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G1O3: The Garlic Team

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

FROM: Jeff May
Deputy Assistant Secretary
for Import Administration, Group I

SUBJECT: Issues and Decision Memorandum for the Administrative Review and New Shipper Reviews of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China

Summary

We have analyzed the case and rebuttal briefs of interested parties in the administrative review of Jinan Yipin Corporation, Ltd., and Shandong Heze International Trade and Developing Company and the new shipper reviews of Jining Trans-High Trading Co., Ltd., and Zhengzhou Harmoni Spice Co., Ltd., of the antidumping duty order on fresh garlic from the People's Republic of China (PRC). The period of review (POR) for the administrative review and the new shipper reviews is November 1, 2001, through October 31, 2002. As a result of our analysis, we have made changes in the margin calculation for all four companies. 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 these reviews:

1. Valuation of Garlic Seed

2. Valuation of Water

3. Valuation of Cartons

4. Valuation of Insecticide

5. Valuation of Ocean Freight

6. Application of Surrogate Financial Ratios

7. Selection of Surrogate Financial Information

8. Factor Usage Rates for Production of Subject Merchandise

9. Comments With Respect to Shandong Heze

10. Comments With Respect to Harmoni

11. Comments With Respect to Jinan Yipin

Background

On December 10, 2003, the Department published the preliminary results of the administrative review and new shipper reviews 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 and New Shipper Reviews, 68 FR 68868 (December 10, 2003) (Preliminary Results). We invited parties to comment on our preliminary results. With respect to the preliminary results of the administrative review, we received comments from the petitioners and the respondent Jinan Yipin Corporation, Ltd. (Jinan Yipin), and rebuttal comments from the petitioners, Jinan Yipin, and Shandong Heze International Trade and Developing Company (Shandong Heze). With respect to the preliminary results of the new shipper reviews, we received comments from the

petitioners and the respondent Zhengzhou Harmoni Spice Co., Ltd. (Harmoni), and rebuttal comments from the petitioners, Harmoni, and Jining Trans-High Trading Co., Ltd. (Trans-High).

Since the publication of the Preliminary Results the following events have occurred. On February 3, 2004, we published a notice extending the time limit for the final results to May 17, 2004. See Fresh Garlic From the People's Republic of China: Notice of Extension of Time Limit for the Final Results of Antidumping Duty Administrative and New Shipper Reviews, 69 FR 5132 (February 3, 2004). On April 23, 2004, the petitioners submitted new factual information concerning one of the respondents. While normally we would not consider accepting new factual information at such a late stage in the review, in this situation, given the nature of the allegations within the submission, we considered it appropriate to accept the information. See April 30, 2004, memorandum from Mark Ross, Program Manager, to Laurie Parkhill, Office Director. Because we required additional time to evaluate this new information and a number of other complex factual and legal questions that related directly to the assignment of dumping margins in this case, on May 13, 2004, we published a notice extending the time limit for the final results to June 7, 2004. See Fresh Garlic From the People's Republic of China: Notice of Extension of Time Limit for the Final Results of Antidumping Duty Administrative and New Shipper Reviews, 69 FR 26548 (May 13, 2004).

Discussion of the Issues

1. Valuation of Garlic Seed

Comment 1: Jinan Yipin and Harmoni argue that the Department should value garlic seed by using data from the Indian import statistics instead of domestic prices for three high-yielding Indian varieties of garlic. The respondents argue that the Department's reliance on information contained in an

unpublished market research report submitted by the petitioners contradicts case precedent and Departmental practice and policy. They cite the decision by Court of International Trade (CIT) in Yantai Oriental Juice Co. V. United States, Slip Op. 02-56, 2002 WL 1347018 (CIT June 18, 2002) (Yantai Oriental), in support of the proposition that the Department is required to corroborate information provided in a private research report prior to relying on it for selection of a surrogate value. They also cite the CIT's finding in Yantai Oriental (Slip Op. 02-56 at 5-6) that it was insufficient for the Department to base its selection on conclusory statements provided in the market research report and that, instead, the Department was obligated to explain the connection between claimed factual information and its surrogate selection. The respondents assert that, although the Department made the tie between corroborated information concerning the physical characteristics of the Indian varieties of garlic and its selection, it did not do so with regard to the characteristics of the subject merchandise and, thus, it erred in its reliance upon conclusory statements in the report that drew comparisons between the Indian varieties and the subject merchandise. The respondents also cited, as reference to Departmental practice and policy, Honey From the People's Republic of China: Final Results of Antidumping Duty New Shipper Review, 68 FR 62053 (October 31, 2003) (Honey Final), and accompanying Issues and Decision Memorandum at Comment 2, in which the Department opted not to use pricing data contained in a market research report that had little or no supporting documentation.

The respondents argue that the record does not establish that the subject merchandise is similar to the three Indian varieties of garlic. They comment that the market research report indicates that the Indian varieties were developed scientifically by the National Horticultural Research and Development Foundation (NHRDF) in contrast to the seed used by Jinan Yipin, which was described by that

company in a supplemental questionnaire response as neither obtained from a laboratory nor modified scientifically. They comment that the petitioners' argument presumes that the sizes of the grown varieties will be identical to those of the seed but that the record shows that the size of the bulbs are the result of several factors, including agricultural practices. The respondents contend that the Department based its surrogate selection on the yield of the Indian varieties, which it found to be similar to that of the subject merchandise, and that the information that the petitioners provided regarding yields of the varieties was unsubstantiated and inaccurate.

The respondents argue that the selected domestic prices, taken from NHRDF price lists submitted by the petitioners, are specific to one organization and one geographic area and that, therefore, the use of these prices are contrary to Departmental practice. They cite Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty New Shipper Review, 67 FR 72139 (December 4, 2002) (Jinan Yipin New Shipper Review), and accompanying Issues and Decision Memorandum at Comment 6 in support of the proposition that the Department prefers the use of country-wide data to the use of company-specific rates. They also comment that the Northern region of India, the region in which the three varieties of garlic are grown, produces a lower volume of garlic than the main garlic-producing regions in the Western and Central states of India and that, consequently, the NHRDF prices are not country-wide values.

The respondents argue that the Department should not rely on the NHRDF prices in its selection of a surrogate value because they are not market prices. Jinan Yipin and Harmoni argue that, because the NHRDF is a government-sponsored research center, its prices are not affected by market competition and the aberrational high prices of the three varieties at issue do not reflect the realities of

the garlic market in India. They argue that use of such prices in the selection of a surrogate value is inconsistent with legal precedent and Departmental practice.

Finally, the respondents assert that the Department should use Indian import data to value garlic seed in keeping with the prior administrative review, Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review in Part, 68 FR 4758 (January 30, 2003) (Seventh Administrative Review), in which it valued the seed using this data. They comment that, as in the prior review, the petitioners have neither demonstrated that the seed used by the respondents is similar to the three Indian varieties nor that the import data is unreliable.

The petitioners respond that it is appropriate for the Department to value the seed using the NHRDF prices, as it did in Jinan Yipin New Shipper Review. They assert that, in contrast to the Seventh Administrative Review and the Jinan Yipin New Shipper Review, for the current segments of this proceeding they submitted extensive documentation of the similarities between the high-yielding Indian varieties of garlic and the subject merchandise. They comment that the respondents had ample opportunity to refute this documentation with other published information but did not do so. The petitioners argue that the record shows clearly that the diameter of the bulbs of the three Indian varieties of the selected information match that of the subject merchandise; they cite the responses of two companies and the verification report of a third company that shows that, for each company, the subject merchandise had a diameter in excess of five centimeters. They state further that the Department was correct to base its valuation on this critical characteristic, because, as shown by the record, large bulbs can only be produced with the use of large bulbs as seed.

The petitioners argue that, similarly, the record shows that the subject merchandise consisted of bulbs with a small number of large cloves, a characteristic shared with the high-yielding Indian varieties and not with the other Indian varieties. They counter that the source of the information on crop yields, the United Nations Food and Agriculture Organization, was a reliable source and that the Department was correct in its selection of the prices of higher-yielding varieties in order to account for the typically high yields of Chinese garlic crops.

The petitioners comment that the record shows that Jinan Yipin used a high-yielding, high-quality seed for its POR crop and that, on the basis of these qualities, its seed should be compared to the three high-yielding Indian varieties. They assert that the three varieties are more comparable to the subject merchandise than garlic reflected in the Indian import statistics or other Indian varieties, which tend to be of lower quality.

The petitioners refute the claims made by the respondents concerning the NHRDF prices. They assert that, because the NHRDF is the sole supplier of the three high-yielding varieties within India, its prices are country-wide. They add that, because the NHRDF prices are the only prices available for these varieties, the prices are reflective of the entire market for these products in India. They also assert that the fact that the NHRDF is a government-sponsored research center does not prevent it from selling seed in the market at market prices. The petitioners comment that the respondents have provided no evidence that the NHRDF price lists are not responsive to market forces. They also assert that the Department was correct to base its price selection on the similarities between garlic produced by the seed and the subject merchandise instead of a comparison of the production levels of the garlic-producing regions of India and the PRC.

The petitioners contend that, unlike in the Honey Final, the pricing information has been corroborated through the submission of published NHRDF price lists. They state that, moreover, the Department rejected pricing data in the earlier review on the basis that it may have been distorted by non-market forces and that the information was not contemporaneous to the POR. They add that, in the current review, the respondents have provided no evidence of non-market forces affecting the prices and comment that the prices cover the POR.

Finally, the petitioners argue that it would be inappropriate for the Department to rely upon the Indian import statistics for selecting a surrogate value because this data is skewed by the PRC's dominance in the marketplace. The petitioners assert that Chinese imports (including imports of garlic transshipped through Hong Kong) account for more than 95 percent of India's imports of garlic and that the low prices of the Chinese imports depress the market price for all imports of garlic into India.

Department's Position: We discussed our selection of a value for seed at length in the factors-valuation memorandum for the Preliminary Results. In that memorandum, we reviewed the numerous comments made by the petitioners and four of the respondent companies. We recounted that, in response to comments by Jinan Yipin and Harmoni, on August 1, 2003, we issued a request to the petitioners to place the source information for their unpublished market research report on the record. We explained that the petitioners complied with the request by placing much of this source information on the record on August 8, 2003, and that Appendix 2 of the submission included the information summarized in the chart on pages 14 and 15 of the market research report. We stated that the information in this chart permitted us to distinguish the three high-yield varieties from the traditional varieties of Indian garlic and to establish the similarities of the three varieties to the merchandise under

review. We concluded that, because the NHRDF pricing information was more product-specific than the Indian import data, it was the information that we selected for the surrogate valuation of seed.

Upon review of the petitioners' June 30, 2003, factor-valuation submissions and its August 8, 2003, submission, we find that the documentation in Appendix 2 of the latter submission appears in Exhibit 4 of the June 30, 2003, submission for the administrative review and Exhibit 5 of the June 30, 2003, submission for the new shipper reviews. Thus, the petitioners submitted key supporting documentation for their market research report along with the report itself. This documentation, which is a NHRDF technical bulletin entitled "Garlic Cultivation in India", contains descriptions of various varieties of garlic. The descriptions provide ranges for bulb diameter and for the number of cloves per bulb. The petitioners appear to have incorporated this information into the summary chart on pages 14 and 15 of the market research report. Therefore, we find that information in the chart concerning these two physical characteristics is corroborated by publicly available information.

The bulb diameter and the number of cloves per bulb provided the basis for our conclusion that three of the varieties in the chart were similar to the subject merchandise. We relied on these characteristics because we are familiar with the average bulb diameter and number of cloves per bulb of the subject merchandise. The petitioners assert that the record shows clearly that the diameter of the bulbs of the three Indian varieties of the selected information match that of the subject merchandise. In support of their claim, they cite Shandong Heze's February 19, 2003, questionnaire response at Exhibit A-4, Jinan Yipin's June 10, 2003, supplemental questionnaire response at Exhibit 2, and Memorandum to the File from Brian Smith entitled "Verification of the Response of Jining Trans-High Trading Co., Ltd." dated December 1, 2003 (Trans-High verification report), at 9 to show that the subject

merchandise had a diameter in excess of five centimeters for three companies. At the verification of Jinan Yipin's factors-of-production data, we documented the average number of cloves per bulb as being fourteen. See Memorandum to the File from Jennifer Moats entitled "Fresh Garlic from the People's Republic of China - Jinan Yipin Corporation, Ltd. - Verification of Jinan Yipin's Factors-of-Production Data" dated March 10, 2004 (Jinan Yipin Verification Report), p. 6.

For the Preliminary Results, we selected the pricing information for the Agrifound Parvati, Yamuna Safed, Yamuna Safed-2, Yamuna Safed-3, and Agrifound White varieties (which, together, we considered to constitute three high-yielding varieties). Upon closer review of the bulb diameter and number of cloves per bulb of each variety, we find that only the Agrifound Parvati and the Yamuna Safed-3 varieties match the subject merchandise closely in these key characteristics. Thus, for the final results, we have selected the pricing information of these two varieties for use as the surrogate value for seed. This narrowing of the selection does not change the amount of the value for the final results because the prices for all of the varieties we used in the preliminary results were identical.

We did not base our selection of pricing data on the production yields of different varieties of garlic because we considered the record insufficient to draw comparisons between these yields and the yields of the respondents' various POR crops. Further, although the market research report provided summaries of the source documentation and conclusory statements, the information was not the basis for our selection of pricing data. The basis for our selection of pricing data was the descriptive information provided in the NHRDF technical bulletin and the information provided by the respondents in their questionnaire responses and at verification.

The respondents ask us to disregard the prices of the Indian varieties on the basis that the

physical characteristics of the grown garlic may not match that of the seed. It is our practice and policy to base surrogate valuations on product-specific information. The pricing information of the two selected varieties represent the most product-specific information on the record. The alternative information, Indian import data, is considerably less product-specific because we cannot ascertain the quality or nature (i.e., bulbs, loose cloves, etc.) of the garlic products entered under the applicable HTS category. In the Seventh Administrative Review, we selected the import data over the NHRDF pricing data submitted by the petitioners. In this review, however, they submitted detailed information about the seed varieties that enabled us to draw significant similarities between certain pricing information from NHRDF and and the subject merchandise.

We do not agree with the respondents that the NHRDF prices are the equivalent of company-specific amounts. In Jinan Yipin New Shipper Review at Comment 6 of the Issues and Decision Memorandum, we concluded that we could not use the electricity rates incurred by a specific company in India as the basis for our surrogate value for that input. By contrast, the NHRDF price lists reflect the sale prices for finished goods and not seed costs incurred by that organization in producing a finished product. Moreover, we have no basis on which to conclude that the NHRDF prices are not market prices. As asserted by the petitioners, the respondents have not submitted evidence that would indicate that these prices are subsidized by the Indian government or otherwise not responsive to market forces. Without such evidence, we cannot conclude that the prices are not country-wide, market-based prices.

2. Valuation of Water

Comment 2: Jinan Yipin and Harmoni argue that the Department has double-counted the cost

for water by valuing it separately as an input. The respondents indicate that the Department cited the CIT's decision in Pacific Giant, Inc. v. United States, Slip Op. 02-140 (CIT December 2, 2002) (Pacific Giant), and rejected the respondents' argument that water should not be valued given that they did not incur costs for the input. The respondents contend, however, that the Pacific Giant ruling is contrary to the CIT's decision in Rhodia, Inc. v. United States, No. 00-08-00407, Slip Op. 01-138 (CIT November 30, 2001) (Rhodia, Inc.), which holds that "the purpose of the statute is to construct the product's normal value as it would have been if the NME country were a market economy." The respondents argue that the Department should not value water because if Jinan Yipin and Harmoni were in a market economy, they would only incur the electricity costs of pumping the water from the wells. The respondents argue that applying a surrogate value to water in this instance does not reflect the actual experience of the Chinese producers and results in a far less accurate calculation of normal value.

Respondents assert that, notwithstanding the precedent in Pacific Giant, the Department should not assign a surrogate value for water for another fundamental reason. Respondents claim that the water expense of Parry Agro Industries Limited (Parry Agro) is included in the Department's calculation of factory overhead or SG&A. They cite Fuyao Industry Group v. United States, No. 02-00282, Slip Op. 03-169 (CIT December 18, 2003) (Fuyao), where the CIT remanded the Department's decision to value water separately because there was no evidence that the water costs were not part of factory overhead. Respondents argue that the Department should not value water separately pursuant to the CIT's decision in Fuyao and its established policy to avoid double-counting.

The petitioners argue that the Department has not double-counted the cost for the water by

valuing it separately as an input. The petitioners comment that not all respondents agree with Jinan Yipin and Harmoni that water should not be valued separately. Further, the petitioners point out that both Jinan Yipin and Harmoni declined the opportunity to suggest a value for water in their surrogate-value submissions, claiming that they did not incur costs for the input. Citing Pacific Giant, the petitioners contend that the Department's decision to value water separately was proper and in accordance with past practice. The petitioners argue that in Pacific Giant the Department assigned a value to well water obtained by the respondent at no cost properly, instead of basing the value on the cost of the electricity used to pump the well water. The petitioners contend that the same situation exists in the current review and that the Department was correct to value the water used during the POR to irrigate the fresh garlic at issue and not the energy inputs used to obtain the water. The petitioners refer to Pacific Giant at 1346 and comment that the CIT decided in the Department's favor because it found that section 773b(c)(3) of the Tariff Act of 1930, as amended (the Act), clearly contemplated the calculation of normal value based on the quantity of inputs for factors of production rather than the costs associated with the production of inputs. As such, the petitioners contend, whether a respondent actually incurs a cost for a particular input is irrelevant.

The petitioners point out further that in Pacific Giant the CIT found that water constituted a factor of production because of its use for "more than incidental purposes" in the production of the subject merchandise. They also comment that the CIT found it reasonable to value water separately in light of the fact that the Department was unable to determine whether the respondents had included water costs in their factory overhead. The petitioners argue that there is no evidence to suggest that Parry Agro included water-related expenses as part of its factory overhead or SG&A or even used

irrigation water in the production of tea. The petitioners comment that Parry Agro's financial report makes no mention of water. They state that one would expect the use of water to be disclosed in such a detailed financial report if it were a significant factor in the production of tea.

The petitioners comment on the respondents' reference to Fuyao. In that case, the petitioners argue, the CIT found that the amount allocated to "stores and spare parts" was sufficiently large to accommodate a significant input such as water. As such, the CIT instructed the Department to demonstrate on remand that its decision to value water as a separate factor of production, rather than as part of factory overhead, did not result in double-counting. The petitioners contend that, if water usage was vital to the production of tea, then Parry Agro would have reported it separately as it did for firewood, coal, and oil. As such, the petitioners argue that the Department should not change its methodology for the separate valuation of water for the final results.

Department's Position: We have continued to value water separately as a factor of production for the final results and have determined that doing so does not result in double-counting. In Pacific Giant, the CIT stated,

> First, the statute plainly focuses on the quantity of inputs for factors of production rather than the costs associated with them. It states that "the factor of production utilized in producing merchandise include, but are not limited to – (A) hours of labor required, (B) *quantities* of raw materials employed (C) *amounts* of energy and other utilities consumed, and (D) representative capital cost including depreciation." 19 U.S.C. §1677b(c)(3). Second, water constitutes a factor of production in this case because of its use for more than incidental purposes. *See Decision Memo* at 22 (emphasis in original).

As the CIT stated in Pacific Giant, the statute specifies clearly that, for the purposes of constructing normal value in a non-market economy case, the Department constructs the factors of production based on the quantities of the inputs, not the costs associated with those inputs. Thus,

regardless of whether respondents purchased or collected water, the Department still uses the quantity of raw materials employed in its calculation of constructed value. Moreover, water is a direct factor of production of garlic because irrigation of the crops requires large quantities of water, and this is clearly different from water used by a company for incidental purposes.

The argument by Jinan Yipin and Harmoni that the CIT's decision in Rhodia, Inc. is contrary to Pacific Giant does not recognize the differences between the two cases; Rhodia, Inc. speaks to what types of information and what sources should be used to value most accurately the factors of production rather than whether a factor of production should be valued. In contrast, Pacific Giant speaks to the fact that the factors of production are based on the quantities of the inputs and not the cost associated with those inputs.

Contrary to the reference by Jinan Yipin and Harmoni to Fuyao in support of their assertion that the Department has double-counted water, in that case the CIT did not remand the Department's decision to value water separately. Rather, it directed the Department to demonstrate that its decision to value water as a separate factor of production, rather than as part of factory overhead, did not result in double-counting. There is no evidence in the financial statements of Parry Agro, the surrogate company we were using in these reviews, in this proceeding, to suggest that the company incurs a cost for water. Nor is there any evidence on the record that irrigation water is essential to the production of tea in India. Moreover, as the CIT has not yet ruled on the Department's remand redetermination in Fuyao, we have continued to value water separately.

3. Valuation of Cartons

Comment 3: Jinan Yipin and Harmoni argue that the Department should value the cartons in which the garlic is packed using price quotes of Indian carton manufacturers instead of data from the Indian import statistics. They argue that the Indian import statistics are distorted in the sense that the majority of entries under the selected subheading of HTS 4819.1001 are for entries of non-packing boxes, such as printed boxes for shoes or DVDs. The respondents also assert that the Indian import statistics are distorted because, as shown by trade intelligence data, some of the imports were sent by air, whereas the record shows that the cartons used by Jinan Yipin were produced in the PRC. They state that, in the preliminary results, the Department should have found that the Indian import statistics were distortive because it did not know whether the respondents had used cartons imported by air. They state that, by relying on the Indian import statistics, the Department is imputing costs to Chinese garlic producers that they would not incur if they were located in a market economy.

Jinan Yipin and Harmoni argue that, in the past, the Department has stated a preference for using domestic prices and that its reasoning for rejecting the domestic price quotes for cartons is not persuasive. Specifically, they assert that the Department's reasoning, that the price quotes were not contemporaneous to the POR and that the Department had no way to determine whether they were representative of a range of prices for cartons during the POR, was not persuasive in light of the fact that the domestic quotes were more specific to the boxes used by the respondents and not distorted by air freight costs. In support of their proposition, the respondents cite Yantai Oriental at 21 and 26, where the CIT rejected the Department's selection of more-contemporaneous Indian import data to value a coal input because that there was no indication that the Indian domestic coal market was

distorted and there was no indication that the Indian import data values best approximated the cost incurred by the respondents.

Finally, Jinan Yipin and Harmoni argue that Synthetic Indigo from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, and accompanying Issues and Decision Memorandum at Comment 11, 68 FR 53711 (September 12, 2003) (Synthetic Indigo), cited by the Department in its FOP memorandum, does not support the use of the Indian import statistics because there was no evidence in that review that the Indian import statistics were distorted and, therefore, the domestic quotes did not constitute the only reasonable surrogate value on the record.

The petitioners contend that Jinan Yipin and Harmoni have not demonstrated that the Indian import statistics are distorted. They point out that the trade intelligence data submitted by the respondents may or may not be a comprehensive listing of all of the entries listed under the selected HTS subheading. They add that the respondents have not submitted information to establish that Indian import statistics under subheading HTS 4819.1009, the subheading suggested by the petitioners for valuation of cartons, is distorted. The petitioners comment that the respondents' domestic price quotes are not pre-existing, published quotes but ones that the respondents obtained for purposes of the administrative and new shipper reviews and that, in light of the fact that the record contains Indian import statistics of reasonably good quality and which cover the POR, the quotes do not constitute the best information available. They assert that the Department's selection of the Indian import statistics to value the cartons is supported by Synthetic Indigo and that, in keeping with that decision, the Department should use Indian import statistics to value the cartons due to their contemporaneity to and coverage of the POR.

Department's Position: For the Preliminary Results, we reviewed the trade intelligence data submitted by Jinan Yipin and Harmoni closely and found that it was not sufficiently detailed to establish that the imports consisted of specialty boxes. In other words, we found that the descriptions of the various boxes were not sufficient for us to conclude that they differed significantly from the boxes or cartons used to pack the subject merchandise. We also found that, because Jinan Yipin and Harmoni had not provided documentation to establish that their domestic carton suppliers had not imported products into the PRC by air, we could not find the Indian import statistics to be distorted on the basis that some imports were sent by air.

For these final results, Jinan Yipin has submitted certificates from each of its suppliers stating that they manufactured the cartons supplied to Jinan Yipin at their factories using raw material inputs that they purchased from the domestic (PRC) market. The respondents did not submit additional price-quote information. Hence, the record contains the price quotes of four Indian carton manufacturers that we considered for the preliminary results. All of these quotes are dated June 2003 and thus post-date the POR by eight months.

We still conclude that the description of the boxes contained in the trade intelligence data is not sufficiently detailed for us to determine that the imports of boxes into India differ significantly from the boxes used by the respondents to pack subject merchandise. Moreover, because the trade intelligence data and the Indian import statistics do not cover a concurrent period of time, we are unable to ascertain the extent to which the trade intelligence data is applicable. Further, the trade intelligence data is not detailed or comprehensive enough to show that the Indian import statistics are unreasonably distorted due to the inclusion of specialty boxes in the category or charges for air freight.

In the Preliminary Results, we discussed Comment 11 of the Issues and Decision Memorandum of Synthetic Indigo, in which the Department found that the use of a value derived from the Indian import statistics for imports of polyethylene sacks and bags was preferable to use instead of a value based on price quotes of Indian suppliers of plastic bags. We found in that review that, consistent with our past practice, the Indian import statistics constituted the best available information on the record because it was contemporaneous with the POR, representative of a range of prices during the POR, and sufficiently specific to the input being valued. The Department acknowledged that the import category was not as product-specific as the price quotes for plastic bags. We concluded in Synthetic Indigo, however, that we were not able to determine that the quotes, which were dated anywhere from seven to ten months after the end of the POR, were representative of the range of prices for the input during the POR.

In light of the reasoning in Synthetic Indigo and the factual considerations of the current review, we found in the Preliminary Results that the Indian import statistics constituted the best available information because the data was contemporaneous with the POR, representative of a range of prices throughout the POR, and sufficiently specific to the product. Because we do not find the import data to be distorted after consideration of the certifications from the PRC carton suppliers and because no additional domestic price information has been added to the record, we do not find a basis to revise our reasoning in Preliminary Results. The respondents have cited Yantai Oriental, in which the CIT did not support the Department's conclusion that Indian import statistics for steam coal was the best available information because there was no indication that the domestic Indian coal market was distorted such that the use of Indian import statistics were preferred and there was no indication that the use of

imported coal values "best approximate[d] the cost incurred" for production of the subject merchandise. Yantai Oriental, Slip Op. 02-56 at 24. However, the Department had selected Indian import statistics over domestic prices, as opposed to price quotes, in that case. Moreover, in Yantai Oriental both the import data and the domestic price data preceded the POR.

Given the circumstances in the current review, we find it appropriate to follow the precedent established by Synthetic Indigo. Accordingly, we have made no changes to our valuation of cartons and have used the Indian import statistics as the basis of this valuation.

4. Valuation of Insecticide

Comment 4: Jinan Yipin and Harmoni claim that in the Preliminary Results the Department valued the insecticide Phoxim using HTS heading 3808.10 for retail insecticides. The respondents claim that they provided Indian import statistics for HTS subheading 2934.9019, which corresponds more closely to Phoxim. The respondents state that they have also provided data showing the chemical names for Phoxim, which demonstrate that HTS subheading 2934.9019 corresponds more closely to Phoxim. Further, respondents state that the Department should exclude aberrational or unreliable data from the HTS number it uses to value insecticide by removing data concerning imports from certain countries.

The petitioners contend that the respondents' arguments are without merit. The petitioners point out that the respondents advocated valuing Phoxim under HTS subheading 3808.30 in their principal surrogate-value submission. The petitioners state that it was only after the Department chose to use the average unit value of the insecticide at the six-digit HTS level did the respondents come forward with the Indian import statistics for an entirely new HTS subheading (2934.9019) covering

other organic chemicals. The petitioners argue that there is no support on the record for the respondents' assertion that HTS subheading 2934.9010 corresponds more closely to Phoxim. The petitioners argue that Phoxim is an insecticide, and is clearly classifiable under HTS 3808.10, covering insecticides rather than under the HTS subheading 2934.9010, which covers miscellaneous organic chemicals. Further, the petitioners argue that the respondents' argument for excluding aberrational data from the Indian import statistics, i.e., excluding data from certain countries, is self-serving and does not have a basis.

Department's Position: Contrary to Jinan Yipin's and Harmoni's assertions, evidence on the record does not demonstrate that the Indian import statistics for HTS subheading 2934.9019 "other organic chemicals" corresponds more closely to the product Phoxim, sold as an insecticide, than Indian import statistics under the heading of retail insecticides.

The Department has reviewed all information on the record and comments received with respect to the valuation of insecticide. Further the Department's research since the Preliminary Results has shown that Phoxim is an organophosphate insecticide. After review of the subheadings under HTS 3808.10, we were able to eliminate those subheadings that are clearly not for organophospate insecticides. The remaining HTS subheadings (3808.1006 and 3808.1016 "Dimethyl-Dichloro-Vinyl-Phosphate," 3808.1025 "Parathion Methyl," and 3808.1026 "Dimethoate Technical") are for types of organophosphate insecticides. See attachment 1 of the Memorandum from **Katja Kravetsky to The File** titled "Factors Valuations for the Final Results of the Administrative Review and New Shipper Reviews" dated June 7, 2004 (Final Results FOP Memorandum). In addition to using the above HTS subheadings, we have included HTS subheading 3808.1029 "Others" in our calculation of the value for

the insecticide used by the respondent companies because imports of organophosphate insecticides could also be included in this subheading. In accordance with our practice we have excluded certain low-quantity import data that appears distortive (i.e., where import volumes from particular countries appear extremely low in comparison to other import volumes for the same input and the value associated with these low import volumes appears to break significantly from the distribution of prices for that input). See Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China, and accompanying Issues and Decision Memorandum at Comment 5, 69 FR 20594 (April 16, 2004), and Final Determination of Sales at Less Than Fair Value: Saccharin from the People's Republic of China, and accompanying Issues and Decision Memorandum at Comment 1, 68 FR 27530 (May 20, 2003). See attachment 2 of the Final Results FOP Memorandum for our calculation.

5. Valuation of Ocean Freight

Comment 5: Jinan Yipin and Harmoni contend that the Department should value ocean freight using the more accurate and comprehensive freight rates now on the record from the Descartes Carrier rate-retrieval database. The respondents assert that the freight quotes from the Descartes database are more comprehensive and accurate than the rates the Department used to value ocean freight in the Preliminary Results. They state that for the Preliminary Results the Department valued ocean freight using a single East Coast and a single West Coast rate quote from one carrier. Respondents contend that, because the quotes reflect a proposed freight rate for a single carrier for a single day, they are not representative of rates throughout the POR and they reflect, at best, the price quote of a single carrier

on that day as opposed to a price more representative of the industry as a whole. The respondents claim that the Department has often declined to use company-specific price quotes for the very reason that they may not be representative of all available prices. They allege that, in this instance, the single company quote is especially suspect because Maersk Sealand is known widely as one of the most expensive freight carriers in the business. The respondents state that Maersk Sealand's price quotes cannot be deemed to be representative of ocean freight as a whole. Further, the respondents argue that there is very little record evidence to support the Department's claim that the two rate quotes it used are representative of the cost for shipping fresh garlic. In addition, the respondents state that the quotes the Department used do not reflect the actual freight route which Jinan Yipin and Harmoni used.

In rebuttal, the petitioners cite their June 30, 2003, submission at page 25 and state that they have recommended that the Department rely on the same source of data for the valuation of ocean freight upon which it relied in the new shipper review of Jinan Yipin. The petitioners assert that, if the Department chooses not to do so, it should continue to use the Maersk Sealand data used in the Preliminary Results. The petitioners argue that the respondents' comment that Maersk Sealand is known widely as one of the most expensive freight carriers in the business is completely unsubstantiated. The petitioners assert that there is no record evidence indicating that Maersk Sealand would charge a higher price for ocean freight. Further, the petitioners argue that the Department relied on the classification of Maersk Sealand shipments with respect to transport of perishable vegetables, which is a sufficient indicator of the general types of products the containers are intended to transport. Moreover, in answer to the respondents' claim that the freight route utilized by Maersk Sealand is not comparable to the trade route utilized by the respondents or their preferred shipping companies used,

the petitioners argue that there is no evidence on the record that would indicate a set freight route that would differ extensively from the one used by Maersk Sealand. The petitioners contend that it is quite difficult to predict an exact trade route used for shipments over an extended period of time and, by relying on the Maersk Sealand quotes, the Department is developing a surrogate value for ocean freight using data from one of the world's largest shipping companies. Finally, the petitioners comment that the respondents suggest that the Department rely on the Descartes database without giving any information as to why that database, in particular, should be chosen. The petitioners claim that the respondents have not provided an objective rationale for choosing the Descartes database from among the various databases listed on the Federal Maritime Commission website. The petitioners assert that, if the values represent the base price offered for shipment as stated in the respondents' January 28, 2004, submission at page 28, then it follows that additional fees are required to calculate the total effective freight charge applicable to commercial transactions.

Department's Position: We stated in the FOP Memorandum for the Preliminary Results that we did not use the ocean freight rate quotes obtained from the Descartes database because they were for non-refrigerated containers. Instead, we obtained and used for the calculation of the surrogate value rate quotes from the Maersk Sealand website for refrigerated containers. Subsequent to the Preliminary Results, Harmoni and Jinan Yipin submitted rates obtained from the Descartes database for refrigerated containers for each month of the POR for shipments from Qingdao, China, to both the east and west coasts of the United States (see January 6, 2004, submission). The rate quotes in the January 6, 2004, submission are for refrigerated shipments of "Chinese Foodstuffs and Mixed Vegetables" and "Fruit and Vegetables" for both the east and west coasts. The commodity text for the west coast

Maersk Sealand quote included refrigerated vegetables such as roots and tubers but we were unable to obtain a commodity text for the east coast quote.

The rate which the petitioners suggest we use covers the period 1998-1999 and, although it was on the summary sheet of surrogate values, we did not use it in the new shipper review nor did we use it in the FOP memoranda for either the preliminary or the final results of that review. See the July 24, 2002, Factors Valuation Memorandum and Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty New Shipper Review, 67 FR 72139 (December 4, 2002). The Department has placed this information on the record for this proceeding. See memorandum to The File, dated June 7, 2004.

Because we do not have access to the Descartes database, we have no knowledge of how information is retrieved from the database. A check of the Descartes website (http://www.etransport.com/rates/etinfo.html) states that the database offers access to rates for more than 5,000 organizations. See Final Results FOP Memorandum, June 7, 2004. As the respondents' submission refers only to "freight forwarder" and does not include the name of the freight forwarder, we are unable to investigate more about these rates further or determine whether these rates are representative of the range of rates available from the database.

Since the preliminary results, we now have a ranged public market-economy rate reported by a respondent for ocean freight in the 11/01/02-04/30/03 new shipper review and used in Fresh Garlic from the People's Republic of China: Preliminary Results of Antidumping New Shipper Reviews, 69 FR 24123 (May 3, 2004). Because this is a rate actually incurred and paid for in a market-economy currency by a respondent in a review of this antidumping duty order on fresh garlic from the PRC, we

have determined that it is the most accurate rate available and selected it as the surrogate value for shipments to the west coast. We adjusted this rate to arrive at a surrogate value for shipments to the east coast. Specifically, we used the ratio of the east coast Maersk Sealand rate to the west coast Maersk Sealand rate (used in the Preliminary Results) to adjust this rate and calculate a rate for the east coast. See Final Results FOP Memorandum.

6. Application of Surrogate Financial Ratios

Comment 6: Jinan Yipin and Harmoni assert that in calculating the overhead, SG&A, and profit amounts for the cost of production the Department applied the surrogate financial ratios incorrectly to production costs that include packing expenses. They argue that application of the surrogate ratios to production costs that include packing expenses is contrary to statutory intent, Departmental practice, and record evidence in these reviews. They argue specifically that provisions under sections 773(b) and (c) of the Act make it clear that packing expenses are to be calculated separately and added to the cost of production after the Department has calculated costs for direct materials and applied the surrogate financial ratios to those values. In support of their argument, the respondents cite several final determinations of less-than-fair-value investigations in which the Department added packing costs to the cost of production after the ratios had been applied to the other expenses (e.g., Creatine Monohydrate from the People's Republic of China, Final Determination of Sales at Less Than Fair Value, 64 FR 71104, 17705 (December 20, 1999), and Collated Roofing Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value 62 FR 51410, 51413 (October 17, 1997)).

Jinan Yipin and Harmoni cite Fresh Garlic from the People=s Republic of China: Final Results

of New Shipper Review, 67 FR 72139 (December 4, 2002) and accompanying Issues and Decision Memorandum at Comment 8, where the Department concluded that, because fresh garlic, packaged or unpackaged, was subject to the antidumping duty order, the packing was not an integral part of the product and should not be included as a portion of direct materials in the calculation of the cost of production. In addition, they assert that the record of these segments of the proceeding does not support the application of the surrogate financial ratios to production costs that include packing expenses. Specifically, the respondents assert that an accounting note in the annual report of the company the Department selected for surrogate financial information
clarifies that packing expenses are not included in the value the Department used as the denominator for the surrogate financial ratio calculations. They contend that, because it is clear that the denominator of the surrogate financial ratio calculation does not include packing expenses, it is improper to apply the resulting surrogate financial ratios to production costs that included packing expenses for calculating the overhead, SG&A, and profit amounts included in the cost of production.

The petitioners argue that the statute requires the Department to calculate packing expenses separately from other expenses but that it does not require the Department to add packing expenses after it has calculated the costs for direct materials and applied the surrogate financial ratios to these costs. They argue that, in practice, the Department cannot always ascertain from the surrogate financial information whether packing expenses have been included in the denominator of the surrogate financial ratio calculations and, thus, there are instances such as in these reviews when it is proper to include packing expenses in the production costs to which the surrogate financial ratios are applied. They comment that a review of the surrogate financial information suggests that the cost of packing labor is

included in the denominator of the surrogate financial ratio calculation for overhead and that the costs of packing labor and materials are included in the denominators of the surrogate financial ratio calculations for SG&A and profit. They argue that, under these circumstances, the Department should apply the surrogate ratios for overhead, SG&A, and profit to production costs that include packing expenses when calculating the amount of overhead, SG&A, and profit to include in the cost of production. Accordingly, the petitioners assert, the Department should make no change to its calculation methodology for the final results of these reviews.

Department's Position: For the final results of these reviews we have re-examined the annual report of Parry Agro (the Indian tea producer that we selected for surrogate financial information), and the costs that we obtained from this company's income statement and included in the numerator and denominator of the surrogate financial ratio calculations. We were not able to determine whether Parry Agro performed packing activities associated with the tea it produced as its financial information does not indicate that it incurred any packing expenses. Furthermore, in the event Parry Agro did incur packing expenses, we do not know the extent to which such expenses are in the values we obtained from its income statement for purposes of calculating the surrogate financial ratios because packing expenses are not included as a line item or distinguished or described in the income statement in any way. Where the Department cannot ascertain from the surrogate financial information whether packing expenses are in the surrogate financial ratio calculations, such as in the denominator, it is not necessarily appropriate to include packing expenses in the production costs to which the surrogate financial ratios are applied. If packing expenses are not in the denominator of surrogate financial ratio calculations or, as here, we cannot identify where and to what extent such expenses are in the ratio calculation, and we

apply the ratios to production costs that include amounts for packing materials and labor, we may distort the amount of overhead, SG&A, and profit that we calculate for the cost of production. Accordingly, for the final results of these reviews, in calculating the amount of overhead, SG&A, and profit included in the cost of production, we have determined not to apply the surrogate financial ratios to production costs that include packing expenses (i.e., we have removed packing expenses from the production-cost build-up to which we apply the surrogate ratios).

As in the Preliminary Results, we have calculated separate surrogate values for materials and labor directly associated with packing fresh garlic from the PRC and added these packing expenses to the construction of normal value.

7. Selection of Surrogate Financial Information

Comment 7: The petitioners argue that the surrogate financial information selected by the Department is aberrational and that the preliminary methodology was improper, inaccurate, and not in accordance with long-standing Department policy. The petitioners advocate that the Department should continue to calculate surrogate financial ratios using the most recently available financial statements of the three mushroom companies used in a prior segment of this proceeding.

The petitioners assert that the use of the financial data of an Indian tea producer, Parry Agro, as the basis for the surrogate financial values was improper because the data was aberrant by tea industry standards. They assert specifically that the directors' report in the 2002 annual report of that company shows that Parry Agro had "an extremely difficult year," that an increase in tea imports had caused a market slump and depressed tea prices, and that the directors recommended that no dividends be paid for that year. The petitioners also assert that a wage reduction resulted in violent labor strikes at Parry

Agro's tea plantations and that, as a result of the strikes, the estates had to be locked down and operations ceased in the spring of 2002. The petitioners contend that this sudden business disruption indicates further the highly aberrational circumstances that make the Parry Agro financial information unusable for the current reviews.

The petitioners argue that the selected financial information was also aberrant because it disclosed a profit rate that was the lowest that Parry Agro had experienced in the past ten years. They also argue that the financial statements reflect the poor performance of two businesses unrelated to the production of tea. The petitioners also contend that, because the financial statements disclose that Parry Agro does not export tea products, its sales operations are not comparable to those of the respondent companies, thereby rendering its financial information as unsuitable for the calculation of surrogate financial ratios.

The petitioners comment that a depreciation/raw materials ratio analysis submitted in Jinan Yipin and Harmoni's July 10, 2003, submission is irrelevant because there ratios cannot be compared to the ratios of Chinese fresh garlic companies. They argue that, because Parry Agro's financial information is aberrant, the financial information of the mushroom companies is the best available information upon which to calculate the surrogate financial ratios.

Jinan Yipin and Harmoni assert that, as an initial matter, the Department made its preliminary decision to use Parry Agro's information based on ample evidence placed on the record by both parties and that the petitioners have placed no new information on the record since the Preliminary Results that would warrant a change in the information selected by the Department. The respondents comment that the Department's selection is consistent with its practice to select the financial data of

producers of identical or comparable merchandise to that of the subject merchandise. They argue that Parry Agro's agricultural operations are more representative of those of Chinese garlic producers than the operations of preserved mushroom producers and that, on this basis, the Department concluded correctly that the Parry Agro information was the most appropriate selection.

Jinan Yipin and Harmoni comment that the petitioners cite no authority to reject Parry Agro's financial statements. The respondents cite the results of numerous Departmental determinations in which a profit ratio of under six percent was selected. They also cite Parry Agro's annual report, which states that the company was not considered a "sick" company under the provisions of Indian law and that its financial data was reported in accordance with Indian GAAP. The respondents assert that the petitioners' reading of Parry Agro's annual report is inaccurate and highly misleading and that the report establishes that the company performed well in a difficult year for the Indian tea industry. The respondents refute the allegation that estates had to be locked down due to labor unrest by citing a statement in the report that only one estate was under lock-out for a week. They also assert that historical information in the financial report shows that Parry Agro's profit amounts varied greatly over the past ten years and argue that its 2002 profit ratio was not aberrational but representative of the cyclical nature of the tea industry.

Jinan Yipin and Harmoni assert that the operations of the mushroom producers are not comparable to those of the producers of fresh garlic. They comment, moreover, that the Department found in recent reviews of the antidumping duty order on certain preserved mushrooms from the PRC that the financial information for one of the mushroom companies, Himalya International, was distortive and could not be used in the calculation of surrogate financial ratios. They conclude that the

Department should continue to use Parry Agro's information to be consistent with the practice of selecting information of companies with comparable merchandise.

Department's Position: We have reviewed the financial statements for Parry Agro and do not find the information to be aberrational. As the respondents observe, the director's report states that the "company . . . performed reasonably well in an extremely difficult year." See Parry Agro's annual report 2002, p. 7. The report identifies a supply and demand imbalance, compounded by the import of low-cost teas, as depressing prices in 2001 and 2002. It also describes a labor strike that turned violent and resulted in a lock-out of one estate for a period of one week in 2002. The report states that, after workers agreed to revised terms in an agreement on wages, "the lock-out was lifted and normal activity returned." *Id*. The annual report contains an auditor's report that states that the audit was conducted in accordance with Indian GAAP and that Parry Agro is not a "sick" company within the provisions of Indian company law. See *id*. at pp. 17-19.

It is clear from Parry Agro's annual report that tea prices were depressed, which likely affected Parry Agro's profitability. The depression in prices was attributed to market conditions that would affect all tea producers during 2001 and 2002. An overall review of the annual report reveals no event or expenditure so unusual as to lead to the conclusion that the financial statements were distortive of the business experiences of Parry Agro. We acknowledge that a strike and a lock-out may constitute an unusual business event but, in the case of a producer as large as Parry Agro, we cannot assume that a lock-out of one week at one facility is sufficient to distort the financial statements for an annual period. Moreover, the financial impact of the lock-out is neither discussed in a note to the financial statements nor the auditor's report.

As discussed in our Preliminary Results, we find that the financial information of Parry Agro is more representative of the financial experiences of Chinese fresh garlic producers than those of the producers of preserved mushrooms. Unlike the mushroom producers, Parry Agro is involved in the production and processing of an agricultural product that is not highly processed or preserved prior to sale. In addition, the financial statements of the mushroom companies reveal high amounts for depreciation, indicating that significant expenses are incurred in the processing and preservation of their products. Finally, as asserted by Jinan Yipin and Harmoni, the Department found the recent financial reports of Himalya International to be distortive.

For all of these reasons, we conclude that the financial information of Parry Agro is the most appropriate information on record for use in the calculation of the surrogate financial ratios.

8. Factor Usage Rates for Production of the Subject Merchandise

Comment 8: The petitioners argue that a review of the reported factor usage rates of various respondents participating in these reviews indicates that the amounts are so widely divergent as to be inexplicable and unusable by the Department in the final results. The petitioners assert that these differences cannot be attributed to differences in geographic and climatic conditions because all the respondents' growing operations are based in Shandong province. The petitioners contend that, while there are examples of wide variations in factor usage rates between respondents in the administrative and new shipper reviews, the factor usage rates for Harmoni are significantly higher than the reported rates of other respondents. The petitioners assert that, while they do not concede that Harmoni's factor usage rates are necessarily accurate, they approach the threshold of plausibility relative to the experience of the other three respondents and the U.S. industry. The petitioners argue that the

unusually low factor usage rates reported by Jinan Yipin, Shandong Heze, and Trans-High undermine their reliability totally. The petitioners contend that because the reported factor usage rates are so demonstrably unreliable and because the factor usage rates are critical to the calculation of normal value, the Department should assign Jinan Yipin, Shandong Heze, and Trans-High the China-wide rate as total facts available. Alternatively, the petitioners argue that the Department should reject those particular unreliable factor usage rates and substitute Harmoni's corresponding data as partial facts available for all the factor usage rates with the exception of water (as discussed below, for water the petitioners request that the Department use a factor usage rate experienced by a California grower).

Garlic Clove/Seed Usage Rates: The petitioners argue that Harmoni's garlic clove usage rate is substantially higher than the garlic clove usage rates reported by the other respondents. In addition, the petitioners comment that Harmoni's publicly reported estimated garlic clove usage rate is corroborated by the usage rate estimated for Chinese-type garlic by a U.S. producer of garlic (which is a member of the petitioning Fresh Garlic Producers of America). Moreover, the petitioners argue, the publicly reported estimated garlic clove usage rate submitted by Jinan Yipin is more than one-third lower than the consumption rate reported by Harmoni. Finally, the petitioners comment, given that all except Shandong Heze reported the same value for the average number of cloves found in the bulbs that are dedicated for seed, nothing on the record explains reasonably how Jinan Yipin, Trans-High, and Harmoni could have such different garlic clove usage rates. The petitioners assert that the only reasonable explanation is that all of the respondents except Shandong Heze overstated the number of cloves in the garlic bulbs they use as seed while all of the respondents except Harmoni under-reported their garlic clove usage rates.

Water Usage Rates: The petitioners contend that all of the respondents, including Harmoni, have under-reported the amount of water they consumed in producing fresh garlic that was sold to the United States during the POR. The petitioners cite their April 14, 2003, submission where, according to a California fresh garlic grower, about 507 cubic meters of irrigation water are required to produce one metric ton of fresh garlic and comment that all the reported water usage rates are a fraction of this amount. The petitioners argue that the huge difference cannot be explained by the difference in the amount of precipitation that falls on garlic growing in the fields in California and China's Shandong Province, where all the respondents are based. The petitioners assert that the record shows that a relatively small amount of precipitation falls on fresh garlic during the eight-month growing cycle in Shandong Province.

As such, the petitioners contend that, because none of the water usage rates claimed by the respondents are credible, the Department should use the the 507 cubic meter irrigation water usage rate experienced in the production of fresh garlic in California.

Fertilizer Usage Rates: The petitioners claim that the fertilizer usage rates reported by the respondents are widely divergent. The petitioners comment that Harmoni's reported fertilizer usage rate is higher than most of the other respondents while the rate reported by Shandong Heze is in the same range as Harmoni. As such, the petitioners argue that the Department should find that only Shandong Heze and Harmoni have reported fertilizer usage rates that are sufficiently reliable and credible to be used for the calculation of normal value.

Herbicide and Pesticide Usage Rates: The petitioners claim that the respondents' reported herbicide and pesticide usage rates vary significantly. The petitioners assert that, while the differences in

the reported pesticide and herbicide usage rates are not glaring, the Department should find that only Harmoni has reported rates that are sufficiently reliable and credible to be used for the calculation of normal value.

Labor Usage Rates: The petitioners state that a comparison of the reported use of unskilled labor reveals dramatic differences. The petitioners assert that the data presented by Harmoni appear to be most reasonable. Moreover, the petitioners argue, given that all of the respondents followed essentially the same general procedure in growing fresh garlic, deviations of the magnitude displayed in the reporting should not exist, calling into question the accuracy of the data on the record.

The petitioners also assert that the data reported by the respondents show a wide disparity between their labor usage rates associated with the harvesting of garlic sprouts. The petitioners contend that the submissions by the various respondents have made clear that the steps involved in the harvesting of garlic sprouts are relatively simple, with the sprouts being cut from each garlic plant and collected as a laborer walks along a row of garlic plants. The petitioners comment that such a simple procedure should not yield the widely divergent labor usage rates that has been reported. The petitioners contend that variations in the labor usage among respondents by such significant amounts calls the accuracy of the data on the record into question.

Jinan Yipin and Harmoni argue that the Department should reject the petitioners' arguments that respondents' factor usage rates are not credible. With respect to the petitioners' claim that Harmoni's water usage rate is understated relative to the experience of a Californian grower, the respondents argue that the usage rates of several Chinese companies have been verified and corroborated while the U.S. producer's water usage rate has not been verified or corroborated. The respondents contend that

the outlier in water usage is the U.S. producer and not the Chinese producers. Moreover, the respondents contend that several factors affect the water needed to harvest garlic, including weather conditions, soil quality, row spacing, fertilizers, and altitude. They comment that the petitioners' one-size-fits-all water usage rate is unrealistic given the multitude of factors that affect the consumption of water. The respondents argue that the Department should reject the petitioners' arguments as they are not based on the realities of agricultural harvesting and production.

Trans-High asserts that the petitioners' challenge to Trans-High's reporting of factor usage rates ignores the fact that its factors have been verified by the Department. Trans-High contends that the petitioners do not dispute that the Department's verification of Trans-High establishes that Trans-High's reported usage rates tied to its supplier's production records without discrepancies. They assert that the petitioners have not cited any prior case in which the Department has replaced its own verified findings with other factor valuations based upon a relative comparison.

Trans-High contends that the Department's verification report indicates that it followed standard verification procedures in verifying the accuracy and integrity of Trans-High's factor usage rates. Citing the Department's December 1, 2003, verification report, Trans-High points out that the Department conducted an on-site verification of its supplier's processing plant and farmland. Trans-High states that, despite the petitioners' contention that Trans-High's garlic clove/seed, fertilizer, herbicide, pesticide, water, and labor usage rates are unreliable, the Department verifiers determined that the company reported accurate amounts of each input used to produce the subject merchandise during the POR. With regard to potassium and urea fertilizer usage, Trans-High argues that the Department conducted an extensive examination and found no discrepancies and cites the verification

report at 17-18. With regard to water usage, Trans-High cites the verification report at 19 and asserts that the Department explained that it examined monthly cost and water usage amounts that were based on the electricity usage amount, value, and pump capacity.

Trans-High asserts that it reported monthly labor hours based on the stage of production, job function, and the number of days worked, separated by hours worked by skilled and unskilled laborers, and that the Department verified reported labor hours by reviewing attendance records for skilled, unskilled, and indirect labor. It cites to the verification report at 20 and contend that it establishes the accuracy of the data.

Trans-High argues that the petitioners do not take issue directly with the Department's verification methodology or findings as such but rather make the faulty assertion that the Department's verification findings may be disregarded because the verifiers did not verify reported data through direct observation. Trans-High contends that it is unrealistic for the petitioners to assert that the Department must be on-site at Yun Feng year-round in order to observe all phases of the garlic-growing process in order to complete a valid verification. In addition, Trans-High cites Monsanto Company v. United States, 698 F. Supp. 275 (CIT 1988), and argues that the Department should disregard the petitioners' assertions outright because it followed its normal procedures consistent with the purpose of verification to verify information in a respondent's questionnaire response.

Trans-High contends the Department should rely on its review of its supplier's (Yun Feng's) actual production process and corresponding records rather than the petitioners' speculation. Trans-High asserts that, because the Department verified and found no discrepancies with Trans-High's reported factor usage rates, the Department cannot justify the applicationof an adverse inference to

Trans-High as the petitioners suggest.

Trans-High argues that the petitioners have not cited any other cases in which the Department has rejected a respondent's reported usage rate because of inconsistencies with other respondents or unverified domestic producers. Trans-High cites several cases in which the Department responded to similar arguments to disregard a respondent's reported factor or cost data because such amounts were allegedly not possible or reasonable. Citing numerout decisions by the Department, Trans-High asserts that the Department has relied consistently on its own verification findings and, therefore, the Department should reject the petitioners' arguments for the final results of review.

Department's Position: Each respondent reported its factor usage rates based on its experience in growing garlic. Pursuant to section 782(i) of the Act, the Department verified the reported factor usage rates submitted by all respondents participating in these reviews. We find no reason to question the factor usage rates reported by the respondents. Moreover, while it is not easy to ascertain the impact of the location of growing operations on usage rates, not all of the respondents' growing operations are based in the Shandong Province (Harmoni's growing operations are based in the Henan Province; see Harmoni's March 3, 2003, new shipper review section A questionnaire response at page 14.) During each verification the Department examined production and accounting information to ensure that each respondent reported its factor usage rates for each material input used in the production of fresh garlic accurately. See Memorandum to the File from Jennifer Moats entitled "Verification of Jinan Yipin's Factors-of-Production Data" dated March 10, 2004 (Jinan Yipin verification report), Memorandum to the File from Brian Smith entitled "Verification of the Response of Zhengzhou Harmoni Spice Co., Ltd." dated November 21, 2003 (Harmoni verification report),

Memorandum to the File from Lyn Johnson entitled "Verification of the Response of Shandong Heze International Trade and Developing Company," dated April 15, 2004 (Shandong Heze verification report), and Trans-High verification report. The records of these reviews do not warrant rejecting the reported factor usage rates or justify favoring one firm's reported factor usage rates over another's. For the final results of these reviews we have not found that the petitioners provided substantial justification or evidence to warrant a rejection of the factor usage rates the respondents reported for growing the subject merchandise.

Comment 9: The petitioners assert that anomalies in the factor usage rates reported by most of the respondents are so significant that the Department should apply facts available. They assert further that the anomalies call into question the basic credibility of the respondents' questionnaire responses, notwithstanding the Department's confirmation through verification that the reported data is consistent with the business records of the respondents. The petitioners assert that Harmoni's reported factor usage rates are consistently much higher than those of the other respondents and by such significant margins that one can only conclude that the respondents other than Harmoni have understated their factor usage rates. The petitioners contend that, verified or not, the respondents' data simply cannot stand when judged against the standards set by Harmoni. The petitioners argue that the fact that the Department verified the factor usage rates by comparing the reported data to business records of the respondents should not keep the Department from rejecting it in the face of contrary data that is more reliable. The petitioners assert that none of the verifications involved direct observation of planting, harvesting, processing, and packing operations, an essential verification technique in cases with a production process as complex and extended in time and place as fresh garlic production.

The petitioners argue that the data in question is so critical to the Department's calculation of normal value that the Department would be justified in concluding that the respondent's data should be discarded entirely, leading to the application of the China-wide rate as total adverse facts available. Alternatively, the petitioners argue that the Department would also be justified in applying partial facts available by discarding only those factor usage rates of the respondents that are inconsistent with those of Harmoni and substituting Harmoni's corresponding factor usage rates (with the exception of water usage, for which the California experience should be substituted), as these would remain the only reliable relevant data on the record.

Department's Position: We do not find that the use of facts available to determine the factor usage rates for production of the subject merchandise is warranted. The Act is clear about the circumstances under which the Department may resort to facts available. Specifically, section 776(a)(2) of the Act states that the Department shall apply facts available when an interested party (1) withholds information that has been requested by the Department, (2) fails to provide such information in a timely manner or in the form requested, (3) significantly impedes a proceeding under the antidumping statute, or (4) provides information that cannot be verified. The Act also states that the Department shall not decline to consider information that is submitted by an interested party and that is necessary to the determination but does not meet all of the applicable requirements established by the Department if (1) the information is submitted by the deadline established for its submission, (2) the information can be verified, (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, (4) the interested party has demonstrated that it has acted to the best of its ability in providing the information and meeting the requirements established by

the Department with respect to the information, and (5) the information can be used without undue difficulty. See section 782(e) of the Act.

All of the respondents acted in a timely manner and to the best of their ability in providing the factor usage information we requested. We verified the information they provided and see no reason to question the credibility or accuracy of the information. In addition, we find no reason to favor the factors reported by one firm over another. As such, we find that the application of facts available due to differences in factor usage is not warranted.

9. Comments With Respect To Shandong Heze

Comment 10: The petitioners argue in their case brief that, because Shandong Heze has not been forthcoming with respect to the relationship between Shandong Heze, one of its U.S. customers, and a U.S. trademark company or with respect to the nature of Shandong Heze's sales to the United States, the Department should determine that Shandong Heze has not cooperated to the best of its ability in this review and assign it a rate based on adverse facts available.

With respect to the information on the record regarding the sales of fresh garlic to the United States, the petitioners assert that the representative for Shandong Heze in this current review (the representative) is the same person that represented Clipper Manufacturing Ltd. (Clipper) in a prior new-shipper review covering the period June 1, 2000, through November 30, 2000 (the Clipper NSR). The petitioners state that the sole U.S. customer in the Clipper NSR is also a customer for Shandong Heze in this current review (the U.S. customer). They state that the representative filed a trademark application for a certain U.S. company (the trademark company) on January 30, 2001, and the trademark was used by Clipper on shipments of fresh garlic to the United States subsequent to the

Clipper NSR. The trademark was also used by Shandong Heze for its shipments to the United States during the current POR. The petitioners comment further that, on August 24, 2001, the Department preliminarily determined that a dumping margin based on adverse facts available was applicable for Clipper. They state that, in late 2001, Shandong Heze began negotiations with the trademark company which resulted in one shipment of fresh garlic from Shandong Heze to the trademark company and the basis for Shandong Heze's request for a new shipper review for the period November 1, 2000, through October 31, 2001 (the Shandong Heze NSR). 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, 11284 (March 13, 2002), and state that the Department found that the single sale made by Clipper was not a bona fide sale and, accordingly, made a final determination to rescind the Clipper NSR. The petitioners then cite Fresh Garlic From the People's Republic of China: Partial Rescission of Antidumping Duty New Shipper Review, 67 FR 65782, 65783 (October 28, 2002), and comment that, due to the lack of support documentation, the Department made a final determination to rescind the Shandong Heze NSR. Given the circumstances described above, the petitioners allege that Shandong Heze, the U.S. customer, the trademark company, and Clipper have been involved in activities to deceive the Department with respect to the exportation of fresh garlic to the United States.

The petitioners assert further that there is contradictory information on the record which supports their claim that Shandong Heze has not been forthcoming with respect to the relationship between the U.S. customer, the trademark company, and the nature of Shandong Heze's sales to the United States. To illustrate that Shandong Heze and the trademark company are related, based on the

Department's decision memorandum in the Shandong Heze new shipper review, the petitioners draw an inference that Shandong Heze did not pay royalties to the trademark company for the one sale made during the Shandong Heze NSR. To illustrate that the trademark company and the U.S. customer are related, the petitioners point to a business card submitted for the record earlier in the review which bears the name of the trademark company but the address and contact numbers of the U.S. customer. The petitioners claim further that there were various conflicting statements by Shandong Heze during the home-market verification for this current review. Specifically, the petitioners allege that the statements made by Shandong Heze during verification with respect to how it acquired the U.S. customer in this current review are inconsistent with information Shandong Heze provided in its supplemental questionnaire response dated June 19, 2003, at 8. Furthermore, the petitioners allege, statements made by Shandong Heze during verification with respect to the dispute over the single sale during the Shandong Heze NSR are inconsistent with statements it made during the Shandong Heze NSR.

The petitioners conclude in their case brief that there was sufficient time remaining in this review to allow the Department to further investigate the U.S. customer and the trademark company and further urge the Department to do so. Otherwise, the petitioners argue, the Department would have been forced to determine that Shandong Heze has not cooperated to the best of its ability in this review and assign it an antidumping rate based on adverse facts available.

Shandong Heze argues that the petitioners' comments are unsupported and contradicted by the information on the record and, therefore, should be rejected by the Department. The respondent asserts that the fact that some of the parties to which the petitioners refer happen to have the same representative has no bearing on the merits of this case. Shandong Heze contends further that the

record shows that it had no relationship with the trademark company other than the use of its trademark under a royalty-bearing trademark license. Furthermore, Shandong Heze asserts, the use of a trademark under a license agreement does not create an affiliation between the trademark owner and the trademark licensee.

With respect to the petitioners' comment regarding royalties, Shandong Heze responds that, during the Shandong Heze NSR, because the trademark company was the buyer of the merchandise and the user of its own trademark, the supplier (Shandong Heze) would not be expected to pay royalties. The respondent states further that, with respect to the business card, it was a temporary card printed further by a third party and asserts that this information was provided to the Department during the Shandong Heze NSR. Finally, Shandong Heze explains that the petitioners' comment concerning conflicting statements made by Shandong Heze is a result of the petitioners' misunderstanding and effort to distort the record.

Department's Position: We have determined that we should not assign Shandong Heze an antidumping duty rate based on adverse facts available.

Section 776(a)(2) of the Act provides that, if an interested party or any other person (A) withholds information that has been requested by the administering authority, (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782, (C) significantly impedes a proceeding under this title, or (D) provides such information but the information cannot be verified as provided in section 782(i), the administering authority shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination. Furthermore, section 776(b) of the Act provides that, if the

Department finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, the Department may use an inference adverse to the interests of that party in selecting from among the facts otherwise available.

During this administrative review, Shandong Heze responded to all of our requests for information by the deadlines we established. Shandong Heze provided adequate information in the form and manner we requested either in its original questionnaire response or in one of its supplemental questionnaire responses. The Department was able to verify the information provided in all of the responses. See the Shandong Heze Verification Report, dated January 5, 2004. Therefore, we do not find that Shandong Heze failed to cooperate to the best of its ability with respect to this administrative review as the petitioners claim.

The petitioners provide a chronological order of events starting with the first new-shipper review in 2001 and allege that several parties have been involved in activities to deceive the Department. On its face, the information provided by the petitioners may indicate that Clipper may have misrepresented its relationship with the trademark company and the U.S. customer to the Department during the Clipper NSR. It is also true that Shandong Heze has become involved with the same U.S. customer and trademark company which Clipper used during the Clipper NSR. Beyond these two conclusions, however, there is little more that the Department can draw from the evidence on the record. The petitioners' submissions are full of unsubstantiated allegations and the Department cannot come to a conclusion on this basis alone. Furthermore, we cannot conclude that the petitioners' allegations are true based only on information that the petitioners selected from prior segments of the garlic proceeding and placed on the record of this administrative review. Because the petitioners'

allegations cover several reviews, in order to make a fair and accurate determination with respect to the validity of the petitioners' claims, the Department would need to review and further investigate each of the parties further and the complete record of each of the segments to which the petitioners refer. Our analysis for this administrative review must be based on the record evidence before us, and the evidence on the record does not substantiate the petitioners' claims adequately. Therefore, we must limit our findings to determining whether Shandong Heze has been forthcoming during this current review with respect to its relationship with its U.S. customer, the trademark company, and the nature of its sales to the United States. We have based our determination on the information on the record of this administrative review.

In addition, the petitioners' inference that Shandong Heze did not pay royalties in the Shandong Heze NSR alone does not support their argument that Shandong Heze has not been forthcoming with respect to the relationship between Shandong Heze and the trademark company. As Shandong Heze asserts, it was the supplier in the Shandong Heze NSR and the trademark company was the customer. Therefore, it is reasonable to believe that Shandong Heze may not have paid royalties to use the trademark company's trademark when actually selling to the trademark company. This information does not provide evidence that Shandong Heze and the trademark company are related, given the circumstances during the Shandong Heze NSR.

With respect to the business card, although it does contain conflicting information, the information only provides that there may be a connection between the trademark company and the U.S. customer, certainly when taken into consideration with the information provided by the petitioners involving the Clipper NSR. For the purpose of determining whether to classify Shandong Heze's sales

in this review as export-price or constructed-export-price sales in accordance with section 772 of the Act, however, the question of affiliation is between Shandong Heze and the U.S. customer or Shandong Heze and the trademark company. Therefore, the information on the business card, if factored into our decision, would not have any bearing on these final results.

The petitioners claim that Shandong Heze made various conflicting statements during the Department's verification of its responses. With respect to how Shandong Heze acquired the U.S. customer, however, we find that the information Shandong Heze provided in its June 19, 2003, supplemental response is consistent with the information it provided during verification. The petitioners also claim that Shandong Heze made statements about the dispute over the single sale during the Shandong Heze NSR that are inconsistent with the statements it made during the verification for this review. We can not conclude that the information is inconsistent based solely on the document the petitioners placed on the record of this review (i.e., The Separate Rates Analysis and Deficient Submissions Memorandum dated July 24, 2002). Based on the information on the record, we have concluded that, as Shandong Heze has asserted, there was a dispute with respect to the single sale during the Shandong Heze NSR.

Furthermore, with respect to the petitioners' suggestion that the Department should continue to investigate the U.S. customer and the trademark company, we have collected and reviewed information about the involved parties while conducting this review. On February 13, 2004, we requested corporate records from the government of the state in which the U.S. customer and the trademark company are registered and located. After reviewing the public documents provided by the state government, we issued a fourth supplemental questionnaire to Shandong Heze on April 26, 2004. See

Shandong Heze's supplemental questionnaire response dated April 30, 2004. We had also issued a supplemental questionnaire addressed to the U.S. customer on March 11, 2004. See Shandong Heze's supplemental questionnaire response dated March 22, 2004. None of the information submitted in response to our requests for additional information support the petitioners' allegations in any way.

We have concluded that the information on the record and arguments which the petitioners have made do not provide sufficient evidence to substantiate their allegations. Furthermore, we do not have sufficient reason to believe that Shandong Heze has not been forthcoming with respect to its relationship with the U.S. customer, the trademark company, and the nature of its sales to the United States during this administrative review. Therefore, we have calculated dumping margin based on the information provided in Shandong Heze's responses and obtained during verification for these final results.

Comment 11: The petitioners assert that the information in its April 23, 2004, filing provides the Department with new factual information which proves that Shandong Heze has been deceiving the Department with respect to Shandong Heze's relationship with the trademark company.

The petitioners cite Alberta Gas Chemicals Ltd. v. Celanese Corp., 650 F.2d 9, 12-13 (2d Cir. 1981), and Borlen S.A.-Einpreedimantos Industrias v. United States, 913 F.2d 933, 941 (CAFC 1990), and state that administrative tribunals have the inherent authority to take appropriate steps to ensure that their decisions are not tainted by fraud. The petitioners assert that, pursuant to 19 CFR 351.302(b), there is good cause for the Department to extend the time limit established and accept the petitioners' proffered information for the record.

The petitioners assert that Shandong Heze has misrepresented material facts during the Shandong Heze NSR and during this current review. The petitioners first argue their position by reiterating most of the information provided in their January 30, 2004, case brief. They then claim that the information in the sworn declaration provided in their April 23, 2004, filing indicates that the trademark company was importing garlic to the United States from Shandong Heze during the POR and that control over the exporter's fresh garlic shipments contradicts Shandong Heze's claim with respect to its relationship with the trademark company. That is, the petitioners imply that the trademark company had control over Shandong Heze's exports of fresh garlic to the United States during the POR. The petitioners make further statements concerning discounts/rebates and royalties.

The petitioners conclude that, given the new information in their April 23, 2004, filing along with the substantial information already on the record, the Department should determine that Shandong Heze has not cooperated to the best of its ability in this review and assign it a rate based on adverse facts available.

Shandong Heze argues that the Department should reject the petitioners' April 23, 2004, filing because it contains uncorroborated new factual information which was submitted after the deadline for filing such information.

Shandong Heze asserts that, pursuant to 19 CFR 351.301(b)(2), the petitioners had 140 days after the last day of the anniversary month, April 19, 2003, to submit the new factual information contained in its April 23, 2004, filing, but did not do so. Shandong Heze asserts further that, pursuant to 19 CFR 351.302(c), the petitioners were required to submit a written request for an extension of time before the applicable deadline under section 351.301 expired which they did not do. In addition,

Shandong Heze asserts that 19 CFR 351.302(d) requires that, unless the Secretary extends a time limit, the Secretary will not consider or retain untimely filed factual information, written argument, or other material. Therefore, Shandong Heze argues, the Department should have rejected the factual information contained in the petitioners' April 23, 2004, letter.

Shandong Heze argues further that even if the petitioners had followed the applicable regulations for requesting an extension of time, the Department had no basis for granting an extension because there was no "good cause" for accepting such information as required by 19 CFR 351.302(b). According to Shandong Heze, the cases the petitioners cite do not support the petitioners' position that there is ample cause for accepting the proffered information for the record. Shandong Heze asserts that in the cases cited the court accepted factual information submitted later than the due dates because the information had been discovered only after the time limit for submitting such information. Shandong Heze argues that, in this current administrative review, the factual information submitted in the petitioners April 23, 2004, letter, is not newly discovered information and is information that the petitioners have had in their possession for over a year. Shandong Heze contends that the petitioners had ample opportunities to submit this information within the deadline but, instead, submitted it 24 days prior to the due date for the final results of review. Therefore, according to respondents, the Department is barred from accepting or considering the petitioners' untimely filing.

Shandong Heze responds to the petitioners' comment that Shandong Heze has misrepresented its relationship with the trademark company by restating the information it presented to the Department during verification. With respect to the petitioners' allegation that certain parties have been deceiving the Department, Shandong Heze adds that none of the events described by the petitioners occurred out

of normal business practice. According to Shandong Heze, the only evidence the petitioners provide to support their deception theory is a declaration from an unknown party. The respondent argues that, without the identity of the party, there is no way for Shandong Heze to know if the party is a credible source and, therefore, the declaration must be struck from the record.

Shandong Heze argues that the application of facts available is not warranted under section 776(a)(2) of the Act because it did not withhold any information requested by the Department, it submitted all of the information requested by the Department in a complete and timely manner, and the Department has verified all of the information it provided has been verified by the Department. Shandong Heze contends that, because it has met all of the requirements set forth by the statutes and the Department's regulations, the Department is required to calculate a fair antidumping margin for Shandong Heze.

Department's Position: Although some of the information provided in the petitioners' April 23, 2004, filing supports to some degree the petitioners' arguments that the importer and trademark owner were essentially the same party or, at minimum, were affiliated during 2002, it does not provide sufficient evidence to support the petitioners' claim that Shandong Heze has, in fact, not been forthcoming with respect to its relationship with the trademark company during this administrative review. See the memorandum from Mark Ross to Laurie Parkhill dated June 7, 2004, addressing the business-proprietary information provided in the petitioners' April 23, 2004, filing. The proprietary declaration offered by the petitioners on the record contains alleged statements which can be described either as mere puffery or as actual statements made on the part of an agent of an exporter. These claims are conveyed second-hand, and little evidence on the record supports the claims made in the

declaration. Therefore, absent substantial evidence on the record, the Department cannot determine the petitioners' allegations to be accurate. Thus, the Department maintains (as it does in response to Comment 10) that adverse facts available is not applicable in this case.

With respect to Shandong Heze's arguments, in accordance with 19 CFR 351.302(c), parties are required to submit a written request for an extension of time to submit factual information. In accordance with 19 CFR 351.302(d), the Department will consider untimely filed factual information only if it grants an extension of time for submitting such information. Accordingly, the petitioners included in their April 23, 2004, filing a request for an extension to submit new factual information (see pp 2-4 of the April 23, 2004, filing). The Department considered the petitioners' request carefully as detailed in the decision memorandum from Mark Ross to Laurie Parkhill dated April 30, 2004. In the memorandum the Department decided to extend the deadline for filing factual information and that it was accepting the petitioners' April 23, 2004, filing. The memorandum also explained the Department's reason for extending the deadline and accepting such new information in accordance with 19 CFR 351.302(b). As stated in the memorandum, normally the Department would not consider accepting new factual information at such a late stage in the review. The Department considered it appropriate in this situation, however, given the severity of the petitioners' claims, to accept the April 23, 2004, submission. Furthermore, the Department solicited a response from Shandong Heze to address the petitioners' claims that the respondent had submitted false information on the record.

With respect to the petitioners' assertions regarding discounts/rebates and royalties, these comments were untimely, were not dependent on the new information submitted by the petitioners on April 23, and should have been raised in the petitioners' case briefs in accordance with 19 CFR

351.309(b). Therefore, we have not considered or addressed these arguments for these final results.

10. Comments With Respect To Harmoni

Comment 12: Harmoni asserts that the Department did not adjust the cost of production for its garlic sprout by-product. The petitioners did not comment on this issue.

Department's Position: We disagree with Harmoni. We made the adjustment for its garlic sprout by-product. See the antidumping margin calculation materials attached to the December 1, 2003, preliminary results analysis memorandum for Harmoni.

Comment 13: The petitioners argue that the Department made an error when it converted the per-piece weight of the cartons Harmoni used to package its garlic to a per-kilogram amount and that the error resulted in a significant understatement of the carton value. Harmoni did not comment on this issue.

Department's Position: We agree that we made an error in the calculation of the per-kilogram usage rate of Harmoni's cartons. For the final results we have corrected this error. See the June 7, 2004, final results analysis memorandum for Harmoni.

Comment 14: The petitioners argue that the Department made an error when it converted the per-piece weights of the mesh bags, metal clips, and bands that Harmoni used to package its garlic to a per-kilogram amount and that the error resulted in a significant understatement of the factor values for these items. Harmoni did not comment on this issue.

Department's Position: We agree that we made an error in the calculation of per-kilogram usage weights for mesh bags, metal clips, and bands. For the final results, we have corrected this error. See the June 7, 2004, final analysis memorandum for Harmoni.

Comment 15: The petitioners assert that the origin of the distance factor the Department used in the valuation of Harmoni's garlic cloves/seed is unclear. They assert that the Department should use a value that is twice the distance factor Harmoni reported from its farm to processing facility which the Department verified, stating that the garlic cloves from the prior year's harvest would need to be transported from the processing facility to the farm for planting and the current year's harvest would then need to be transported from the farm to the factory. Harmoni did not comment on this issue.

Department's Position: We agree that we should incorporate the distance factor twice in our valuation of garlic cloves. See the June 7, 2004, final analysis memorandum for Harmoni.

Comment 16: The petitioners assert that in calculating the cost of production for Harmoni the Department did not use the surrogate profit ratio as specified in the FOP Memorandum for the Preliminary Results. Harmoni did not comment on this issue.

Department's Position: We agree with the petitioners. For the Preliminary Results we inadvertently used the wrong surrogate profit ratio. For the final results we have corrected the error.

Comment 17: The petitioners contend that the Department's cost-of-production calculation for the preliminary results did not include a value for the electricity consumed by Harmoni. The petitioners also claim that the Department should correct Harmoni's electricity consumption usage rate with information Harmoni provided at verification. Harmoni did not comment on this issue.

Department's Position: Because we valued the water consumed by Harmoni which covered this particular irrigation expense, we did not value the amount of electricity consumed for irrigation. See our response to Comment 2 above. We did value the amount of electricity consumed for cold storage by using a cold-storage usage rate.

11. Comments With Respect To Jinan Yipin

Comment 18: Jinan Yipin accuses the Department of being biased, intentionally manipulating the record, fabricating reasons to support its use of adverse facts available, and making every effort to distort the facts in order to support its desired conclusion rather than allowing an objective reading of the facts as a whole determine the lawful conclusions. (See Jinan Yipin's Administrative Case Brief dated March 23, 2003, at pages 6, 10, and 17.) Jinan Yipin claims that the Department has abandoned all pretense of conducting a fair and unbiased proceeding and is not administering the dumping law in a lawful manner. *Id.*

Citing 18 U.S.C. § 1001, the petitioners maintain that "respondent's rhetoric goes beyond the bounds of zealous advocacy; for whether Jinan Yipin's counsel recognize it or not, they are effectively accusing both Department employees and petitioners' counsel of criminal conduct." (See the petitioners' Rebuttal Brief dated March 31, 2004, at page 1 (PRB).) The petitioners argue that, despite Jinan Yipin's accusations, the Department's administration of this review was neither "biased" nor irregular. PRB at 1. Instead, the petitioners argue that "Jinan Yipin's case brief distorts the plain facts of the record, and does nothing to hide or even mitigate the fact that it did not act to the best of its ability and, as a result significantly impeded this proceeding." See PRB.

Department's Position: Jinan Yipin has misconstrued the facts surrounding the Department's conduct of verification and the information that it did (and did not) provide pertaining to Mr. Edward Lee and his various relationships with his brother, Henry Lee, American Yipin, the United States customer, the co-owner of the United States customer, Houston Seafood, and Jinan Yipin itself. Jinan Yipin portrays the Department as an agency which is out "to get" Jinan Yipin, "intentionally"

misconstruing facts and acting in bad faith. Such accusations are baseless. The Department's determination is supported by substantial evidence on the record and is otherwise in accordance with the definition of "affiliated persons" found in section 771(33) of the Act. The Supreme Court and other federal courts have indicated clearly that there is a presumption of honesty, integrity, and good faith on the part of the administrative decision-maker, and for a party to prove otherwise, it must do so through "well-nigh irrefragable proof." See, e.g., Kalvar Corp., Inc. v. United States, 543 F.2d 1298, 1300 (USCC 1976) (raising presumption of good faith and requiring "well-nigh irrefragable proof to induce the court to abandon the presumption of good faith" in deciding the merits of plaintiff's claim); NEC Corp. v. United States, 958 F. Supp. 624, 629 (CIT 1997) ("to prevail on a prejudgment claim, a plaintiff must overcome the presumption of honesty and integrity in the administrative decision maker, and show that the decision maker has an (irrevocably closed) mind on the subject of the investigation," citing directly from FTC v. Cement Inst., 333 U.S. 683, 701 (1947)). As provided below, the Department's employees have acted at all times in an objective manner during the course of this administrative review, and the Department's determination is supported by the record. Accordingly, Jinan Yipin's claims of agency bias are without merit, and no further response to such comments is warranted.

Comment 19: Before addressing the parties' comments and providing the Department's analysis, as a matter of clarification, it is important to identify the parties at issue in this case and the time line as it applies to those parties. During part of the POR but before the actual invoice date for the transactions at issue in this case, Edward Lee, a resident of Louisiana, was co-owner with another party of the business Houston Seafood, located in Texas. At the same time, Edward Lee's brother,

Henry Lee, was employed as a sales manager for American Yipin, a United States affiliate of the respondent, Jinan Yipin. American Yipin was also located in Texas. Two sales of subject merchandise were shipped to Houston Seafood from Jinan Yipin in the days before Edward Lee sold his shares of Houston Seafood to his partner. Accordingly, the terms of sale for at least these two shipments between Jinan Yipin (by way of American Yipin) and Houston Seafood apparently occurred during a time when Edward Lee had control over Houston Seafood and his brother had the authority to negotiate sales and set prices for American Yipin. Following these shipments, Edward Lee sold his shares to his partner, while his brother continued his employment at American Yipin. A few months later, Edward Lee began to "assist" American Yipin with its sales procedures and in September 2002 American Yipin moved all of its operations to Louisiana to take advantage of Edward Lee's expertise. Accordingly, in September, Edward Lee was hired officially as American Yipin's new sales manager, while his brother, Henry Lee, stepped down from his leadership role to take up different employment with the company. The Department found in its Preliminary Results that Edward Lee, Henry Lee, Houston Seafood, Jinan Yipin, American Yipin, and the reported ultimate customer were all possibly affiliated during at least part of the POR and that Jinan Yipin had not acted to the best of its ability in responding to the Department's request for information regarding affiliation during the administrative review. The Department also determined that a company named Bayou Dock was affiliated with American Yipin when, during verification, it discovered that these companies were sharing record-keeping software, computers, and personnel, a fact never mentioned in any of Jinan Yipin's submissions to the Department. Therefore, the Department applied adverse facts available to some of Jinan Yipin’s transactions in its calculations for the preliminary results.

We have segregated Jinan Yipin's comments into three subsections. We address all three in a consolidated Position following the third comment.

A. The Department's Affiliation Analysis is Improper

Jinan Yipin contends that the Department=s affiliation analysis between American Yipin and Houston Seafood is improper because the Department has not considered the date that Edward Lee actually began his employment with American Yipin. Jinan Yipin claims that, during the POR, Edward Lee was never simultaneously an employee of American Yipin and a shareholder of Houston Seafood and the Department did not mention this fact in the temporal aspects of these alleged relationships. Citing Hontex Enterprises, Inc. v. United States, 248 F. Supp. 2d 1323 1344n.17 (CIT 2003) (Hontex), the respondent states that the courts have said that the Department is required to consider the temporal aspects of relationships when making an analysis of possible affiliations. Jinan Yipin also states that the Department has pointed to temporal considerations in reaching negative decisions regarding affiliation even prior to the date of the decision in Hontex, citing Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review and Final Rescission of Antidumping Duty Administrative Review of Freshwater Crawfish Tail Meat from the PRC: Sept. 1, 1999 through Aug. 31, 2000, at Comment 17 (finding that the terms of promissory note did not require repayment of debt within the POR), Issues and Decision Memorandum for the Final Results in the Antidumping Duty Administrative Reviews of Certain Forged Stainless Steel Flanges from India (Flanges from India), at Comment 1 (holding that Mr. Orban's role was specifically limited in its authority and duration, covering only the first seven weeks of the POR), Issues and Decision Memo for the Final Results of the New Shipper Review of Petroleum Wax Candles from the PRC (Candles from

China), at Comment 1 ("Peak Candles, LLC was not incorporated, nor was the Operation Agreement signed, until after the date of invoice and date of shipment of the subject merchandise from New Star to Mr. Quartano"), and New World Pasta Co. V. United States (New World Pasta), Slip Op. 04-18 at p. 14 (CIT March 1, 2004) (the Department found the sale of a shareholder's interest in another company prior to the POR to negate a finding of common ownership and affiliation). The respondent claims that the Department has not considered the temporal aspect of this affiliation and did not provide a reason for not considering this factor.

Jinan Yipin argues further that the Department made statements in its December 1, 2003, "Memorandum from Laurie Parkhill to Jeffrey May Regarding Use of Facts Otherwise Available for Jinan Yipin Corporation" (FA Memorandum) at page 4 which asserted that the date of shipment from the factory in China is the appropriate date of sale for Jinan Yipin's sales. Jinan Yipin states that, under the interpretation of the language advocated by the Department in its FA Memorandum, there could never be a date of sale after the date of shipment from the factory in the exporting country. The respondent states that this is against the Department=s established date-of-sale policy. Jinan Yipin argues that the Department must have considered the date of shipment from the factory in China to be the appropriate date of sale for purpose of its analysis because that is the only way the Department can have claimed in its Preliminary Results that at least two sales were made to the affiliated customer while Edward Lee was a shareholder in Houston Seafood.

Jinan Yipin asserts that the Department's claim that the shipment date from the factory constitutes the date of sale directly contradicts previous statements made by the Department to counsel for Jinan Yipin. The respondent alleges that counsel for Jinan Yipin received a phone call from the lead

analyst for Jinan Yipin in which the analyst stated that the Department did not believe the name Houston Seafood was subject to business-proprietary treatment in Jinan Yipin's October 9, 2003, submission because Edward Lee and Houston Seafood were no longer affiliated. Jinan Yipin argues that this sequence of events shows that the Department manipulated the record intentionally by changing its position on the date of sale so that Jinan Yipin would be compelled to treat the name Houston Seafood as public information. It argues that, assuming *arguendo* that the Department's position regarding date of sale has any merit, the Department's established policy in similar situations would only lead to a conclusion that an affiliation existed with respect to the two sales made during the overlap period.

In addition, the respondent asserts that the Department=s findings regarding favorable terms of sale afforded the affiliated customer are also not supported by the record. It states that the Department is unable to provide any data to support its findings and relies on generalizations. The respondent argues that the Department has a computer database containing every minute detail of American Yipin's sales during the POR, yet it is still unable to quantify its finding using precise numbers. Jinan Yipin argues that the Department's FA Memorandum alleges merely that the terms of sale offered to most customers varies from the amount of time the "affiliated" customer actually took to make payment. Jinan Yipin claims that sales to the "affiliated" customer were on an equal footing with sales to other customers in every other respect. It claims that the fact that the Department has attempted to construe such a meaningless point as a "smoking gun" demonstrates further that its finding of affiliation was not based on a fair and impartial analysis of the record.

Finally, Jinan Yipin states that it provided all information requested by the Department in a timely manner. It claims that the Department had time to request additional information it deemed

relevant or to request the information that it considered necessary because the Department issued another supplemental questionnaire after the verification. Citing the FA Memorandum at p.4, Jinan Yipin states that the record shows that, while Jinan Yipin and American Yipin were in the process of responding to the Department's questions in its third supplemental questionnaire, the Department was engaged in its own exhaustive research of Houston Seafood, Edward Lee, and other matters it deemed relevant to its inquiry. Jinan Yipin claims that the Department's assertion that the record remains "incomplete" has little credibility. Because Jinan Yipin provided all the information the Department requested, it states that it should not be penalized.

In response to the respondent's first point, the petitioners contend that Jinan Yipin mis-characterizes the Department=s decision to use adverse facts available and ignores portions of the decision and facts on the record. They argue that the Department discovered at verification that Edward Lee=s brother, Henry Lee, was the sales manager for American Yipin when it was located in Texas. The petitioners state that, therefore, Edward Lee negotiated sales on behalf of the affiliated customer with his brother, while Henry was the sales manager for American Yipin. They state that the negotiators of the sales between these companies were brothers and, in addition, that Edward Lee became the sales manager for American Yipin while still affiliated with Houston Seafood. Citing Jinan Yipin=s June 10, 2003, Supplemental Questionnaire Response (SQR) at 5-6 and Jinan Yipin=s February 24, 2003, Section A Questionnaire Response (AQR) at 8, the petitioners state that American Yipin negotiated all prices and terms of sale, the sales manager of American Yipin was authorized to negotiate sales, and no outside organization approved the sale. The petitioners state that Jinan Yipin=s reference to temporal aspects of relationships ignores Edward Lee=s relationship to his brother before,

during, and after the POR, and, therefore, the respondent=s reference to Hontex is inapposite. The petitioners claim that Jinan Yipin=s reference to Flanges from India is also inapposite because, in Flanges from India, the decision that two companies were not affiliated was based on the fact that the manager=s role was specifically limited in its authority and duration. Citing AQR at 8, SQR at 5-6, and FA Memorandum at 6, the petitioners contend that Jinan Yipin stated that the sales manager for American Yipin had full authority to negotiate sales and bind the company. The petitioners argue further that in Candles from China the Department determined that an affiliation did not exist because the company in question was not incorporated until after the date of invoice and shipment. The petitioners contend that in the current review the affiliation was established before the date of invoice and before the date of shipment. Finally, in distinguishing the authority cited by Jinan Yipin, the petitioners explain that in New World Pasta the Department found that the sale of a shareholder=s interest in another company took place prior to the POR and this negated a finding of affiliation. The petitioners assert that in this review the affiliation between American Yipin and Houston Seafood existed during the POR.

With regard to the respondent's second point, the petitioners contend that the Department does not allege that the date of shipment from the factory in China is the appropriate date of sale for Jinan Yipin=s U.S. sales. They contend that, in fact, the Department acknowledged that the proper date of sale is the date of invoice as reported. Citing SQR at 18 and AU.S. Sales Verification of Jinan Yipin Corporation, Ltd., in the 2001/2002 Administrative Review of the Antidumping Duty Order of Fresh Garlic from the People=s Republic of China" dated November 24, 2003 (SVR), at Exhibit 3, they state that negotiation and confirmation of all sales to customers during the POR took place prior to shipment

from China. Citing the SVR at 7 and SQR at 18, the petitioners assert that Jinan Yipin admitted that the negotiations for merchandise took place prior to the shipment of merchandise. They state that, because American Yipin began negotiating the essential terms of sale for its first two POR sales to the affiliated customer through Edward Lee and because his brother Henry Lee was the sales manager of American Yipin, a finding of affiliation is not contingent upon a change in the date of sale but upon a finding that during negotiations of the terms of sale a clear affiliation existed.

Third, the petitioners argue that the Department=s concern about the payment terms extended to the affiliated customer was justified and even understated, based on their analysis of information on the record. They argue that the Department had reason to state that its uncertainty increased regarding the relationship of American Yipin and the affiliated customer when it found the disparity in payment histories and the advantageous payment terms afforded this customer. Such factors, the petitioners assert, can indicate the experience of a continuing affiliation. The petitioners contend that advantageous payment terms are not trivial and meaningless and are an indication of the continuing affiliation between the two companies throughout the POR.

Finally, the petitioners assert that Jinan Yipin and American Yipin did not provide all information requested by the Department. The petitioners argue that Jinan Yipin was provided numerous opportunities to submit requested information regarding its affiliations and did not disclose such information. Citing the Standard Questionnaire at 3.c., the petitioners argue that, to begin with, Section A of the standard questionnaire requests that respondents report all information related to any affiliations with any companies and requires a reporting of detailed information for affiliated parties that are involved in the production and/or sale of the subject merchandise. They argue that the

questionnaire sets forth the criteria clearly which the Department considers in determining whether two parties are affiliated, including members of the same family. The petitioners argue that at no point in any of its initial or supplemental questionnaire responses did Jinan Yipin admit to or disclose its affiliation with Houston Seafood. Therefore, they contend that it is not true, as Jinan Yipin claims, that it "provided all information requested by the Department" (citing Respondent's Case Brief at 12). The petitioners argue that, when a respondent has withheld critical information requested by the Department, it cannot be rewarded for creating confusion on the record. The petitioners argue that during verification American Yipin revised its answers regarding affiliations only in response to facts that the Department presented to the company. In conclusion, they state that Jinan Yipin is responsible for an incomplete record regarding affiliations.

B. Application of Adverse Facts Available with Respect to Certain Jinan Yipin Sales Is Not Warranted

Citing Olympic Adhesives, Inc. v. United States, 899 F.2d1565, 1572-1575 (CAFC 1990), Jinan Yipin states that A{t}o avoid the threat of application of adverse facts available, a submitter need only provide complete answers to the questions present in an information request.@ Citing NSK Ltd. v. United States, 19 CIT 1319, 1328 (1995), it states that, because the Department=s finding of affiliation is not supported by the record and it is a departure from established precedent regarding affiliation, Jinan Yipin could not be expected to reach the same conclusion. In addition, citing Mannesmannrohren-Werke AG v. United States, 77 F. Supp. 2d 1302, 1316 (CIT 1999), Jinan Yipin states that it is improper for the Department to make an adverse inference in this situation. The respondent states that the Department never asked Jinan Yipin to provide any sales data for the

"affiliated" customer and, thus, it had no reason to believe that sales information from the "affiliated" customer to its customers would be necessary. It argues that such sales information was not under Jinan Yipin=s control and could not have been obtained easily. Citing Queen=s Flowers de Colombia v. United States, 981 F. Supp. 617, 628 (CIT 1997), Usinor Sacilor v. Unites States, 893 F. Supp. 1112, 1141-42 (CIT 1995), Ta Chen Stainless Steel Pipe, Ltd. v. United States, 23 CIT 804 (1999), and Olympic Adhesives, Inc., supra, 899 F.2d at 1572-1575, Jinan Yipin states that the Department may not use adverse facts available in this case.

Jinan Yipin argues that the Department's decision to use adverse facts available is unsupported by the record evidence in this review. It states that the FA Memorandum relies on the claim that Edward Lee provided inaccurate information to the verification team. The respondent states that the verification report claims that Mr. Lee answered a question by the verifiers by stating that 100 percent of the work for American Yipin is performed in the American Yipin office and that later an employee of American Yipin contradicted this statement. Jinan Yipin states that the personnel from American Yipin present at the verification challenged that the Department asked such a question and that Mr. Lee ever gave such an answer. The respondent claims the verifiers did not ask Mr. Lee this question and, if so, it was misunderstood.

Jinan Yipin requests that the Department clarify statements that it claims are contradictory. Jinan Yipin states that the Department required the public disclosure of the name Houston Seafood by claiming that Edward Lee was no longer affiliated with Houston Seafood. It states, however, that, in the Department=s FA Memorandum, it contradicts this assertion. Jinan Yipin also asserts that the FA Memorandum states that the verification team recognized Edward Lee=s name from his involvement in

the antidumping duty order on fresh crawfish tailmeat from the PRC, although the verification report states that the team only learned of Mr. Lee=s involvement with the crawfish case through discussions with Department officials. The respondent claims that the verification report never mentioned which Department officials were aware of Edward Lee=s involvement in the crawfish case or how they became aware of this information and that the Department has tried to distort the record evidence on this point intentionally in the FA Memorandum. Jinan Yipin also claims that the Department states that it did not provide a full response to questions in the October 27, 2003, supplemental questionnaire. It states that the Department ignores that the October 27, 2003, supplemental questionnaire asked for a time line of Edward Lee's business dealings "starting in December 1998 through to the present." Jinan Yipin states that the Department did not request information concerning activities prior to December 1998 and it has distorted the record to create the appearance that Jinan Yipin did not provide complete answers. The respondent also asserts that, while the FA Memorandum states that one employee did the bulk of her work for American Yipin at the Bayou Dock offices, the verification report states that the employee said that she sometimes did work for American Yipin at the Bayou Dock office. It claims that the Department distorted the statements to manipulate the record to justify the application of facts available. Jinan Yipin argues that these inconsistencies and inaccuracies undermine the credibility of the conclusions the Department has made in this review and that Jinan Yipin has not impeded this review.

The petitioners argue that, if on-site verification determines that the respondent has not been fully honest or forthcoming with the information submitted to the Department, the agency is free to apply adverse facts available in this case. They contend that Olympic Adhesives, cited by Jinan Yipin, acknowledges that application of adverse facts available is appropriate where a respondent provides

information that is "inaccurate in significant and material respects." They state that in both cases respondents withheld information relevant to the critical issue of affiliation.

The petitioners assert that Jinan Yipin and American Yipin did not provide all information requested by the Department. They argue that Jinan Yipin was provided numerous opportunities to submit requested information regarding its affiliations and did not disclose such information. Citing the Standard Questionnaire at 3.c., the petitioners argue that to begin with, Section A of the standard questionnaire requests that respondents report all information related to any affiliations with any companies and requires a reporting of detailed information for affiliated parties that are involved in the production and/or sale of the subject merchandise. They argue that the questionnaire sets forth the criteria clearly which the Department considers in determining whether two parties are affiliated, including members of the same family. The petitioners contend that, given that these standards were identified expressly in the Department's initial questionnaire, there is no question that Jinan Yipin was aware of how the Department views affiliation. In addition, they argue that, because Edward Lee of American Yipin was involved personally in the crawfish case where similar issues related to affiliation were raised, Mr. Lee can hardly plead ignorance of the information which the Department requires. The petitioners argue that at no point in any of its initial or supplemental questionnaire responses did Jinan Yipin admit to or disclose its affiliation with Houston Seafood. Therefore, they contend that it is not true, as Jinan Yipin claims, that it "provided all information requested by the Department" (citing Respondent's Case Brief at 12).

The petitioners contend that the Department's finding that American Yipin withheld information

concerning the relationship between its sales manager, Edward Lee, and Houston Seafood both before and during verification is supported by record evidence. They argue that this is in the Department's FA Memorandum:

> As the verification report shows, several times the verification team requested information from Edward Lee and/or the company and was given inadequate, incomplete, or incorrect responses. Although in the end the team was able to finally extract further information from American Yipin which the verifiers requested very specifically, in no small part as a result of their own independent research on the internet, the responses pertaining to affiliations among the various companies mentioned above led to even more unanswered questions about affiliations between these companies, including American Yipin and {and other affiliated parties}. Thus, also pursuant to section 776(a)(2)(C) of the Act, we find that the inadequate responses we received through out the administrative review also impeded our process significantly.

FA Memorandum at 7.

The petitioners contend that, when a respondent has withheld critical information requested by the Department, it cannot be rewarded for creating confusion on the record. They argue that a great deal of information related to American Yipin's and Edward Lee's affiliations was placed on the record very late in the review, "some of it conflicting", after verification, and to the extent there are any questions as to the affiliation between these parties and others, "the questions exist on the record because Jinan Yipin did not provide complete and accurate responses to the Department's questions during this review" (citing FA Memorandum at 4, 6-7). The petitioners argue that during verification American Yipin revised its answers regarding affiliations only in response to facts the Department presented to the company. They state that Jinan Yipin is responsible for an incomplete record regarding affiliations.

The petitioners state that Jinan Yipin contends that, "even assuming *arguendo* that Commerce's findings of an affiliation throughout the entire POR is lawful, Jinan Yipin could not be expected to reach

the same conclusion on its own" (citing Respondent's Case Brief at 14-15). The petitioners argue that is not the real issue. The real issue, they contend, is that American Yipin's general manager, Henry Lee, clearly had a relationship with one of its major customers during a time when sales with that customer were being negotiated and the respondent made a conscious decision not to disclose that information to the Department at the outset of the review in its Section A questionnaire response. The petitioners contend that the facts concerning Mr. Lee's relationship with the customer and its history fell squarely within the plain terms of the statutory definition of "affiliated persons" and were therefore requested unambiguously in the Department's Section A questionnaire. They contend that the only judgement call to be made by the respondent was the strategic one of whether to disclose these facts to the Department in response to the Section A questionnaire. The petitioners argue that this is not a case where a respondent is being punished for its failure to respond to an ambiguous question. Rather, the petitioners assert, it is a case of a respondent having to bear the consequences of not responding, in a full and forthcoming and timely manner, to one of the more fundamental questions in any antidumping investigation or review.

The petitioners argue that nothing in the statue requires the Department to request additional data when the agency discovers for the first time during verification that critical data have been withheld. They contend that, while the Department chose to go the extra mile and issued an extensive supplemental questionnaire following verification in order to obtain further facts about the relationship, the Department had no obligation to request that Jinan Yipin supply downstream-sales data for the affiliated customer at this late date in the review. They contend that doing so would have rewarded Jinan Yipin for its failure to have disclosed information about the relationship at the outset of the review

and would have impeded the Department's ability to secure the cooperation of respondents in other investigations. The petitioners state that, for that reason, the length of time the Department took to transmit its post-verification supplemental questionnaire and the amount of time available to the respondent to supply downstream-sales data are irrelevant.

The petitioners argue that, had Jinan Yipin made full disclose of its affiliation with Houston Seafood at the outset of the review when it was requested to provide the information, the Department would have been in a position to make a preliminary determination regarding affiliation at a time in the review when additional fact-finding could have been conducted. They argue that instead Jinan Yipin made its own strategic decision not to disclose the relevant facts to the Department early on, thereby depriving the agency of an opportunity to resolve the issue at a point in the review which would have allowed all of the relevant facts and legal arguments to be analyzed thoroughly. The petitioners argue that, by doing so, Jinan Yipin impeded the Department's review and precluded full verification; as a result, the petitioners contend, the agency has full authority to respond by applying facts otherwise available in assessing duties on Jinan Yipin's sales to the affiliated customer.

The petitioners argue that, while Jinan Yipin has devoted considerable effort to try to impeach the verification team's recollection about where Mr. Lee stated that American Yipin employees performed their work, there is no indication in the verification report that it was a "cornerstone" of the Department's justification for resorting to adverse facts available. They contend that the "cornerstone" of the decision to apply adverse facts available was Mr. Lee's failure to acknowledge the ownership interest and family connections supporting a finding of affiliation between American Yipin and Houston Seafood.

The petitioners assert that the Department required the name of Houston Seafood to be on the public record because Jinan Yipin claimed that Edward Lee was no longer affiliated. They also contend that there is nothing inconsistent between the statement in the FA Memorandum that the verification team recognized Edward Lee=s name from the crawfish case and the statement that the team then sought to confirm their suspicions with Department officials in Washington. The petitioners contend that, although the Department asked for a time line of Edward Lee's business dealings "starting in December 1998 though to the present," this does not excuse Jinan Yipin from disclosing information relevant to an affiliation that may have preceded this time. The petitioners argue that the Department's finding that Jinan Yipin did not cooperate fully and disclose all necessary information was not based alone on its response to the Department's October 27, 2003, supplemental questionnaire. Rather, they contend, it is based on Jinan Yipin's failure to disclose important information regarding affiliates in its questionnaire responses and throughout verification.

C. Use of Adverse Facts Available with Respect to Indirect Selling Expenses Not Warranted

Jinan Yipin asserts that the Department=s use of adverse facts available with regard to the addition of all payroll-related expenses from Bayou Dock to the selling-expense ratio for Jinan Yipin was not warranted. It claims that the only overlap of expenses were for miscellaneous office supplies and a possible misallocation of salary payments. The respondent asserts that American Yipin made every possible effort to report its indirect selling expenses properly and that Jinan Yipin provided the Department with all requested financial information for Bayou Dock as soon as it was requested. Jinan Yipin asserts that the use of adverse facts is not warranted given such a minor deficiency.

The petitioners assert that the Department is justified in finding that the American Yipin

employee did her work while at Bayou Dock considering that, earlier during the verification, Mr Lee told Department verifiers that this never occurred. The petitioners state that the use of adverse facts available for salary expenses was warranted considering that for the first three months none of American Yipin=s employees were paid.

Department Position: Contrary to the respondent=s claims, we have not applied adverse facts available to certain sales and selling expenses improperly.

With regard to Comment 19.A, as detailed in our original questionnaire, an affiliated person is

> "(1) members of a family, (2) an officer or director of an organization and that organization, (3) partners, (4) employers and their employees, and (5) any person or organization directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and that organization. In addition, affiliates include (6) any person who controls any other person and that other person, and (7) any two or more persons who directly control, are controlled by, or are under common control with, any person. 'Control' exists where one person or organization is legally or operationally in a position to influence decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. See Section 771(33) of the Act; sections 351.102(b) and 351.401(f) of the regulations."

See also the original questionnaire at page App. I-1. As stated in our FA Memorandum, "at verification Edward Lee explained that his brother, Henry Lee, was the sales manager for American Yipin when it was located in Texas." See FA Memorandum at page 6. Thus, prior to Edward Lee's employment with American Yipin in September 2002 and his assistance to American Yipin in August 2002, it was Edward Lee's brother, Henry Lee, who was the sales manager for American Yipin. As explained clearly in our definition of affiliated persons provided to the respondent in our original questionnaire, brothers would be considered affiliates as detailed by "(1) members of a family." *Id*.

Jinan Yipin argues that the Department should only look to the temporal aspects of Edward

Lee=s ownership of Houston Seafood and the official start date of his employment at American Yipin. This argument ignores the important fact that, even before the date of Edward Lee=s employment with American Yipin, the sales manager of American Yipin was his brother, Henry Lee. In terms of the statutory language, Edward Lee, as a co-owner, controlled Houston Seafood, and his "affiliated" brother, as sales manager, controlled American Yipin's commercial decisions during part of the POR. Although these two entities negotiated at least two transactions during this time, Jinan Yipin implies that this fact is irrelevant. We disagree. Houston Seafood and American Yipin could be considered affiliated for purposes of the Department's analysis, on the basis of a 'family grouping' (see Ferro Union, Inc. And Asoma Corporation v. United States, et al., 74F. Supp. 2d 1289, 1926 (Oct. 6, 1999)), for at least part of the POR. This information, which Jinan Yipin did not provide to the Department, is relevant.

Furthermore, Jinan Yipin's analysis would also have the Department ignore the fact that before Edward Lee was hired officially by American Yipin he "assisted" the company, using the company's own terminology, and, at some point preceding his official employment, American Yipin decided that it would move all of its operations from Texas to Louisiana to be near Edward Lee to benefit from his wisdom and expertise. Such a fact may not prove decisively that Edward Lee controlled American Yipin immediately following his sale of Houston Seafood stock, but it is certainly information that is relevant to an affiliation analysis.

Finally, Jinan Yipin would have us ignore the fact that Edward Lee sold his shares of Houston Seafood to a person for which we found two previous transactions with Edward Lee on file with the Harris County Clerk's Office. See memorandum from Jennifer Moats to the File entitled "Previous

Business Relationships With Buyer of Houston Seafood," dated December 1, 2003. As the Department explained in its FA Memorandum, "because the Department has learned of a seemingly longstanding relationship between these parties so late in the review, inadequate time remains in which to evaluate possible further affiliations." See FA Memorandum at page 4. Jinan Yipin did not supply the Department with a great deal of information involving its potential affiliated parties and it was only through information derived at verification and information derived through independent research that the Department was able to learn further information pertaining to Edward Lee, Houston Seafood, and the buyer of the company's shares. The Department did not indicate in the FA Memorandum that the information which it discovered so late in the proceeding indicated that Houston Seafood was affiliated with American Yipin. What we did determine in the FA Memorandum, and we are clarifying in this decision, is that Jinan Yipin did not cooperate to the best of its ability in providing information pertaining to all of its affiliates during the POR. Thus, it is no surprise that some unanswered questions remain in the record of this review. This is a direct result of American Yipin's inadequate responses to the Department's questionnaires.

Jinan Yipin cites New World Pasta, Candles form China, Crawfish, and Hontex in order to argue that the Department has made temporal considerations in reaching negative decisions regarding affiliation in previous decisions. Jinan Yipin claims that in New World Pasta the Department found that the sale of a shareholder's interest in another company prior to the POR negated a finding of common ownership and affiliation. On a closer reading of New World Pasta it states specifically:

> With regards to the first factor, affiliation, under 19 U.S.C. § 1677(33)(A), Commerce will consider persons (including corporations under 19 C.F.R. § 351.102(b)) affiliated where there is a family relationship between them. Under 19 U.S.C. § 1677 (33)(F), Commerce will consider persons affiliated when they are under common control.

> Because Amato's major shareholders include a sister and a sister-in-law of Garofalo's majority shareholder, Commerce found that the two companies were affiliated under 19 U.S.C. § 1677(33)(A). Preliminary Collapsing Memo, C.R. Doc. No. 45 Pl.'s Conf. Ex. 7 at 4. Commerce also found that a group of related individuals exercised common control over both Garofalo and Amato. Id. Hence, Commerce found the two companies affiliated under both 19 U.S.C. § 1677(33)(A) and 19 U.S.C. § 1677(33)(F). Id.

New World Pasta, Slip Op. 04-18 at 12.

In New World Pasta the Department made a determination not to 'collapse' affiliated entities pursuant to 19 CFR 351.401(f)(1). The Department considered temporal aspects related to the sale of stock before the POR because "the evidence required to justify a collapsing determination 'goes beyond that which is necessary to find common control.'" Slip Op. 04-18 at 14. Therefore, the analyses at issue in that case was not the affiliation analysis by the Department based on section 771(33) of the Act, but the Department's subsequent collapsing analyses. Thus, the situation in New World Pasta does not refute our finding of a possible affiliation and, in fact, shows that, even though there was a sale of shares prior to the POR, the parties were still considered affiliated under section 771(33) of the Act.

In addition, in New World Pasta Garofalo disclosed a family relationship in its response and submitted to the Department, previous to verification, a list of all purchases from the "affiliated" company. At verification the Department examined the selected records of purchases until the end of the POR, compared amounts and prices, and concluded that the transactions were made on the same basis as those being conducted with other non-affiliated producers. Slip Op. 04-18 at 4, 17. Therefore, unlike the present case, the Department had adequate time to review and verify the data on the record and found that the sales to the "affiliated" party sales were at arm's length.

In Candles from the PRC, the respondent reported an affiliation with a company that did not exist until after the date of invoice and the date of shipment of the single sale during the POR. In Candles from the PRC the Department found that, unlike in this case, the party fell short of the definition of "affiliated persons" and "affiliated parties" in 19 CFR 351.102(b). Thus, the facts of that case do not apply here.

In Hontex, the issue addressed was the collapsing of companies, not the issue of affiliation. In fact, with regard to the issue of affiliation, again, the court agreed with the Department that its methodology is a permissible interpretation of the antidumping statute. See Hontex, Slip Op. 03-17 at 36. As petitioners point out in regard to Hontex, a relationship between Edward Lee and his brother Henry Lee is not temporary or episodic. Clearly, because Henry Lee and Edward Lee fall squarely within this definition of "affiliated persons," the analysis of Hontex does not apply in this case.

In Flanges from India, as Jinan Yipin suggests, the record showed that Mr. Orban's authority and control were limited in scope and duration. Critical management decisions and functions, such as pricing and operational funding, continued to be handled by Viraj, so Mr. Orban's authority was limited. This is unlike the present situation where the record shows that Edward Lee was able to control pricing and that he funded a portion of American Yipin's operations during the POR through Bayou Dock. Similarly in Crawfish, the facts of that case led the Department to conclude that Fujian Pelagic was not in a position to exert direction or control over Pacific Coast. In both cases, the respondents were also forthcoming about potential affiliates and the information was clear on the record. Not so here. The facts of this case are distinguishable from Flanges from India and Crawfish and, therefore, they are inapposite.

With regard to the respondent's second point, it was American Yipin who reported that all of its sales were negotiated prior to the shipment of the goods from China. See SQR at 18 ("American Yipin and Jinan Yipin always have an order from a customer prior to shipping merchandise to the United States"). We examined the date of shipment to evaluate whether negotiations for sales took place while an affiliation existed between American Yipin and the customer. In no way does this affect our position on the date of sale. We find that the date of sale is the date of invoice as reported. Certainly, the date of sale is significant with regards to the final terms of a commercial transaction. It is the Department's experience, however, that, in most commercial transactions, purchasers, suppliers, and negotiators all negotiate the terms of sale before the actual date of sale. In this case, Jinan Yipin's own questionnaire responses indicated that orders existed between Jinan Yipin and Houston Seafood before Jinan Yipin shipped its subject merchandise to the United States. Perhaps Jinan Yipin's confusion arises from its belief that affiliation is only relevant at the date of sale. This is incorrect. Affiliation is an issue for the purposes of our analysis anytime it may affect transactions examined. Thus, from the first offer to purchase merchandise to delivery of the merchandise, the relationships of a producer/exporter and its U.S. customer are significant for our analysis. As we indicated in our FA Memorandum at page 6, American Yipin and Houston Seafood were most likely affiliated during the period in which some of Jinan Yipin's sales were negotiated with Houston Seafood. This is an important fact, one which Jinan Yipin failed to provide in response to the Department's questionnaires.

With regard to respondent's third point, we explained our decision in the FA Memorandum as follows:

> The legislative history indicates that, in repealing the earlier provisions defining related parties and codifying a new definition of "affiliated person," one of Congress's goals

> was to broaden the ability of the Department to analyze commercial relationships for the purposes of its dumping analysis and make that analysis consistent with economic reality. See Statement of Administrative Action (SAA), H.R. Doc. No. 103-826, at 870 (1994). This was accomplished, in part, by adding a new paragraph which defines affiliation to include control relationships not covered explicitly in the earlier statute. Section 771(33)(F) of the Act provides, in pertinent part, that two or more entities are affiliated where they directly or indirectly control, are controlled by, or are under common control of another entity.
>
> Moreover, control by persons may be by individuals or groups, and multiple persons may control, individually and jointly, one or more entities. See Certain Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review, 62 FR 53808, 53815 (October 16, 1997). Additionally, evidence of actual control is not required for a finding of affiliation within the meaning of section 771(33) of the Act; it is the ability to control that is at issue. See also Antidumping Duties; Countervailing Duties; Proposed Rules: 19 CFR Parts 351, 353, and 355, 61 FR 7308, 7310 (February 27, 1996).

See FA Memorandum at page 2.

Pursuant to section 771(33) of the Act, evidence of control is not required for a finding of affiliation, it is the ability to control that is at issue. We analyzed information on the record and found that, throughout the POR, the affiliated customer received payment terms which were significantly more advantageous than other customers. Again as stated in our FA Memorandum, "our uncertainty as to the relationships of these companies was increased when we verified that payment terms to the affiliated customer were on average more advantageous than the terms offered to American Yipin's other customers... Thus, after reviewing the record extensively, we find that issues pertaining to the affiliation of American Yipin and its customer remain outstanding." See FA Memorandum at page 5. The data on the record submitted by Jinan Yipin showed that this customer had been afforded payment terms more beneficial than other customers. Therefore, we determined, along with the other identified circumstances, that this fact supported a finding that this customer's relationship was distinguishable

from customers which had no affiliation throughout the POR.

With regard to Comment 19.B, section 776(a)(2) of the Act provides that, if an interested party or any other person (A) withholds information that has been requested by the administering authority, (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782, (C) significantly impedes a proceeding under this title, or (D) provides such information but the information cannot be verified as provided in section 782(i), the administering authority shall, subject to section 782(d), use facts otherwise available in reaching the applicable determination. In its FA Memorandum for the preliminary results, the Department described in detail the reason for the application of adverse facts available as follows:

> We find that, pursuant to 776(a)(2)(A), American Yipin withheld information concerning the relationship between its sales manager, Edward Lee, and Houston Seafood both before and during verification. As the verification report shows, several times the verification team requested information from Edward Lee and/or the company and was given inadequate, incomplete, or incorrect responses. Although in the end the team was able to finally extract further information from American Yipin which the verifiers requested very specifically, in no small part as a result of their own independent research on the internet, the responses pertaining to affiliations among the various companies mentioned above led to even more unanswered questions about affiliations between those companies, including American Yipin and Houston Seafood. Thus, also pursuant to section 776(a)(2)(C) of the Act, we find that the inadequate responses we received throughout the administrative review also impeded our process significantly. The use of facts otherwise available is therefore, warranted in this case.
>
> Section 782(d) of the Act provides that, if the Department determines that a response to a request for information does not comply with the request, the Department shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of the review. In this administrative review, the Department issued its questionnaire. Then it followed with a supplemental questionnaire, requesting specific information. It then followed with a second supplemental questionnaire. Then it verified the accuracy of

> these responses and, during verification, it asked numerous questions which were answered, although on many occasions American Yipin revised those answers during verification in light of facts which the Department presented to the company. See Jinan Yipin U.S. Sales Verification at page 4 for a discussion about Edward Lee's involvement with Louisiana Packing. Finally, the Department followed the verification with a third supplemental questionnaire. Accordingly, pursuant to section 782(d) of the Act, the Department has provided American Yipin with numerous opportunities to remedy or explain deficiencies on the record, as required by this provision.

See FA Memorandum at page 7.

Although the Department had given numerous opportunities for Jinan Yipin to provide all the relevant information for the Department's affiliation analysis, it did not do so. The Department applied adverse facts available to both the sales to the affiliated customer and to the indirect selling expenses because Jinan Yipin failed to report affiliated parties and, in particular, its affiliations with Houston Seafood and Bayou Dock in its questionnaire responses. Then, as further support of the Department's decision to apply an adverse inference, Jinan Yipin continually misrepresented particular facts on more than one occasion at verification when the Department asked certain questions. See SVR at page 4. Rather than cooperate with the agency, it was left to agency employees to do research, discover information involving Edward Lee, and then confront Edward Lee at verification about this information just to get relevant affiliation information on the record. Indeed, at verification we asked a number of questions regarding affiliated parties, including questions pertaining to the existence of any previously unidentified affiliated parties and to the separateness of American Yipin's accounting records from affiliates. In response, American Yipin either did not disclose all relevant information, unless prodded by information the Department uncovered, or denied information that the Department found later to be true. Despite Jinan Yipin's claims to the contrary, such conduct does not reflect a respondent acting "to the best of its ability."

Jinan Yipin's stonewalling continued even after verification, when the Department provided Jinan Yipin a fourth opportunity to identify its affiliates in a third supplemental questionnaire. In its response, Jinan Yipin still did not clearly identify all of its owners, affiliates, their owners, and relationships, leaving out critical pieces of information and links to further familial and long-standing business relationships. Despite Jinan Yipin's sweeping claims in its brief to the contrary, Edward Lee's misrepresentation in response to our questions regarding certain employees' workplaces and shared resources during verification was an element of our decision to apply an adverse inference, but we did not rely solely on this factor in reaching our decision. Pursuant to sections 776(a) and (b) of the Act, the decision to apply adverse fact available was in response to all of Jinan Yipin's failures to cooperate to the best of its ability in providing accurate, responsive information on the record with respect to the issue of affiliated parties.

Jinan Yipin tries to blame the Department through unsubstantiated claims of bias for its own failures in responding to the Department's questionnaires and questions at verification, but the Department's application of adverse facts available in this case was a direct result of lack of information, or misinformation, provided by Jinan Yipin on the record with respect to affiliation. Accordingly, the application of adverse facts available is warranted in this case.

The respondent claims that the Department made statements in its FA Memorandum and verification report that it considers contradictory. Its assessment of our analysis is unsubstantiated and incorrect. First, despite Jinan Yipin's claims, the Department did not require the public disclosure of Houston Seafood's name by claiming that Edward Lee was no longer affiliated to Houston Seafood. In fact, the opposite is true. The information was already available publicly on the record of another

proceeding that Edward Lee owned Houston Seafood. Therefore, we did not consider that proprietary treatment was warranted in this proceeding because the information was already publicly available.

Second, it is true that "the verification team recognized Edward Lee's name from his involvement in certain administrative reviews of the antidumping duty order on freshwater crawfish tail meat from the PRC" (FA Memorandum at p. 3). The case analyst for Jinan Yipin knew that Edward Lee was involved in the crawfish case. It is information that is publicly available on the record of that proceeding. It is also true that the case analyst did not know that Edward Lee was involved with American Yipin until verification. Jinan Yipin had not identified the names of American Yipin's sales managers, although these managers have a high level of control over Jinan Yipin's U.S. sales, including control over sales prices and bank accounts. Upon arrival at verification and during the course of introductions, the Department learned the identity of these managers for the first time, including Edward Lee's role as an owner of Houston Seafood during the POR. The case analyst recalled Edward Lee's name from the crawfish case and decided to call Department officials in Washington during verification in order to confirm the role that Edward Lee played in that case. As a result of this confirmation, the verification team was then able to ask further questions at verification.

Third, the Department works with little to no information about a respondent unless that information is provided during the course of the review or that information is publicly available. Therefore, it is imperative that the respondent replies completely to any questions in the Department's questionnaires. The record evidence shows that, in response to certain questions involving American Yipin and its affiliations, Jinan Yipin answered questions partially or failed to answer questions altogether. For example, in our original standard questionnaire, we asked at questions 2a.i. and 2b for

the identification of the people who control the company and requested the full name and address of the individual(s), corporation(s), or entities that control the company. In addition we asked respondents to include the full names and addresses of all current owners, directors, and managers. See original questionnaire at pages A1-A2. We requested further that respondents report prior positions held by each of their owners, directors, and managers listed, any position that their owners, directors, and managers hold with other companies or entities are identified, and the nature of those positions and the company's full names and addresses are reported. See *id.* at page A-2. These are not questions we asked only of Jinan Yipin, but questions that we asked of every respondent in this review. Jinan Yipin's response to these questions was incomplete, even after the Department issued a third supplemental questionnaire following verification. For example, in our question 2.b., Jinan Yipin responded with the names of the owners of Louisiana Newpack, but it did not identify that one of these owners has a family relationship with Edward Lee. Therefore, without a clear identification of the owners and their relationships, it has become impossible for the Department to conduct its affiliation analysis with any certainty. In these ways, Jinan Yipin has impeded the conduct of this review.

Finally, the Department did not contradict itself, as asserted by Jinan Yipin, when it "found that one employee did the bulk of her work for American Yipin at the Bayou Dock offices" (FA Memorandum at p. 12) and indicated in the verification report that one employee stated that she "sometimes" did work for American Yipin at the Bayou Dock office. As the petitioners point out correctly, "Jinan Yipin's suggestion that (the terms) 'sometimes' and 'the bulk' are mutually exclusive terms is without merit; 'sometimes' can, depending on the context, mean only 'not always.' See PRB at page 25. More importantly, however, the Department's statement that it "found" something, i.e.,

made an affirmative determination in its FA Memorandum, does not contradict its reference to the employee's claims as reported in the verification report. In the verification report, we restated what we had been told by American Yipin's employee. In the FA Memorandum, we stated what we had determined to be the truth based not only upon the employee's claims but also the evidence before us at verification, including the location of the shared computer, shared software, and shared records. See FA Memorandum at page 12 and Jinan Yipin Verification Report at pages 14-15.

Addressing Comment 19.C, through verification of American Yipin in October 2003 and additional research, we found that not all indirect selling expenses American Yipin incurred on the sales of subject merchandise and another company were captured in Jinan Yipin's responses properly. In calculating a dumping margin, the Department makes various adjustments to the selling price of the subject merchandise. See section 772 of the Act. In accordance with section 772(d)(1)(B) of the Act, where the Department calculates CEP, the Department must make an adjustment for "expenses that result from and bear a direct relationship to the sale such as credit expenses, guarantees, and warranties." Thus, the Department explained Jinan Yipin's inadequate responses to this issue in its FA Memorandum:

> Jinan Yipin reported that its U.S. affiliate, American Yipin, handled all U.S. sales. See Jinan Yipin's February 21, 2003, response at page 11. In the same response at page 31, it explained that it calculated the ratio for indirect selling expense using the 2002 profit and loss statement for American Yipin. In its June 10, 2003, supplemental response at page 23, Jinan Yipin stated that "the {indirect selling expense} ratio was calculated using all indirect expenses for American Yipin that have not been reported elsewhere in the database."

See FA Memorandum at page 11. Therefore, American Yipin told the Department that it had included all its indirect selling expenses. At verification, however, we learned:

> When verifying Jinan Yipin's claimed figures for its indirect selling expenses associated with U.S. sales of the subject merchandise, we found that, although Jinan Yipin's U.S. affiliate's office, American Yipin, opened in September 2002 in Westwego, Louisiana, salaries were not paid to employees of American Yipin for the first three months of operation. See Jinan Yipin U.S. Sales Verification at page 14. In addition, Edward Lee, the sales manager, did not receive a salary for the first three months he worked at American Yipin. When we visited Bayou Dock and examined its books and records, we found that Edward Lee and the two other employees of American Yipin had been paid consistently by Bayou Dock. See Jinan Yipin U.S. Sales Verification at page 14 and 15.

See FA Memorandum at pages 11-12. Accordingly, after finding at verification that the American Yipin employees were not paid for the first three months of their employment with American Yipin, we found that they were paid by Bayou Dock for their services.

Edward Lee explained that American Yipin is a completely separate entity from Bayou Dock and the selling activities and accounting records are kept separately. See Jinan Yipin U.S. Sales Verification at page 4. As explained in our FA Memorandum, however,

> (w)e then visited Bayou Dock and reviewed its electronic accounting records. We saw that through the main screen of the accounting software Ms. Bourge has the option to open a number of accounting records. This included accounting records for American Yipin, Louisiana Packing, and Bayou Dock plus records for other companies mentioned earlier during verification and companies of which we were not aware.

See FA Memorandum at page 12.

American Yipin did not indicate to the Department that American Yipin employees had control of the accounting records of multiple companies. As stated previously, "we have determined that, by sharing employees, salaries, computers, office space, accounting software and records, overhead expenses, and other expenses, American Yipin and Bayou Dock were managed and operated in a manner that is not consistent with two totally unaffiliated business entities during the period of review."

See FA Memorandum at page 12.

Based on our findings that Bayou Dock incurred certain indirect selling expenses on behalf of Jinan Yipin's sales of fresh garlic in the United States, it is clear that Jinan Yipin withheld certain information pertinent to the calculations of a dumping margin. Accordingly, it was appropriate for the Department to determine, as adverse facts available, that Bayou Dock's personnel expenses should be included in Jinan Yipin's calculation of its indirect selling expenses.

Comment 20: Jinan Yipin claims that the petitioners have provided false and misleading information intentionally in order to manipulate the results of this case. It asserts that the petitioners have done so by providing inaccurate statements from the U.S. industry and by knowingly misrepresenting Jinan Yipin=s factors-of-production data in order to support their arguments. In addition, the respondent argues that the Department has relied on all the information provided by the petitioners without attempting to determine the veracity of this information. It states that, in doing so, the Department has abandoned all pretense of conducting a fair and unbiased proceeding. It argues that the Department is administering the dumping law in an unlawful manner by accepting all assertions made by petitioners and placing the burden on respondents to refute these claims.

The petitioners argue that these claims by Jinan Yipin reflect a transparent attempt to divert the Department's attention from why Jinan Yipin's reported consumption ratios are so different from those reported by other respondents. The petitioners assert that the Department did not rely on any information submitted by the petitioners in its factors-of-production analysis for the preliminary results. They contend that all information the Department used in determining the factors of production for Jinan Yipin was taken from its responses.

Department Position: We have not relied on any information submitted by the petitioners in our calculation of a dumping margin for Jinan Yipin. Although we have reviewed any claims made by the petitioners regarding the veracity and plausibility of the information on the record of this review, such claims did not cause us to veer from our standard practice of relying on the data provided by respondents unless there is some distortion of the record which causes us to use adverse inferences as provided by law.

Comment 21: Jinan Yipin claims that the inspection charges which the Department deducted in its calculation of U.S. net price were incurred as a direct consequence of the antidumping duty order. Jinan Yipin states that its shipments are four to five times more likely to be selected for examination as a result of this antidumping duty order. Citing Federal-Mogul Corp. v. United States, 824 F. Supp. 215 (1993), and AK Steel Corp v. United States, 988 F. Supp. 594 (CIT 1997), Jinan Yipin states that it is the Department=s policy not to deduct expenses from the U.S. price that are the direct result of an antidumping duty order or participation in a dumping review. The respondent asserts that it is improper for the Department to adjust Jinan Yipin=s U.S. sales price by the full amount and a reasonable portion of these charges should be disregarded when calculating a margin for the final results.

The petitioners argue that, although Jinan Yipin claims that these charges are a direct consequence of its involvement in an antidumping duty order, this is a mis-characterization. They state that Jinan Yipin=s broker admitted that three government agencies, U.S. Customs and Border Protection, the U.S. Food and Drug Administration, and the U.S. Department of Agriculture, are involved in the processing and release of merchandise and that these agencies together have caused delays in processing. In addition, the petitioners state that the same broker stated that Jinan Yipin=s

shipments of fresh garlic were four to five times more likely to be examined than non-agricultural products subject to antidumping duties. They argue that it is because Jinan Yipin=s product is an agricultural product rather than because it is subject to the antidumping duty order which caused the increased level of examination. The petitioners argue that, even assuming that the inspection fees can be tied directly to increased scrutiny by Customs, this increased scrutiny is due to Jinan Yipin=s complaint to Customs regarding identity theft. Therefore, they argue, that it is proper for the Department to adjust Jinan Yipin=s U.S. sales price by the full amount of inspection charges.

Department Position: As required by section 772(d)(1)(D) of the Act, we have deducted the inspection charges reported by Jinan Yipin from the U.S. price. The letter on the record provided by a Customs broker indicates there are three agencies responsible for the inspections of merchandise imported from Jinan Yipin. Two of the three agencies are in no way involved in any aspect of the collection of cash deposits or assessment of antidumping duties on Jinan Yipin=s imported merchandise. In addition, U.S. Customs and Border Protection can inspect containers arriving in the United States for a myriad of reasons. Because the inspection charges were incurred on the importation of the subject merchandise, it is appropriate under the statute to deduct the total amount of inspection fees reported by Jinan Yipin from the U.S. price.

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 _____

_____
James J. Jochum
Assistant Secretary
for Import Administration

_____
Date