, we have made changes in the margin calculation for FHTK and have determined to rescind the administrative review of Clipper and Golden Light. We recommend that you approve the positions that we have developed in the "Discussion of the Issues" section of this memorandum. Below is the list of the issues for which we received comments and rebuttal comments by parties in this review:

1. Rescission of Review of Clipper

2. Rescission of Review of Golden Light

3. Bona Fides of FHTK's Sale

4. Use of Facts Available

5. Valuation of Garlic Seed

6. Valuation of Garlic Sprouts

7. Valuation of Urea

8. Valuation of Potassium Fertilizer

9. Calculation of Surrogate Financial Ratios

10. Valuation of Electricity

11. Valuation of Cartons

Background

On August 9, 2002, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on fresh garlic from the People's Republic of China. See Fresh Garlic from the People's Republic of China; Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Administrative Review, and Intent to Rescind Administrative Review in Part, 67 FR 51822 (August 9, 2002) (Preliminary Results). We invited parties to comment on our preliminary results.

On September 9, 2002, we received a case brief from Clipper in response to our intent to rescind the review of that company in our preliminary results. On September 16, 2002, the petitioners, the Fresh Garlic Producers Association[1] and its individual members, submitted a rebuttal brief in

[1]The members of the Fresh Garlic Producers Association are Christopher Ranch LLC, Farm Gate LLC, The Garlic Company, Spice World, Inc., and Vessey and Company, Inc.

response to Clipper's case brief.

On September 9, 2002, we received a request for rescission of the review from the respondent company Golden Light, in response to our preliminary results. The petitioners filed comments to this request on September 11, 2002. The Department received an improperly filed submission from Golden Light on September 23, 2002, and incorporated this document into the record on November 14, 2002. See Memorandum to the File regarding submission by Golden Light Trading Company, Ltd. (November 14, 2002). On November 13, 2002, the petitioners submitted a case brief that addressed the request for rescission. In response to the Department's November 14, 2002, request for comments on its September 23, 2002, submission, Golden Light submitted comments on November 20, 2002. It filed a rebuttal brief on November 25, 2002, in response to the petitioners' case brief.

In their November 13, 2002, case brief, the petitioners also addressed the preliminary results with respect to FHTK. FHTK submitted a rebuttal brief on November 18, 2002.

On December 5, 2002, the Department conducted a hearing at which the petitioners, FHTK, and Golden Light presented testimony concerning the issues raised in the case briefs and rebuttal briefs.

Discussion of the Issues

In the Preliminary Results, we found that record evidence indicated that entities earlier in the transaction chain than Clipper had knowledge that the subject merchandise was destined for export to the United States. Specifically, information submitted to the Department by Clipper in its questionnaire responses demonstrated that both the entities which supplied the merchandise for export (the suppliers) and the export agents had knowledge of the U.S. destination of the subject merchandise. Thus,

pursuant to section 772(a) of the Tariff Act of 1930 (the Act), we determined that Clipper was not an appropriate respondent for review of the sales at issue and announced our intent to rescind the administrative review with respect to Clipper.

1. Rescission of Review of Clipper

Comment 1: Citing section 772(a) of the Act, Clipper argues that the Department erred in determining that the exporting agents are the appropriate party for review and not Clipper. Clipper supports this argument by alleging that, first, the exporting agents did not sell the subject merchandise to Clipper and, second, the exporting agents should not be considered exporters for the purposes of this review. Thus, Clipper argues the Department should not rescind the administrative review of Clipper.

Clipper claims that the exporting agents did not sell the subject merchandise to Clipper, but merely facilitated the export transaction. Clipper asserts that the export agents were not part of the transaction until Clipper finalized the terms of sale with both the supplier and the U.S. importer. Clipper also alleges that the exporting agents shipped the subject merchandise pursuant to instructions from Clipper. Therefore, Clipper considers that it made the first non-intra-nonmarket-economy (NME) sale to an unaffiliated party, constituting it the appropriate party for review.

Clipper argues that it, and not the exporting agents, should be considered exporters for the purposes of this review. Citing section 772(a) of the Act, Clipper holds that the party to be reviewed must be a producer or an exporter of the subject merchandise. Clipper asserts that, because the Act and the regulations pursuant thereto do not specify whether an export agent is considered an exporter, the Department should look to the Restatement of Law (Second) for the definition of "Agency." Clipper asserts that the exporting agents had a very limited function in the completion of the transactions

and that Clipper, as the principal in the agent-principal relationship, is the appropriate party to be reviewed. Clipper alleges it hired the export agents, who hold a special exporting license, solely to clear the merchandise with the PRC export control agency, something which Clipper says is common practice for exporters based in Hong Kong. Clipper adds that the export agents' invoices to Clipper and the payment documentation indicating payments from Clipper to the export agents, which Clipper placed on the administrative record, were created because PRC export regulations require that the entities holding the export licences must be the parties receiving the payment. Clipper also contends that the export agents did not participate in the negotiation and determination of the price and other substantive terms of the transactions. In addition, Clipper asserts that the exporting agents had no economic interest in the goods, as they would be paid an agreed-upon amount, unlike Clipper who was at all times responsible for the losses and other risks.

The petitioners argue that the Department should reject Clipper's assertion that the sales between Clipper and its U.S. customer are the appropriate sales to be reviewed and should rescind the administrative review of Clipper. The petitioners claim that Clipper has misunderstood both the statute and the Department's knowledge-destination analysis. The petitioners contend that the Department should not ignore the sales between Clipper and its exporting agents which, as the first non-intra NME sales to an unaffiliated party, according to section 772(a) of the Act, are the appropriate sales to be reviewed. The petitioners stress that the record clearly establishes that the exporting agents sold the subject merchandise to Clipper. The petitioners also allege that Clipper admits in its case brief to paying its suppliers through its exporting agents. The petitioners deem that, consistent with the statutory language, the exporting agents both had knowledge of the U.S. destination and performed the first non-

intra-NME sale in the chain of distribution for exportation to the United States. The petitioners claim that, based on these facts, admissions, and an appropriate application of the statute, the Department properly found that the sales between Clipper and its exporting agents are the appropriate sales to be reviewed.

The petitioners dispute Clipper's claim that the exporting agents are not exporters. The petitioners assert that the exporting agents clearly satisfy the statutory definition of an exporter as they are the only party in the chain of distribution with the authority to export regulated commodities, such as garlic, from the PRC. The petitioners allege that neither the suppliers nor Clipper have an exporting license; therefore, they contend, the only parties eligible to be considered exporters are the exporting agents. The petitioners conclude by claiming that the exporting agents had knowledge of the U.S. destination, made the first non-intra-NME sale to an unaffiliated party for exportation to the United States, held the capacity of an exporter, and, therefore, are the appropriate party to be reviewed.

Department's Position: As we found in the Preliminary Results, we consider the exporting agents, and not Clipper, to be the appropriate parties to review. Because we did not receive a request to review the exporting agents, we are rescinding the review of Clipper.

The invoices and wire transfers between Clipper and the export agents on record demonstrate that the exporting agents purchased the subject merchandise from the suppliers and sold it subsequently to Clipper. See response to Section A of the questionnaire, Exhibit A-11 (April 6, 2002), and response to the supplemental questionnaire, Exhibit SA-9 (June 13, 2002). No information on the administrative record supports Clipper's contention about the alleged limited role of the exporting

agents in the chain of transactions leading to the passing of title of the subject merchandise to Clipper. Indeed, Clipper provided no proof whatsoever which supports its claims that it finalized the substantial terms of sale with both the suppliers and the U.S. importer prior to the export agents' purchase of the subject merchandise from the suppliers. Even if such evidence were present, it would not make Clipper the appropriate respondent in this case. All evidence on the record indicates that the export agents were the party in the chain of distribution that made the first non-intra-NME sale and that the export agents had knowledge that the merchandise was destined for the United States.

Thus, we find that the exporting agents are the exporters for the purposes of section 772(a) of the Act. Indeed, Clipper admits that the exporting agents are the only parties holding the exporting licenses required by the PRC exporting regulations and that they exported the subject merchandise from the PRC. See the response to the supplemental questionnaire, page 4, questions 14 and 15 (June 13, 2002).

Comment 2: Clipper alleges that the Department relied erroneously on the lack of documentation substantiating a relationship between Clipper and the suppliers as a basis for concluding that there were no transactions between them. Clipper asserts that, although the Department never requested such information, the lack of this documentation on record does not preclude a binding agreement between Clipper and the suppliers.

The petitioners did not comment on this issue.

Department Position: The Department requested documentation from Clipper that would establish any relationship it had with the suppliers of the subject merchandise. Specifically, the Department requested ". . . all correspondence, all price-negotiating documents, all order forms, all

invoices issued, all exporting documents, all shipping documents, and any other documents relevant to these sales as issued by or to the suppliers . . ." See the supplemental questionnaire page 3, question 23 (June 4, 2002), and the response to the supplemental questionnaire, page 6, question 23 (June 13, 2002). Clipper did not provide any such documentation. The lack of documentation on record substantiating a relationship between Clipper and the suppliers fortifies the Department's position, which is supported by the information Clipper did supply which indicates that the agents purchased the subject merchandise from the suppliers and subsequently sold it to Clipper, thus qualifying the export agents as the party in the distribution chain making the first non-intra-NME sale.

Comment 3: Citing 19 CFR 351.102, Clipper alleges that the export agents do not possess adequate transaction information required for the Department's determination of a proper price. Thus, Clipper argues, because the export agents did not have the relevant pricing information, they cannot be the appropriate party to review in an antidumping proceeding.

The petitioners did not comment on this issue.

Department Position: The record evidence does not support Clipper's claims. One of the key factors in our analysis is that we must determine which transaction establishes the export price as defined in section 772(a) of the Act. Outside the information on the record, we cannot determine independently on the facts of the record in this case whether one party or another had knowledge of specifics surrounding the price of garlic. We know only that the information on the record supports finding the export agents as the party in the distribution chain making the first non-intra-NME sale.

Comment 4: Clipper asserts that the suppliers of subject merchandise did not have knowledge of the U.S. destination at the time they made the sales to Clipper.

The petitioners argue that, first, this assertion is untrue and refer to Clipper's questionnaire and supplemental questionnaire responses in which Clipper stated that the suppliers had knowledge of the U.S. destination of the subject merchandise and, second, that, even if it were true, Clipper's assertion that the suppliers had no knowledge of the U.S. destination is irrelevant to the Department's analysis.

Department Position: We agree with the petitioners. Clipper stated in both the questionnaire response and the supplemental questionnaire response that the suppliers had knowledge of the U.S. destination. See the response to the questionnaire, page 16, question 9 (April 6, 2002), and the response to the supplemental questionnaire, page 9, question 41 (June 13, 2002). As we found that the exporting agents both had knowledge of the U.S. destination of the subject merchandise and were the parties that made the first non-intra-NME sale of the subject merchandise, we have already demonstrated that Clipper is not the appropriate party to be reviewed. Thus, whether or not the suppliers had knowledge of the U.S. destination of the subject merchandise does not affect our determination to rescind the review of Clipper.

2. Rescission of Review of Golden Light

Comment 5: The petitioners request that, in keeping with the Preliminary Results, the Department should continue to assign the dumping margin of 376.67 percent to Golden Light based on adverse facts available. They contend that a September 9, 2002, submission from the company to the Department constitutes untimely submitted new factual information and, as such, should be stricken from the record. They contend, moreover, that the submission reflects Golden Light's lack of candor in interacting with the Department because its claim in the submission of having never received the Department's quantity-and-value questionnaire conflicts with the Department's finding in the Preliminary

Results that Golden Light received the questionnaire but opted not to respond to it. The petitioners argue that, based on Golden Light's failure to respond to the questionnaire and its lack of candor in the September 9, 2002, submission, the Department should assign the margin of 376.67 percent to Golden Light in the final results.

Golden Light rebuts that the Department should rescind its review because, as the record demonstrates, it cooperated to the best of its ability once notified of its involvement in the review and it did not make sales of subject merchandise during the period of review (POR). Golden Light asserts that the September 9, 2002, submission in which it requested rescission from the review and a letter it submitted to the Department on November 20, 2002, demonstrate that it was unaware of its involvement in the review until after the issuance of the Preliminary Results. It states that, although the Department alleges that Golden Light received a quantity-and-value questionnaire, the Department did not place the tracking record of delivery of the questionnaire on the record. Golden Light states that a copy of the envelope of the package it received from the Department containing the preliminary results and that was later placed on the record, indicates that the Department had been using an erroneous and incomplete address for the company. Golden Light argues that, because the Department did not provide timely notice of requests for information, it would be improper and unlawful of the Department to resort to the use of adverse facts available. It asserts further that shipping documentation, unofficially submitted to the Department by Golden Light on September 23, 2002, and later placed on the record by the Department, shows that all of the shipments of fresh garlic that Golden Light made to the United States during the POR were of garlic produced in Thailand.

Department's Position: A review of data from the U.S. Customs Service confirms Golden

Light's assertion that it made no shipments of subject merchandise during the POR. Thus, we find it appropriate to rescind the review of Golden Light pursuant to 19 CFR 351.213(d)(3) on the basis that the company had no entries, exports, or sales of subject merchandise during the POR.

Furthermore, although the petitioner would have us presume that Golden Light did not participate intentionally in the beginning of this proceeding, we agree with Golden Light that the use of adverse facts available would be inappropriate based on the evidence on the record. Golden Light contacted the Department initially on September 9, 2002, with its request to be rescinded from the review. At this time, Golden Light submitted the copy of the envelop of the package that it had received from the Department and that shows that the Department had been using an incorrect address in order to contact the company. In the Preliminary Results, the Department had found that, based on a tracking record from Federal Express, Golden Light had received the quantity-and-value questionnaire the Department issued to it on January 8, 2002. See Memorandum from Laurie Parkhill to Richard W. Moreland regarding responses to the quantity-and-value letter (May 16, 2002). However, in light of the fact that the Department had been using an incorrect address for Golden Light at the time that it mailed the questionnaire, we cannot presume that the questionnaire was successfully delivered to Golden Light. Thus, it would be unreasonable to apply adverse facts available in this case.

3. Bona Fides of FHTK's Sale

Comment 6: The petitioners argue that the Department should rescind the review of FHTK on the basis that the one reported U.S. sale was not a bona fide sale and, thus, cannot serve as the basis for the calculation of a dumping margin. They assert that the sale was made at an unreasonably high

price when compared to the average export prices at which Chinese producers and exporters of fresh garlic sold the product to customers in third countries during the POR. The petitioners assert that the price is also significantly higher than prices at which Chinese producers and exporters offered to sell fresh garlic to customers in the United States during this period. They assert that the sale was structured so as to ensure the calculation of a zero margin for FHTK and that, because the sale does not have the indicia of a sale made in the normal course of business, it is not a bona fide sale. The petitioners cite Fresh Garlic From the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review, 67 FR 11283 (March 13, 2002) (Clipper Rescission), in support of their argument that, where a significant discrepancy exists between the price paid by the U.S. customer in the reported sale and the export price of Chinese sales of fresh garlic to third-country markets, a bona fide sale has not been completed and the review of that sale should be rescinded.

FHTK rebuts that the "totality of the circumstances" in this review indicates that the sale was bona fide and commercially viable. Citing OCTG from Japan; Final Results of Antidumping Duty Administrative Review, 65 FR 15305 (March 22, 2000) and accompanying Issues and Decision Memorandum at Comment 1 (OCTG from Japan), FHTK asserts that the petitioners have not addressed many of the factors that fall under the totality-of-the-circumstances analysis. It asserts further that the only factor cited by the petitioners, the price differential between FHTK's price and other Chinese imports of garlic, is not dispositive of the bona fides of the sale and that the petitioners' allegations concerning this factor are factually inadequate.

Department's Position: We reviewed the average export prices from The World Trade Atlas

that the petitioners provided in a May 3, 2002, submission and found that the prices were for exports of all types of garlic products, not just prices for whole, fresh bulbs of garlic. When we reviewed the prices pertaining solely to exports of fresh bulbs of garlic, we found that FHTK's reported sale price was not dissimilar to the average export price of bulbs exported to the United States during the POR. For a detailed discussion of these prices, see the Memorandum to the File regarding the analysis methodology used to determine the dumping margin for FHTK (January 21, 2003). Thus, the petitioners' assertion of an unreasonably high price is not supported by the appropriate export pricing data. As for the price offers from Chinese exporters and producers that the petitioners submitted in their May 3, 2002, submission, these offers were made in June 2001 – at the height of the Chinese garlic harvest – to individual petitioners. Thus, it is reasonable for the prices to be lower than the price at which FHTK sold its garlic since the sale in question took place when garlic was not in season. Moreover, the offers the petitioners submitted as evidence present us with the question of whether the prices contained in the offers are similar to prices offered at that time to U.S. garlic purchasers not involved in this segment of the proceeding.

For all of these reasons, we conclude that FHTK's price was not unreasonably high and that, absent any other findings that would lead us to question the bona fides of the sale, the sale was bona fide. Therefore, we have not rescinded the review on this basis.

4. Use of Facts Available

Comment 7: The petitioners argue that the Department should collapse FHTK and some of its affiliates in the calculation of a margin for FHTK. The petitioners also assert that, because the Department would not be able to calculate a company-specific rate for the collapsed entity based on

the information currently on the record, it should rely upon the facts available and assign the PRC-wide margin of 376.67 percent to the collapsed entity for the final results of review.

Specifically, the petitioners assert that FHTK could not have stored the subject merchandise outdoors for longer than three months, so FHTK must have placed its subject merchandise in cold storage prior to shipment, and that, due to its limited amount of cold storage, FHTK likely obtained cold-storage services from two of its affiliates that are also wholly owned subsidiaries of FHTK's Singapore-based parent company. They assert that the Department should find that Longkou Fook Huat Tong Kee Refrigeration Co., Ltd. (Longkou FHTK), provided cold-storage services based on its affiliation with FHTK, due to the fact that Longkou FHTK was named as a grower and processor of fresh garlic in earlier administrative reviews and the fact that its operations involve the refrigeration of agricultural products. The petitioners assert that Shanghai Fook Huat Tong Kee Cold Storage Co., Ltd. (Shanghai FHTK) should be found to have provided cold-storage services because of its affiliation with FHTK and because, by Shanghai FHTK's own statement, it generates revenues from leasing and maintaining cold-storage warehouse facilities. The petitioners argue that, based on these two findings, the fact that Longkou FHTK and Shanghai FHTK operate cold-storage facilities that would require no retooling to be used to store garlic and the fact that the availability of these facilities creates a significant potential for FHTK to manipulate its factors-of-production information, the Department should collapse Longkou FHTK, Shanghai FHTK, and FHTK into one entity pursuant to 19 CFR 351.401(f)(1) (2001). In addition, they argue that FHTK withheld the information necessary for the Department to determine that the companies should be collapsed and that, in order to prevent FHTK from being rewarded for such behavior, the Department should use the facts available and assign the PRC-wide

margin of 376.67 percent to the collapsed entity.

FHTK rebuts that the Department should reject the speculative arguments made by the petitioners and continue to calculate the margin for FHTK based solely on its factors-of-production information. It comments that the fact that FHTK did not process garlic on a year-round basis during the POR did not indicate a need for additional cold storage but merely that all of the garlic placed in the outdoor storage and cold storage was consumed in processing prior to the end of the year. It adds that the record does not support the petitioners' assertion that fresh garlic is not commercially saleable if placed in outdoor storage in excess of three months and that, even if this assertion were true, FHTK's production of fresh garlic – as opposed to other products – was too small to create a need for additional cold storage. FHTK also argues that the record does not support the collapsing of FHTK and affiliates because FHTK provided data in its questionnaire responses to demonstrate that none of the affiliates were involved in the production or sale of subject merchandise during the POR, the Department reviewed this information at verification and found no discrepancies, and the petitioners did not submit any evidence that suggests such involvement of an affiliate.

Department's Position: The petitioners' argument is premised on the supposition that FHTK lacked cold-storage space for the subject merchandise. There is no indication from the record that such was the case or that FHTK placed the subject merchandise in cold storage at any time prior to its shipment. At verification, company officials provided a tour of the cold-storage facility and explained that, due to its space limitation, FHTK could neither store all of the seed it would need for the coming planting nor store a supply of garlic that would enable it to produce its garlic products not subject to the order on a twelve-month basis at the facility. See verification report for FHTK, page 8 (November 5,

2002). They explained that, because of FHTK's inability to store all of its seed, it purchased additional seed at the beginning of a planting. *Id*. They also stated that, up until that time, FHTK had not been able to run its processing facility on a year-round basis but that it sought to do so in the future. *Id*.at 3. Thus, FHTK had limited cold-storage space in which it could store subject merchandise if it so chose.

In addition, at verification the company officials provided a tour of an outdoor storage area and explained how garlic could be stored outdoors for approximately three months after it was harvested. *Id*. at 7-8. As the petitioners are aware, the actual point in time at which a crop is harvested and the actual length of time that garlic may be stored outdoors is contingent on weather conditions. Thus, it is feasible that FHTK harvested the subject merchandise in late June and stored it outside prior to its shipment in mid-October. Finally, in its response to section D of the original questionnaire, FHTK stated that it shipped the merchandise directly to the port and did not place it in a distribution warehouse. See response to Section D, page 9 (April 8, 2002). Therefore, we find no indication that FHTK needed to place the subject merchandise in cold storage or that it in fact did place it in such storage at its facility or elsewhere.

Because the petitioners had requested the collapsing of FHTK and several affiliates in earlier segments of this proceeding and prior to the verification in this review, we asked FHTK about all of the Chinese subsidiaries of FHTK Singapore at verification. See verification report for FHTK, pages 3-5 (November 5, 2002). With respect to four such companies located at the port city of Longkou, we found that:

> . . . When we asked about possible storage of fresh garlic at Longkou, both Mr. Tan and Mr. Lo explained that, given the proximity of Longkou and Qingdao (the port city from which FHTK Taian ships the garlic to the United States) from Taian, the

> transportation costs to send the garlic to Longkou for storage would be prohibitive. They added that it is more practical to ship the merchandise to the United States from Qingdao than Longkou because the port at Qingdao has modernized shipping facilities (i.e., uses the modern, standardized shipping containers). . . .

Id. at 3. The transportation costs to send the garlic to southern ports, such as Shanghai, for cold storage would be equally prohibitive. Moreover, it would test the bounds of practicality to send the garlic a great distance to the south for storage and then transport it for shipment from a northern port. Yet, without any evidence of need for cold storage of the subject merchandise or of its storage outside of FHTK's own processing facility, the petitioners ask us to infer that FHTK undertook such a course of action.

Based on the evidence of record, we find no basis to treat FHTK and other subsidiaries of FHTK Singapore as a single entity. There is no evidence to suggest a significant potential for the manipulation of price or production of the product; the sole fact that the other subsidiaries of FHTK Singapore also maintain cold-storage facilities is not sufficient to suggest the potential for manipulation exists, especially where these companies are located at great distances away from the processing facility and the port of exit. Therefore, we decline to treat FHTK and other subsidiaries of FHTK Singapore as a single entity, apply facts available, or make an adverse inference in this case.

Comment 8: The petitioners argue that, by purchasing its export quota from another company instead of directly from the government, FHTK did not establish that its exportation of the subject merchandise complied with Chinese export law and that, as a result, the Department should assign the PRC-wide margin of 376.67 percent on the basis of facts available. The petitioners comment that, throughout various segments of the proceeding, FHTK or its parent company has asserted that it is

necessary to obtain an export quota to export fresh garlic to the United States lawfully but, in the current review, FHTK has not provided specific information or documentation relating to its purchase of an export quota from another company or information that would indicate that purchase and use of a quota assigned to another company is consistent with Chinese law. The petitioners comment further that neither FHTK nor other respondents in this review have provided information that would support a contention by FHTK that export quotas were traded and sold as commodities under Chinese law during the POR.

FHTK rebuts that this argument has been rejected by the Department in the past, most recently in Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from the PRC, 63 FR 72255 (December 31, 1998) (Mushrooms Determination). It also asserts that the issue is moot because the Chinese government abolished the quota system in January 2002.

Department's Position: There is no statutory or regulatory basis for assigning a respondent company a margin based on adverse facts available because it may not have complied with provisions of the law of the country from which it exported merchandise. Our ability to calculate a margin relies upon the completeness of the information provided by a respondent company. In this case, we reviewed both questionnaire responses and information at verification in order to determine that the information was sufficiently complete and accurate for calculation of a final margin. Based on that review, we found that the information was sufficiently complete and accurate for such a purpose and have, accordingly, calculated a margin on this basis.

5. Valuation of Garlic Seed

Comment 9: The petitioners argue that the Department should not continue to value garlic seed

based on the data for Indian imports of fresh garlic but should value the seed based on prices the petitioners provided for two varieties of export-quality Indian garlic. The petitioners assert that the verification report shows that FHTK used and purchased high-quality garlic seed to produce the subject merchandise and that, in doing so, it reflects that FHTK needed high-value seed to produce fresh garlic of sufficient quality to facilitate its export to the United States. The petitioners assert that, because the garlic exported to the United States is of higher quality than the garlic exported to India, the use of Monthly Statistics of Foreign Trade of India – Volume II Imports (MSFTI) data undervalues the garlic seed that FHTK used significantly. They assert that the Department should value the seed based on the prices of two varieties of garlic grown in India that they believe to be of the quality suitable for export to the United States. Furthermore, the petitioners assert that the MSFTI data is distorted by the fact that all of the import prices for imports from market economies are tainted because the majority of garlic was transshipped from the PRC through these economies into India.

FHTK rebuts that the petitioners did not present evidence that establishes that India only imports low-quality garlic. It argues that the petitioners likewise have not established that the United States only imports high-quality garlic. In addition, FHTK asserts that the petitioners have twisted the findings of the verification report and cites the section of the report that states that FHTK is more concerned with producing a high-yield crop than individual, high-quality bulbs. Finally, FHTK asserts that the petitioners did not place evidence on the record that substantiates their claims with respect to transshipments of garlic and, accordingly, FHTK requests that the Department continue to rely upon the MSFTI data as the best available information to value garlic seed.

Department's Position: At verification, we asked company officials to describe how FHTK

selected its seed. They responded that, "they used the largest bulbs from the previous crop and also purchased large bulbs for seed. They confirmed that the seed was all of one variety of garlic. They also asserted that the variety that FHTK Taian grows is the same variety grown throughout the province." See verification report for FHTK, page 11 (November 5, 2002). Thus, the verification report shows that FHTK used its largest bulbs and purchased large bulbs for seed. It does not establish, as asserted by the petitioners, that FHTK purchased high-value seed. Furthermore, the petitioners have submitted no evidence to support their allegation that the Indian and U.S. markets import different qualities of garlic. We believe that the Indian import data provides a reliable basis on which to value the seed FHTK purchased. We do not find a basis on which to value the seed FHTK used by using the price of specific, high-quality varieties of garlic and the petitioners have provided no persuasive evidence to undermine the India import data.

Furthermore, the petitioners' MSFTI data argument is based on mere speculation at best. The Department cannot determine, based on the information provided, the origin of the Indian imports is in question. The Department is not in a position to determine affirmatively that a PRC surrogate value is unacceptable merely because some garlic shipped to India from Hong Kong or Indonesia might have been transshipped from the PRC. Moreover, even if some of the garlic did originate in the PRC, the petitioners have not established that the import prices did not reflect the world-market prices since the merchandise had entered a market economy prior to importation into India.

Therefore, we have relied upon the MSFTI data for valuation of garlic seed in our final results.

6. Valuation of Garlic Sprouts

Comment 10: The petitioners argue that the Department relied improperly upon the MSFTI

data for fresh garlic in order to value garlic sprouts, a by-product of garlic. The petitioners argue that, by assigning a value for the by-product that equals the value of the main product, the Department has violated long-standing practice and sound accounting principles. The petitioners assert that, because a by-product is a product that is generated during the course of production of a main product, it must have a lower value compared to that of the main product. In addition, the petitioners assert that the Department will meet its obligation to select an appropriate surrogate value by finding the value for a product that, like sprouts, is a by-product and has similar characteristics to sprouts. In support of its assertion, the petitioners cite Notice of Final Determination of Sales at Less Than Fair Value; Honey from the People's Republic of China, 66 FR 50608 (October 4, 2001) and accompanying Issues and Decision Memorandum at Comment 6, where the Department selected the value, based on Indian import statistics, for inedible molasses as the surrogate value for scrap honey.

FHTK responds that the surrogate value was based on the MSFTI data for the HTS category that included onions, shallots, leeks and other alliaceous vegetables in addition to garlic and, therefore, the selection of the value was accurate and consistent with Departmental practice. It adds that, if the Department finds that the value is too high for the value of a by-product, then it should treat the sprouts and garlic as co-products and allocate the factors of production among the two products.

Department's Position: We addressed the issue of whether to consider a product as a by-product or a co-product in Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel, 66 FR 49349 (September 27, 2001) and accompanying Issues and Decision Memorandum at Comment 3 (Magnesium), in which we stated:

The National Association of Accountants ("NAA") defines a joint product as two or

> more products so related that one cannot be produced without producing the other(s), each having relatively substantial value and being produced simultaneously by the same process up to a split-off point. The NAA defines a byproduct as a secondary product recovered in the course of manufacturing a primary product, whose total sales value is relatively minor in comparison with the sales value of the primary product(s). In a similar vein, it has been noted that the products in a jointly produced group often vary in importance. Products of greater importance are termed major products and products of minor importance are termed byproducts. When two or more major products appear in the same group, they are called coproducts. The term joint product includes major products, byproducts, and coproducts because all are jointly produced. See Management Accountants' Handbook, Fourth Edition; Keller, Bulloch and Shultis at 11.6. The Department has looked to several factors in order to determine whether joint products are to be considered coproducts or byproducts. See Final Results of Antidumping Finding Administrative Review: Elemental Sulphur From Canada ("Elemental Sulphur From Canada"), 61 FR 8239, 8241-42 (March 4, 1996). Among these factors are the following: (1) how the company records and allocates costs in the ordinary course of business, in accordance with its home country GAAP; (2) the significance of each product relative to the other joint products; (3) whether the product is an unavoidable consequence of producing another product; (4) whether management intentionally controls production of the product; and (5) whether the product requires significant further processing after the split-off point. No single factor is dispositive in our determination. Rather, we consider each factor in light of all of the facts and circumstances surrounding the case.

Garlic sprouts are harvested shortly before a garlic crop is harvested by trimming the main stem, or sprout, of the plant from the garlic plant and are used in local cuisine. A review of FHTK's data shows that, by weight, the amount of the sprouts it harvested and sold from the POR crop equaled approximately one fourth of the amount of fresh garlic it harvested and processed from that crop.

For the Preliminary Results, we could find no publicly available information regarding the pricing of garlic sprouts in the surrogate country. The petitioners did not suggest a price for sprouts based on data for a corresponding product. Thus, we accepted FHTK's suggestion that we value the sprouts using the MSFTI data under the tariff heading HTS 0703.2000 for imports of garlic, fresh or chilled. We did not base the value on the data under the more generalized tariff category HTS 0703, for

onions, shallots, garlic, leeks, and other alliaceous vegetables, fresh or chilled, as FHTK asserts in its rebuttal comments.

In light of the considerations set forth in Magnesium, we find that garlic sprouts and fresh garlic are joint products since one cannot be produced with producing the other, each has a relatively substantial value, and both are produced simultaneously by the same process until reaching a split-off point. We established at verification that garlic bulb products remain the products of primary importance, in relation to all other products, in terms of sales and strategic planning. See verification report for FHTK, pages 2-3 (November 5, 2002). Thus, we consider the garlic sprouts to be a product of minor importance to the company. In addition, we find that the production of sprouts is an unavoidable consequence of producing fresh garlic and that it does not require significant further processing after the split-off point. Based on these findings, we conclude that the sprouts are a by-product of fresh garlic rather than a co-product. Consequently, we have not allocated the factors of production among the two products in our margin calculations.

We have not located any publicly available information regarding the pricing of garlic sprouts in India (or elsewhere) since completion of the Preliminary Results. The petitioners provided no suggested price for us to use in the final results. Having reviewed the MSFTI data, however, we find that the sprouts correspond most closely to onions, shallots, leeks, or other alliaceous vegetables. Like leeks, garlic sprouts are a green vegetable that is added to a dish to enhance the flavor of the dish. Therefore, we have valued the sprouts based on all of the data under the tariff category HTS 0703, the category for imports of onions, shallots, garlic, leeks, and other alliaceous vegetables, fresh or chilled, for the final results. We recognize that, for the time period under consideration in this review, the only

data listed under this category was for imports of garlic. Nonetheless, this category contains the products that correspond most closely to garlic sprouts and, accordingly, it is more appropriate to select the data under this category than to base the value on imports of products that correspond less closely to the sprouts.

7. Valuation of Urea

Comment 11: The petitioners argue that the Department should base the value of urea on data from the Indian journal Chemical Weekly as opposed the MSFTI data the Department used in the Preliminary Results. They assert that the Chemical Weekly data, which they provided to the Department in an August 29, 2002, submission, is more contemporaneous than the MSFTI data because the data in the Indian journal covers the entire POR instead of, as in the case of the MSFTI data, only five months of the POR. The petitioners assert that the Chemical Weekly data is equal in quality to the MSFTI data and, because of potential misclassification errors in the MSFTI data, the Chemical Weekly data is more specific than the MSFTI data.

FHTK submitted no rebuttal comments.

Department's Position: The petitioners' argument reflects the Department's policy of selecting surrogate values for factors based on their contemporaneity, specificity, and quality. In the Final Determination at Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China, 62 FR 61964, 61987 (November 20, 1997) we clarified that:

> It is important to emphasize, however, that our overarching mandate is to select the "best" available data (see 19 U.S.C. 1677b(c)(1)), which involves weighing all of the relevant characteristics of the data, rather than relying solely on one or two absolute "rules." Thus, for example, the most specific data may not be the most contemporaneous, the most reliable, or from the selected surrogate country. There is

> no set hierarchy for applying the above-stated principles, nor will parties always agree as to the reliability of certain data or the relevance of certain facts or assertions. Thus, the Department must weigh available information with respect to each input value and make a product-specific and case-specific decision as to what the "best" surrogate value is for each input. . . .

In the Preliminary Results, we based our valuation of urea on MSFTI data under the tariff heading HTS 3102.1000. See Memorandum to the File regarding the factors valuation for the preliminary results of the administrative review, page 3 (August 2, 2002). This tariff heading contains imports of "urea, whether or not in aqueous solution." The more generalized heading, HTS 3102, contains "mineral or chemical fertilizers, nitrogenous." Thus, the data upon which we based our valuation was import data for urea for use as fertilizer. The Chemical Weekly data that the petitioners submitted in August 2002 lists the market price for "Urea (Technical)" as well as the price for other organic chemicals. Thus, the price in this data is not use-specific.

Given these circumstances, we find that the two data sources provide equally reliable information. Moreover, when the value resulting from the Chemical Weekly data is reduced by an amount for domestic sales and excise taxes, the values derived from both data sources are essentially the same surrogate value. See Memorandum to the File regarding the factors-of-production valuation for the final results, pages 2-3 (January 21, 2003). Therefore, we have continued to rely on the MSFTI data for our final results rather than basing the surrogate value on two sources.

8. Valuation of Potassium Fertilizer

Comment 12: The petitioners argue that the value the Department selected for potassium fertilizer is deficient in two respects. First, they assert that the value should have been based upon the MSFTI data of four tariff headings under the tariff category HTS 3104 (for mineral or chemical

fertilizers, potassic) instead of two of the headings because FHTK did not specify the type of potassium fertilizer that it used on its garlic crop. Second, the petitioners comment that the data for that value reflects only the first five months of the POR but that the MSFTI data they submitted in August 2002 reflect the last seven months of the POR, such that the latter information is more contemporaneous to the POR. They assert that, as the most contemporaneous data on the record, it should be the basis for the valuation of the fertilizer.

FHTK submitted no rebuttal comments.

Department's Position: We agree with the petitioners that it is appropriate to value potassium fertilizer using all of the MSFTI data listed for the tariff category HTS 3104.

We have reviewed FHTK's questionnaire responses and found that the company only identified the factor as "potassium fertilizer" in these submissions. Although we reviewed the purchase and inventory documentation of the fertilizer at verification, we received no details of the specific nature or chemical make-up of the input. Without this additional detail, we cannot ascertain the tariff heading under the category HTS 3104 to which the fertilizer FHTK used most closely corresponds. Thus, we conclude that selecting the data from all of the tariff headings is the most appropriate course of action.

Because MSFTI data for this category that covers the entire POR is on the record, we have used all of the data in our final results to calculate the factor value for potassium fertilizer.

9. Calculation of Surrogate Financial Ratios

Comment 13: The petitioners state that, as it did in the Preliminary Results, the Department should calculate the surrogate financial ratios based on the 1999-2000 financial statements of three Indian mushroom producers. They comment that FHTK expressed its support of the use of the

financial information of these three companies in the prior segment of this proceeding. In addition, the petitioners assert that reliance on this information is appropriate because of the similarities between the production of garlic and mushrooms and because, like FHTK, the three mushroom companies export their product to the United States and incur costs associated with adherence to U.S. food and health standards.

FHTK submitted no rebuttal comments.

Department's Position: We reviewed the issue of the financial information upon which to rely for calculation of the surrogate ratios in response to Issues and Decision Memorandum at Comment 5 in Fresh Garlic from the People's Republic of China; Final Results of New Shipper Review, 67 FR 72139 (December 4, 2002) (Jinan Yipin Review). We concluded in that review that the most appropriate information was the 2000-2001 financial statements of the three Indian mushroom producers. Because the new-shipper review and this review cover the identical POR, we have placed the updated information on the record of this segment of the proceeding and have calculated the surrogate ratios based on this information. See Memorandum to the File regarding the factors-of-production valuation for the final results, page 5 (January 21, 2003).

As in the new-shipper review, we have included the line item "Infotech Division Expenses" that appears in the financial statement for Himalya International Ltd. in our calculation of the surrogate ratio for selling, general, and administrative expenses. This item reflects an expense that relates to multiple food products, not solely to mushrooms. See Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review, 66 FR 42507 (August 13, 2001) and accompanying Issues and Decision Memorandum at Comment 17. Therefore, it is appropriate to include it in our

calculation of selling, general, and administrative expenses, as they are general and administrative expenses incurred by a producer of comparable merchandise. See 19 CFR 351.408(c)(4) (2001).

10. Valuation of Electricity

Comment 14: The petitioners argue that the most appropriate surrogate value for electricity is the value that the Department selected in 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) (CPMs from the PRC). The petitioners assert that this value, which is based on the electricity costs incurred by three Indian companies, is preferable to a value based on country-wide prices because of its specificity. They argue that, because the costs were drawn from audited financial statements of the Indian companies, there is no doubt as to their quality. Furthermore, the petitioners assert that the value is more contemporaneous than the 1995-1997 value which FHTK suggested because the financial statements of the Indian companies cover the 1999-2000 period. They ask that, in the event that the Department continues to value electricity using data from the International Energy Agency's Energy Prices & Taxes: Quarterly Statistics (IEA) as it did in the Preliminary Results, that the Department use data from a later edition of that publication in the final results so as to reflect prices that are more contemporaneous to the POR.

FHTK submitted no rebuttal comments.

Department's Position: After reviewing the sources of data available to value electricity and considering previous determinations, we find that the most appropriate data on which to base the surrogate value for electricity is provided in the 1999/2000 Teri Energy Data Directory and Yearbook (Teri). We relied upon this value in the recently completed Jinan Yipin Review and accompanying

Issues and Decision Memorandum at Comment 6, because of its specificity, quality, and contemporaneity to the POR. See also Brake Rotors from the People's Republic of China: Preliminary Results of the Sixth Antidumping Duty New Shipper Review, 67 FR 38251 (June 3, 2002).

In this review, FHTK reported usage of electricity to irrigate the garlic crop but not to process the garlic at the processing facility. We confirmed this usage at verification. See verification report for FHTK, pages 15-16 (November 5, 2002). Thus, we find that the Teri data is more specific than the other data placed on the record because it provides rates specific to usage for agricultural irrigation. The data in the later edition (Second Quarter, 2002) of the IEA publication, submitted by the petitioners for the record on August 29, 2002, is slightly more contemporaneous than the Teri data but pertains to industrial rates (i.e., usage in factories). Because the Teri data best satisfies our criteria of specificity, quality, and contemporaneity, we have selected it for valuation of electricity in the final results.

In response to the petitioners' suggestion that we select the value used in CPMs from the PRC, which was company-specific, we use country-wide data whenever possible, and we only resort to the use of company-specific rates when country-wide data is not available. Moreover, it is likely that the electricity costs incurred by the Indian companies in that case related to industrial usage so it is less appropriate to use in this case than the Teri data.

11. Valuation of Cartons

Comment 15: The petitioners argue that the Department should base the value for cartons on the MSFTI data listed under the tariff heading HTS 4819.1009, for cartons and cases of corrugated paper and paperboard, rather than the data listed under tariff heading HTS 4819.1001, for boxes of

corrugated paper and paperboard, as it did in the Preliminary Results. The petitioners assert that FHTK characterized the containers in which it packed its fresh garlic as "corrugated paper cartons" in comments that it submitted on June 13, 2002, and that the tariff heading that corresponds most closely to this characterization is that of HTS 4819.1009. They assert that, accordingly, the Department should use the data under this tariff heading to value the factor. In addition, the petitioners assert that the packaging in which the fresh garlic is placed must be sufficiently strong to protect the product from being crushed or damaged during shipment and, thus, the cartons must be of high quality and high value. The petitioners state that this conclusion also leads to the determination that the data under HTS 4819.1009 corresponds best to the cartons FHTK used. The petitioners ask that, in the event that the Department continues to calculate a value based on the data for corrugated boxes, that it weight-average this data with the data for corrugated cartons and cases.

FHTK submitted no rebuttal comments.

Department's Position: We observed the packing of the fresh garlic at verification and found that the garlic was placed in 30-pound cardboard boxes. See verification report for FHTK (November 5, 2002), page 8. These boxes did not resemble corrugated cases. Thus, we conclude that the tariff heading HTS 4819.1001, for boxes of corrugated paper and paperboard, most closely corresponds with the "cartons" that FHTK uses and, accordingly, we have used the data under this heading for valuing the cartons in our final results.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of the review and the

final dumping margins for all of the reviewed firms in the Federal Register.

Agree _____ Disagree _____

_____
Faryar Shirzad
Assistant Secretary
for Import Administration

_____
Date