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Administrative Review
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June 20, 2011

MEMORANDUM TO: Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the 15th Administrative Review of Fresh Garlic from the People's Republic of China

SUMMARY:

We have analyzed the case briefs submitted by Shenzhen Xinboda Industrial Co., Ltd. (Xinboda) and Jinan Farmlady Trading Co., Ltd. (Farmlady), as well as the rebuttal brief submitted by Petitioners,[1] in the administrative review of fresh garlic from the People's Republic of China (PRC).[2] The Department of Commerce (Department) published the preliminary results in the Federal Register for this review on December 22, 2010.[3] The period of review (POR) is November 1, 2008, through October 31, 2009. Based on our analysis of the record and comments received, we have made adjustments to our calculations. These are discussed in the section of the accompanying Federal Register notice entitled "Changes Since the Preliminary Results." We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of issues for which we received comments and rebuttal comments from parties.

[1] Petitioners are the Fresh Garlic Producers Association, its individual members being Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc.

[2] See Fresh Garlic from the People's Republic of China – AR 15 – Case Brief – Shenzhen Xinboda (May 23, 2011) (Xinboda Case Brief); Fresh Garlic from the People's Republic of China – Comments of Jinan Farmlady Trading Co., Ltd. in Connection with the 15th Administrative Review (May 20, 2011); and Fresh Garlic from the People's Republic of China: Petitioners' Rebuttal Brief (June 3, 2011).

[3] See Fresh Garlic from the People's Republic of China: Preliminary Results of, Partial Rescission of, and Intent to Rescind, in Part, the 15th Antidumping Duty Administrative Review, 75 FR 80458 (December 22, 2010) (Preliminary Results).

Comment 1: Whether the Application of Total Adverse Facts Available to Xinboda is Warranted

Comment 2: Whether the Department Properly Compiled the Record Regarding Allegations Against Xinboda

Comment 3: Surrogate Values for Garlic Bulbs

Comment 4: Wholesale Price Index

Comment 5: Xinboda's Water Valuation

Comment 6: Surrogate Financial Ratios

Comment 7: Surrogate Wage Rates

Comment 8: Partial Rescission in Administrative Reviews

Comment 9: Means to Exclude Separate Rate Companies from Administrative Reviews

Comment 10: Zeroing in Administrative Reviews

BACKGROUND:

The following is a history of events relevant to understanding certain issues discussed below. On September 20, 2007, the Department issued the final results of the new shipper review (NSR) for Xinboda.[4] In that NSR, we determined that Xinboda was entitled to a cash deposit rate of zero for sales of garlic produced by Xinboda's affiliate, Zhengzhou Dadi Garlic Industry Co., Ltd. (Dadi). This combination rate (or "chain rate") would not be applicable to exports by Xinboda of garlic produced by other companies, which would be required to enter at the PRC-wide rate.[5]

On April 1, 2011, the Department placed on the record of this review a submission that requested a changed circumstances review (CCR) received in late 2009. The request alleged that Xinboda was shipping garlic to the United States produced by another company, not Dadi. Essentially, the request alleged that Xinboda's zero rate was being used for exports that should have entered at the PRC-wide rate. The Department determined on January 25, 2010, not to initiate the review because the request relied on information pertaining to a period well after the period covered by the NSR. We stated, however, that the documents submitted coincided with the time period that is currently under review and that we would take them into consideration during this administrative review.[6]

[4] See Fresh Garlic From the People's Republic of China: Final Results of the Eleventh New Shipper Reviews, 72 FR 54896 (September 27, 2007).
[5] Id.
[6] Consistent with this statement, the Department placed the CCR request on the record of the current review, along with comments from Xinboda, the Department's January 25, 2010 letter to the requesting party explaining our decision not to initiate a CCR, and other related documents. See Memorandum to the File, "15th Administrative

Because the combination rate applied only to subject merchandise produced by Dadi and exported by Xinboda, the Department followed its normal practice during this administrative review and collected information regarding what Dadi produced and what Xinboda exported, thus confirming Xinboda's statements that it had shipped Dadi-produced garlic exclusively during the POR. We compared Xinboda's reported exports of subject merchandise during the POR against data collected by U.S. Customs and Border Protection (CBP) listing suspended entries during the POR that had been placed on the record in the respondent selection phase of this review.[7] We found that the volume of Xinboda's exports were very close to the volume of entries suspended by CBP under the combination rate of zero, and the difference could reasonably be explained by the lag time for ocean transit between export date and import date. Furthermore, Xinboda reported that Dadi had produced in several facilities all of the subject merchandise it had exported to the United States. We requested and received backup documentation supporting this statement. As such, we relied on the information reported by Xinboda for the Preliminary Results.

From April 12 to April 19, 2011, the Department conducted verification of Xinboda and its affiliated producer, Dadi. We issued the verification report on May 13, 2011.[8] On May 9, 2011, we placed on the record an email from a party unfamiliar to the Department alleging that Xinboda's garlic exports were actually produced by a company other than Dadi.[9] As with the CCR request, this allegation suggested Xinboda's combination rate was being applied improperly to Xinboda's exports. Along with that email, we placed on the record print-outs from a website apparently maintained by the other company identified in the email allegation, discovered through the Department's own internet research conducted after receipt of the email allegation.[10] That website indicated that the other company is an active processor and exporter of garlic. The Department invited parties to comment on the new information placed on the record. On May 20, 2011, along with its case brief, Xinboda submitted timely new factual information, in accordance with 19 CFR 351.301(c)(1), to rebut the allegation and the Department's research. For a full discussion of the issues surrounding whether Dadi produced the subject merchandise that Xinboda exported, see Comments 1 and 2 below.

Review of Antidumping Duty Order on Fresh Garlic from People's Republic of China: Placing on the Record Documents related to DLC Trading Co., Ltd.'s Request for a Changed Circumstance Review of Shenzhen Xinboda Industrial Co., Ltd.," dated April 1, 2011.

[7] See Letter to All Interested Parties from Thomas Gilgunn, Program Manager, Office 6, "15th Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: CBP Data for All Subject Merchandise Entries During the POR," dated January 12, 2010.

[8] Memorandum to the File, "Verification of the Sales and Factors Response of Shenzhen Xinboda Industrial Co., Ltd. in the Antidumping Administrative Review of Fresh Garlic from the People's Republic of China, dated May 13, 2011 (Verification Report).

[9] The email was signed by "the People of Jinxiang." The email address from which the allegation was received is "jinxiangjining@yahoo.com." Thus, the email does not specifically identify an individual or organization as the source of the allegation.

[10] See Memorandum to the File, "15th Administrative Review of Antidumping Duty Order on Fresh Garlic from People's Republic of China: Placing on the Record Documents and Information Related to Shenzhen Xinboda Industrial Co., Ltd.," dated May 10, 2011 (Email Memorandum), placed on the record on May 10, 2011.

DISCUSSION OF THE ISSUES:

Comment 1: Whether the Application of Total Adverse Facts Available to Xinboda is Warranted

Xinboda's Arguments

- The anonymous email allegation placed on the record by the Department on May 9, 2011, is an amateurish fraud, including doctored photos of Xinboda's production facilities and implausible allegations of deceit supposedly undertaken by Xinboda personnel, and should be afforded no weight in the Department's final results.
- Xinboda has never attempted to conceal information about the facilities in which it processes garlic.
- The Department's examination at verification of inventory, accounting, production and sales records, and other documents, both on paper and electronically, proves the veracity of Xinboda's claims. Specifically, verification confirmed that Xinboda sells only garlic produced by Dadi, and that Dadi's production is sold only through Xinboda.
- Verification was conducted after the Department placed the 2009 request for a CCR on the record of this administrative review. Because that request included allegations of fraud similar to those made in the email allegation, the Department was mindful of such fraud allegations while conducting verification.
- The internet research conducted by the Department in response to the anonymous email allegation does not support the claims contained in the allegation. The website found by the Department is merely advertising maintained by a party unrelated to Xinboda. The claims made on that website are implausible and demonstrate its inaccurate nature.

Petitioners' Arguments

- The email allegation and the information gathered by the Department over the internet demonstrate that Xinboda and Dadi have materially misrepresented the nature of their operations. In particular, the Department's research indicates that the peeled garlic shipped by Xinboda and supposedly produced by Dadi is actually produced by another company, through means that allow the other company to take advantage of Xinboda's zero cash deposit rate.
- The Department's verification report indicates that Dadi's facilities would not allow it to supply fresh whole bulb garlic to Xinboda for export beyond November or December because of a lack of atmosphere-controlled storage capacity. This timeline is inconsistent with the timing of Xinboda's reported sales. In fact, a schematic of Dadi's storage facility for whole garlic indicates it could not hold the entire amount of whole garlic supposedly supplied to Xinboda for any amount of time—the facility simply is not large enough. Therefore, an additional producer must be supplying Xinboda with whole garlic.
- The verification report indicates that Dadi consumes a large amount of water in the production of peeled garlic, contrary to Xinboda's earlier claims that water is an insignificant factor in its garlic production.

- Given these material misrepresentations by Xinboda and Dadi regarding the nature of their operations, the Department must determine that all data submitted by Xinboda is unreliable and apply total adverse facts available (AFA).

Department's Position:

After weighing all evidence on the record, and after careful consideration of all arguments, the Department finds that the application of AFA is not warranted. As explained below, in response to Comment 2, in placing the email allegation on the record of the review, the Department did not endorse the allegations contained in the email or imply that we would be relying on the email's allegations without additional support for those claims. Rather, we conducted independent internet research ourselves in an attempt to determine whether the allegations in the e-mail could be substantiated by information in the public domain. When we found information on the internet germane to the issue at hand, we placed that information on the record along with the email. We believed the information obtained through our internet research, along with the similarity between the claims in the email allegation and those in the CCR request,[11] warranted placing the allegation and the results of our internet research on the record to afford all parties the opportunity to rebut or clarify the information and to submit comments and explanations.

The Department did not reach a determination regarding the information at the point at which it was placed on the record. Since we were unaware of the information until after the record had been closed, we opened the record for an additional ten days pursuant to 19 CFR 351.301, which allows parties additional time to submit new factual information to rebut, clarify, or correct information placed on the record by any other party, including the Department. Xinboda placed additional information on the record at the end of the ten-day period; Petitioners did not.

Despite the apparent contradiction between the information gathered by the Department (as well as the information contained in the CCR submission) and the information submitted by Xinboda, the Department, after considering all of the evidence and comments, finds that this information is not sufficient to undermine Xinboda's own claims which were supported by the results of verification. The verification results support Xinboda's contention that its products are all sourced from Dadi, and that Dadi's sales are all made to Xinboda. As explained in the Verification Report, at 13, the Department tied all of Xinboda's inventory to its accounts payable owed to Dadi. We then tied Xinboda's accounts payable to Dadi's accounts receivable. We found the figures for these three accounts to be identical after minor adjustments for taxes. We tied these accounts to the balance sheets of both companies. Thus, the verification results support a finding that Dadi was Xinboda's sole supplier during the POR.[12]

We also performed several tests during verification to assess the general reliability of both companies' records, and performed a reconciliation of Xinboda's reported sales values and

[11] As noted in the Background section, above, we received a request for a CCR of the NSR in 2009. Although we determined not to initiate a CCR, we stated we would examine its allegation in this administrative review. The allegations in the CCR also claimed that Xinboda was supplied by a company other than Dadi.

[12] In addition, the verification results support Xinboda's explanation regarding the actual nature of its connection with the other company identified in the allegation.

quantities and Dadi's sales values with their financial statements. We also reviewed Dadi's purchases and consumption of raw garlic bulbs.[13]

The claims made on the other company's website appear to contradict statements made by Xinboda claiming that only Dadi produced garlic in the facility at issue. However, Xinboda has argued that this other company is an agricultural trading company which does not produce garlic and that its website contained inaccuracies and exaggerations made for advertising purposes. As such, even though there are a number of anomalies contained in the website that Xinboda has not adequately explained, we find that the record evidence as a whole supports reliance on the results of our verification which indicate that Dadi was the producer of the subject merchandise exported to the United States by Xinboda.

Finally, we do not find the other two alleged inaccuracies in Xinboda's responses discussed by Petitioners warrant the application of AFA, either in conjunction with the dispute over the origin of Xinboda's production or as stand-alone allegations. First of all, the Department's statements in the Verification Report regarding storage capacity do not provide an adequate basis for determining Xinboda must have another supplier of processed whole garlic in addition to Dadi.[14] The report's entire discussion of the storage capacity at Dadi's whole garlic facility is as follows.

> Next, we visited the cooling storage complex. The complex is divided into multiple rooms. Each room's temperature can be set independently. The plant manager opened the door to one of the refrigerated rooms, and we entered the room and observed piles of sacks containing raw material garlic bulbs. The plant manager explained that temperature inside the storage room is below zero degrees Celsius. We confirmed this by examining the thermometer for that cooler in the control room. After the cooling storage complex, the plant manager showed us the dry storage space, an open space with a roof on the top but no walls. The plant manager explained that this space is mainly used for raw material storage, but it also can be used for processing the garlic when they have a large order and the processing building is full.[15]

Petitioners estimate the capacity of the storage facilities discussed in the above excerpt from a schematic of Dadi's whole garlic plant provided in a questionnaire response. In addition to providing this estimate, Petitioners note that Dadi's suppliers of raw garlic are farmers who are unlikely to have additional storage capacity of their own.[16] Thus, Petitioners conclude, there is inadequate storage capacity among Dadi and its farmer suppliers to account for the whole garlic supplied to Xinboda. Petitioners do not cite how much storage capacity is needed for a unit of whole garlic (e.g., a ratio of square footage per kilogram), but simply allow the figures to speak

[13] Verification Report at 16.
[14] This is a different, albeit similar, allegation than the one discussed above. The email allegation and internet research conducted by the Department involved the possibility that another producer of peeled garlic supplies Xinboda, in addition to or instead of Dadi, which produces peeled garlic in Shandong province. Separately, Petitioners surmise the existence of another whole garlic producer, in addition to Dadi, based on Dadi's supposedly inadequate storage capacity at its whole garlic facility in Henan province.
[15] Verification Report at 10.
[16] Pages 9 and 10 of the Verification Report suggest they are small scale village farmers.

for themselves; i.e., they juxtapose the square footage they estimate for the storage facilities with the amount of whole garlic sold by Xinboda and assume the inadequacy of the capacity will be self-evident to the reader. Likewise, Petitioners do not address how much turnover Dadi might have had in its inventory and how turnover might affect the amount of capacity that Dadi would need at any given time. Finally, the Verification Report only discusses the storage facilities at Dadi's whole garlic factory. The report never addresses the question of whether offsite storage facilities are available.

Petitioners' second claimed inaccuracy to be found in the Verification Report involves Dadi's water usage in its peeled garlic facilities. The Department stated in the Verification Report that it observed Dadi using a considerable amount of water in washing and sterilizing its peeled garlic, contrary to earlier statements by Xinboda in questionnaire responses reporting that, although it could not measure the amount precisely, a small amount of water was used.[17] While Xinboda's earlier statements appear to have been inaccurate, the Department does not find that they warrant the application of total AFA. We note in this regard that even the "considerable" amount of water used by Dadi amounts to a relatively insignificant percentage of Dadi's overall production costs once the Department applies the surrogate value for water used in other recent PRC dumping cases.[18] We also note that the Department has taken this unreported water usage into account for our final results, as explained in response to Comment 5, below.

Comment 2: Whether the Department Properly Compiled the Record Regarding Allegations Against Xinboda

Xinboda's Arguments

- The Department improperly placed the request for a CCR from 2009 onto the record of this administrative review. Counsel for the party that requested the review obtained administrative protective order (APO) access under false pretenses, as the company had dissolved five months prior to its counsel's APO application, and the Department did not seek the requesting company's permission before examining its claims within the context of this administrative review, as the Department previously stated it would. Finally, examining the information contained in the CCR request within the context of this review amounts to an "initiation" of a CCR without abiding by the regulatory steps for doing so and in contradiction of the Department's prior finding that a CCR initiation was unwarranted.
- The Department took no steps to verify the truthfulness of the anonymous email allegation, such as a careful examination of the pictures attached to the email or attempts to contact or identify the source of the email.
- The anonymous email allegation was an untimely submission of new factual information and should have been rejected as such by the Department. This late submission seriously prejudiced Xinboda by leaving it with only 10 days to address

[17] Verification Report at 17.

[18] In its May 20, 2011 rebuttal information submission, Xinboda provides a business proprietary information (BPI) figure for the amount of water it uses each day. The surrogate value for water is approximately 16 rupees (or $0.35) per metric ton. This figure was obtained from data made available by Maharashtra Industrial Development Corporation and is the standard surrogate value used when India is selected as the surrogate country for valuing FOPs. See Comment 5 below for details and citations.

the allegation with its own rebuttal information and argument while at the same time having to devote resources to its case brief. The email allegation also failed to meet basic filing requirements regarding number of copies submitted, markings, etc. as required by 19 CFR 351.303(b).
- In failing to abide by the Department's filing regulations, the unbracketed submission disclosed Xinboda's BPI, "when viewed in toto." Specifically, Xinboda objects to the release of the name of the other garlic company.

Petitioners' Arguments
- The Department's regulations regarding the timing and other aspects of properly filed submissions apply only to interested parties. There is no evidence that the email allegation was submitted by an interested party in this proceeding.
- The Department ultimately controls the record and may extend any time limit for "good cause" under 19 CFR 351.302.
- Despite the fact that the Department determined not to initiate the CCR, it may still consider information contained therein for purposes of analysis in this administrative review.

Department's Position:

The Department properly complied with its regulations in all respects in placing the CCR request and the email on the record of this review. The accuracy of an APO application is certainly of concern to the Department, and the Department's APO/Dockets Unit is examining Xinboda's allegation concerning the legitimacy of the APO application filed by the counsel to the party who originally submitted the CCR request.[19] However, whether or not the counsel to the party requesting the CCR properly obtained its APO access in the instant review is not relevant to whether its submission of public information can be placed on the record of this review by the Department.

We also disagree with Xinboda that analyzing information in the CCR request within the confines of this review amounts to an unlawful self-initiation of a CCR or contradicts our previous findings. We did not place this information on the record of this review for purposes of providing the remedy sought by the requester—that the Department should re-examine the basis on which Xinboda's new shipper combination rate was determined. Our determination not to initiate a CCR was based on our conclusion that the information in the request was not relevant to the NSR period and therefore did not warrant re-examining the findings of the NSR. This was not a decision evaluating the accuracy or quality of the information contained in the request. In fact, we stated clearly in reaching our determination not to initiate a CCR that we would examine the information in the request during this administrative review (with which the request's information was contemporaneous). Thus, our examination of this information is completely consistent with our prior findings.

[19] Memorandum to the File, "Administrative Review of Fresh Garlic from the People's Republic of China: APO Access for DLC Trading Inc.," dated June 9, 2011.

Building on the argument in its case brief, counsel for Xinboda stated in the hearing held on June 7, 2011, that it was not representing Xinboda when the CCR was filed, and that it was, therefore, prejudiced by the Department placing the CCR request on the record of this review only a week before the start of verification. However, the fact that Xinboda was represented by different counsels does not absolve the company, whether directly or through its representatives, of responsibility for ongoing familiarity with the proceeding, particularly portions of the proceeding in which it participates. The CCR request was a public document, and it is clear that Xinboda's prior counsels and Xinboda itself were aware of the request and its contents because they submitted comments on the request in December 2009, shortly after the request was filed.[20] It is reasonable to assume that Xinboda's current counsel would be aware of the request, just as Xinboda was aware of the information and allegations contained in that submission. Xinboda cannot now claim that the timing of the placement of the CCR information on the record infringed its due process rights.

The Department notes that it did receive permission to place the materials on the record of this administrative review, but it inadvertently omitted the document itself in the materials placed on the record of this segment. We have done so now.[21] However, even if the Department had not received permission, it had the discretion to place the CCR request, and information contained therein, on the record if it considered it to be pertinent to issues in this segment of the proceeding.

Regarding the email allegation, we disagree with Xinboda's characterization of our treatment of that allegation. By placing the email on the record, we did not reach any conclusion about the credibility of the allegation. We do, however, as an administrative agency have certain responsibilities to maintain a transparent record.[22] Thus, even when the Department rejects a submission as being improperly filed, we do so via a memorandum that notifies all interested parties and the public of the attempted filing with the Department. We do not simply ignore the submission and pretend that it never existed. Nevertheless, given the seriousness of the allegation, and the fact that it came from an unfamiliar source, the Department did exercise care before placing the email on the record. The Department did attempt to assess whether the claims contained therein could be substantiated by conducting research over the internet into the parties involved. After discovering information that appeared germane to the issue (e.g., a website for the company named in the allegation with photographs of an active factory processing garlic), we placed the allegation and our research onto the record of this review to allow comments and explanations by interested parties, including comments regarding the credibility of the allegation. In addition, the fact that the allegation in the email was similar to that stated in the CCR request provided additional corroboration suggesting the issue deserved further examination and comment from parties.

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[20] At the request of the Department, the comments were refiled in January 2010 to include Xinboda's certification. Xinboda's comments were first filed on the public record of this order in 2009/2010. Those comments were placed on the record of this specific segment (i.e., this administrative review) on April 1, 2011, along with the CCR request itself, and other related documents. See footnote 6, above.

[21] See Letter to the Department from DLC Trading Co., Inc., dated February 11, 2010, placed on the record of this segment on June 15, 2011.

[22] See sections 516A(b)(2)(A) and 782(g) of the Tariff Act of 1930, as amended (the Act).

Xinboda highlights aspects of the allegation and the attached photographs that suggest it might be doctored or otherwise fraudulent but, as the above discussion demonstrates, it is incorrect to claim the Department took no steps to examine the allegation's merits. We simply took different steps than Xinboda. We sought to determine whether information in the public domain substantiated the claims contained in the allegation; Xinboda examined the format, markings, and photographs themselves.

Despite the fact that the email was not properly filed, the Department has the authority to place information on the record itself under 19 CFR 351.301. While ideally all information would be placed on the record earlier rather than later, the event that apparently triggered the submission of this allegation was verification, which often comes later in a proceeding. We do not consider that this unduly prejudiced Xinboda or any other party, as all parties were provided an opportunity to respond to the information placed on the record by the Department pursuant to 19 CFR 351.301(c).

Finally, we disagree that the placement of the email allegation on the record amounted to a disclosure of BPI.[23] Except for the photographs, the information contained in the allegation is virtually identical to that contained in the 2009 CCR request, which is a public document that has been on the record of this proceeding for nearly a year and a half. The request was served on Xinboda in 2009 and again in April 2011. Xinboda never suggested any of the information contained in the CCR was BPI. Furthermore, there can be no claim for BPI treatment of the photographs because the same photographs could be taken by any member of the public walking by the facility shown in the photographs. The documents simply indicate that Xinboda may have misled the Department because they claim Dadi is not the producer of the merchandise Xinboda is exporting to the United States.

Comment 3: Surrogate Values for Garlic Bulbs

Xinboda's Arguments

- Record evidence does not support the Department's garlic bulb valuation using the Azadpur Agricultural Produce Marketing Committee Ch. Hira Singh Wholesale Fruit & Vegetable Market (Azadpur) grade super-A prices dating from November 2007 through February 2008.[24]
- The Department's use of price data covering a period of only three months and five days is improper because it does not capture the seasonal fluctuations of the garlic crop. The Department selected the months with the highest prices in the seasonal price fluctuation.
- The Department's use of non-contemporaneous prices for grade super-A garlic ("S.A.") is unacceptable in this case. Specifically, the label grade "S.A." has a short-lived existence on one Indian market and is no longer used in the trade. It is now subsumed under grade A. Imported Chinese garlic sold on the Azadpur market during November 2007 through February 2008 distorts garlic prices of all comparable sizes in this market.

[23] See Memorandum to the File, "Allegation that the Department of Commerce Disclosed the Business Proprietary Information of Shenzhen Xinboda Industrial Co., Ltd.," dated June 20, 2011.

[24] Xinboda denies that "S.A." as used by the Azadpur market stands for "super-A." However, throughout the most recent segments of this proceeding, the Department has consistently referred to the garlic at issue to be grade "super-A." Thus, to avoid confusion, we refer to the grade in question as "super-A" throughout this memorandum.

- A plethora of data on the broad market average prices of garlic in India during the POR is on the record of this case. Using these data, the Department can calculate a contemporaneous surrogate value. These data include: (1) Indian domestic market data from government sources; (2) Indian World Trade Atlas (WTA) import statistics; (3) Indian export statistics; and, (4) the specific experience of Garlico Co., Ltd. (Garlico), an Indian garlic producer that purchases garlic bulbs for further preparation.
- Garlico's low purchase price for garlic bulbs clearly demonstrates the unreasonableness of the Department's surrogate value calculation.
- The Department has misapplied its intermediate input methodology for garlic bulb surrogate values. By using Azadpur price data, the Department is essentially calculating a surrogate value using a finished product price.

Petitioners' Arguments

- The Department's use of Azadpur pricing from November 2007 to February 2008 is reasonable.
- Grade super-A garlic values used by the Department are reasonably contemporaneous.
- Data provided by Xinboda on pricing for other types of garlic are not appropriate, either for use as surrogate values or as benchmarks for the super-A garlic. None of the values proffered by Xinboda provides the product specificity that the Department has long recognized as necessary and that is provided for by the Azadpur price data.
- The Department correctly applied the intermediate input methodology**.**

Department's Position:

Since the 2004-2005 administrative review, the Department has used the intermediate input methodology to value the garlic bulb input used in the production of fresh whole garlic and peeled garlic.[25] During the course of past reviews, it has become clear that size and quality are important characteristics of the subject merchandise exported from the PRC to the United States.[26] As such, the Department's preference has been to use, whenever possible, prices for the garlic bulb input based on size.[27] In the past three reviews, the Department has used size-specific prices from the Azadpur market in India as the best available information to value the garlic bulb input.[28] The Department's goal is to find the most representative and least distortive market-based Indian values because the more broad-based the value, the greater the likelihood that the value is representative.[29]

When selecting possible surrogate values for use in a non-market economy (NME) proceeding, the Department's preference is to use, where possible and in no particular order, a publicly available value which is: (1) an average non-export value; (2) representative of a range of prices

[25] See Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the Eleventh Administrative Review and New Shipper Reviews, 72 FR 34438 (June 22, 2007).
[26] See Garlic From the People's Republic of China: Final Results and Partial Rescission of the 13th Antidumping Duty Administrative Review and New Shipper Reviews, 74 FR 29174 (June 19, 2009) (13th AR/NSR Final Results) and accompanying Issues and Decision Memorandum (13th AR/NSR IDM) at Comment 2.
[27] See, e.g., 13th AR/NSR Final Results.
[28] See, e.g., 13th AR/NSR Final Results.
[29] See 13th AR/NSR IDM at Comment 2.

within the period of investigation/POR; (3) product-specific; and, (4) duty and tax-exclusive.[30] This preference has been consistently sustained by the Court of International Trade (CIT).[31] The Department has consistently demonstrated that Azadpur prices meet these criteria and are reliable and credible representations of a broad market average for prices in India; this conclusion was recently upheld by the CIT. [32] In this review, we continue to find that the Azadpur prices meet these criteria. A careful examination of the Azadpur data shows that agricultural products from all over India are sold on the Azadpur market.[33] Specifically, we note that the Azadpur data for garlic grades super-A and A used by the Department in this proceeding represent millions of kilograms of garlic sold from at least eight Indian states. Moreover, the Department has determined that the product-specific garlic size prices available from the Azadpur are preferable because garlic size is an important factor in garlic pricing.[34] Having the grade-differentiated price data from Azadpur has thus allowed the Department to construct even more detailed, and therefore more accurate, normal value (NV) calculations for Xinboda.

Regarding Xinboda's argument that we should not use the Azadpur grade super-A garlic prices for the period November 2007 through February 2008 because that period does not accurately reflect seasonal pricing effects, the Department first notes that we did not, as Xinboda implies, pick a limited number of months during which the highest prices were reported. Rather, the Department selected all those months since the end of the standard POR in a garlic review (i.e., November) for which there were grade super-A price data reported in the Azadpur market. Based on Xinboda's comments, we have examined the historical price data for grade super-A prices and find that there have been fluctuations over time. Therefore, to smooth out any fluctuations that might occur during the course of the POR, we have determined that it is appropriate to use the most recent 12 complete months for which grade super-A data are available. Thus, while the Department has continued to use grade super-A garlic prices as the basis, in part, of the surrogate value for Xinboda's' raw garlic bulbs, it has used grade super-A data for the last 12 calendar months – February 2007 through January 2008 – for which complete data are available. We have indexed these data to be contemporaneous with the POR.[35]

With respect to Xinboda's arguments that the Department should not use non-contemporaneous Azadpur APMC grade super-A prices, the CIT has supported the Department's decision to use non-contemporaneous data in the calculation of surrogate values when the data is determined to be the best available information.[36] The Department has consistently stated that it prefers to select surrogate values that are: (1) for products as similar as possible to the input being valued; (2) contemporaneous with, or closest in time to the POR; and (3) representative of a range of prices in effect during the POR; this continues to be the case in this review. While the garlic prices derived from Agmarknet, WTA and Garlico information placed on the record by Xinboda

[30] See Notice of Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 from the People's Republic of China, 69 FR 67304 (November 17, 2004) and accompanying Issues and Decision Memorandum at Comment 3.
[31] See, e.g., Jining Yongjia Trade Co. v. United States, Slip Op. 2010-134 (CIT, December 16, 2010) (Jining Yongjia).
[32] Id. at 35-36.
[33] Id. at 36.
[34] See 13th AR/NSR IDM at Comment 2.
[35] See Comment 4, below.
[36] See, e.g., Shandong Huarong Machinery Company v. United States, 29 CIT 484 (May 2, 2005).

may reflect values that are contemporaneous with the POR, Azadpur prices are much more similar to the inputs being valued and more accurately represent a range of prices during the POR by providing size-specific pricing information. Additionally, having selected Azadpur grade super-A prices for February 2007 through January 2008, the Department has selected values that are sufficiently close in time to the POR.

The Department also notes that the contemporaneous Agmarknet and WTA data Xinboda placed on the record are data sources which the Department has previously determined lack the product-specific bulb size data that Azadpur provides. The Department has previously declined to use these price data as an alternative to Azadpur price data and the CIT has upheld this decision.[37] While Xinboda argues that Garlico's purchase price for garlic bulbs demonstrates the unreasonableness of the surrogate bulb value data, the Department notes that Xinboda constructed this bulb purchase price based on extremely limited information contained in Garlico's financial statement. There is no product-specific or size-specific characteristic information on the record for the garlic purchased by Garlico nor is there any evidence that Garlico's raw garlic purchases are in any way representative of a broad market average, such as that offered by the Azadpur price data, or are even reflective of Xinboda's operations. As such, we find that the Azadpur grade super-A data from February 2007 through January 2008 (appropriately indexed to be contemporaneous with the POR) covers a sufficiently recent period before the POR to be reflective of market prices during the POR and continues to be the best available information. Therefore, the Department considers the selection of non-contemporaneous grade super-A price data to be consistent with Department and CIT precedent as well as with the best available information for valuing Xinboda's garlic bulb inputs.

Addressing Xinboda's contention that Azadpur grade super-A prices have been subsumed under Azadpur grade A price data, the Department notes that no evidence has been placed on the record which clearly explains why grade super-A prices have not been reported since February 2008. Consequently, the Department cannot assume that grade super-A prices have been subsumed under grade A prices. Although Xinboda argues Chinese garlic sold on the Azadpur market has distorted prices for all comparable sizes, the Department notes the following. First, it is not clear what Xinboda means by distortions. While it would be expected that prices would drop on the Azadpur market with an influx of Chinese garlic, Xinboda makes arguments elsewhere in this proceeding that the Azadpur grade super-A price is too high. Second, the Azadpur daily bulletins provide a separate page listing information on prices of imported goods; garlic from the PRC appears on this list only occasionally during the February 2007 through January 2008 selection period. The Department notes that the Market Research on Whole Fresh Garlic in India specifically noted that Azadpur does list Chinese wholesale garlic prices, with the prices provided separately.[38] There is no evidence on the record which would indicate that these import prices are included on the main rate page, particularly as the main rate page lists prices based on Indian community and/or state. Even if the Azadpur import price data were to somehow flow into the domestic Azadpur price list, the import prices are divided into grades, demonstrating that no Chinese garlic was classified as grade super-A during the period February 2007 through January 2008 (classified only as grades A, B and C). Therefore, the Department

[37] See Jining Yongjia at 37.
[38] See Memorandum to the File, "Placing Petitioners' Submissions from Previous New Shipper Reviews on the Record of This Administrative Review," dated January 24, 2011, at Attachment 1, Exhibit 7.

finds no evidence that the February 2007 through January 2008 grade super-A price data reflect distortions due to imported Chinese garlic in the Indian market.[39]

Further, Xinboda argues that grade A Azadpur values also suffer from distortions related to Chinese garlic imports during the period November 2007 through February 2008. The Department is not relying on grade A values for this period, instead using contemporaneous data. As Xinboda correctly notes, the contemporaneous grade A price data do not suffer from distortions from Chinese garlic imports; Xinboda itself pointing out that Chinese garlic imports into India were banned in early 2008, prior to the POR. Thus, the Department also finds that there is no evidence that the grade A data used in its analysis reflect any distortions arising from the presence of Chinese garlic in Indian markets.

Finally, Xinboda argues that the Department misapplies the intermediate input methodology by using Azadpur garlic bulb prices which are "laden with additional costs" that Xinboda does not pay. In making this argument, Xinboda holds that the Department should tailor its choice of surrogate value to Xinboda's exact production experience. We disagree that such an exercise would be appropriate, absent unusual circumstances. The Department notes that the CIT in Longkou Haimeng Machinery Co., Ltd. v. United States states:

> Of course, a surrogate value must be as representative of the production process in the NME country as is practicable, if it is to achieve the statutory objective of assigning dumping margins as accurately as possible. This, however, does not mean that Commerce must duplicate the exact production experience of the NME manufacturers at the expense of choosing a surrogate value that most accurately represents the fair market value of subject merchandise in a hypothetical market economy China.[40]

Thus, the Department is not required to duplicate the exact experience of an exporter when calculating surrogate values but rather must select from among the available surrogate values those that permit the Department to calculate the most accurate dumping margin possible. While Xinboda argues that Azadpur prices are significantly different from the prices paid by Xinboda, the Department's calculation of a surrogate value is meant to broadly reflect what the producer's costs would be if it were operating in a market economy country at a comparable level of economic development.

In considering Xinboda's argument that Azadpur prices reflect resale prices, the Department notes that it has consistently found the Azadpur data to reflect Indian wholesale market prices.[41]

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[39] Xinboda's argument that the prices for imported Chinese grade A garlic on the Azadpur market would serve as an exact surrogate for its exports to the United States were they not from the PRC is incorrect. We note that the Department has previously established that the size of garlic inputs used by Chinese exporters, including Xinboda, for exports to the United States is covered by grade A garlic and grade super-A garlic. See Memorandum to the File, "Preliminary Results of the 2008-2009 Administrative Review of Fresh Garlic from the People's Republic of China: Surrogate Values," dated December 7, 2010. As such, grade A prices from the Azadpur market (domestic or imported) are not an exact surrogate for all of Xinboda's exports to the United States.

[40] See Longkou Haimeng Machinery Co., Ltd. v. United States, 617 F. Supp. 2d 1363 (CIT May 18, 2009) (citing Nation Ford Chem. Co. v. United States, 166 F.3d 1373, 1377 (CAFC 1990) (Nation Ford)).

[41] See 13th AR/NSR IDM at Comment 2.

Xinboda has argued that the Azadpur APMC prices reflect extra transportation and handling expenses as compared to what it pays for raw garlic bulbs. However, Xinboda has not placed information on the record regarding the extra transportation and handling expenses incurred at the Azadpur market. Rather, information on the record speaks to the similarities of garlic entering the Azadpur market and the garlic entering Xinboda's processing facilities. Specifically, the garlic entering the Azadpur market arrives pre-sorted by grade and packaged in large 40 kilogram (katta) mesh sacks. The Department observed during verification that the garlic delivered to Dadi arrives also in pre-graded packages of large mesh sacks.[42] There is no evidence on the record to support Xinboda's claim that the garlic sold in a domestic market in India is processed, packaged and shipped in the same manner as garlic processed for export to the United States. Therefore, the Department determines that it has correctly applied the intermediate input methodology as is required by its regulations and court precedent and, as a result, has calculated the most accurate antidumping margin possible.

Comment 4: Wholesale Price Index

Xinboda's Arguments

- Should the Department decide to use the non-contemporaneous, distortive, and unrepresentative prices for a garlic variety that no longer exists on the Indian market, it must calculate an inflator/deflator using the Indian wholesale price index (WPI) specific to garlic.
- The general Indian WPI is not the best available information on the record of the review for use as an inflator/deflator.
- Alternatively, the Department can calculate a theoretical grade S.A. price for the POR based on historical Azadpur market data establishing the price ratio between grades A and S.A.

Petitioners' Arguments

- The Department's methodology for inflating non-contemporaneous garlic prices by using the Indian WPI is appropriate and consistent with longstanding precedent.

Department's Position:

Based on our analysis of all the information and arguments on the record, the Department has decided to use the garlic-specific price index information from the Office of the Economic Adviser to the Government of India (GOI), Ministry of Commerce and Industry, to inflate the non-contemporaneous garlic bulb values for the final results. In the Preliminary Results, the Department followed its normal practice and used the general WPI from the surrogate country, for all commodities, as determined by data published in International Financial Statistics by the International Monetary Fund (IMF).[43] As an initial matter, it is the Department's practice to use

[42] See Verification Report at 9-10.

[43] See Memorandum from Scott Lindsay, Re: Preliminary Results of the 2008-2009 Administrative Review of Fresh Garlic from the People's Republic of China: Surrogate Values Memorandum (December 7, 2010) (Preliminary Surrogate Value Memorandum).

a single, country-wide WPI.[44] Further, in prior reviews of fresh garlic, we have also used the same WPI methodology utilized in the instant case.[45]

However, where record evidence exists that demonstrates the commodity price for the input in question did not follow the country-wide WPI for all commodities, and a reliable alternative methodology is on the record to calculate a more accurate index for the commodity, the Department has used a product-specific WPI in place of the country-wide WPI. [46] In the instant review, Xinboda has placed on the record information from the GOI which explains that the official Indian WPI, which is used by the IMF, is based on the GOI's calculation of 676 commodity-specific wholesale price indices, which are then weighted based on their value in the economy. Xinboda also placed the monthly commodity-specific wholesale price indices, including the garlic-specific index, on the record to document how each specific index is used to generate the official Indian WPI.[47] As such, record evidence demonstrates that the IMF WPI data the Department normally applies can be broken down to display the garlic-specific WPI. Furthermore, the Department checked to ensure that the GOI WPI data placed on the record by Xinboda matched the IMF WPI data normally used by the Department and which was utilized in the Preliminary Results and found no inconsistencies.

The Department's mandate is to calculate the most accurate dumping margins possible. On the record of this review, there is a WPI for garlic that is specific to the subject merchandise. This garlic-specific WPI is generated and maintained by the GOI, and serves as part of the basis upon which the country-wide WPI is calculated which in turn is the basis for the WPI published by the IMF. Given these facts, the Department finds it appropriate to use the garlic-specific WPI from the GOI for the final results of this review.

Comment 5: Xinboda's Water Valuation

Xinboda's Arguments

- The Department should not assign a value to Xinboda's water factor because the water utilized by Dadi is well water and any expenses incurred in its use is part of overhead.
- If the Department determines to assign a value to Xinboda's water factor, the Department should rely on neutral facts available in selecting a factor of production (FOP).
- The Department never provided Xinboda an opportunity to cure any deficiency in its claims regarding water usage.

[44] See, e.g., Non-Frozen Apple Juice Concentrate from the People's Republic of China: Preliminary Results for the Administrative Review, 74 FR 31238, 31240 (June 30, 2009), unchanged in Non-Frozen Apple Juice Concentrate from the People's Republic of China: Final Results for the Administrative Review, 74 FR 50955 (October 2, 2009).
[45] See, e.g., Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 12th Administrative Review, 73 FR 34251 (June 17, 2008) and 13th AR/NSR Final Results.
[46] See, e.g., Notice of Final Results of Antidumping Duty New Shipper Review: Honey From the People's Republic of China, 68 FR 62053 (October 31, 2003) and accompanying Issues and Decision Memorandum at Comment 2, where the Department utilized an inflator based on actual prices from several honey producers in place of a country-wide WPI in months where the country-wide WPI was not representative of price increases in honey.
[47] See Xinboda's SV Submission at Exhibits 9, 10 and 14. .

Petitioners' Arguments

- Xinboda has significantly under-reported Dadi's consumption of water in its peeling operations.

Department's Position:

For these final results, the Department is calculating a water usage rate for Xinboda based on the information Xinboda placed on the record in its May 20, 2011 rebuttal information submission.[48] Further, to value water, the Department used data from the Maharashtra Industrial Development Corporation (www.midcindia.org) since it includes a wide range of industrial water tariffs.[49] This source provides industrial water rates within the Maharashtra province for "inside industrial areas" and "outside industrial areas" from April 2009 through October 2009, and has been consistently used by the Department across all PRC proceedings for several years.[50]

In its section D questionnaire response, Xinboda stated that "{f}or the production of 'peeled garlic,' a small quantity of water is needed. Since Dadi uses well water there is no specific meter to measure the quantity of water consumed and no record as to how much water was used during the POR."[51] In the Preliminary Results, based on Xinboda's response that it used only a small quantity of water in the processing of peeled garlic, the Department did not include a water factor in its calculation of Xinboda's margin. However, during verification, the Department observed that the peeled production process appeared to consume a "considerable amount of water."[52] In its May 20, 2011 rebuttal information submission, Xinboda indicated that it measured the amount of water Dadi consumed during one day of processing peeled garlic, and reported this quantity to the Department.[53]

Xinboda argues that because it sources its water from well water at no cost, the Department should not assign a value to Xinboda's water factor, and that the CIT has found that the Department should not value well water in its factors calculation.[54] The Department notes first

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[48] See Mernorandum from Lingjun Wang to the File: Administrative Review of Fresh Garlic from the People's Republic of China: Calculation Memorandum for the Final Results of Shenzhen Xinboda Industrial Co., Ltd. (June 20, 2011) (Final Calculation Memorandum).

[49] See, e.g., Frontseating Service Valves from the People's Republic of China: Preliminary Results of the 2008-2010 Antidumping Duty Administrative Review and Partial Rescission of Review, 76 FR 26686 (May 9, 2011).

[50] See, e.g., Freshwater Crawfish Tail Meat From the People's Republic of China: Final Results of Antidumping Duty Administrative and New-Shipper Reviews, 75 FR 79337 (December 20, 2010); see Memorandum to the File, Administrative Review of Fresh Garlic from the People's Republic of China: Surrogate Values for the Final Results, dated June 20, 2011 (Final Surrogate Value Memorandum) at Exhibit 2; see also Final Calculation Memorandum.

[51] See Xinboda's May 4, 2010 Section D Questionnaire Response at 12.

[52] See Verification Report at 17.

[53] See Xinboda's May 20, 2011 rebuttal information submission at Exhibit 9. Although the Department would normally view this as new factual information submitted too late in the proceeding to be considered, in accordance with 19 CFR 351.301(b)(2), and would therefore reject it, Xinboda claims that the information it provided on its water consumption rebuts the information placed on the record by the Department on May 10, 2011. See Email Memorandum. While Xinboda provided this information on its water usage to rebut factual information with respect to another issue entirely, the Department has decided to accept the information submitted by Xinboda on its water usage in order to include this FOP in the calculation of NV.

[54] See Taian Ziyang Food Co. Ltd. v. United States, 637 F. Supp. 2d 1093 (CIT 2009) (Taian).

that there is information on the record indicating that Xinboda is responsible for paying for water.[55] Second, the Department notes that the specific facts of the Taian case indicate that the water in question was farm water for irrigation purposes, unlike the water used in the Dadi facility which is an industrial facility, and Xinboda's water usage is for industrial purposes. Furthermore, contrary to Xinboda's characterization of the Taian case, whether or not Dadi paid for the water is irrelevant. As the CIT held in Taian, "factors of production are to be valued based on their cost or price in the selected market economy country, to reflect what the producer's costs would be if the NME country were a market economy environment."[56] Thus, "if record evidence establishes that an input may be obtained at no cost in a market economy environment, it is improper and distortive to assign a positive value to that particular factor of production."[57] Unlike in the Taian case, record evidence does not indicate that water is obtained at no cost in industrial areas in the surrogate country, and the Department has used industrial water rates within the Maharashtra province of India to value Dadi's water usage. Therefore, the Department finds that the Taian case is inapposite to the valuation of Dadi's water usage.

While the Department normally does not accept new information during or after verification, the Department finds, in this case, that it is appropriate to use the information, timely placed on the record for other purposes, to calculate an FOP for water usage by Xinboda. Although Xinboda's questionnaire response with respect to water did not verify, the Department determines that, in this instance, given the minor impact water has on the overall valuation, it is reasonable to utilize the data submitted by Xinboda as the best available information. The Department has taken the information provided by Xinboda and calculated a cubic meter of water per kilogram of peeled garlic usage rate and has included a surrogate value for water in the NV calculation.

Comment 6: Selection of Surrogate Financial Ratios

For the Preliminary Results, we calculated a single set of surrogate financial ratios applicable to the production and sales of all subject merchandise using an average of Tata Tea Ltd.'s (Tata Tea) and Limtex Ltd.'s (Limtex) consolidated financial data from 2008-2009 (08/09). At the time, we noted that both Indian companies are non-integrated tea processors and their "combined" financial data reflect the broader experience of the surrogate industry. Interested parties have placed financial statements from six companies on the record;[58] each company's statements cover both the 08/09 and 2009-2010 (09/10) reporting periods.[59]

[55] The information at issue is BPI but is fully discussed in the Final Calculation Memorandum.
[56] Taian, 637 F. Supp. 2d at 1130.
[57] Id.
[58] The six companies are: (1) Tata Tea; (2) Limtex; (3) ADF Foods Limited (ADF), a food processor; (4) Garlico, a food processor; (5) REI Agro Limited (REI Agro), a rice producer; and (6) LT Foods Limited (LT Foods), a rice producer. Some of these financial statements include detailed unconsolidated financial information as well as financial information from subsidiaries.
[59] The Indian fiscal year runs from April to the following March. The 08/09 period covers April 2008 through March 2009 and the 09/10 period covers April 2009 through March 2010.

Xinboda's Arguments

- Tata Tea's financial data are an unsuitable source for Xinboda's surrogate financial ratios because:
    - the production of tea is not comparable to the production of garlic;[60]
    - Tata Tea is an integrated producer;[61]
    - Tata Tea is not a domestic Indian bulk tea producer;
    - Tata Tea produces almost exclusively branded products;
    - loan agreements on the record indicate that Tata Tea has received countervailable subsidies; and,
    - the Department routinely rejects the financial statements of surrogates that benefit from countervailable subsidies.
- The Department should rely on the 09/10 annual report of Garlico as the sole source for Xinboda's surrogate financial ratios because Garlico produces identical merchandise. In support, Xinboda cites to the past cases on preserved mushrooms, non-frozen apple juice concentrate, honey, and frozen warmwater shrimp from the PRC where the Department used financial data from a surrogate company producing the "same" merchandise as that under review.[62]
- The Department properly declined to use ADF's financial statement in calculating surrogate financial ratios for the Preliminary Results.
- If the Department uses financial data from companies other than Garlico as a source for Xinboda's surrogate financial ratios, then the Department must use the financial data from REI Agro and LT Foods.

Petitioners' Arguments

The Department should reject Xinboda's arguments on surrogate financial ratios for the following reasons.

- Garlic and tea production are comparable.
- Tata Tea's processing operations are not integrated and Tata Tea's audited financial statement indicates that it did not receive countervailable subsidies.
- Garlico's financial ratios are not a suitable surrogate for Xinboda because Garlico does not process subject merchandise and the products it produces are not comparable to Xinboda's. Rather, Garlico is a wholesaler that also produces downstream products such as food powders and flakes.
- Limtex's financial statement reflects countervailable subsidies and other flaws.
- ADF should be considered an appropriate surrogate because its product lines are comparable to fresh garlic production.
- The Department should not rely on the financial statements of rice companies to calculate surrogate financial ratios in the final results because the Indian rice industry is heavily subsidized.

[60] The Department favors the financial statements of surrogates that produce the identical merchandise, consume the identical raw material, and have identical or comparable production experience.

[61] Dadi (Xinboda's supplier) is a non-integrated processor that purchases its raw garlic input (rather than growing it from seed).

[62] See Xinboda Case Brief at 50-54.

Department's Position:

After analyzing all of the financial data on the record and the comments by the parties, the Department has determined the only appropriate source for the surrogate financial ratios is Tata Tea's 09/10 unconsolidated financial data. We note that, although we used the 08/09 statements in the Preliminary Results, it is more appropriate to select from among the 09/10 statements (timely placed on the record after the Preliminary Results) since the 09/10 statements cover seven months of the POR of this review. Therefore, since we have 09/10 financial statements on the record for all of the companies the parties are arguing that the Department should use to calculate the surrogate financial ratios, we have focused the analysis set forth below on the 09/10 financial statements.

In the most recent segment of this proceeding, the Department used financial statements from non-integrated tea processors as the basis for the respondents' surrogate financial ratios.[63] This decision was based on (1) the Department considering tea processing to be sufficiently similar to garlic processing in that neither product is highly processed or preserved prior to sale, and (2) the Department's preference to use financial data from more than one surrogate producer to reflect the broader experience of the surrogate industry.

Tata Tea's unconsolidated financial statement is the best information on the record and provides complete and usable financial data for a non-integrated producer and seller of tea. Moreover, we note that Tata Tea's unconsolidated financial statement indicates that it has not received subsidies under programs the Department has found countervailable in Indian countervailing duty proceedings. In Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 40485 (July 15, 2008) and accompanying Issues and Decision Memorandum at Comment 17.A (Tires), the Department stated that its practice is to disregard financial statements where we have reason to suspect that the company has received actionable subsidies, and where there is other usable data on the record. Although Xinboda has placed "loan agreements" which it contends indicate that Tata Tea has received subsidies the Department has found countervailable, in our analysis of Tata Tea's 09/10 financial statement, we did not find evidence of these loans. We note that it is the Department's practice to rely on information in financial statements on an "as is" basis when calculating surrogate financial ratios.[64]

Xinboda has argued that Tata Tea is now an integrated producer in the global branded beverage business, with offices all over world and employing thousands of employees. Therefore, Xinboda contends, Tata Tea's financial ratios cannot be considered a good match for Dadi's financial ratios. After analyzing the arguments and re-examining Tata Tea's financial statement, the Department has determined that the unconsolidated 2009-2010 financial statement is a better match for the garlic industry than the consolidated financial statement. Many of Xinboda's

[63] See Fresh Garlic From the People's Republic of China: Final Results of New Shipper Review, 75 FR 61130 (October 4, 2010) and accompanying Issues and Decision Memorandum at Comment 4.

[64] See, e.g., Certain Frozen Warmwater Shrimp From the People's Republic of China: Notice of Final Results and Rescission, in Part, of 2004/2006 Antidumping Duty Administrative and New Shipper Reviews, 72 FR 52049 (September 12, 2007) and accompanying Issues and Decision Memorandum at Comment 2.

concerns about the global aspects of Tata Tea's business, and any movement towards becoming a beverage business, are addressed by using Tata Tea's unconsolidated statements. Specifically, over 99 percent of Tata Tea's sales reported on an unconsolidated basis are for tea.[65] Further, only 8.26 percent and 0.21 percent of Tata Tea's total unconsolidated sales come from integrated production[66] and traded goods,[67] respectively.

Although information on the record indicates that Limtex is also a non-integrated processor and seller of tea, its 09/10 financial statement indicates that it has received subsidies under a program found countervailable by the Department.[68] Since the 09/10 financial statement on the record indicates that Limtex has used a program the Department has found countervailable, and there is other usable financial data on the record, we have disregarded the financial data of Limtex from our surrogate financial ratio calculations.

Xinboda has also placed financial data from REI Agro and LT Foods on the record of this review. In prior segments of this proceeding, the Department has also found rice processing to be similar to processing subject merchandise.[69] However, our analysis of both REI Agro's and LT Foods' 09/10 financial statements indicates that each received subsidies under programs that the Department has previously found countervailable.[70] Since the 09/10 financial statements on the record indicates that these two companies have received subsidies under programs that we have found countervailable and there is other usable financial data on the record, we have disregarded REI Agro's and LT Foods' financial data from our surrogate financial ratio calculations.[71]

We also note that the Department has found ADF's food processing to be similar to processing subject merchandise in past segments of this proceeding[72] and that Petitioners have placed

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[65] Of Tata Tea's 169,818.30 Rs. (in lakhs) sales, tea accounted for 168,682.02 Rs (in lakhs). See Exhibit 1 of Petitioners' January 24, 2011 surrogate value submission (Petitioners' SV Submission), Tata Tea's Financial Statement, at Schedule 22, note 16 (page 89).

[66] Of the total raw materials consumed by Tata Tea only 84.94 kgs. (in lakhs) of the 1028.66 kgs. (in lakhs) consumed (8423.31 kgs. (in lakhs) (tea) + 84.94 kgs. (in lakhs) (Green Leaf (Own Estates)) + 101.41 kgs. (in lakhs) (Purchases)) was from Tata Tea's own estates. See Exhibit 1 of Petitioners' SV submission at Schedule 22, note 17 (page 90).

[67] Of Tata Tea's 850.44 kgs. (in lakhs) tea sales, only 1.81 kgs. (in lakhs) were resold finished goods. See Exhibit 1 of Petitioners' SV submission, Tata Tea's Financial Statement, at Schedule 22, note 16 (page 89).

[68] Page 13 of Limtex's 09/10 financial statement indicates that it sold a Duty Entitlement Pass Book (DEPB) license. See Exhibit 43 of Xinboda's January 24, 2011 Surrogate Value Submission (Xinboda's SV Submission). The DEPB program has been found countervailable. See Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review, 73 FR 7708 (February 11, 2008) and accompanying Issues and Decision Memorandum at 12 (PET Film).

[69] See, e.g., Fresh Garlic from the People's Republic of China: Final Results and Final Rescission, In Part, of New Shipper Reviews, 74 FR 50952 (October 2, 2009).

[70] Page 31 of REI Agro's 09/10 financial statement indicates that it received packing credits. See Exhibit 42 of Xinboda's SV Submission. The packing credit program has been found countervailable. See, e.g., PET Film. Page 74 of LT Foods' 09/10 financial statement indicates that it received Export Promotion Capital Goods Scheme (EPCGS) subsidies. See Exhibit 42 of Xinboda's SV Submission. The EPCGS program has been found countervailable. See, e.g., Commodity Matchbooks From India: Final Affirmative Countervailing Duty Determination, 74 FR 54547 (October 22, 2009) and accompanying Issues and Decision Memorandum at 4.

[71] See Tires.

[72] See, e.g., Fresh Garlic from the People's Republic of China: Final Results and Final Rescission, In Part, of New

financial data from ADF on the record of this review. However, our analysis of ADF's 09/10 financial statement indicates that it used a program that the Department has found to be countervailable.[73] Since the 09/10 financial statement on the record indicates that ADF has received subsidies under a program that the Department found countervailable and there is other usable financial data on the record, we have disregarded ADF's financial data from our surrogate financial ratio calculations.

Our analysis of Garlico's 09/10 financial statement indicates that it acts as a trading company (rather than food processor) on nearly one quarter of its sales.[74] We note that 19 CFR 351.408(c)(4) directs the Department to determine financial ratios used in the calculation of NME NV using financial statements gathered from producers of identical or comparable merchandise in the surrogate country. Since "trading sales" comprise such a considerable portion of Garlico's operations and other usable statements exist on the record of this review, we have disregarded Garlico's financial data from our surrogate financial ratio calculations. Moreover, we note that, contrary to Xinboda's claims, Garlico does not produce "identical" merchandise. Our analysis of Garlico's financial statement indicates that the company's primary production is of downstream food products. Schedule XIII (Sales) of Garlico's financial statement provides a breakdown of the company's sales from April 2009 through March 2010. The majority of the products listed in this schedule are goods that require further production than that required for peeled or whole, fresh garlic. Specifically, the majority of Garlico's products are described as "dehydrated" or "powder." The only products listed in the sales schedule that appear to be comparable to peeled or whole garlic are: raw garlic (4,435,311.50 Rs.); raw onions (2,227,200 Rs.); mint leaves (12,550 Rs.); and coriander leaves (7,000 Rs.), which account for only 8.4% of Garlico's total sales (79,537,693 Rs.). Finally, the financial statement indicates that all of the raw garlic and raw onion sales were traded goods.[75]

Therefore, based on our analysis of the six 09/10 financial statements, the Department finds that Tata Tea's unconsolidated financial statements provide the best available information for calculating surrogate financial ratios in this proceeding.

Comment 7: Surrogate Wage Rates

Xinboda's Arguments

- The Department should select India alone as the most economically-comparable country to calculate the labor rate.

Shipper Reviews.

[73] Page 33 of ADF's 09/10 financial statement indicates that it received packing credits. See Exhibit 1 of Petitioners' SV submission. The packing credit program has been found countervailable. See, e.g., Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Lined Paper Products from India, 71 FR 45034 (August 8, 2006).

[74] According to the breakdown of trading activities listed under "Additional information pursuant to the provision to the schedule VI to the companies Act, 1956," sales from Garlico's trading activities totaled 19,325,883 Rs. (Raw Garlic – 4,435,311 Rs.; Raw Onion – 2,227,200 Rs.; Garlic Flakes – 3,959,000 Rs.; Potato Dehydrated – 5,816,860 Rs.; Methi Leaves – 1,561,352 Rs.; Cabbage Dehydrated – 21,000 Rs.; and Carrot Dehydrated – 1,305,160 Rs.) or 24.3% of Garlico's 79,537,693.06 Rs. sales (Schedule XIII (Sales)). See Exhibit 40 of Xinboda's SV Submission.

[75] See Exhibit 40 of Xinboda's SV Submission, at trading activities listed under "Additional information pursuant to the provision to the schedule VI to the companies Act, 1956".

- The Department's selection of comparable significant producers should only include countries that exported/produced a significant amount of comparable merchandise in years recent to the POR. The Department's synonymous reading of significant producers with any country that exports comparable product is impermissible. Further, the Department's inclusion of seven Harmonized Tariff Schedule (HTS) numbers as comparable merchandise is too broad to be comparable.
- The Department should include ISIC data from Revision 3 and Revision 2 in its wage rate calculation.
- The Department's preference to "earnings" over "wages" improperly results in double-counting of expenses and improper exclusion of data. Earnings include bonuses and other forms of compensation that are normally measured by the Department elsewhere in its calculations. Also, by using "earnings" instead of "wages," more recent data from some countries are excluded. Further, the Department should not use data more than three years before the POR, as inflating the data with the consumer price index (CPI) can result in over-inflation.

Petitioners' Arguments

- The Department's labor calculation in the Preliminary Results is reasonable.

Department's Position: We continue to find the industry-specific International Labor Organization (ILO) data (using Sub-Classification 15 data) from multiple countries to be the best available information for determining the surrogate value for labor in this case, as explained below.

In Dorbest Ltd. v. United States, 604 F.3d 1363, 1372 (CAFC 2010) (Dorbest), the CAFC invalidated the Department's regulation, 19 CFR 351.408(c)(3), which directs the Department to value labor using a regression-based method. As a consequence of the CAFC's decision, the Department is no longer relying on the regression-based wage rate and is continuing to evaluate options for determining the surrogate value for labor in light of the CAFC decision. For the final results of this review, we continue to calculate an hourly wage rate by averaging industry-specific "earnings" and/or "wages" in countries that are economically comparable to the PRC reported under ILO ISIC-Rev.3 Sub-Classification 15 for Manufacture of Food Products and Beverages.[76]

Section 773(c)(4) of the Act requires the Department, "to the extent possible," to use "prices or costs of factors of production in one or more market economy countries that are (A) at a level of economic development comparable to that of the non-market economy country, and (B) significant producers of comparable merchandise." Accordingly, to calculate a wage rate, the Department first looked to the Surrogate Country Letter issued in this proceeding to determine countries that were economically comparable to the PRC.[77] In analyzing economic comparability, the Department acts in accordance with 19 CFR 351.408 by placing primary emphasis on gross national income (GNI) in determining economically comparable surrogate

[76] See Preliminary Results, 75 FR at 80464.

[77] See Letter To All Interested Parties, "15th Administrative Review of Fresh Garlic from the People's Republic of China," dated July 20, 2010 (Surrogate Country Letter) at Attachment 1.

countries.[78] In the Preliminary Results, the Department selected six countries for consideration as the primary surrogate country for this review based on the Surrogate Country Letter.[79] From the list of countries contained in the Surrogate Country Letter, the Department, for the purpose of valuing labor, used the country with the highest GNI (i.e., Peru) and the lowest GNI (i.e., India) as "bookends" for economic comparability. The Department then identified all countries in the World Bank's World Development Report with per capita GNIs for 2008 that fell between the "bookends." This resulted in 43 countries, ranging from India (with USD 1,040 GNI) to Peru (with USD 3,990 GNI), that the Department considers economically comparable to the PRC.[80]

Next, regarding the "significant producer" prong of the statute, the Department identified all countries which have exports of comparable merchandise (defined as exports under HTS numbers 0703.20.0010, 0703.20.0020, 0703.20.0090, 0710.80.7060, 0710.80.9750, 0711.90.6000, 2005.90.9700, the ten-digit HTS codes identified in the scope of the order)[81] between 2007 and 2009.[82] In this case, we have defined a "significant producer" as a country that has exported comparable merchandise during the period 2007 through 2009. After screening for countries that had exports of comparable merchandise, we determine that 27 of the 43 countries designated as economically comparable to the PRC are also significant producers. Accordingly, for the purpose of assigning a value to labor for the final results, the Department determines the following 27 countries out of 43 countries designated as economically comparable to the PRC are also significant producers of comparable merchandise: Albania, Bhutan, Bolivia, Cape Verde, Ecuador, Egypt, El Salvador, Fiji, Guatemala, Guyana, Honduras, India, Indonesia, Jordan, Morocco, Nicaragua, Paraguay, Peru, the Philippines, Samoa, Sri Lanka, Sudan, Swaziland, Syria, Thailand, Tunisia, and Ukraine.[83]

With respect to Xinboda's argument that the Department's methodology for utilizing seven HTS numbers as comparable merchandise is too broad to be comparable, we disagree. These HTS numbers represent each of the HTS classifications of merchandise covered by the scope of the antidumping duty order on fresh garlic from the PRC. While these HTS numbers are not dispositive, the Department considers them to be an appropriate basis upon which to find comparable merchandise for purposes of calculating a surrogate wage rate.

With respect to Xinboda's argument that the Department's methodology for defining "significant producer" is flawed, we disagree. The statute and regulations are silent in defining a "significant producer," and the statute grants the Department discretion to examine various data sources for

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[78] The Department notes that 19 CFR 408(b) specifies that the "Department places primary emphasis on per capita GDP." However, it is Departmental practice to use "per capita GNI, rather than per capita GDP, because while the two measures are very similar, per capita GNI is reported across almost all countries by an authoritative source (the World Bank), and because the Department believes that the per capita GNI represents the single best measure of a country's level of total income and thus level of economic development." See Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates, 72 FR 13246 (March 21, 2007) at footnote 2.

[79] Preliminary Results, 75 FR at 80464. The Department notes that these six countries are part of a non-exhaustive list of countries that are at a level of economic development comparable to the PRC. See Surrogate Country Letter.

[80] See Preliminary Surrogate Value Memorandum at Attachment 9.

[81] See Preliminary Results, 75 FR at 80460.

[82] The export data is obtained from Global Trade Atlas (GTA).

[83] See Preliminary Surrogate Value Memorandum at Attachment 9.

determining the best available information.[84] Moreover, while the legislative history provides that the "term 'significant producer' includes any country that is a significant net exporter,"[85] it does not preclude reliance on additional or alternative metrics. In practice, the Department has relied on other indices for determining whether a country is a significant producer. For example, in WBF/PRC,[86] the Department relied on production data for selecting the primary surrogate country. Furthermore, while the CIT has recently ordered the Department to modify the way in which it determines whether a country is a significant producer of comparable merchandise in Shandong Ronxin Import & Export Co., Ltd. v. United States, Slip Op. 11-45, at 17-19 (CIT April 21, 2011) (Shandong Ronxin), the Department has not yet completed its analysis on remand in that case and, therefore, the court's decision in that case is not yet final.

The Department next researched which of the 27 countries determined to be significant producers reported the necessary data to the ILO. In doing so, the Department has continued to rely upon ILO Chapter 5B "earnings," if available, and "wages," if not. We used the most recent data available (2008) and went back five years, resulting in wage data from 2003-2008. We then adjusted the data for countries, where it was available, to the POR using the relevant CPI.[87] Of these 27 countries, 19 countries, i.e., Albania, Bhutan, Bolivia, Cape Verde, El Salvador, Fiji, Guatemala, Guyana, Honduras, India, Morocco, Nicaragua, Paraguay, Samoa, Sri Lanka, Sudan, Swaziland, Syria, and Tunisia, were not used in the surrogate wage rate valuation because there were no "earnings" or "wages" data available, or the data available were inaccurate. The remaining eight countries reported either "earnings" or "wages" rate data to the ILO within the last five years.[88] Therefore, the Department relied on data from the following eight countries to arrive at its surrogate wage rate in these final results: Ecuador, Egypt, Indonesia, Jordan, Peru, the Philippines, Thailand, and Ukraine.

[84] See section 773(c) of the Act; Nation Ford, 166 F.3d at 1377.
[85] See Conference Report to the 1988 Omnibus Trade & Competitiveness Act, H.R. Rep. No. 100-576, at 590 (1988).
[86] See Wooden Bedroom Furniture from the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Review, 75 FR 9581 (March 3, 2010) (WBF/PRC), unchanged in Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty New Shipper Review, 75 FR 44764 (July 29, 2010).
[87] Under the Department's regression analysis, the Department limited the years of data it would analyze to a two-year period. See Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments, 71 FR 61716, 61720 (October 19, 2006) (Antidumping Methodologies 2006). However, because the overall number of countries being considered in the regression methodology was much larger than the list of countries now being considered in the Department's calculations, the pool of wage rates from which we could draw from two years worth of data was still significantly larger than the pool from which we may now draw using five years worth of data (in addition to the base year). The Department believes it is acceptable to review ILO data up to five years prior to the base year as necessary (as we have previously), albeit adjusted using the CPI. See Expected Non-Market Economy Wages: Request for Comment on Calculation Methodology, 70 FR 37761 (June 30, 2005). In this manner, the Department is able to capture the maximum number of countries that are significant producers of comparable merchandise, including those countries that choose not to report their data on an annual basis. See Preliminary Surrogate Value Memorandum at Attachment 9
[88] See Preliminary Surrogate Value Memorandum at Exhibit 9; see also Final Surrogate Value Memorandum at Exhibit 1.

With respect to Xinboda's argument that the Department should not use "earnings" data, but only "wages" data, we disagree. As we stated in TRBs/PRC,[89] under the industry-specific methodology, the Department maintains its current preference for "earnings" over "wages" data under Chapter 5B. However, under the previous practice, the Department was typically able to obtain data from somewhere between 50 to 60 plus countries using only earnings. Given that the current basket in this administrative review now includes significantly fewer countries, the Department finds that our long-standing preference for a robust basket outweighs our exclusive preference for "earnings" data. We note that several countries that met the statutory criteria for economic comparability and significant production, such as Indonesia, Peru and Thailand, reported only "wages" data. Thus, if "earnings" data are unavailable from the base year (2008) and the previous five years (2003-2007) for certain countries that are economically comparable and significant producers of comparable merchandise, the Department uses "wages" data, if available, from the most recent of the base year or previous five years for those countries. The hierarchy for data suitability is described in the Antidumping Methodologies 2006 and still applies for selecting among multiple data points within the "earnings" or "wages" data. This allows the Department to maintain consistency as much as possible across the basket.

With respect to Xinboda's contention that the Department's preference for "earnings" data over "wages" data impermissibly "double-counts" certain "earnings" data, such as "gratuity," including them in both the labor rate and the selling, general, and administrative expenses, the Department disagrees. Xinboda's general argument cites to no specific information on the record of this review demonstrating that the value of labor has been overstated. The surrogate financial statement, with which the Department calculated the surrogate financial ratios, includes three expenses related to salaries, wages, and benefits: "Salaries, Wages, and Bonuses," "Contribution to Provident Fund and other Funds," and "Workmen and Staff Welfare."[90] Only "Contribution to Provident Fund and other Funds" and "Workmen and Staff Welfare" are included in the numerator of the manufacturing overhead expenses, and there is no indication that these expenses include bonuses or gratuities as defined by the ILO. Therefore, the Department finds that there is no basis for Xinboda's argument that the value of labor has been overstated on the record of this review.[91]

In addition, the Department disagrees with Xinboda's argument that the Department should not use the CPI to inflate wages because this can lead to over-inflation, and should instead only use data that is within three years of the POR. The Department finds that Xinboda has not provided sufficient evidence that the Department should treat labor differently from other FOPs such that uninflated wage rates would be more accurate than wage rates inflated using CPI. Nor have they provided an alternative method to inflate the labor wage rates. It is a fact that inflation existed in the countries during the years in which these data were collected and, notably, Xinboda does not challenge this point. Thus, the Department continues to consider CPI to be the best available information to capture the inflation within a country for labor wage rates.

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[89] See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review, 76 FR 3086 (January 19, 2011) (TRBs/PRC) and accompanying Issues and Decision Memorandum at Comment 17.

[90] See Final Surrogate Value Memorandum at Exhibit 1.

[91] See Final Calculation Memorandum.

With regard to Xinboda's assertion that we should rely exclusively on the Indian wage data from the ILO, we disagree. While information from a single surrogate country can reliably be used to value other FOPs, wage data from India does not constitute the best available information for purposes of valuing the labor input in this review. Due to the variability that exists across wages from countries with similar GNI, the Department prefers to use data from multiple sources.[92] Using the high- and low-income countries identified in the Surrogate Country Letter as bookends provides more data points, which the Department currently finds to be preferable.

Based on the selection methodology set forth above, the Department has determined it is most appropriate to rely on industry-specific data reported by the ILO for the final results. Determinations as to whether industry-specific ILO datasets constitute the best available information must necessarily be made on a case-by-case basis. In making these determinations, the Department considers a number of factors such as the appropriateness of the ILO industry-specific data in light of the subject merchandise and the availability of industry-specific data. Because an industry-specific dataset relevant to this proceeding exists within the Department's preferred ILO source, and because, absent evidence to the contrary, the industry-specific data would be at least more specific to the subject merchandise than the national manufacturing data, the Department has used industry-specific data to calculate a surrogate wage rate for these final results, in accordance with section 773(c)(1) of the Act. Thus, the Department has determined the surrogate wage rate calculation to be a simple average of the data provided to the ILO under Sub-Classification 15 of the ISIC-Revision 3 standard by countries determined to be both economically comparable to the PRC and significant producers of comparable merchandise. We have determined that this is the best available information from which to derive the surrogate wage rate.

With regard to Xinboda's argument that the Department should include ISIC data from both ISIC-Rev.3 and ISIC-Rev.2, we disagree. The ISIC code is maintained by the United Nations Statistical Division and is updated periodically. The ILO, an organization under the auspices of the United Nations, utilizes this classification for reporting purposes. Currently, "wage" and "earnings" data are available from the ILO under the following revisions: ISIC-Rev.2, ISIC-Rev.3, and ISIC-Rev.4. The ISIC code establishes a two-digit breakout for each manufacturing category, and also often provides a three- or four-digit sub-category for each two-digit category. Depending on the country, data may be reported at either the two-, three- or four-digit subcategory. Due to concerns that the industry definitions may lack consistency between different ISIC revisions, the Department finds that averaging wage rates within the same ISIC revision (i.e., not mixing revisions) constitutes the best available information for the final results.

It is the Department's preference to use data reported under the most recent revision, however, in this case we found that none of the countries found to be economically comparable and significant producers reported data pursuant to ISIC-Rev.4. Accordingly, in this case, we turned to the industry definitions contained in ISIC-Rev.3 to find the appropriate classification for garlic. Under the ISIC-Revision 3 standard, the Department identified the two-digit series most specific to fresh garlic as Sub-Classification 15, which is described as "Manufacture of Food

[92] See Dorbest, 604 F.3d at 1372 (describing a possible "subset of . . . countries" that would satisfy the requirements of section 773(c)(4)); see also Shandong Ronxin at 14-15 ("Commerce is well justified in averaging wage rates to produce a single surrogate value . . .").

Products and Beverages." Accordingly, for this review, the Department has calculated the wage rate using a simple average of the data provided to the ILO under Sub-Classification 15 of the ISIC-Revision 3 standard by countries determined to be economically comparable to the PRC and significant producers of comparable merchandise. Additionally, when selecting data available from the countries reporting under ISIC-Rev.3, Sub-Classification 15, we used the most specific data available within this revision.

As indicated above, the following eight countries reported industry-specific data under the ISIC-Revision 3, under Sub-Classification 15, "Manufacture of Food Products and Beverages:" 1) Ecuador, 2) Egypt, 3) Indonesia, 4) Jordan, 5) Peru, 6) the Philippines, 7) Thailand, and 8) Ukraine. The following 19, however, did not report "wage" or "earnings" data on an industry-specific basis: 1) Albania, 2) Bhutan, 3) Bolivia, 4) Cape Verde, 5) El Salvador, 6) Fiji, 7) Guatemala, 8) Guyana, 9) Honduras, 10) India, 11) Morocco, 12) Nicaragua, 13) Paraguay, 14) Samoa, 15) Sri Lanka, 16) Sudan, 17) Swaziland, 18) Syria, and 19) Tunisia. Accordingly, these 19 countries are not included in our surrogate wage rate calculation.

Based on the above, the Department relied on data reported under ISIC-Rev.3. Sub Classification 15 "Manufacture of Food Products and Beverages" from the following countries to arrive at the industry-specific surrogate wage rate calculated for this review: Ecuador, Egypt, Indonesia, Jordan, Peru, the Philippines, Thailand, and Ukraine. Following the foregoing methodology, we derived the surrogate wage rate to be applied in the final results, consistent with the CAFC's ruling in Dorbest, and the statutory requirements of section 773(c) of the Act.

Comment 8: Partial Rescission in Administrative Reviews

Farmlady's Arguments

- The Department's approach allowing Petitioners to designate certain PRC exporters/producers as respondents, and, subsequently to rescind the review with respect to specified respondents is arbitrary, capricious, and contrary to law. The CAFC in Transcom, Inc. v. United States, 294 F.3d 1371, 1375 (CAFC 2002) affirmed the Department's policy of differentiating between market economy and NME country investigations and recognized that all producers/exporters from an NME country are deemed part of the NME entity and have "conditional coverage" when the Department initiates a review.
- Providing Petitioners with more than a symbolic opportunity to request a review is contrary to the Department's NME one-entity policy, and allowing Petitioners to determine which exporter/producer to drop from a review is arbitrary and capricious because it contradicts both the one-entity policy and encourages abuse of the law. Moreover, repeated use of withdrawals represents a failure by Petitioners to explain "why" they requested the review.

Department's Position:

The Department's regulations require that domestic interested parties (i.e., Petitioners) must name specific exporters or producers in their request for an administrative review. The Department's regulations state:

> Request for administrative review. (1) Each year during the anniversary month of the publication of an antidumping or countervailing duty order, a domestic interested party or an interested party described in section 771(9)(B) of the Act (foreign government) may request in writing that the Secretary conduct an administrative review under section 751(a)(1) of the Act of specified individual exporters or producers covered by an order (except for a countervailing duty order in which the investigation or prior administrative review was conducted on an aggregate basis), if the requesting person states why the person desires the Secretary to review those particular exporters or producers.[93]

The Department's regulations make clear that Petitioners' request for a review of specified individual companies is precisely how the review request process is designed. Therefore, the Department does not consider Petitioners' review requests to be arbitrary, capricious, or contrary to law. Furthermore, the regulations are also clear that any party (including Petitioners) requesting a review may withdraw any of its requests for review normally within 90 days from the date of publication of the initiation of review, and if no other party has requested a review of that producer/exporter, then the Department is obliged to rescind the review for that producer/exporter.[94]

Comment 9: Means to Revoke Separate Rate Companies from Administrative Reviews

Farmlady's Arguments

- Once a company has established it is eligible for a separate rate in a segment of a proceeding, the Department must still provide that company with a means to obtain an exclusion from the order. By indicating a producer/exporter is free of Chinese government control, both de facto and de jure, the Department's failure to calculate a rate based on that exporter's actual prices denies that producer/exporter the opportunity to be judged on its own prices and factor inputs. Under the current scheme, it is virtually impossible in NME cases to obtain an exclusion from an order.

Petitioners' Arguments

- The Department's regulations are clear on what is required to be excluded from an order.

Department's Position:

Although Farmlady's comments use the term "exclusion," we consider the comments to be addressing the Department's company-specific "revocation" procedures outlined in its regulations, which are the same for market economy and NME cases:

> The Secretary may revoke an antidumping order, in part, if the Secretary concludes that: (i) One or more exporters or producers covered by the order have sold the merchandise at not less than normal value for a period of at least three consecutive years; (ii) It is not likely that those persons will in the future sell the

[93] See 19 CFR 351.213(b) (emphasis added).
[94] See 19 CFR 351.213(d)(1).

> subject merchandise at less than normal value; and (iii) For any exporter or producer that the Secretary previously has determined to have sold the subject merchandise at less than normal value, the exporter or producer agrees in writing to its immediate reinstatement in the order, as long as any exporter or producer is subject to the order, if the Secretary concludes that the exporter or producer, subsequent to the revocation, sold the subject merchandise at less than normal value.[95]

We note that Farmlady has not actually requested revocation from the order pursuant to 19 CFR 351.222(b)(2). Moreover, as Farmlady was not selected for individual examination in this review, we cannot evaluate whether it has or has not sold subject merchandise at not less than normal value for a period of at least three consecutive years. Because Farmlady was not selected for individual review pursuant to section 777A(c)(2)(B) of the Act, and because it filed the necessary separate rates information, it was treated as a cooperative separate-rate respondent, and has received a separate rate pursuant to the statute and the Department's practice. The statute does not require the Department to select exporters for revocation purposes within the context of section 777A(c)(2)(B) of the Act. Rather, pursuant to that statutory provision, because of the large number of companies with review requests, the Department selected respondents for individual examination that could reasonably be examined. The only statutory provision regarding revocation is section 751(c) of the Act regarding sunset reviews, and that provision only covers revocation of an entire order as a result of a finding of no likelihood of continued dumping or subsidization by the Department or a finding of no likelihood of injury by the International Trade Commission.

Nor do the Department's regulations require us to conduct an individual examination of companies' data, where, as here, the Department determined to limit its examination to a reasonable number of exporters in accordance with section 777A(c)(2)(B) of the Act. Nothing in the regulations requires the Department to conduct an individual examination and verification when the Department has limited its review under section 777A(c)(2) of the Act. The procedures set forth in the regulations are not designed as a guarantee of revocation, rather, they are designed to provide the possibility of revocation only under certain limited circumstances.

Moreover, the record of this review shows that Farmlady was aware that the Department has the authority to limit the number of exporters it examines during the course of a proceeding. We note that in the initiation notice for this administrative review, the Department notified all interested parties that it intended to select respondents based on the volumes reported in CBP data for imports into the United States during the POR. Finally, on January 12, 2010, the Department reiterated its intention to limit the respondents selected for individual examination in this administrative review based on CBP data and invited comments from interested parties. As noted in our respondent selection memorandum, dated March 10, 2010, no party filed comments. Indeed, Farmlady did not raise the issues related to the Department's respondent selection methodology and the criteria for revocation until its case brief.

[95] See 19 CFR 351.222(b)(2).

Comment 10: Zeroing in Administrative Reviews

Farmlady's Arguments

- The Department must calculate a rate for Farmlady, even if based on the weight-averaged rate for the mandatory respondent, without zeroing. In Dongbu Steel Co., Ltd. v. United States, 635 F.3d 1363 (March 31, 2011) (Dongbu), the CAFC ordered the Department to justify its conflicting zeroing policies: one for investigations and one for administrative reviews. The Department has been unable to articulate a rational distinction between the two policies. If Dongbu is not decided before the final results are issued, the Department must calculate two rates, one with zeroing, and the other without.

Xinboda's Arguments

- Based on Dongbu, the Department must calculate Xinboda's rate without zeroing.

Petitioners' Arguments

- The CAFC has remanded the issue of zeroing back to the Department and, at this time, the Department has not yet filed its response.
- Xinboda and Farmlady misstate the CAFC's holding in Dongbu.

Department's Position:

We have not changed our methodology regarding so called "zeroing" for the weighted-average dumping margin for these final results. Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than export price (EP) or constructed export price (CEP). As no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department does not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of the statute.[96]

Section 771(35)(B) of the Act defines "weighted-average dumping margin" as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." The Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which NV exceeds EP or CEP, and dividing this amount by the value of all sales. The use of the term "aggregate dumping margins" in section 771(35)(B) of the Act is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) of the Act as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the NV permitted to offset or cancel out the dumping margins found on other sales.

[96] See, e.g., Timken Co. v. United States, 354 F.3d 1334, 1342 (CAFC 2004) (Timken).

This does not mean that non-dumped sales are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise examined during the POR: the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin. The CAFC explained in Timken that denial of offsets is a "reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value."[97] As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner interpreted by the Department. No U.S. court has required the Department to demonstrate "masked dumping" before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales.[98]

In 2007, the Department implemented a modification of its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations.[99] With this modification, the Department's interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. The Department's interpretation of the statute was unchanged in other contexts. Recognizing that the change in the Department's interpretation of the statute was limited to investigations using average-to-average comparisons, the CAFC upheld the Department's interpretation as applied in an investigation using average-to-average comparisons as a reasonable interpretation of ambiguous statutory language.[100] In addition, the CAFC recently upheld, as a reasonable interpretation of ambiguous statutory language, the Department's continued application of zeroing in the context of an administrative review completed after the implementation of the Final Modification.[101] In that case, the Department had explained that the changed interpretation of the ambiguous statutory language was limited to the context of investigations using average-to-average comparisons and was made pursuant to statutory authority for implementing an adverse WTO report. We find that our determination in this administrative review is in accordance with the CAFC's recent decision in SKF.

We disagree with Xinboda's and Farmlady's arguments that the CAFC's recent decision in Dongbu requires the Department to change its methodology in this administrative review. Unlike the circumstances examined in Dongbu, the Department is providing a reasoned explanation for the changed interpretation of the statute subsequent to the Final Modification whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For that reason, we find that the present administrative review is distinguishable from the proceeding before the CAFC in Dongbu. Furthermore, the Department notes that Xinboda improperly attributed the following statement to the Dongbu court on page 91 of its case brief: "{O}nce Commerce announced its

[97] See Timken, 354 F.3d at 1343.
[98] See, e.g., Timken, 354 F.3d at 1343; see also NSK Ltd. v. United States, 510 F.3d 1375, 1379-80 (CAFC 2007).
[99] See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006) (Final Modification).
[100] See U.S. Steel Corp. v. United States, 621 F.3d 1351 (CAFC 2010) rehearing, en banc, denied by U.S. Steel Corp. v. United States, 2011 U.S. App. LEXIS 4499 (CAFC 2011).
[101] See SKF USA Inc. v. United States, 630 F.3d 1365 (CAFC 2011) (SKF).

new interpretation of 19 U.S.C. § 1677(35) – even though Commerce intended the new interpretation to apply only to investigations – it may not rely on an entirely inconsistent interpretation of the exact same statutory provision to justify zeroing in {administrative reviews}." Rather, the quote attributed to the CAFC is the court's summary of the plaintiff Union Steel Manufacturing Co., Ltd.'s argument in Dongbu, not the court's holding. Accordingly, and consistent with the Department's interpretation of the Act described above, in the event that any of the export transactions examined in this review are found to exceed NV, the amount by which the price exceeds NV will not offset the dumping found in respect of other transactions.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final results of review and the final dumping margins in the Federal Register.

AGREE_____ DISAGREE_____

_____
Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

_____
Date