UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

A-570-831
Administrative Review
POR: 11/01/2015-10/31/2016
New Shipper Review
POR: 11/01/2015-10/31/2016
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June 8, 2018

MEMORANDUM TO: Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance

FROM: James Maeder
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results and Final Rescission of the Antidumping Duty Administrative Review and New Shipper Reviews: Fresh Garlic from the People's Republic of China; 2015-2016

I. SUMMARY

The Department of Commerce (Commerce) conducted these reviews in accordance with section 751 of the Tariff Act of 1930, as amended (the Act). Commerce analyzed the case briefs and rebuttal briefs submitted by interested parties in the 22nd administrative review and concurrent new shipper reviews of the antidumping duty order on fresh garlic from the People's Republic of China (China). As a result of this analysis, we have made changes to the *Preliminary Results*. We recommend that you approve the positions described in the "Decisions of the Issues" section of this memorandum.

Administrative Review

Comment 1	Whether Section 751 of the Act Requires Commerce to Conduct an AR of Harmoni Following the CFTG's Request for Review
Comment 2	Whether the CFTG's Review Request was Valid, and Whether the Members of the CFTG are Producers and Wholesalers of a Domestic Like Product

Comment 3	Whether Harmoni and the FGPA Obstructed or Impaired Legitimate Government Activity

New Shipper Reviews

Comment 4	Whether Yudi's Sale was Made on a *Bona Fide* Basis
Comment 5	Whether Join's Sale was Made on a *Bona Fide* Basis
Comment 6	Whether Commerce Correctly Selected Romania as the Surrogate Country

II. BACKGROUND

Administrative Review

On December 7, 2017, Commerce published the *Preliminary Results* of this administrative review.[1] We preliminarily found that the mandatory respondent, Shandong Jinxiang Import & Export Co., Ltd. (Zhengyang) sold subject merchandise to the United States at less than normal value. Furthermore, we preliminarily determined that the review request made by the Coalition for Fair Trade in Garlic (the CFTG) was not valid, and preliminarily rescinded the review with respect to seven companies, including mandatory respondent, Zhengzhou Harmoni Spice Co., Ltd. (Harmoni), covered by the CFTG's review request. Further, we preliminarily found that five companies made no shipments during the POR and that six companies qualified for separate rate status.

Following the *Preliminary Results*, we issued a supplemental questionnaire regarding the separate rate status of the QTF-Entity,[2] to which QTF, QXF, QBT, Golden Bird, Lianghe, QTHF and Huamei filed timely responses on January 3, 2018.[3]

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[1] *See Fresh Garlic from the People's Republic of China: Preliminary Results, Preliminary Rescission and Final Rescission, in Part, of the 22nd Antidumping Duty Administrative Review and Preliminary Results of the New Shipper Reviews; 2015-2016*, 82 FR 57718 (December 7, 2016) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum (PDM).

[2] The QTF-Entity includes Qingdao Tiantaixing Foods Co., Ltd. (QTF); Qingdao Xintianfeng Foods Co., Lt. (QXF); Qingdao Lianghe International Trade Co., Ltd. (Lianghe); Qingdao Tianhefeng Foods Co., Ltd. (QTHF); Qingdao Beixing Trading Co., Ltd. (QBT); Hebei Golden Bird Trading Co., Ltd. (Golden Bird); and Huamei Consulting (Huamei); *see Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 21st Administrative Review; 2014-2015* 82 FR 27230 (June 14, 2017) (*Garlic 21 Final*), and accompanying Issues and Decision Memorandum (IDM) at 26-35.

[3] *See* QTF's Letter, "Fresh Garlic from the People's Republic of China: Separate Rate Application" dated January 3, 2018 (QTF's SSRA); *see also* QXF's Letter, "Fresh Garlic from the People's Republic of China: Separate Rate Application" dated January 3, 2018 (QXF's SRA); *see also* Lianghe's Letter, "Fresh Garlic from the People's Republic of China: Separate Rate Application" dated January 3, 2018 (Lianghe's SRA); *see also* QTHF's Letter, "Fresh Garlic from the People's Republic of China: Separate Rate Application" dated January 3, 2018 (QTHF's SRA); *see also* QBT's Letter, "Fresh Garlic from the People's Republic of China: Separate Rate Application" dated January 3, 2018 (QBT's SRA); *see also* Golden Bird's Letter, "Fresh Garlic from the People's Republic of China: Separate Rate Application" dated January 3, 2018 (Golden Bird's SRA); *see also* Huamei's Letter, "Fresh Garlic from the People's Republic of China: Separate Rate Application" dated January 3, 2018 (Huameni's SRA).

Between December 29, 2017, and January 8, 2018, the CFTG and Zhengyang each filed an affirmative request for a hearing in the administrative review.[4] Harmoni and the petitioners[5] each filed a request to participate in a hearing if an affirmative request for a hearing was made by another party.[6] On May 7, 2018, and May 24, 2018, the CFTG and Zhengyang each withdrew its affirmative request for a hearing. With no standing request for a hearing on the administrative record, Commerce did not hold a hearing for this administrative review.

On January 18, 2018, the petitioners withdrew their request to conduct verification in this administrative review.[7]

Commerce exercised its discretion to toll all deadlines affected by the closure of the Federal Government from January 20 through 22, 2018. On March 14, 2018, we extended the deadline of these final results from April 9, 2018, to June 8, 2018.[8]

On April 16, 2018, we established the deadlines for submitting case and rebuttal briefs in the administrative review.[9] The CFTG and Zhengyang submitted case briefs on April 25, 2018,[10] and on May 2, and May 3, 2018, Harmoni and the petitioners, respectively, submitted rebuttal briefs.[11] On May 15, 2018, Commerce rejected Zhengyang's case brief because it contained new and revised information.[12] On May 17, 2018, Zhengyang refiled its case brief,[13] however, on May 21, 2018, Commerce again rejected Zhengyang's case brief because it contained new and revised information.[14] On May 22, 2018, Commerce placed a memorandum on the record

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[4] *See* CFTG's Letter, "22nd Administrative Review of Fresh Garlic from the People's Republic of China – CFTG Hearing Request" dated December 29, 2017; *see also* Zhengyang's Letter, "Fresh Garlic from the People's Republic of China" dated January 8, 2018.

[5] The petitioners are the Fresh Garlic Producers Association and its individual members: Christopher Ranch L.L.C.; The Garlic Company; Valley Garlic; and Vessey and Company, Inc.

[6] *See* Harmoni's Letter, "Request to Participate in Hearing in 22nd Administrative Review of Antidumping Duty Order on Fresh Garlic from the People's Republic of China," dated January 4, 2018; *see also* the Petitioners' Letter, "22nd Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China – Petitioners' Request to Participate in Any Public Hearing Authorized by the Department," dated January 8, 2018.

[7] *See* the Petitioners' Letter, "22nd Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China – Petitioners' Withdrawal of Verification Request," dated January 18, 2018.

[8] *See* Memorandum, "Fresh Garlic from the People's Republic of China – 22nd Administrative Review (2015-2016): Extension of Deadline for the Final Results of Review," dated March 14, 2018.

[9] *See* Memorandum, "22nd Administrative Review of the Antidumping Duty Order on Garlic from the People's Republic of China: Deadline Case and Rebuttal Briefs," dated April 16, 2018.

[10] *See* CFTG's Letter, "Case Brief: Filed on Behalf of the Coalition for Fair Trade in Garlic in the 22nd Administrative Review of Fresh Garlic from China," dated April 25, 2018 (CFTG's Case Brief); *see also* Zhengyang's Letter, "Fresh Garlic from the People's Republic of China – Case Brief," dated April 25, 2018.

[11] *See* the Petitioners' Letter, "Fresh Garlic from the People's Republic of China: Petitioners' Rebuttal Brief," dated May 2, 2018 (the Petitioners' Rebuttal Brief); *see also* Harmoni's Letter, "Harmoni Administrative Review Reply Brief: 22nd Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China (A-570-831)," dated May 2, 2018 (Harmoni's Rebuttal Brief).

[12] *See* Commerce's Letter, "22nd Antidumping Duty Administrative Review of Fresh Garlic from the People's Republic of China: Request for Removal of Untimely New Factual Information" dated May 15, 2018.

[13] *See* Zhengyang's Letter, "Fresh Garlic from the People's Republic of China – REVISED CASE BRIEF" dated May 17, 2018.

[14] *See* Commerce's Letter, "22nd Antidumping Duty Administrative Review of Fresh Garlic from the People's Republic of China: Request for Removal of Untimely New Factual Information" dated May 21, 2018.

stating that, because the arguments contained in Zhengyang's case brief relied upon new and revised factual information, which is no longer on the record, these arguments, as well as rebuttal to these arguments, would not be considered for the Commerce's final decision.[15] On June 5, 2018, Zhengyang requested that Commerce reconsider the rejection of Zhengyang's refiled case brief.[16] As stated above, we previously provided Zhengyang an opportunity to correct its case brief in a timely manner, and Zhengyang failed to do so. Therefore, we have not reconsidered our decision to reject Zhengyang's revised case brief at this late stage of the proceeding.

New Shipper Reviews

On December 7, 2017, Commerce published the *Preliminary Results* of the new shipper reviews of Qingdao Joinseafoods Co., Ltd. (Qingdao Join) and Join Food Ingredient (Join Food) (collectively, Join) and Zhengzhou Yudi Shengjin Agricultural Trade Co., Ltd. (Yudi). We found that Join and Yudi each made a *bona fide* sale.[17]

Following the *Preliminary Results*, Yudi submitted comments regarding Commerce's preliminary *bona fides* analysis.[18]

On January 8, 2018, Yudi filed an affirmative request for a hearing in its new shipper review.[19] On January 4, and January 23, 2018, the petitioners and Qingdao Join respectively filed a request to participate in a hearing if an affirmative request for a hearing was made by another party.[20] On May 23, 2018, Yudi withdrew its affirmative request for a hearing.[21] With no standing request for a hearing on the administrative record, Commerce did not hold a hearing for the new shipper reviews.

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[15] Petitioners' rebuttal brief contains argument regarding surrogate values; however, with no affirmative arguments on the administrative record concerning surrogate values, we have not addressed the petitioners' post-prelim surrogate value rebuttal. *See* Memorandum, "22nd Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: Rebuttal to Zhengyang Case Brief" dated May 22, 2018.
[16] *See* Zhengyang's Letter, "Fresh Garlic from the People's Republic of China – Request to Reinstate Revised Case Brief," dated June 5, 2018. We note that this letter was submitted well after close of business. Therefore, it was not reviewed until June 6, 2018, two days before the signature date of these *Final Results*.
[17] *See Preliminary Results*, PDM.
[18] *See* Yudi's Letter, "Fresh Garlic from the People's Republic of China – Comments on Bona Fide Memorandum," dated December 14, 2017.
[19] *See* Yudi's Letter, "Fresh Garlic from the People's Republic of China – Hearing Request," dated January 8, 2018.
[20] *See* the Petitioners' Letter, "24th New Shipper Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China – Petitioners' Request to Participate in Any Public Hearings Authorized by the Department," dated January 8, 2018; *see also* Join's Letter, "New Shipper Review of the Antidumping Duty on Fresh Garlic from the People's Republic of China – Qingdao Joinseafoods Co., Ltd. and Join Food Ingredient Inc.'s, Request to Participate in Any Public Hearing," dated January 23, 2018.
[21] *See* Yudi's Letter, "Fresh Garlic from the People's Republic of China – Withdrawal of Hearing Request," dated May 23, 2018.

On March 5, 2018, we issued supplemental questionnaires to Yudi and Qingdao Join,[22] to which each respondent filed a timely response.[23]

On April 16, 2018, we established the deadlines for submitting case and rebuttal briefs in the new shipper reviews.[24] Qingdao Join, Yudi, and the petitioners submitted case briefs on April 25 and April 26, 2018, and Qingdao Join and the petitioners submitted rebuttal briefs on May 2 and May 3, 2018.[25] On May 21, 2018, Commerce rejected Yudi's case brief because Commerce determined it contained new and revised information.[26] On May 23, 2018, Commerce determined that the factual information contained in Yudi's case brief was already on the record of the proceeding and reinstated Yudi's case brief on the administrative record.[27]

III. SCOPE OF THE ORDER

The products covered by the order are all grades of garlic, whole or separated into constituent cloves, whether or not peeled, fresh, chilled, frozen, water or other neutral substance, but not prepared or preserved by the addition of other ingredients or heat processing. The differences between grades are based on color, size, sheathing, and level of decay. The scope of the order does not include the following: (a) Garlic that has been mechanically harvested and that is primarily, but not exclusively, destined for non-fresh use; or (b) garlic that has been specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed. The subject merchandise is used principally as a food product and for seasoning. The subject garlic is currently classifiable under subheadings: 0703.20.0000, 0703.20.0005, 0703.20.0010, 0703.20.0015, 0703.20.0020, 0703.20.0090, 0710.80.7060, 0710.80.9750, 0711.90.6000, 0711.90.6500, 2005.90.9500, 2005.90.9700, 2005.99.9700, of the Harmonized Tariff Schedule of the United States (HTSUS).[28]

Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive. In order to be excluded from the order, garlic entered under the HTSUS subheadings listed above that is (1) mechanically harvested and primarily, but not exclusively, destined for non-fresh use or (2) specially prepared

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[22] *See* Commerce's Letter, "New Shipper Review of Fresh Garlic from the People's Republic of China – Second Supplemental Questionnaire for Yudi," dated March 5, 2018; *see also* Commerce's Letter, "New Shipper Review of Fresh Garlic from the People's Republic of China – Second Supplemental Questionnaire for Join," dated March 5, 2018.

[23] *See* Yudi's March 12, 2018 Second Supplemental Questionnaire Response (Yudi's March 12, 2018 2nd SQR); *see also* Join's March 14, 2018 Second Supplemental Questionnaire Response (Join's March 14, 2018 2nd SQR).

[24] *See* Memorandum, "New Shipper Reviews of the Antidumping Duty Order on Garlic from the People's Republic of China: Deadline Case and Rebuttal Briefs," dated April 16, 2018.

[25] *See* Yudi's Letter, "Case Brief" dated April 25, 2018 (Yudi's Case Brief); *see also* Qingdao Join's Letter, "Case Brief" dated April 25, 2018 (Join's Case Brief); *see also* the Petitioners' Letter, "Petitioners' Case Brief" dated April 25, 2018 (Petitioners' NSR Case Brief); *see also* Qingdao Join's Letter, "Rebuttal Case Brief" dated May 2, 2018 (Join's Rebuttal Brief); *see also* the Petitioners' Letter, "Petitioners' Rebuttal Brief," dated May 2, 2018 (Petitioners' NSR Rebuttal Brief).

[26] *See* Commerce's Letter, "Antidumping Duty New Shipper Review of Fresh Garlic from the People's Republic of China: Request for Removal of Untimely New Factual Information" dated May 21, 2018.

[27] *See* Memorandum, "New Shipper Review of the Antidumping Duty Order of Fresh Garlic from the People's Republic of China: Reconsideration of Rejection," dated May 23, 2018.

[28] *See Antidumping Duty Order: Fresh Garlic from the People's Republic of China*, 59 FR 59209 (November 16, 1994).

and cultivated prior to planting and then harvested and otherwise prepared for use as seed must be accompanied by declarations to U.S. Customs and Border Protection (CBP) to that effect.

IV. PARTIAL RESCISSION OF THE ADMINISTRATIVE REVIEW

In the *Preliminary Results*, we preliminarily determined that the material misrepresentations and inconsistencies in the statements made by the CFTG rendered all of the submissions of the CFTG unreliable. Accordingly, we preliminarily determined that the CFTG's review request was invalid, and preliminarily rescinded the review with respect to the seven companies requested by the CFTG for which there were no other standing review request on the record. As discussed in Comment 2 below, we continue to find that the CFTG's review request was invalid and thus, rescind the review with respect to these seven companies.

V. FINAL DETERMINATION OF NO SHIPMENTS

We preliminarily determined that each company listed in Appendix IV of the *Preliminary Results* made no shipments of subject merchandise during the POR.[29] There is no information on the record to warrant reconsideration of our preliminary findings. As such, for these *Final Results*, we find that the five companies listed in Appendix III had no shipments during the POR.

VI. DISCUSSION OF METHODOLOGY

Administrative Review

In the *Initiation Notice*, Commerce notified parties of the application process by which exporters and producers may apply for separate rate status in NME reviews.[30] In proceedings involving NME countries, Commerce has a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assessed at a single AD rate.[31] It is Commerce's policy to assign all exporters of subject merchandise in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.[32] Exporters can demonstrate this independence through the absence of both *de jure* (in law) and *de facto* (in fact) governmental control over export activities.[33] Commerce analyzes each entity's export independence under a test first articulated in *Sparklers* and as further developed in *Silicon Carbide*.[34]

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[29] *See Preliminary Results* at Appendix IV.
[30] *See Initiation Notice*.
[31] *See* Policy Bulletin 05.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries, available at *http://trade.gov/enforcement/policy/bull05-1.pdf.*
[32] *Id.*
[33] *Id*.
[34] *See Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991) (*Sparklers*); *see also Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994) (*Silicon Carbide*).

In order to demonstrate separate-rate status eligibility, Commerce normally requires an entity, for which a review was requested, and which was assigned a separate rate in a previous segment, to submit a separate-rate certification stating that it continues to meet the criteria for obtaining a separate rate.[35] For entities that were not assigned a separate rate in the previous segment, however, Commerce requires a separate rate application.[36]

QTF-Entity Separate Rate Status

In the *Preliminary Results*, we preliminarily found that the record did not contain sufficient evidence to determine the separate rate status of the QTF-Entity.[37] As noted above, following the *Preliminary Results*, we issued supplemental separate rate questionnaires to the members of the QTF-Entity. Each member of the QTF-Entity timely responded to our supplemental questionnaires.

The timely-filed separate rate applications came from QTF, QXF, QBT, QTHF, Lianghe, Golden Bird, and Huamei Consulting.

1. Absence of *De Jure* Control

Commerce considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) other formal measures by the government decentralizing control of companies.[38]

The evidence placed on the record of the instant administrative review by the members of the QTF-Entity demonstrates an absence of *de jure* government control under the criteria identified in *Silicon Carbide* and *Sparkler*s.

2. Absence of *De Facto* Control

Typically, Commerce considers four factors in evaluating whether each respondent is subject to *de facto* government control of its export functions: (1) whether the export prices are set by or are subject to the approval of a government agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.[39] Commerce determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of government control which would preclude Commerce from granting a separate rate.

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[35] *See Initiation Notice*.
[36] *Id.*
[37] *See* PDM at 18-19.
[38] *See Sparklers*, 56 FR at 20589.
[39] *See Silicon Carbide*, 59 FR at 22586-87; *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995).

The evidence placed on the record of the instant administrative review by the members of the QTF-Entity demonstrates an absence of *de facto* government control under the criteria identified in *Silicon Carbide* and *Sparklers*. Accordingly, Commerce has determined that the QTF-Entity has demonstrated that it is eligible for a separate rate.

Separate Rate for Non-Selected Companies

Pursuant to section 777A(c) of the Act, because of the large number of exporters/producers, and lacking the resources to examine all companies, Commerce determined that it was not practicable to individually examine all companies subject to this review and, thus, employed a limited examination methodology. Pursuant to section 777A(c)(2)(B) of the Act, we selected Zhengyang and Harmoni, the exporters accounting for the largest volume of imports of the subject merchandise, as the respondents in this review.[40]

As discussed above, and in the *Preliminary Results*,[41] we have determined that Bainong, Feiteng, Sea-line, Shunchang, Weifang, Xinboda, and the QTF-Entity, who were not selected for individual examination, have demonstrated eligibility for a separate rate. We received no comments or additional information which would cause us to reconsider our determination, and, therefore, we continue to grant these companies a separate rate.

The statute and Commerce's regulations do not directly address the establishment of a rate to be applied to companies not selected for individual examination where Commerce limited its examination in an AR pursuant to section 777A(c)(2) of the Act. Commerce's practice in cases involving limited selection based on exporters accounting for the largest volume of imports has been to look to section 735(c)(5) of the Act for guidance, which provides instructions for calculating the all-others rate in an investigation using margins established for individually investigated producers and exporters, excluding any zero or *de minimis* margins or any margins based entirely on facts available.[42]

In this review, Zhengyang is the only reviewed respondent that received a weighted-average margin. In the *Preliminary Results*, Commerce determined that Zhengyang's calculated weighted-average dumping margin of $2.69 per kilogram would be assigned to Bainong, Feiteng, Sea-line, Shunchang, Weifang, and Xinboda, which is unchanged in these *Final Results*. Here, Commerce also determines to assign Zhengyang's weighted-average dumping margin of $2.69 per kilogram to the QTF-Entity.

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[40] *See* Memorandum, "Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: 2015-2016: Selection of Respondents for Individual Examination," dated March 7, 2017.
[41] *See* PDM at 16-18.
[42] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Preliminary Results and Partial Rescission of the Antidumping Duty Administrative Review and Preliminary Results of the New Shipper Review; 2012-2013*, 79 FR 42758 (July 23, 2014).

New Shipper Review

Application of Facts Available and Use of Adverse Inference

Section 776(a)(1) and 776(a)(2)(A)-(D) of the Act provide that if necessary information is not available on the record or if an interested party: (A) withholds information that has been requested by Commerce; (B) fails to provide such information in a timely manner or in the form or manner requested subject to section 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified as provided for in section 782(i) of the Act, Commerce shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Section 782(c)(1) of the Act provides that if an interested party "promptly after receiving a request from {Commerce} for information, notifies {Commerce} that such party is unable to submit the information requested in the requested form and manner," Commerce shall consider the ability of the interested party and may modify the requirements to avoid imposing an unreasonable burden on that party.

Section 782(d) of the Act provides that, if Commerce determines that a response to a request for information does not comply with the request, Commerce shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person an opportunity to remedy or explain the deficiency. If that person submits further information that continues to be unsatisfactory, or this information is not submitted within the applicable time limits, Commerce may, subject to section 782(e) of the Act, disregard all or part of the original and subsequent responses, as appropriate.

Section 782(e) of the Act states that Commerce shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Section 776(b) of the Act provides that Commerce may use an adverse inference in applying the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. In doing so, Commerce is not required to determine, or make any adjustments to, a weighted average dumping margin based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information. Section 776(b)(2) states that an adverse inference may include reliance on information derived from the petition, the final determination from the investigation, a previous administrative review, or other information placed on the record. In addition, Commerce may employ an adverse inference "to ensure that the party does not obtain a more

favorable result by failing to cooperate than if it had cooperated fully."[43] Further, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference.[44]
Section 776(c) of the Act provides that, when Commerce relies on secondary information rather than on information obtained in the course of an investigation, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is defined as information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise. Further, Commerce is not required to corroborate any dumping margin applied in a separate segment of the same proceeding.

Finally, under section 776(d) of the Act, Commerce may use any dumping margin from any segment of a proceeding under an antidumping order when applying an adverse inference, including the highest of such margins. Commerce is not required to estimate what the dumping margin would have been if the interested party failing to cooperate had cooperated or to demonstrate that the dumping margin reflects an "alleged commercial reality" of the interested party.

In selecting a from adverse facts available (AFA), Commerce selects facts sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.[45] Accordingly, we are relying, in part, on adverse inferences with respect to our interpretation of the facts available and thus, some of the weight we put on the record evidence is affected by a parties' lack of cooperation and adverse inferences.

Application of Adverse Facts Available to Qingdao Join

The record of this new shipper review shows that Qingdao Join provided incomplete and false information with respect to the sales-related activities of its U.S. affiliates, despite two rounds of questionnaires. Although we preliminarily determined that Qingdao Join's constructed export price (CEP) sale was *bona fide* under section 751(a)(2)(B)(iv) of the Act, we also pointed to concerns regarding Qingdao Join's payment of related expenses, and Qingdao Join's payment terms.[46] In its initial questionnaire response, Qingdao Join informed Commerce that Qingdao Join and Join Food Ingredient (Join Food) were the only companies involved in the production

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[43] *See Statement of Administrative Action accompanying the Uruguay Round Agreements Act*, H.R. Rep. 103-316, Vol. 1, 103d Cong. at 870 (1994) (SAA).
[44] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR 42985 (July 12, 2000); *Antidumping Duties, Countervailing Duties*, 62 FR 27296, 27340 (May 19, 1997); and *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (CAFC 2003) (*Nippon Steel*).
[45] *See* SAA at 870.
[46] *See* Memorandum, "Bona Fide Nature of the Sales in the Antidumping Duty New Shipper Review of Fresh Garlic from the People's Republic of China: Qingdao Joinseafoods Co., Ltd.," dated November 30, 2017 (Join's Prelim *Bona Fide* Memo) at 7.

and sale of subject merchandise.[47] In a subsequent supplemental questionnaire response, Qingdao Join stated "{b}ased upon the sale term between {Join Food} and {Qingdao Join}, Join Food is responsible for all expenses incurred after the shipped merchandise is loaded at the port of departure. Therefore, Join Food paid the ocean freight (door to door), the U.S. customs duties and charges, and all brokerage & handling expenses in the United States for the sale under review."[48] That same supplemental questionnaire asked Qingdao Join to document the expenses for the sale under review.[49] Qingdao Join responded by providing a list of all expenses and purported to provide supporting documentation for those expenses.[50] Qingdao Join's response to the supplemental questionnaire was incomplete as to the documentation of payment of expenses, and falsely reiterated that no other U.S. affiliates were involved in the sale. Specifically, the supporting documentation provided for the expenses did not include bank statements demonstrating that Qingdao Join actually paid the expenses. As stated above, we issued a second supplemental questionnaire to Qingdao Join after the *Preliminary Results*, to, among other things, request the payment documentation for the expenses incurred after the shipped merchandise is loaded at the port of departure. Qingdao Join provided the requested bank documentation, but it also responded that it paid for a bond through another U.S. affiliate of both Qingdao Join and Join Food.[51] Qingdao Join stated that "{e}xcept for assisting Join Food for one-time payment of this expense, {the affiliate} was not involved in any activities of the sale of the subject merchandise during the POR."[52]

Information concerning an affiliate's involvement in the sale that is the subject of the new shipper review is central to Commerce's *bona fide* sale analysis under section 751(a)(2)(B)(iv) of the Act. This information is also critical to Commerce's calculation of an accurate dumping margin for that respondent. Though Qingdao Join informed Commerce of this particular affiliation,[53] it did not report that the affiliate was involved with the sale under review in its initial questionnaire response,[54] nor in its first supplemental questionnaire response.[55] Indeed, as indicated above, Qingdao Join stated multiple times that no other parties were involved in the sale at issue. It was only in its post-preliminary supplemental response, while finally providing the twice-requested payment documentation, that it reported the true activities of this affiliate.[56] By not reporting that this affiliate was involved in the sale under review until this late stage of the proceeding, Qingdao Join has deprived Commerce of the opportunity to properly analyze the activities of the affiliate, including any possible expenses that would arise from those activities,

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[47] *See* Qingdao Join's February 9, 2017 Section A Questionnaire Response (Join's February 9, 2017 AQR) at Exhibit A-7.
[48] *See* Qingdao Join's September 22, 2017 Supplemental Questionnaire Response (Join's September 22, 2017 SQR) at 1.
[49] *Id*.
[50] *Id*. at 1 and Exhibit 1.
[51] *See* Qingdao Join's March 14, 2018 2nd Supplemental Questionnaire Response (Join's March 14, 2018 2nd SQR) at 1 and Exhibit 1; *see also* Join's Rebuttal Brief at 2 ("The petitioner raised the question about the payment…of bond…").
[52] *See* Join's March 14, 2018 2nd SQR at 1.
[53] *See* Join's February 9, 2017 AQR at Exhibit A-7.
[54] *Id*.
[55] *See* Join's September 22, 2017 SQR at 1.
[56] *See* Join's March 14, 2018 2nd SQR at 1.

and calls into question the accuracy and reliability of Qingdao Join's reporting as discussed further below.

For these reasons, we find that Qingdao Join withheld information that had been repeatedly requested by Commerce and significantly impeded the proceeding under sections 776(a)(2)(A) and (C) of the Act. We also find that Qingdao Join failed to cooperate to the best of its ability under section 776(b) of the Act. Therefore, application of an adverse inference in selecting from the facts available is warranted.

Framework for Bona Fides Analysis

Section 751(a)(2)(B)(iv) of the Act was recently amended[57] to set forth the criteria Commerce shall consider in determining if sales, such as the sale by Qingdao Join under review in this NSR, are *bona fide*. A weighted-average dumping margin determined in a new shipper review must be based solely on *bona fide* sales during the period of review.[58]

Where a review is based on a single sale, exclusion of that sale as non-*bona fide* necessarily must end the review.[59] To determine whether a sale in a new shipper review is *bona fide*, Commerce considers, depending on the circumstances surrounding such sales:

> (I) the prices of such sales; (II) whether such sales were made in commercial quantities; (III) the timing of such sales; (IV) the expenses arising from such sales; (V) whether the subject merchandise involved in such sales was resold in the United States at a profit; (VI) whether such sales were made on an arms-length basis; and (VII) any other factor {it} determines to be relevant as to whether such sales are, or are not, likely to be typical of those the exporter or producer will make after completion of the review.[60]

In examining the totality of the circumstances, Commerce looks to whether the transaction is "commercially unreasonable" or "atypical of normal business practices."[61]

Although some *bona fide* issues may share commonalities across various cases, Commerce examines the *bona fide* nature of a sale on a case-by-case basis, and the analysis may vary with the facts surrounding each sale.[62] In *TTPC*, the U.S. Court of International Trade (CIT) affirmed

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[57] *See* Section 433 of the Trade Facilitation and Trade Enforcement Act of 2015, Pub. Law 114-125 (Feb. 24, 2016) (adding a new section 751(a)(2)(B)(iv) entitled, "Determinations based on bona fide sales").
[58] Section 751(a)(2)(B)(iv) of the Act.
[59] *See Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States*, 366 F. Supp. 2d 1246, 1249 (CIT 2005) (*TTPC*).
[60] *See* Section 751(a)(2)(B)(iv) of the Act.
[61] *See Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 374 F. Supp. 2d 1333, 1339 (CIT 2005) (*New Donghua*), citing *Windmill Int'l Pte., Ltd. v. United States*, 193 F. Supp. 2d 1303, 1313 (CIT 2002) (*Windmill*); *see also TTPC* at 1249-50.
[62] *See New Donghua*, 374 F. Supp. 2d at 1340, n.5, citing *TTPC,* 366 F. Supp. 2d at 1260, and *Certain Preserved Mushrooms from the People's Republic of China: Final Results and Partial Rescission of the New Shipper Review and Final Results and Partial Rescission of the Third Antidumping Duty Administrative Review*, 68 FR 41304 (July 11, 2003), and accompanying Issues and Decision Memorandum at Comment 2.

Commerce's practice of considering that "any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future is relevant,"[63] and found that "the weight given to each factor investigated will depend on the circumstances surrounding the sale."[64]

Finally, in *New Donghua*, the CIT affirmed Commerce's practice of evaluating the circumstances surrounding a new shipper review sale, so that a respondent does not unfairly benefit from an atypical sale and obtain a lower dumping margin than the producer's usual commercial practice would dictate.[65] Commerce's practice makes clear that it will examine objective, verifiable factors to ensure that a sale is not being made to circumvent an antidumping duty order.[66] Thus, a respondent is on notice that it is unlikely to establish the *bona fides* of a sale merely by claiming to have sold in a manner representative of its future commercial practice.[67] Where Commerce finds that a sale is not *bona fide*, it will exclude the sale from its export price calculations.[68] When the respondent under review makes only one sale and Commerce finds the transaction atypical, "exclusion of that sale as non-*bona fide* necessarily must end the review, as no data will remain on the export price side of {Commerce's} antidumping duty calculation."[69]

Reevaluation of the Bona Fides of Qingdao Join's Single U.S. Sale.

In the *Preliminary Results*, we determined that Join's sale of subject merchandise was made on a *bona fide* basis. Specifically, relying on the state of the record at that time, we found that that: (1) the timing of the sale by itself did not indicate that the sale might not be *bona fide*; (2) the price and quantity of the sale was commercially reasonable and not atypical of normal business practices of fresh garlic exporters; (3) Join did not incur any extraordinary expenses arising from the transactions; (4) Join's unaffiliated U.S. customers appeared to have made profit in the resale of subject merchandise; and (5) the new shipper sales were made between Join and its respective unaffiliated U.S. customers at arm's length. In addition, reviewing this single sale over other relevant factors, we further found that there was incomplete information pertaining to the receipt of payment, and noted that one more opportunity will be provided to Qingdao Join to supplement the record. Lastly, we found that information on the record confirmed Qingdao Join's claim that it made a single sale of garlic to the United States.[70]

In light of our determination to use an adverse inference in selecting from among the facts otherwise available regarding Join pursuant to sections 776(a) and 776(b) of the Act, we have reevaluated the *bona fides* of Qingdao Join's single sale in accordance with section 751(a) of the

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[63] *See TTPC*, 366 F. Supp. 2d at 1250.
[64] *See TTPC*, 366 F. Supp. 2d at 1263.
[65] *See Hebei New Donghua Amino Acid Co., Ltd. v. United States, 374 F. Supp. 2d 1333, 1342* (CIT 2005) (*New Donghua*) (citing *Fresh Garlic from the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review*, 67 FR 11283 (March 13, 2002)).
[66] *Id*. at 1339.
[67] *Id*.
[68] *See Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States*, 366 F. Supp. 2d 1246 (CIT 2005) (*TTPC*) at 1249.
[69] *Id*.
[70] *See* PDM at 15; *see also* Join's Prelim *Bona Fide* Memo.

Act. Specifically, as noted above, Qingdao Join's failure to reveal the involvement of an additional affiliate in the sale at issue until after the *Preliminary Results* deprived Commerce of the opportunity to fully examine numerous factors of our *bona fides* analysis, including details surrounding the expenses that were reported, and further calls into question whether Qingdao Join has accurately and reliably reported other information, including the full universe of expenses arising from the transaction, as well as the full universe of sales from the affiliate.

With respect to Qindao Join's reported expenses arising from the transaction, we preliminarily determined that Join did not incur any extraordinary expenses. However, as discussed above we find that Qingdao Join failed to fully disclose and document the payments of all expenses that arose from the sale, and potentially, underreported its CEP expenses. Moreover, Qingdao Join deprived Commerce of the opportunity to directly question this affiliate regarding the reported expenses, and to examine any additional expenses potentially incurred by the affiliate related to the sale in question.

For similar reasons, although we preliminarily determined that Join had no other sales, we were deprived of the opportunity to question the affiliate with respect to whether it was involved in any other sales. To complete our *bona fide* analysis, Commerce would have requested the additional information from the affiliate to ensure that it had no sales of subject merchandise during the POR, but because of the failure to identify the involvement of the U.S. affiliate until late in the process, Commerce did not have an opportunity to do so. Therefore, pursuant to sections 776(a) and (b) of the Act, we considered the facts otherwise available, with an adverse inference, and find that these factors weigh against finding that the sale is *bona fide*.

Concerning receipt of payment, as noted above we preliminarily determined that the delay in payment was inconsistent with Join's reported payment terms, and that we intended to further evaluate the issue. In determining whether the timing of a payment indicates a sale as *bona fide*, Commerce will look at the sales terms and determine when a payment was due. If payment is untimely, Commerce will examine whether or not there was any attempt to collect on the overdue payments.[71] While the established payment terms for this sale were "net 30 days after delivery,"[72] Qingdao Join's U.S. customer did not make its payment on time, as further explained in the preliminary determination.[73] In response to our supplemental, Qingdao Join stated "Join food repeatedly urged the customer to make the payment after the payment became due. But the customer continued to excuse the payment by complaining of slow payments from its resale customers and the difficulty of its own cash flow…In order to maintain a good relationship with its customer, Join Food had to extend the credit to and accept the late payment from its customer."[74] Commerce has found that allowing payment to go uncollected departs from normal

[71] *See TTPC* 366 F. Supp. 2d at 1259; *see also Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Intent to Rescind Antidumping Duty New Shipper Reviews; 2013-2014*, 80 FR 4544 (January 28, 2015), and accompany Issues and Decision Memorandum at comment 1, unchanged in *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Rescission of Antidumping Duty New Shipper Reviews; 2013-2014*, 80 FR 36970 (June 29, 2015).
[72] *See, e.g.*, Join's March 14, 2018 2nd SQR at 1.
[73] Since additional details surrounding the delayed payment are BPI, *see* Join's Prelim *Bona Fide* Memo at 7.
[74] *See* Join's March 14, 2018 2nd SQR at 1.

commercial business practices.[75] Accordingly, setting aside the issues we have identified above related to expenses and quantity of sales, the timing surrounding the payment for the sale under review suggests that the single sale was not *bona fide*.

We have also further examined Qingdao Join's reporting that it made only one sale during the POR. While a single sale is not inherently commercially unreasonable, the CIT has agreed that single sales must be "carefully scrutinized to ensure that new shippers do not unfairly benefit from unrepresentative sales."[76] The same principle would apply with respect to administrative reviews in which the respondent made only a single sale during the POR. As the Court of International Trade stated,

> While plaintiff's reliance on a single sale need not be fatal, a single sale leaves little to review. In one-sale reviews, there is, as a result of the seller's choice to make only one shipment, little data from which to infer what the shipper's future selling practices would look like. This leaves the door wide to the possibility that the sale may not, in fact, be typical, and that any resulting antidumping duty calculation would be based on unreliable data…. In order for Commerce to set an accurate rate, it must have before it a transaction from which it can reasonably determine a margin. Thus, a single transaction need not be "extremely distortive" in order to be found unsuitable. Rather, to be used as a basis for setting an individual rate, a sale must be typical of normal business practices.[77]

Qingdao Join's claim that it made only a single sale to the United States during the POR, which we find is lacking complete and reliable information as discussed above, further weighs in favor of finding the sale not *bona fide*. Furthermore, with only one sale, Commerce has no other transactions from which to draw inferences regarding Qingdao Join's future selling practices.

Given the significant issues with Qingdao Join's reporting that we have identified above which has led us to use an adverse inference when selecting from among the facts otherwise available pursuant to sections 776(a) and (b) of the Act with respect to certain factors, and given that the totality of the circumstances weigh against finding the sale *bona fide*, we have not further re-evaluated any other *bona fide* factors relating to the sale at issue (*i.e.*, price and quantity) beyond our evaluation of those factors in the PDM. As discussed in Comment 5 below, Commerce concludes that Qingdao Join's sale is not a *bona fide* sale, and is rescinding the new shipper review.

VII. DISCUSSION OF THE ISSUES

<u>*Administrative Review Comments*</u>

Comment 1: Whether Section 751 of the Act Requires Commerce to Conduct an AR of Harmoni Following the CFTG's Request for Review

[75] *See TTPC* at 1259-60.
[76] *See TTPC*, 366 F. Supp. 2d at 1263.
[77] *See Windmill*, 193 F. Supp. 2d at 1313 (evaluating the *bona fides* of a single sale in the context of a new shipper review).

CFTG's Case Brief

- If a review request is filed, all entries subject to the AD order must be examined.[78]
- If the petitioners want Chinese garlic to be reviewed, and if the FGPA is comprised of domestic interested parties, then any domestic interested party is entitled to request a review. However, the petitioners cannot choose which company to exclude from the review. By doing so, the petitioners are not representing the U.S. garlic industry.[79]
- In 1984, the antidumping duty law was changed to require Commerce to conduct ARs only "if a request for review has been received." But once Commerce begin an AR, Commerce shall compute a dumping margin for each entry from the subject country.[80]
- No exporter is exempt from a determination of the applicable antidumping duty unless Commerce revokes the AD Order in whole or in part.[81]
- Congress enacted the statute, and there is no provision in the AD law that grants Harmoni a right to import without being subject to AD duties.[82]
- The fact that Commerce has an established practice of rescinding reviews that were validly initiated, "under the perceived authority of 19 CFR 351.213(d)(1) does not make the practice legal."[83]
- Commerce discontinued the practice of issuing company-specific revocations under 19 CFR 351.222 in 2012, thus recognizing the primacy of the Act.[84]
- Commerce's regulation is not entitled to deference under the two-step analysis enunciated in *Chevron*.[85]
- The question of whether Commerce's construction of the statute is permissible, is essentially a question of the reasonableness of Commerce's interpretation,[86] and Commerce's conclusion must represent a rational decision.[87]
- The law is clear, once Commerce initiates an AR, it "shall" compute a dumping margin for each entry from the subject country.[88]

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[78] *See* CFTG's Case Brief at 10; *see also* Section 751(a)(1) and (2) of the Act.

[79] *See* CFTG's Case Brief at 11.

[80] *Id*. at 12 (*citing Trade Agreements Act of 1984*); *see also* section 751(a)(1) of the Act.

[81] *See* CFTG's Case Brief at 13.

[82] *Id*.; *see also Board of Trustees of University of Illinois v. United States*, 289 U.S. 48, 57 (1933) (*Board of Trustees*) ("The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted. No one can be said to have a vested right to carry on foreign commerce with the United States.").

[83] *See* CFTG's Case Brief at 14; *see also Floral Trade Council of Davis, California v. United States*, 888 F.2d 1366 (Fed. Cir. 1989).

[84] *See* CFTG's Case Brief at 14; *see also Modification to Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders*, 77 FR 29875 (May 21, 2012).

[85] *See* CFTG's Case Brief at 14; *see also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*).

[86] *See* CFTG's Case Brief at 15; *see also Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1038 (*Fujitsu General*) (Fed. Cir. 1996).

[87] *See* CFTG's Case Brief at 15; *see also Matsushita Elec. Indus. Co. v. U.S.*, 750 F.2d 933 (Fed. Cir. 1984) (*Matsushita*); *see also IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992) (*IPSCO*); *see also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962) (*Burlington Truck Lines*).

[88] *See* CFTG's Case Brief at 15.

Petitioners' Rebuttal Brief

- The CFTG errs in its assertation that the petitioners may not selectively choose which company to exclude from the review. Commerce's regulations explicitly provide that a domestic interested party, in submitting a request for an AR, must identify "specified individual exporters or producers covered by an order" in a request for an AR.[89]
- Commerce's regulations also permit an interested party to withdraw requests for an AR. The ability of an interested party to identify individual foreign exporters or producers that it wishes Commerce to review, and to withdraw any request, demonstrates the ability of a domestic interested party to choose to exclude a party from an AR.[90]
- The CFTG's arguments concerning the FGPA's lack of representation of the U.S. garlic market are also misguided. The FGPA is an ad hoc association that represents the interests of its individual members. It does not represent, and has never represented, every single entity producing fresh garlic in the United States.[91]
- The CFTG's claim that 19 CFR 351.213(d)(1) is contrary to Section 751(a) of the Act is also misplaced. The CFTG's attack on Commerce's regulation allowing for conditional review-request withdrawal is solely under *Chevron*'s Step 1. The CFTG fails to claim that Commerce's regulation runs afoul of Step 2, and provides no relevant facts to any Step 2 analysis.[92]
- Section 751(a)(1) of the Act requires Commerce to "review, and determine" the amount of AD duties owed on entries of subject merchandise, but only "if a request for such a review has been received" by Commerce. Congress included that requirement to prevent Commerce from spending scarce resources on conducting an AR in the absence of any interested party's interest in it.[93]
- Commerce is fully authorized to rescind a request for an AR where there is no record evidence to establish the requestor is a domestic interested party that has standing to request an AR. Because the record does not contain reliable information to establish that any member of the CFTG is an interested party, Commerce should continue to find that the CFTG's request was void *ab initio*.[94]

Harmoni's Rebuttal Brief

- When enacted in 1979, Section 751 of the Act required Commerce to conduct annual reviews of AD Orders to determine a rate for all exporters for each review period. In 1984, Congress amended section 751 of the Act to limit annual reviews to designated exporters requested by interested parties.[95]
- Commerce then enacted regulations implementing the change in law, and was affirmed by the CAFC.[96]

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[89] *See* the Petitioners' Rebuttal Brief at 6-7; *see also* 19 CFR 351.213(b)(1).
[90] *See* the Petitioners' Rebuttal Brief at 7; *see also* 19 CFR 351.213(d)(1).
[91] *See* the Petitioners' Rebuttal Brief at 7.
[92] *Id*. at 9 (*citing Chevron*).
[93] *Id.* at 9.
[94] *Id*. at 10.
[95] *See* Harmoni's Rebuttal Brief at 28; *see also Antidumping and Countervailing Duties; Administrative Reviews on Request; Transition Provisions*, 50 FR 32556 (August 13, 1985).
[96] *See* Harmoni's Rebuttal Brief at 28 (*citing Floral Trade Council v. United States*, 888 F.2d 1366 (CAFC 1989)).

- Commerce later added the 90-day withdrawal provision to ensure that a review would not take place unless an interested party believed that a review was necessary.[97] The Courts upheld Commerce's 90-day withdrawal provision.[98]
- The 90-day withdrawal period remained in Commerce's regulations after U.S. law was modified by the Uruguay Round Agreements Act (URAA) of 1995.[99]
- Section 751 of the Act expressly and unequivocally limits annual reviews of AD orders to parties for whom a review had been requested and initiated.[100]
- The CFTG's reliance on Section 777A(c)(1) ignores the fact that this provision applies solely to exporters whose shipments are subject to review pursuant to Section 751 of the Act.[101]
- Likewise, the CFTG's reliance on Section 751(a)(2) is similarly limited to named exporters.[102]
- The fact that Commerce's 90-day withdrawal regulation was not changed by the URAA constitutes an independent reason why it cannot be rejected by Commerce here.[103]

Commerce's Position

We disagree that all entries subject to the order must be reviewed following initiation of an administrative review. The CFTG's assertion that section 751(a)(1)-(2) of the Act requires Commerce to review all entries of subject merchandise is unpersuasive, as the relevant portion of the Act also states "if a request for such a review has been received…"[104] As we have determined that the CFTG's review request was invalid *ab initio*,[105] there remain no valid review requests of Harmoni.

The CFTG's reliance on *Fujitsu General, Matsushita, IPSCO, and Burlington Truck Lines* is also unpersuasive. *Chevron* requires the courts to defer to Commerce's interpretation of the statute, as long as that interpretation is reasonable and as long as the statute does not contain unambiguous language to the contrary.[106] As indicated above, section 751(a)(1) uses the conditional term "if," thereby describing a request for review as a precondition to Commerce's administrative review. Similarly, the courts have repeatedly affirmed our 90-day withdrawal regulation,[107] and, in doing so, have found our interpretation of the statute to be reasonable. We

[97] *See* Harmoni's Rebuttal Brief at 29 (*citing Antidumping Duties: Final Rule*, 54 FR 12742 (March 28, 1989)).
[98] *See* Harmoni's Rebuttal Brief at 29-30 (*citing Floral Trade Council v. United States*, 17 CIT 1417 (1993); *Transcom, Inc. v. United States*, 182 F.3d 876 (Fed. Cir. 1999) (*Transcom II*); *Transcom, Inc. v. United States*, 294 F.3d 1371 (Fed. Cir. 2002) (*Transcom IV*)).
[99] *See* Harmoni's Rebuttal Brief at 30 (*citing Antidumping Duties; Countervailing Duties: Final Rule*, 62 FR 27296 (May 19, 1997)); *see also Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369 (Fed. Cir. 2003).
[100] *See* Harmoni's Rebuttal Brief at 31.
[101] *Id*.
[102] *Id*.
[103] *Id*.
[104] *See* section 751(a)(1) of the Act.
[105] *See* PDM at 13.
[106] *See Chevron.*
[107] *See Floral Trade 1993*, 17 CIT 1417; *see also Transcom II*; *Transcom IV*.

have rescinded the review as to the seven companies in the CFTG's review request, that do not have a standing request for review, as further discussed below.

Comment 2: Whether the CFTG's Review Request was Valid, and Whether the Members of the CFTG are Producers or Wholesalers of a Domestic Like Product

CFTG's Case Brief

- The members of the CFTG are interested parties under 19 CFR 351.102(b)(29)(v) and Section 771(9)(C) of the Act.[108]
- Each member of the CFTG grows fresh garlic and sells the fresh garlic that they grow, thus they are, by definition, domestic interested parties. There is no legislative history defining manufacturer, producer, or wholesaler.[109] Commerce has, used the dictionary definition of wholesaler in the past.[110]
- Both Ms. Melinda Bateman and Mr. Stanley Crawford provided copies of their Schedule F forms confirming that both qualified as farmers to the IRS.[111]
- The record is full of evidence that the members of the CFTG are garlic farmers, and thus, domestic interested parties.[112] Commerce cannot conclude that one or more members of the CFTG are not garlic farmers, unless it conducts a verification of the CFTG.[113]
- Furthermore, the members of the CFTG have a Constitutional right to petition Commerce for redress of grievances. No federal statute can be claimed by a foreign exporter to prevent a U.S. citizen from exercising his or her right under the Petition Clause of the First Amendment.[114]
- "The members of the CFTG were protected from spurious allegations of antitrust violations when they formed the CFTG and filed the AR request that the Department review Zhengzhou Harmoni.[115] The same cannot be said for an agreement by foreign and domestic interests to form a cartel to control the U.S. market."[116]
- Commerce's citations to "compensation" and "remuneration," including a payment by Hume to Crawford have nothing to do with the fact that the members of the CFTG are garlic farmers.[117]
- No Chinese entity bought members of the CFTG farms for the purpose of filing a review request. There is no agreement between the members of the CFTG and any Chinese

[108] *See* CFTG's Case Brief at 16.
[109] *Id*. at 11; *see also* Section 771(9) of the Act.
[110] *See Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 70163 (November 25, 2014), and accompanying Issues and Decision Memorandum at Issue 1.
[111] *See* CFTG's Case Brief at 16.
[112] *Id*.
[113] *Id.* at 19.
[114] *Id*. at 18.
[115] *Id*. at fn 69; s*ee also Eastern Railroad Presidents Conference et al. v. Noerr Motor Freight. Inc.*, 81 S.Ct. 523 (1961); *see also United Mine Workers of America v. Pennington*, 85 S.Ct. 1585 (1965).
[116] *See* CFTG's Case Brief at 18, fn 69*; see also Go-Video, Inc. v. Akai Electric Company*, 885 F. 2d 1406 (91h CIR 1989).
[117] *See* CFTG's Case Brief at 19.

entity. There were no instructions from any Chinese entity to file an AR request for any AR.[118]

- Commerce improperly relied on events during one segment of the garlic proceeding to another in this AR, without identifying why the conditions in an earlier segment apply to this segment. "{I}f the facts remained the same from period to period, there would be no need for administrative reviews."[119]
- Without specific information pertinent to this AR, Commerce cannot conclude that there was any involvement by the Chinese entities with one or more members of the CFTG.[120]

Petitioners' Rebuttal Brief

- Despite the members of the CFTG having responded to Commerce's questions about standing, Commerce properly concluded that those responses are insufficient to establish that either the CFTG or any of its individual members is a "domestic interested party" for purposes of the statute.[121]
- Commerce should continue to conclude that all information submitted by the CFTG relating to Mr. Crawford's operations is unreliable and does not support a determination that the CFTG or Mr. Crawford is a domestic interested party.[122]
- The record in this segment does not support a determination that Ms. Sanford is a domestic interested party. Accordingly, Commerce should continue to reach such a finding in its final results.[123]
- The Constitutionally-protected right of Mr. Crawford, Ms. Sanford, and Ms. Bateman (as well as the CFTG) to assemble and petition the government does not guarantee them a right to have their position prevail.[124]
- The CFTG does not address Commerce's findings that the information submitted to Commerce by and concerning Mr. Crawford is not reliable. Therefore, there is no basis for Commerce to depart from its *Preliminary Results*.[125]
- The CFTG admits that it failed to respond to Commerce's supplemental questionnaire.[126] The CFTG failed to submit a response, or request an extension of the deadline to respond to that questionnaire. However, the CFTG states that it provided Commerce with the requested information in subsequent submissions. Counsel for the CFTG does not mention that those subsequent submissions were made on the record of the 23rd Administrative Review.[127]

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[118] *Id*.
[119] *Id*. at 19-20 (*citing Albermarle Corp. v. United States*, 821 F.3d 1345 (Fed. Cir. 2016) (*Albermarle*) (*citing Shandong Huarong Mach. Co. v. United States*, 29 CIT 484, 490-91 (CIT 2005)); *see also Issues and Decision Memorandum for the Final Results in the Second Antidumping Duty Order Administrative Review of Diamond Sawblades and Parts Thereof from the Republic of Korea*, 78 FR 36524 (June 18, 2013) at Comment 4; *see also Freeport Minerals Co. (Freeport McMoran, Inc.) v. United States*, 776 F.2d 1029, 1032 (Fed. Cir. 1985)).
[120] *See* CFTG's Case Brief at 20.
[121] *See* the Petitioners' Rebuttal Brief at 11.
[122] *Id*. at 13.
[123] *Id*. at 13-14.
[124] *Id*. at 15.
[125] *Id*. at 16.
[126] *Id*. at 2 and 3 (*citing* CFTG's Case Brief at 2-3).
[127] *See* the Petitioners' Rebuttal Brief at 2-3.

- Each segment of a proceeding is unique, and will have a separate record. The fact that the CFTG responded to Commerce's questionnaire on the record of the 23rd administrative review is irrelevant to Commerce's conduct of this segment.[128]
- The CFTG fails to identify any factual information on the record of this segment that contradicts or undermines Commerce's preliminary findings. As such, there is no basis for Commerce to determine that it improperly rejected untimely new factual information submitted by CFTG; or depart from its preliminary findings that the information submitted by CFTG is not reliable or credible and, therefore, does not provide a basis for determining that CFTG or any of its individual members is a domestic interested party.[129]

Harmoni's Rebuttal Brief

- The CFTG has failed to direct Commerce to any evidence on the record of this administrative review that would contradict Commerce's findings in the preliminary determination.[130]
- Mr. Hume's repeated claims that his payment of $50,000 to Mr. Crawford was not related to Mr. Crawford's efforts on behalf of Mr. Hume's Chinese clients are not credible.
- Even if the payment had been made from Mr. Hume's personal bank account, Commerce has recognized that money is fungible.[131]
- The fact that Mr. Hume was paid for work done on behalf of the QTF Entity at the same time that Mr. Hume was paying Mr. Crawford for services rendered on behalf of the QTF Entity constitutes substantial evidence of the close financial relationship between the QTF Entity and Mr. Crawford.[132]
- The farming records which Mr. Crawford submitted to Commerce are not credible, and do not rise to the dignity of production and accounting records maintained by for-profit commercial enterprises.[133]
- Commerce should review the entire record, including the information contained in Harmoni's AR21 case brief, to determine whether Mr. Crawford's representations are

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[128] *Id*. at 3-4, (*citing e.g., Peer Bearing Company – Changshan v. United States*, 587 F. Supp. 2d 1294, 1299 (CIT 2012); *see also Certain Steel Threaded Rod from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2015-2016*, 82 FR 51611 (November 11, 2017), and accompanying Issues and Decision Memorandum at Comment 1 ("Each review proceeds de novo and determinations in that review are based upon the specific record developed during the course of that particular segment of the proceeding.")(*citing Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 FR 14499 (March 12, 2012) and accompanying Issues and Decision Memorandum at Comment 1)).

[129] *See* the Petitioners' Rebuttal Brief at 4-5.

[130] *See* Harmoni's Rebuttal Brief at 7-8.

[131] *Id*. at 8 (*citing Kiswok Indus. Pvt. Ltd. v. United States*, 28 CIT 774, 787 (2004)); *see also Barden Corp. v. United States*, 144 F. Supp. 3d 1341, 1349 (CIT 2016); *see also Notice of Final Results of Antidumping Duty Administrative Review and Final Determination Not to Revoke Order in Part: Canned Pineapple Fruit from Thailand*, 65 FR 77851 (December 13, 2000); *see also Stainless Steel Wire Rod from Taiwan; Final Results of Antidumping Duty Administrative Review*, 66 FR 52587 (October 16, 2001).

[132] *See* Harmoni's Rebuttal Brief at 8.

[133] *Id*. at 9 (*citing* Harmoni's Letter, "Harmoni's Response to Factual Information Submitted by the CFTG on July 12, 2017 and Resubmitted on August 3, 2017; 22nd Administrative Review of Antidumping Duty Order on Fresh Garlic from the People's Republic of China," dated 8/17/17 (Harmoni's Rebuttal Re: CFTG QR) at 36-42).

credible, and whether evidence supports his claim to be a domestic producer with no ties to the QTF entity.[134]

- The CFTG failed to submit a timely response to Commerce's questionnaire that requested Ms. Sanford's 2016 tax return. Commerce has the authority to transfer documentation from one record to another, but Commerce should not move documents to remedy a party's failure to respond to a questionnaire.[135]
- Ms. Sanford was not a member of the NMGGC in AR21, thus the reasons why Commerce preliminarily found her submissions not to be credible in AR22 were based on information on the record of this proceeding.[136]
- The CFTG, "cannot pick and choose information it wishes to present to {Commerce.}"[137]
- The direct link between Mr. Crawford's request for money from China, and its relationship with this proceeding, is found in Mr. Hume's email to Mr. Katz, who asked to join Mr. Crawford in "shaking the tree." Mr. Hume replied, "Okay. Whatever you do now supports our Garlic 22 case. Just let me know what you need and when."[138]
- The rights that U.S. person have under the constitution do not include the right that a U.S. Government agency must accept that person's representations, without analysis, and without considering the credibility of the information submitted.[139]
- Commerce has the right to reject a party's submission in their entirety because of material misrepresentations with respect to significant issues.[140]
- The CFTG's claim that all of its members were "farmers" is not supported by evidence on the record of this review.[141]

Commerce's Position

As explained in the *Initiation Notice,* each year during the anniversary month of the publication of an antidumping duty order, an interested party, as defined in section 771(9) of the Act may request that Commerce conduct an administrative review under section 751(a)(1) of the Act of specified exporters or producers covered by an order. The Act defines an "interested party" as

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[134] *See* Harmoni's Rebuttal Brief at 9.
[135] *Id*. at 12.
[136] *Id*. at 17.
[137] *Id*. at 18 (*citing Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 53387 (September 11, 2006)); *see also Certain Iron Mechanical Transfer Drive Components from Canada: Final Affirmative Determination of Sales at Less Than Fair Value,* 81 FR 75039 (October 28, 2016), and accompanying Issues and Decision Memorandum at Comment 1; *see also Uncovered Innerspring Units from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review; 2015-2016*, 81 FR 78116 (November 7, 2016); *see also Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 64746 (October 31, 2014), and accompanying Issues and Decision Memorandum at Comment 1.
[138] *See* Harmoni's Rebuttal Brief at 19 (*citing* Harmoni's Rebuttal Re: CFTG QR at Exhibit 32).
[139] *See* Harmoni's Rebuttal Brief at 24.
[140] *Id*. at 24-25 (*citing Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339 (Fed. Cir. 2015)); *see also Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1375 (Fed. Cir. 2016); *see also Lightweight Thermal Paper from Germany: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 23220 (April 18, 2013); *see also Large Power Transformers from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2014-2015*, 82 FR 13432 (March 13, 2017).
[141] *See* Harmoni's Rebuttal Brief at 25.

including "a manufacturer, producer, or wholesaler in the United States of a domestic like product."[142] The term "producer" is not defined in the Act, and Commerce has consistently explained that the Act does not contemplate a minimum threshold amount of production or manufacture for a party to be considered a domestic producer. Commerce here reiterates this.

During the course of an administrative review, Commerce issues questionnaires and solicits information from the parties. These responses become the basis of the administrative record, solely upon which Commerce relies for its final results.[143] In other words, Commerce's rationale underlying its final determinations and final results are based exclusively on record evidence submitted by, and certified by, interested parties. In fact, any determination by Commerce which is not based on substantial evidence on the record will be held unlawful by the Courts.[144] Commerce acts within its expertise and discretion when it considers directly conflicting evidence and decides which evidence to credit.[145]

Although there is no minimum threshold of production activity to qualify a company as a domestic producer, Commerce nevertheless must be able to rely on, and give credit to, the evidence that is submitted during a proceeding – including evidence of domestic production.

In the *Preliminary Results*, Commerce determined that the material misrepresentations and inconsistencies in the statements made by the CFTG make all of the submissions of the CFTG unreliable.[146] As explained in the *Preliminary Results*, Commerce's "analysis of the standing of the CFTG in this case pertains to the original requesting members of the CFTG, Mr. Katz, Mr. Crawford, Ms. Sanford, and Mr. Pino…. Regardless of whether the CFTG requested the review as an association {within the meaning of section 771(9)(E) of the Act} or as individuals {(771(9)(C))}, submission and statements made by each of the members of the requesting party contained material misrepresentations and inconsistencies."[147] We also explained, that since Ms. Bateman joined the CFTG long after the review request, she "is not relevant to the standing of the CFTG at the time of the review request."[148]

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[142] *See* section 771(9) of the Act; *see also* 19 CFR 351.102(b)(17) which defines "domestic interested party" as one of the parties described in subparagraph (C), (D), (E), (F) or (G) of section 771(9) of the Act.
[143] *See* section 751 of the Act; *see also e.g.*, 19 CFR 351.102 (21), which defines factual information; 19 CFR 351.301, which provides for the time limits for submission of factual information; 19 CFR 351.302, which provides for extensions of time, and return of untimely filed or unsolicited material; 19 CFR 351.303, which provides for filings, document identification, format, translation, service, and certification of documents.
[144] *See* section 516A(b) of the Act, which provides for the Court of International Trade's standard of review.
[145] It is well settled that any evaluation of the substantiality of evidence, "must take into account whatever in the record fairly detracts from its weight, including contradictory evidence, or evidence from which conflicting inferences could be drawn." *see Zhengzhou Harmoni Spice Co. v. United States,* 617 F. Supp. 2d 1281 (CIT 2009).
[146] *See* PDM at 7. We note that both Mr. Katz and Mr. Pino withdrew from the CFTG; *see* CFTG's Letter, "22nd Administrative Review of Fresh Garlic from the People's Republic of China – Withdrawal of Avrum Katz from the Coalition for Fair Trade in Garlic (CFTG)," dated December 14, 2016; *see also* CFTG's Letter, "22nd Administrative Review of Fresh Garlic from the People's Republic of China – Withdrawal of Alex Pino from the Coalition for Fair Trade in Garlic (CFTG)," dated February 15, 2017.
[147] *See* PDM at 10-11.
[148] *Id*. at 10.

As discussed in the *Preliminary Results*, Commerce sent a supplemental questionnaire to the CFTG to request information to rely on in making the standing determination of the CFTG.[149] The CFTG failed to respond to the questionnaire. The CFTG argues that the record is full of evidence that the members of the CFTG are garlic farmers, and thus, domestic interested parties.[150] However, the CFTG failed to provide the information requested by Commerce demonstrating that Ms. Sanford is a domestic interested party. Without the requested information, and combined with the material misrepresentations and inconsistencies on the record, we continue to find that the CFTG's review request, in whole, and in this particular part, is not credible.

Harmoni's case brief from the proceeding administrative review was timely placed on the record of this proceeding in April 2017.[151] The evidence relied upon in the *Preliminary Results*, some of which was argued and presented in Harmoni's POR 21 Case Briefs, relates to events that took place during the POR for the instant review.[152] Counsel for the CFTG and Mr. Crawford also contradicted each other on the record of this proceeding, with counsel declaring that the "only payment I made to {Mr.} Crawford was $50,000 on March 2015, about the Garlic 20 AR. This payment was made from my personal bank account…"[153] Contrary to counsel's claim, evidence on the record indicates that the payment was made from Hume & Associates' bank account, and was booked as an expense to the firm.[154] Mr. Crawford, in a response to Commerce's supplemental questionnaire (in the same submission as counsel's statement), stated "I received no remuneration or equipment gratis during 2015 and 2016."[155]

Based on the evidence on the record of this proceeding, neither Ms. Sanford nor Mr. Crawford are credible, and thus do not have standing as individuals or as part of the larger CFTG party. Interested parties have not pointed to any factual information on the record of this proceeding that would cause Commerce to reverse our *Preliminary Results*. Accordingly, we continue to find the CFTG's review request invalid *ab initio*, and, therefore, continue to find that there is no valid review request remaining for seven of the companies for which CFTG purported to request a review. In conclusion, Commerce is rescinding the administrative review with respect to the seven companies that were requested solely by the CFTG for which another valid review request was not made.

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[149] *Id*. at 4; *see also* Commerce's Letter, "22nd Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: Request for Further Information," dated October 13, 2017 (CFTG Supplemental Standing Questionnaire).
[150] *See* CFTG's Case Brief at 16.
[151] *See* Harmoni's Letter, "Harmoni Placing POR 21 Case and Rebuttal Brief on the Administrative Record in POR 22; Antidumping Duty Order on Fresh Garlic from the People's Republic of China," dated April 6, 2017 (Harmoni's POR 21 Case Briefs).
[152] *See, e.g.*, PDM at 8 ("{Commerce pointed to several email communications between 2010 and 2017…").
[153] *See* the CFTG's August 3, 2017 QR at Appendix 16.
[154] *See* Harmoni's Rebuttal Re: CFTG QR at Exhibit 37.
[155] *See* CFTG August 3, 2017 QR at Appendix 5.

Comment 3: Whether Harmoni and the FGPA Obstructed or Impaired Legitimate Government Activity

CFTG's Case Brief

- On April 16, 2018, the CFTG noted that counsel for Harmoni had failed to serve the CFTG with copies of the BPI versions of Harmoni's submissions until two-and-a-half months after Commerce's rules required.[156]
- Commerce should reject all of Harmoni's BPI submission and find that Harmoni failed to cooperate to the best of its ability.[157]
- Harmoni's refusal to provide copies of its BPI submissions under the APO has impaired, obstructed, and attempted to defeat the lawful function of Commerce.[158]
- The FGPA has been the only domestic interested party involved in garlic proceedings since the 1994 filing of the petition.[159] By making sure that Harmoni's exports are not reviewed by Commerce, the FGPA is protecting Harmoni's zero cash deposit rate.[160]
- This ensures that the majority of Chinese garlic comes from one exporter, Zhengzhou Harmoni, and goes through one group of distributors, the FGPA.[161]
- In this case, Commerce is not required to find that Harmoni and the FGPA's actions successfully resulted in any actual loss to the government of any property or funds, only that the defendant's activities impeded or interfered with legitimate government functions.[162]
- 18 U.S.C. Section 371 makes it an offense to willfully impair a legitimate function of the government, whether or not the improper acts or objective are criminal under another statute.[163] Section 371 is also designed and intended to protect the integrity of the United States and its agencies, programs, and policies.[164]

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[156] *See* CFTG's Case Brief at 4; *see also* CFTG's Letter, "22nd Administrative Review of Fresh Garlic from the People's Republic of China – Response Pertaining to Receipt of Harmoni Business Proprietary Information – filed on Behalf of the CFTG," dated April 16, 2018.
[157] *See* CFTG's Case Brief at 4.
[158] *Id*. at 25 (*citing United States v. Gallup*, 812 F.2d 1271, 1276 (10th Cir. 1987)); *see also United States v. Hopkins*, 916 F.2d 207 (5th Cir. 1990), "the defendants' actions in disguising contributions were designed to evade the Federal Election Commission's reporting requirements and constituted fraud on the agency under Section 371."
[159] *See* CFTG's Case Brief at 24 (*citing Initiation of Antidumping Duty Investigation: Fresh Garlic from the People's Republic of China*, 59 FR 9470 (February 28, 1994)).
[160] *See* CFTG's Case Brief at 24.
[161] *Id*.
[162] *Id*. at 25 (*citing United States v. Puerto*, 730 F.2d 627 (11th Cir.), *cert. denied*, 469 U.S. 847 (1984)); *see also United States v. Tuohey*, 867 F.2d 534 (9th Cir. 1989) (*Tuohey*); *see also United States v. Sprecher*, 783 F. Supp. 133, 156 (S.D.N.Y. 1992) (It is sufficient that the defendant engaged in acts that interfered with or obstructed a lawful governmental function by deceit, craft, trickery or by means that were dishonest"), *modified on other grounds*, 988 F.2d 318 (2d Cir. 1993).
[163] *See* CFTG's Case Brief at 25 (*citing Tuohey*, 867 F.2d at 537).
[164] *See* CFTG's Case Brief at 25 (*citing United States v. Burgin*, 621 F.2d 1352, 1356 (5th Cir.), *cert. denied*, 449 U.S. 1015 (1980)); *see also United States v. Herron*, 825 F.2d 50,57-58 (5th Cir.); *see also United States v. Winkle*, 587 F.2d 705,708 (5th Cir. 1979), *cert. denied*, 444 U.S. 827 (1979).

- If the defendant and others have engaged in dishonest practices in connection with a program administered by an agency of the Government, it constitutes a fraud on the United States under Section 371.[165]
- Commerce should find a remedy to address its concern for misuse of the law and regulations over which it has principal responsibility.[166] If Commerce does not take remedial action in this AR, it will create the appearance of government acquiescence in cartel formations under the guise of antidumping laws that it has the principal responsibility to enforce.

Petitioners' Rebuttal Brief

- The CFTG fails to apply any record facts that suggest that Harmoni and the petitioners are guilty of the obstruction or impairment of the legitimate function of government.[167]
- Commerce does not have the resources to investigate more than one or two exporters in each administrative review. Therefore, it is crucial for the domestic producers choose exporters that, based on domestic producer reconnaissance, are likely involved in duty evasion schemes.[168]
- From AR 12 through 21, 15 out of 23 of the mandatory respondents selected by Commerce were subject to a zero or near-zero cash deposit rate during a significant portion of the relevant review's POR.[169]
- More than half of the 23 mandatory respondents were assigned the China-wide rate. By carefully limiting its review requests, a domestic producer enables Commerce to focus its limited resources on those exporters for which close review is most needed.[170]

Harmoni's Rebuttal Brief

- Harmoni timely served all submission on the CFTG. Most importantly, Harmoni served its August 17, 2017 response to the CFTG's August 3, 2017, response to Commerce's standing questionnaire on August 21, 2017.[171]
- On December 26, 2017, Mr. Hume replaced Mr. Natelson as the legal representative of the CFTG. At this time, all prior Harmoni submission had been properly served on counsel for the CFTG, and the time period for responding to Harmoni's NFI had passed.[172]
- Harmoni's decision not to re-serve Mr. Hume with documents previously served on the CFTG was based on the fact that shortly thereafter, Harmoni filed a formal request that

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[165] *See* CFTG's Case Brief at 25-26; *see also United States v. Conover*, 772 F.2d 765 (11th Cir. 1985), *aff'd, sub. nom. Tanner v. United States*, 483 U.S. 107 (1987); *see also United States v. Del Toro*, 513 F.2d 656 (2nd Cir.), *cert. denied*, 423 U.S. 826 (1975); *see also United States v. Jacobs*, 475 F.2d 270 (2nd Cir.), *cert. denied*, 414 U.S. 821 (1973).
[166] *See* CFTG's Case Brief at 26; *see also Glycine & More, Inc. v. United States, et al.*, Slip Op. 15-124 (CIT 2015).
[167] *See* the Petitioners' Rebuttal Brief at 17.
[168] *Id*.
[169] *Id*. at 18 and Exhibit 1.
[170] *Id*.
[171] *See* Harmoni's Rebuttal Brief at 37 (*citing* Harmoni's Letter, "Harmoni's Response to Questions re Service of Documents; 22nd Administrative Review of Antidumping Duty Order on Fresh Garlic from the People's Republic of China," dated April 12, 2018 (Harmoni's April 12, 2018 Service QR)).
[172] *See* Harmoni's Rebuttal Brief at 38.

Commerce revoke Mr. Hume's access to APO. When Commerce rejected Harmoni's request, Harmoni immediately re-served Mr. Hume with the documents.[173]

- Commerce does not have jurisdiction to consider the CFTG's Section 371 claims.[174]
- The FGPA and its members have the right to request that Commerce review any or all Chinese garlic exporters. In addition, any other legitimate domestic producer or wholesaler of garlic has the same right.[175]
- The NMGGC and CFTG have failed in their review requests because of the material misrepresentations and omissions in their submissions.[176]
- The increase in Harmoni's share of Chinese garlic exports resulted from the fact that Commerce and CBP were finally able to stop the QTF Entity's illegal funneling schemes.[177]
- Legitimate American garlic producers and farmers benefited when Commerce and CBP stopped the QTF Entity's funneling scheme and fraudulent representations. The fact that Mr. Hume and the CFTG allege that Harmoni's right to import garlic at an earned cash deposit rate is injurious to the domestic industry, while at the same time partnering with the QTF Entity, further proves that the CFTG's submissions should be carefully examined.[178]
- Harmoni's current position vis-a-vis other Chinese exporters did not result from any wrongdoing or collusion.[179]

Commerce's Position:

The CFTG alleges that the petitioners and Harmoni have engaged in cartel-like behavior and have violated criminal statutes. Commerce does not have the authority to enforce the criminal laws of the United States cited by the CFTG. Thus, we offer no opinion on such matters which are beyond the scope of this administrative review.

In regard to the CFTG's arguments that Harmoni failed to serve the BPI versions of its submissions on the CFTG until two months after they were due to be served, and thus, failed to cooperate to the best of its ability, we disagree. As evidenced by Harmoni's response to Commerce's service questionnaire, Harmoni timely served all BPI submissions on counsel for the CFTG (either Mr. Natelson, or Mr. Hume) simultaneously with filing.[180] While 351.305(b)(3) of Commerce's regulations provide the procedures for serving BPI submissions on parties who receive access to the information after it had already been submitted, it does not apply here. The CFTG has had representation throughout the entirety of the proceeding. A representative of the CFTG, either Mr. Natelson, or Mr. Hume, received a copy of each of Harmoni's BPI submissions at the time of filing, and therefore, had the ability to comment on the

[173] *Id*. at 38-39.
[174] *Id*. at 41.
[175] *Id*.
[176] *Id*.
[177] *Id*. at 42.
[178] *Id*.
[179] *Id*. at 43.
[180] *See* Harmoni's April 12, 2018 Service QR at 1 and Exhibit 1.

submissions in a timely manner.

We note that when Mr. Hume resumed his representation of the CFTG on December 26, 2017, the deadline for submission of NFI had passed. Harmoni did not file a BPI submission after Mr. Hume's return, until the filing of its rebuttal brief on May 2, 2018. Moreover, Harmoni re-served all of its BPI submissions to Mr. Hume six weeks before the due date for case briefs in this administrative review,[181] thereby providing the CFTG with ample time to prepare its case brief.

New Shipper Review Comments

Comment 4: Whether Yudi's Sale was Made on a *Bona Fide* Basis

Yudi's Case Brief

- In the *Preliminary Results*, Commerce stated that it would continue to review expenses arising from the transaction, as well as whether the U.S. customer made payment to the importer of record.[182] In its response to a supplemental questionnaire, Yudi provided the importer of record's bank statement, tying the reported value to the deposited value, proving that Yudi's sale was made at a profit.[183]
- In its response to Commerce's supplemental questionnaire, Yudi also explained where in the importer of record's bank statement each of the POR's payments for subject and non-subject merchandise appeared.[184]

Commerce's Position

We continue to find that Yudi made a *bona fide* sale for these final results. In the *Preliminary Results*, Commerce preliminarily found that Yudi's sale of subject merchandise subject to the review was made on a *bona fide* basis.[185] However, in its analysis, Commerce noted that certain inconsistencies – including the receipt of payment and related expenses – required further examination prior to the final results.[186] Thus, as noted above, we issued a supplemental questionnaire to Yudi requesting that it demonstrate that its U.S. customer paid the importer of record. Moreover, we requested that Yudi substantiate its claim that the importer of record made a profit on its resale of subject merchandise in this review. As noted by Yudi, in its supplemental questionnaire response, Yudi provided Commerce with further explanation of the importer of record's bank statement, tying the bank statement value to the reported value paid by the U.S.

[181] *See* Harmoni's Letter, "Service of Harmoni BPI Submissions on CFTG Counsel in the 22nd Administrative Review of Antidumping Duty Order on Fresh Garlic from the People's Republic of China," dated March 14, 2018.
[182] *See* Yudi's Case Brief at 2 (*citing* Memorandum, "Bona Fide Nature of the Sales in the Antidumping Duty New Shipper Review of Fresh Garlic from the People's Republic of China: Zhengzhou Yudi Shengjin Agricultural Trade Co., Ltd." dated November 30, 2017 (Yudi's Prelim *Bona Fides* Memo) at 4-5).
[183] *See* Yudi's Case Brief at 3-4 (*citing* Yudi's March 12, 2018 Supplemental Questionnaire Response (Yudi's March 12, 2018 SQR) at Exhibit SQ2-1).
[184] *See* Yudi's Case Brief at 3 (*citing* Yudi's September 22, 2017 Supplemental Questionnaire Response (Yudi's September 22, 2017 SQR) at 3-4 and Exhibit SQ1-3).
[185] *See* PDM at 14-15; *see also* Yudi's *Bona Fides* Memo.
[186] *See* Yudi's *Bona Fides* Memo.

customer to the importer of record.[187] Together with information previously reported by Yudi regarding its receipt of payment from its importer of record, Yudi provided sufficient evidence to demonstrate that its sale of subject merchandise was resold at a profit.[188]

Accordingly, we find that: (1) the timing of the sale by itself does not indicate that the sale might not be *bona fide*; (2) record evidence indicates that the price and quantity of the sale is commercially reasonable and not atypical of normal business practices of fresh garlic exporters; (3) Yudi did not incur any extraordinary expenses arising from the transactions; (4) Yudi's unaffiliated U.S. customer and importer of record appear to have made a profit in the resale of subject merchandise; and (5) the new shipper sale was made between Yudi its unaffiliated U.S. customer at arm's length.[189] The totality of the circumstances surrounding the sale continue to support finding that Yudi has made a *bona fide* sale to the United States, and we therefore continue to find that Yudi's sale of subject merchandise was *bona fide* for purposes of the new shipper review.

Comment 5: Whether Join's Sale was Made on a *Bona Fide* Basis

Join's Case Brief

- When compared to sales with the same level of trade as Join's sale (*i.e.*, Join Food's domestic sale to its U.S. customer), there is no difference in the quantity and price.[190]
- The reasonable profit made by Join's unaffiliated U.S. customer demonstrates that it was a *bona fide* sale in terms of price and quantity.[191]
- Commerce should only compare the price of Join's sale with imports from China.[192]
- Join's sale of subject merchandise is whole garlic or USHTS 0703.20.0015.[193]
- There are transactions with prices higher than and lower than Join's sale of subject merchandise during the POR,[194] so Join's price is a typical price that could be sustained in future business.[195]
- Join submitted all payment records to support that it reported all expenses related to its sale.[196]
- Join took a reasonable time to negotiate with its customer, process, and ship the subject merchandise to the United States.[197]

[187] *See* Yudi's March 12, 2018 SQR at 1-3.
[188] *See* Yudi's September 22, 2017 SQR.
[189] For further information regarding the other prongs of the *bona fides* analysis, *see* Yudi's *Bona Fides* Memo.
[190] *See* Join's Case Brief at 2.
[191] *Id*.
[192] *Id*. at 3 (*citing, e.g., Freshwater Crawfish Tail Meat Preliminary Results of Antidumping Duty Administrative Review and New Shipper Reviews; 2013-2014,* 80 FR 60624 (October 7, 2015) (*Crawfish from China*) and *Multilayered Wood Flooring from the People's Republic of China: Rescission of Antidumping Duty New Shipper Review; 2014-2015,* 81 FR 74393 (October 26, 2016)).
[193] *See* Join's Case Brief at 4 (*citing* Join's February 9, 2017 AQR at Exhibit A-5).
[194] *See* Join's Case Brief at 5 (*citing Crawfish from China*, 80 FR 60624, IDM at 4).
[195] *See* Join's Case Brief at 5 (*citing* section 752(2)(B)(iv) of the Act).
[196] *See* Join's Case Brief at 5 (*citing* Join's March 14, 2018 2nd SQR).
[197] *See* Join's Case Brief at 5-6.

Petitioners' Case Brief

- Commerce should substantially revise its preliminary determination that Join's sale was made on a *bona fide* basis.[198]
- Join's price, quantity, timing, and expenses arising from the transaction indicate that its sale is not likely to be predictive of the company's future selling practices.[199]
- In the *Preliminary Results*, Commerce indicated that Join did not provide full documentation to support its claim that Join Food paid its reported expenses.[200]
- Join did not provide the requested bank documentation.[201]
- Although Join reported that its U.S. affiliate, Join Food, paid all expenses incurred after the shipped merchandise was loaded at the port of departure,[202] in a later supplemental questionnaire response, Join reported that a U.S. affiliate of Qingdao Join and Join Food actually paid a bond expense.[203]
- Join's inability to document that payment of all expenses arising from the transaction, as well as discrepancies in its identification of the parties involved in paying such expenses, provide additional support that Join's sale was not made on a *bona fide* basis.[204]
- Join's failure to seek credit expenses from its U.S. customer, after it failed to make a timely payment, suggests that the transaction was not made on an arm's length basis.[205]

Join's Rebuttal Brief

- Commerce should compare the new shipper sale with domestic sales because the transaction between Join Food (Qingdao Join's U.S. affiliate) and its ultimate customer is a domestic transaction, not an import sale.[206]
- The bond payment in question involved the other affiliate because of an error of the accountant which handled both affiliates.[207] Join has fully reported its expenses related to the sale and did not misreport any record of payments related to these sales.[208]
- Join reasonably accepted late payment from the buyer because it is a new entrant to the U.S. garlic market and the contract did not explicitly provide a late payment clause.[209]

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[198] *See* the Petitioners' NSR Case Brief at 6.
[199] *Id*. at 7-8.
[200] *Id*. at 9 (*citing* Join's Prelim *Bona Fides* Memo at 6-7).
[201] *Id*.
[202] *Id*. at 8 ("Join stated that 'Join Food is responsible for all expenses incurred after the shipped merchandise is loaded at the port of departure … {and for paying} the ocean freight … the U.S. customs duties and charges, and all brokerage & handling expenses in the United States.' *citing* Join's September 22, 2017 SQR at 1).
[203] *See* the Petitioners' NSR Case Brief at 9 (*citing* Join's March 14, 2018 2nd SQR).
[204] *See* the Petitioners' NSR Case Brief at 10 (*citing Zhengzhou Huachao Indus. Co. v. United States*, 2013 CIT LEXIS 84, Slip. Op. 13-161 (May 14, 2013); *Honey from the People's Republic of China: Final Rescission of the New Shipper Review of Shanghai Sunbeauty Trading Co., Ltd.*, 82 FR 15697 (March 30, 2017) and accompanying Issues and Decision Memorandum at 11-13).
[205] *See* the Petitioners' NSR Case Brief at 11.
[206] *See* Join's Rebuttal Brief at 1-2.
[207] *Id*. at 2 (*citing* Join's March 14, 2018 2nd SQR).
[208] *See* Join's Rebuttal Brief at 2.
[209] *Id*. at 3.

Petitioners' Rebuttal Brief

- Commerce should not place significant weight on the information submitted by Join, because it is self-selected, self-serving information that is limited in scope.[210]
- Commerce's reliance on the CBP entry data to evaluate whether the price and quantity of Join's single reported sale are reflective of a *bona fide* transaction is appropriate.[211]
- The CBP entry data demonstrates that Join's reported sale is not a *bona fide* transaction that is reflective of future business practices, even when compared only to other sales of subject merchandise from China during the POR.[212]
- The circumstances and details, including price, quantity, timing, and expenses, of Join's sale suggest that it was completed solely in an effort to obtain an unreasonably low cash deposit rate.[213]
- The deficiency in Join's responses to Commerce's questionnaires regarding expenses and affiliates involved in the transaction provides another basis for Commerce to conclude that Join's single reported sale is not likely to be typical of sales the entity will make after the conclusion of this segment.[214]

Commerce's Position

As described above, although Commerce preliminarily found that Join's sale of subject merchandise was made on a *bona fide* basis,[215] in its analysis, Commerce noted that certain inconsistencies – including the receipt of payment and related expenses – required further examination prior to the final results.[216] Thus, we issued a supplemental questionnaire after the *Preliminary Results* to Qingdao Join requesting that it demonstrate that Join Food paid for the expenses arising from the sale. Moreover, we requested that Join substantiate its claim that the first unaffiliated customer made a profit on its resale of subject merchandise in this review. As indicated by Qingdao Join, and discussed in detail above, in its supplemental questionnaire response, while Join provided Commerce with payment documentation for the expenses arising from the sale of subject merchandise, it also revealed that another affiliate paid for a bond associated with the sale.[217]

Therefore, as discussed above, we have determined that Qingdao Join withheld information that had been requested by Commerce and significantly impeded the proceeding under sections 776(a)(2)(A) and (C) of the Act. We have also found that Qingdao Join failed to cooperate to the best of its ability under section 776(b) of the Act because its failure to reveal the involvement of an additional affiliate in the sale at issue until after the *Preliminary Results* deprived Commerce of the opportunity to fully examine numerous factors of our *bona fides* analysis, including details surrounding the expenses that were reported, and further called into question whether Qingdao

[210] *See* the Petitioners' NSR Rebuttal Brief at 3.
[211] *Id*. at 4.
[212] *Id*. at 4-5.
[213] *Id*. at 7.
[214] *Id*. at 7-8.
[215] *See* PDM at 14-15; *see also* Join's Prelim *Bona Fides* Memo.
[216] *See* Join's Prelim *Bona Fides* Memo.
[217] *See* Join's March 14, 2018 2nd SQR at 1 and Exhibit 1.

Join has accurately and reliably reported other information, including the full universe of expenses arising from the transaction, as well as the full universe of sales. Therefore, use of an adverse inference in selecting from among the facts otherwise available is warranted.

As further noted above, although Commerce preliminarily found that Join's sale of subject merchandise was made on a *bona fide* basis,[218] we have re-evaluated our determination. Specifically, with respect to Qindao Join's reported expenses arising from the transaction, as discussed above we find that Qingdao Join failed to fully disclose and document the payments of all expenses that arose from the sale, and potentially, underreported its CEP expenses. Moreover, Qingdao Join deprived Commerce of the opportunity to directly question this affiliate regarding the reported expenses, and to examine any additional expenses potentially incurred by the affiliate related to the sale in question. Likewise, although we preliminarily determined that Join had no other sales, we were deprived of the opportunity to question the affiliate with respect to whether it was involved in any other sales. To complete our *bona fide* analysis, Commerce would have requested the additional information from the affiliate to ensure that it had no sales of subject merchandise during the POR, but because of the failure to identify the involvement of the U.S. affiliate until late in the process, Commerce did not have an opportunity to do so. Therefore, pursuant to sections 776(a) and (b) of the Act, we considered the facts otherwise available, with an adverse inference, and find that these factors weigh against finding that the sale is *bona fide*. We therefore disagree with Join's arguments that it fully reported its expenses related to the sale and did not misreport any record of payments related to these sales.

Concerning receipt of payment, as discussed in detail above, while the established payment terms for this sale were "net 30 days after delivery,"[219] Qingdao Join's U.S. customer did not make its payment on time, as further explained in the preliminary determination.[220] Commerce has found that allowing payment to go uncollected departs from normal commercial business practices.[221] Moreover, the length of time at issue here (which is discussed in proprietary detail in the preliminary determination) further demonstrates that this was not a reasonable acceptance of a late payment. We therefore disagree with Join's arguments. Accordingly, setting aside the issues we have identified above related to expenses and quantity of sales, the timing surrounding the payment for the sale under review suggests that the single sale was not *bona fide*.

Qingdao Join's claim that it made only a single sale to the United States during the POR, which we find is lacking complete and reliable information as discussed above, further weighs in favor of finding the sale not *bona fide* for the reasons discussed above. Furthermore, with only one sale, Commerce has no other transactions from which to draw inferences regarding Qingdao Join's future selling practices.

Given the significant issues with Qingdao Join's reporting that we have identified above which have led us to use an adverse inference when selecting from among the facts otherwise available pursuant to sections 776(a) and (b) of the Act with respect to certain factors, and given that the totality of the circumstances weigh against finding the sale *bona fide*, we have not further re-

[218] *See* PDM at 14-15; *see also* Join's Prelim *Bona Fides* Memo.
[219] *See*, *e.g.*, Join's March 14, 2018 2nd SQR at 1.
[220] Given that additional details surrounding the delayed payment are BPI, *see* Join's Prelim *Bona Fide* Memo at 7.
[221] *See TTPC* at 1259-60.

evaluated any other *bona fide* factors relating to the sale at issue (*i.e.*, price and quantity) beyond our evaluation of those factors in the PDM. We also agree with the petitioners that Commerce should not place significant weight on the information submitted by Join, because it is self-selected, self-serving information that is limited in scope

In short, based on the totality of the circumstances surrounding the single sale under review for Qingdao Join, we determine that the sale was not a *bona fide* commercial transaction and should not be used to calculate an assessment rate or a cash deposit rate. Namely, the delayed payment by the U.S. customer, the failure to allow Commerce to examine the proper universe of expenses or sales, the fact there is only one sale to examine, and the inconsistent responses concerning the parties involved in the sale, call into question whether the sale is indicative of normal business practices. We therefore are rescinding the new shipper review.

Comment 6: Whether Commerce Properly Selected Romania as the Surrogate Country

Background: When Commerce is investigating imports from a NME country, section 773(c)(1) of the Act directs us to base normal value (NV), in most circumstances, on the NME producer's factors of production (FOPs), valued in a surrogate market economy (ME) country, or countries, considered appropriate by Commerce. In accordance with section 773(c)(4) of the Act, in valuing FOPs, Commerce shall utilize, to the extent possible, the prices or costs of the FOPs in one or more ME countries that (A) are at a level of economic development comparable to that of the NME country and (B) are significant producers of comparable merchandise. Moreover, it is Commerce's practice to select an appropriate surrogate country (SC) based on the availability and reliability of data on the record.[222]

For the *Preliminary Results*, we selected Romania as the SC from an Office of Policy list (OP List) that included Brazil, Mexico, Romania, Bulgaria, South Africa, and Thailand.[223] We found that Romania was at a comparable level of economic development,[224] and a significant producer of comparable merchandise.[225] We also found that there were publicly available Romanian data for all FOPs on the record of this review.[226] Furthermore, we determined that Romanian data

[222] *See* Commerce's Letter, "Fresh Garlic from the People's Republic of China: Request for Economic Development, Surrogate Country and Surrogate Value Comments and Information," dated March 14, 2017 (Request for Economic Development Information).
[223] *Id*. at Attachment: "Request for a List of Surrogate Countries for a New Shipper Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China ('China')" dated March 10, 2017." Commerce determined that Brazil, Mexico, Romania, Bulgaria, South Africa, and Thailand are countries whose per capita gross national incomes (GNI) are comparable to China in terms of economic development for purposes of this new shipper review.
[224] In our March 14, 2017 memorandum, Commerce determined that both Romania and Mexico were considered economically comparable to China, pursuant to section 773(c)(4)(A) of the Act. *See* Request for Economic Development. Following Commerce's selection of Romania as the primary SC, no parties commented on the economic comparability of Romania or Mexico in their briefs. Moreover, there is no information on the record that warrants reconsideration of this finding. As such, Commerce continues to find that both Romania and Mexico are at a level of economic development comparable to that of China.
[225] *See* PDM at 31-32.
[226] *Id.*

were superior to Mexican data in a number of respects, and therefore, constituted the best available information.[227]

Parties submitted comments on whether Romania and Mexico were significant producers of comparable merchandise, and which SV data was superior. As discussed below, we continue to find that Romania is the most appropriate SC because it is at a comparable level of economic development as China, it is a significant producer of comparable merchandise, and its data quality is the best available on the record.

A. *Which Countries are Significant Producers of Comparable Merchandise*

Yudi's Case Brief

- Chinese garlic ranges from 38.1 mm to 63.5 mm or 1.5 inches to 2.5 inches.[228]
- The commercial classifications of garlic in Mexico show that the majority of garlic grown and traded commercially is large bulb garlic: of the ten varieties of garlic, only the smallest size is outside the size range of Chinese garlic.[229]
- Various independent and objective articles firmly and unequivocally establish that Mexico grows large bulb garlic and primarily large bulb garlic.[230]
- Mexico has historically been, and continues to be, a significant exporter of garlic to the U.S.[231]
- The petitioners' argument that Mexico's climate is not comparable to China's garlic-growing climate is illogical because: (1) the comparison does not pinpoint the regions of Mexico that primarily grow garlic to compare with China's garlic growing regions; and (2) the ideal growing conditions for garlic are not necessarily those in which Chinese garlic is grown.[232]
- The Zacatecas region has similar climate characteristics – *i.e.*, cold, semi-arid climate (BSk) – that overlaps with Chinese garlic growing regions.[233]
- Mexico has 1,594 zones with the BSk climate, while Romania has merely 7 zones of BSk climate.[234]
- Romanian garlic is not comparable to Chinese garlic. The only support for the weight ratio relied upon to compare Chinese garlic to Romanian garlic is a 1998 chart in a 2001

[227] *Id.*
[228] *See* Yudi's Case Brief at 9-10 (*citing* PDM at 31); *see also* Fresh Garlic from China, Inc. No. 731-TA-683, USITC Pub. 4316 (April 2012) (Third Sunset Review) (USITC 2012 Garlic Report).
[229] *See* Yudi's Case Brief at 23 (*citing* the Petitioners' Letter, "24th New Shipper Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China – Petitioners' Surrogate Country and Surrogate Value Rebuttal Comments," dated April 28, 2017 (Petitioners' NSR SC Rebuttal) at Exhibit MEX-5).
[230] *See* Yudi's Case Brief at 27 (*citing* Yudi's Letter, "Fresh Garlic from the People's Republic of China – Surrogate Country Comments and Surrogate Values for the Preliminary Results," dated April 14, 2017 (Yudi's SVs) at Exhibit SV-6).
[231] *See* Yudi's Case Brief at 29-30.
[232] *Id*. at 32-33.
[233] *Id*.
[234] *Id*. at 33.

article and an *assumption* that 1 gram of fresh garlic is equal to 1 mm diameter of a garlic bulb from two Alibaba advertisements.[235]

- Assuming the weight ratio, only two of the five varieties grown in Romania are within the size range of the Chinese garlic; and the remaining varieties are much smaller than Chinese garlic. Thus, the majority of Romanian garlic is not large, and not within the size range comparable with China.[236]
- Romanian garlic yield (58,650 hg/ha), as compared to that of China (253,452 hg/ha) and Mexico (100,781 hg/ha) strongly suggests that the majority of the Romanian garlic is not large bulb.[237]
- Because Romania is not a net exporter or significant exporter of garlic on the world market, Romania is not a suitable surrogate country.[238]
- According to Commerce, the Court of International Trade (CIT), and Federal Circuit, a country is a significant producer if it "trade{s} in" comparable merchandise and is likely to have influence or effect in the world market.[239]
- World garlic trade statistics demonstrate that Romania exports very little garlic, while Mexico is a more significant producer of garlic in the world market and the United States.[240]

Petitioners' Rebuttal Brief

- The absence of net exports does not necessarily indicate the absence of a robust domestic industry.[241]
- Net exports could be a possible indirect indicator of domestic production. However, when domestic demand is high, both domestic and foreign producers may supply the market, leading to a country being a net importer.[242]
- While a net exporting position is an indicator of domestic production, it cannot be the exclusive test for the existence of domestic production in a potential surrogate country.[243]
- The record of this review clearly shows that Romania is a significant producer of fresh garlic. Despite the FAO production data showing that Romania actually produced more

[235] *Id*. at 10-11 (*citing* Petitioners' Letter, "24th New Shipper Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China – Petitioners' Comments on Surrogate Country Selection" dated April 14, 2017 (Petitioners' NSR SC Comments) at Exhibits ROM-1A and PRC-1).
[236] *See* Yudi's Case Brief at 12.
[237] *Id*. at 13 (*citing* Yudi's Letter, "Fresh Garlic from the People's Republic of China – Rebuttal Surrogate Country Comments and Surrogate Values for the Preliminary Results," dated April 28, 2017 (Yudi's Rebuttal SVs) at Exhibit SV2-7).
[238] *See* Yudi's Case Brief at 18-19.
[239] *Id*. at 17-18 (*citing* Policy Bulletin 04.1 (where Commerce states that the "trade in" comparable merchandise is an aspect of determining what countries are "significant producers."); *Fresh Garlic Producers Association v. United States*, CIT 2016 LEXIS 55, *9 (citing *Dupont Teijin Films v. United States*, 997 F. Supp. 2d 1338, 1342 (CIT 2014) (*Dupont Teijin*); *Shandong Rongxin Imp & Exp. Co. v. United States*, 774 F. Supp. 2d 1307, 1316 (CIT 2011) (*Shandong Rongxin*); *China First Pencil Co., v. United States*, 466 F. App'x 881 (Fed. Cir. 2012)).
[240] *See* Yudi's Case Brief at 18-19 (*citing* Yudi's SVs at 18 at Exhibits SV2-1 and SV2-2).
[241] *See* the Petitioners' NSR Rebuttal Brief at 9.
[242] *Id*.
[243] *Id*. at 10.

garlic than Mexico in 2014, Yudi argues that Mexico is a significant producer and Romania is not, since Romania is not a net exporter.[244]

- Nothing in the statute requires a country to be a net exporter or a significant exporter of comparable merchandise in order to be considered a significant producer.[245]
- Commerce should continue to find that Romania is a significant producer of identical or comparable merchandise.[246]
- There are multiple factors that make Mexico's garlic crop a less representative and reliable source of information to value input garlic bulbs.[247]
- Yudi ignores the additional Romanian evidence that shows that a 1:1 gram to bulb diameter (in mm) ratio is a conservative ratio.[248]
- Garlic bulbs that have been held in storage, packed, and shipped to the United States will have experienced a significant amount of moisture loss.[249]
- To the degree that some of the Romanian garlic is medium-sized, the domestic pricing provides a conservative measure of the value of large-sized Chinese input bulbs.[250]
- Yudi also ignores its own weight-size correlation data, which shows a 1 to 1.17mm ratio.[251]
- The data in the studies that Yudi points to presents problems for considering Mexican garlic comparable. "Even when the Chinese White variety presented a greater bulb weight than that of regional purple varieties, the performance was lower."[252]
- Given the scarcity of fully comparable merchandise in Mexico, it is the minority of Mexican garlic bulbs that are potentially comparable to the Chinese input bulbs that are exported to the United States, leaving behind little or no domestically grown quality bulbs to be sold in the Mexican market.[253]
- The low AUV of Mexico's garlic exports stands in sharp contrast to the AUV of Mexico's imports of large-bulb garlic from third countries.[254]
- Imports of garlic from Chile have replaced imports of garlic from China as a result of Mexico's complete phytosanitary ban, and the Chilean producers have met this demand by growing Chinese varieties of garlic from Chinese garlic seed.[255]

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[244] *Id*. at 10-11 (*citing* PDM at 28).
[245] *See* the Petitioners' NSR Rebuttal Brief at 12 (*citing Shandong Rongxin*, 774 F. Supp. 2d 1307, 1316 (CIT 2011) (explaining that "significant producer" is not defined in the statute and is inherently ambiguous)).
[246] *See* the Petitioners' NSR Rebuttal Brief at 13.
[247] *Id*. at 25.
[248] *Id*. at 19.
[249] *Id*. at 20 (*citing* the Petitioners' NSR SC Comments at Exhibit PRC-4).
[250] *See* the Petitioners' NSR Rebuttal Brief at 21.
[251] *Id*. at 23.
[252] *Id*. at 26 (*citing* the Petitioners' NSR SC Rebuttal at Exhibit MEX-5).
[253] *See* the Petitioners' NSR Rebuttal Brief at 27.
[254] *Id*. at 28-29.
[255] *Id*. at 29.

Commerce's Position

For these *Final Results*, we have continued to rely on the 2014 UN FAO production data to determine that Romania and Mexico are significant producers of comparable merchandise.[256] Although fresh garlic from both Romania and Mexico is identical merchandise and therefore comparable, we continue to find that the record supports a finding that Romanian garlic bulbs are more comparable because they are similar in size to the input garlic bulbs consumed in the production of subject merchandise.[257] Moreover, garlic in Romania is stored and sold throughout the year.[258] Conversely, information on the record indicates that fresh garlic grown in Mexico is smaller, and generally harvested as whole plants that have been uprooted from the field, many of which are sold as "wet bulbs" in large open sacks, and are not differentiated by size.[259] Garlic harvested in this manner would require significant processing to produce fresh garlic products.[260] In contrast, Chinese input bulbs undergo significant processing by the intermediate processors, and require only minimal further processing to produce fresh garlic products.[261] Additionally, as explained in the PDM, record evidence demonstrates that Mexico sells the vast majority of its garlic during a 4-6-month time range.[262] For these reasons, we continue to find that the fresh garlic produced in Romania is more physically similar than the garlic produced in Mexico, to the subject merchandise, garlic produced in China. Regarding the petitioners' and Yudi's arguments on the climate regions of Mexico and Romania, we note that evidence on the record of the new shipper review supports a finding that both Mexico and Romania have similar climate regions to the garlic growing regions of China.

Yudi's argument that Mexico is the largest supplier of fresh garlic to the United States after China is irrelevant. Commerce does not compare potential surrogate country data to China's production level of fresh garlic, which is by far the largest in the world – approximately 80 percent of world production, and over 15 times larger than the next largest producing country. Given this disparity, it is not useful to make a judgment "consistent with the characteristics of world production of, and trade in, comparable merchandise," as suggested in Policy Bulletin 04.1. Rather, based on the unique circumstances of this case,[263] Commerce has evaluated the garlic production data from Romania and Mexico to determine whether the production was sufficiently large in volume, such that price data from either country could provide reliable SVs reflecting the commercial market reality of producing the subject merchandise in that country.

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[256] *See* PDM at 27-28.

[257] *See* PDM at 31; *see also* Petitioners NSR SC Comments at 4-7 and Exhibits ROM-1A, ROM-2, PRC-1 and PRC-2.

[258] *See, e.g., Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 21st Antidumping Duty Administrative Review; 2014-2015*, 82 FR 27230 (June 14, 2017) (*Garlic 21 Final*), and accompanying issues and decision memorandum at 50.

[259] *See* the Petitioners' Letter, "24th New Shipper Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China – Petitioners' Final Affirmative Surrogate Value Submission," dated October 31, 2017 (Petitioners' Final SV Submission) at Exhibit SV-Supp-3; *see also Garlic 21 Final*, and accompanying issues and decision memorandum at 47.

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] Policy Bulletin 04.1 acknowledges the need for flexibility and the use of discretion because the "meaning of 'significant producer' can differ significantly from case to case."

This interpretation follows logically from the underlying purpose of section 773(c)(4) of the Act which directs Commerce to identify reliable market-based prices upon which to value a NME producer's factors of production.

Here, Romania's and Mexico's 2014 production amounts are each noticeably and measurably large – 62,773 and 54,724 metric tons,[264] respectively, such that it is reasonable to assume the quantity reflects an adequate number of garlic producers that are commercially viable, and therefore provide data reflecting market-based transactions. Yudi has not offered any meaningful distinction between the significance of Romanian and Mexican 2014 production levels.

Yudi's reliance on *Shandong Rongxin* is misplaced. In that case, the CIT took issue with Commerce's finding that countries with miniscule export levels (*i.e.*, $43, $67, $159, and $218) were significant producers.[265] In this review, both countries under consideration produce measurably large quantities of fresh garlic to be considered significant producers. Yudi's reliance on *Dupont Teijin* is similarly misplaced. In that case, world production data were not available, so Commerce relied upon export data to determine whether a country was a significant producer. In this case, world production data are available, and Commerce has determined that both Mexico and Romania are significant producers of fresh garlic. Yudi argues that Romania is not a net exporter of garlic, however, Commerce notes that section 773(c)(4) of the Act does not require that a country determined to be a significant producer be a net exporter; instead, the statute does not mandate a particular methodology to determined significance of production, and Commerce is afforded discretion in determining how to measure significance, provided its analysis is reasonable under the statute. Further, Policy Bulletin 04.1 explains that being a net exporter is merely one of many possible measures of significant production. Here, world production data supports finding that both Mexico and Romania are significant producers of comparable merchandise, in accordance with section 773(c)(4) of the Act.

B. Which Country Presents the Best SV Data

Yudi's Case Brief

- Commerce has found that FAO prices are (1) farmgate specific; (2) based on the broadest market average; (3) contemporaneous; (4) exclusive of taxes and duties; and (5) publicly available.[266]
- Commerce has consistently found that FAO data are farmgate and successfully defended its preference for the use of farmgate prices over wholesale prices to value respondents' garlic in court.[267]

[264] *See* PDM at 27.
[265] *See Shandong Rongxin*, 774 F. Supp. 2d 1307, 1316 (CIT 2011).
[266] *See* Yudi's Case Brief at 31 (*citing, e.g.*, PDM at 22; *see also Fresh Garlic Final Results of the Semiannual Antidumping Duty New Shipper Review of Jinxiang Merry Vegetable Co., Ltd. and Cangshan Qingshui Vegetable Foods Co., Ltd.; 2012-2013*, 79 FR 62103 (October 16, 2014), IDM at 8) (*Merry Vegetable and Cangshan Qingshui*)).
[267] *See* Yudi's Case Brief at 5-6 (*citing Merry Vegetable and Cangshan Qingshui* IDM at 8; *Fresh Garlic from the People's Republic of China: Final Results of the Antidumping Duty Administrative Review; 2010-2011*, 78 FR

- According to the FAO country notes and the Romanian government, the garlic bulb data for Romania are wholesale, not farmgate, and likely include "transportation costs, storage costs, processing or packaging costs, and a profit mark-up."[268]
- Yudi purchased its garlic bulb input directly from the farmers, so the wholesale Romanian price would not be a reasonable option to value Yudi's garlic bulb source.[269]
- It is unclear whether the Romanian price includes taxes and duties.[270]
- Because of the tariff quota imposed on imported foreign garlic in Romania, and the indisputable correlation between the price of garlic and the imposition of the tariff quota, it is evident that the Romanian garlic market is distorted and not representative of the prices in China.[271]
- Romanian garlic production, exports, and consumption remain virtually unchanged while Romania's garlic imports have decreased dramatically, evidencing the widespread problems in Romania with garlic smuggling.[272]
- In addition to the country-wide, contemporaneous garlic price from a country that definitely grows large bulb garlic, Commerce also has complete, reliable record evidence for all other factors of production in Mexico.[273]

Petitioners' Rebuttal Brief

- Commerce should once again reject Yudi's argument that the European Union's 9.6 percent duty on fresh garlic imports and a quota on Chinese garlic imports demonstrates that Romanian producer prices are distorted and unreliable.[274]
- Yudi fails to demonstrate a causal link between the EU tariff and quotas on Chinese garlic have distorted garlic prices in Romania.[275]
- Yudi's argument that if Romania had greater imports of garlic from China, it would be influenced by market forces as "China production and prices are determined by normal market sources," is spurious and remarkable.[276] This proceeding is fundamentally predicated on the fact that China's fresh garlic production and prices are determined by non-market forces.[277]
- Commerce should continue to find that Romanian producer prices are not distorted by smuggling.[278]

36168 (June 17, 2013) (*Garlic 17 Final*), IDM at 13-16; *Fresh Garlic Producers Association v. United States*, 83 F. Supp. 3d 1330 (CIT 2015) (*FGPA I*).

[268] *See* Yudi's Case Brief at 7-8 (*citing* Yudi's Rebuttal SVs at Exhibit SV2-9 – SV2-11).

[269] *See* Yudi's Case Brief at 8-9 (*citing* Yudi's February 28, 2017 Section D Questionnaire Response (Yudi's February 28, 2017 DQR). (We note that Yudi cites to Zhengyang's questionnaire response. As that response is not on the record of this NSR, we have ignored those arguments).

[270] *See* Yudi's Case Brief at 9.

[271] *Id*. at 14-16 (*citing* Yudi's Rebuttal SVs at Exhibits SV2-1 – SV2-6).

[272] *See* Yudi's Case Brief at 17 (*citing* Yudi's Rebuttal SVs at Exhibit SV2-2).

[273] *See* Yudi's Case Brief at 34.

[274] *See* the Petitioners' NSR Rebuttal Brief at 13.

[275] *Id*. at 14

[276] *Id*. at 14-15 (*citing* Yudi's Case Brief at 16).

[277] *See* the Petitioners' NSR Rebuttal Brief at 15.

[278] *Id*. at 15-16.

- The information provided by Yudi points to the target countries (of garlic smuggling) being Sweden, Austria, Hungary, Ireland, and Poland, not Romania.[279]
- In this review, as in AR 21, input garlic bulbs consumed by the Chinese respondents most closely resemble the input garlic bulbs represented by the NIS price from Romania.[280]
- The input garlic bulbs consumed by the respondents are large in size, and have undergone significant post-harvest processing.[281]
- In the two previous administrative reviews, Commerce found that since the NIS prices were monthly, any raw garlic sold in Romania between October and early June would require either cold storage or controlled atmosphere storage facilities in order to remain marketable.[282]
- Commerce should reject Yudi's argument that Commerce should not rely on the NIS prices because they are not farmgate.[283]
- Yudi's general correlation between the SAGARPA prices and the UNFAO producer prices may be correct, however, Yudi's analysis ignores a great deal of significant issues with the SAGARPA prices, their contemporaneity, and the type of product they represent.[284]
- Since the SAGARPA prices are annual, they are not fully contemporaneous with the POR. Neither of the other two sources of Mexican input bulb prices satisfy Commerce's SV criteria either. None of the three sources are fully contemporaneous with the POR.[285]
- The monthly source submitted by Yudi is not reported to the FAO, has not been demonstrated to be exclusive of taxes and duties, and does not appear to represent a broad market average.[286]
- Commerce has found that the Mexican input bulbs (reflective of the farm gate prices submitted by respondents) are not physically similar to Chinese input garlic bulbs. The long running drought in Mexico made production of high-quality garlic bulbs even more challenging during the POR.[287]

Commerce's Position

We continue to rely on the SV information from Romania for the final results. As an initial matter, Commerce continues to determine that the wholesale Romanian garlic bulb data are representative of those purchased by Yudi. In its brief, Yudi argues that the wholesale price of Romania's garlic bulb pricing data makes them unsuitable for SV use.[288] Specifically, Yudi notes that the "farmgate" price reported to the UN FAO by the INSSE is actually the wholesale price.[289] The UN FAO country notes indicate that for several vegetables, including garlic, the

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[279] *Id*. at 16.
[280] *Id*. at 17
[281] *Id*. (*citing* the Petitioners' Final SV Submission at Attachments SV-Supp-6A and SV-Supp-6B).
[282] *See* the Petitioners' NSR Rebuttal Brief at 17.
[283] *Id*. at 18.
[284] *Id*. at 30.
[285] *Id*. at 30-31.
[286] *Id*. at 31.
[287] *Id*. at 32-35 (*citing Garlic 21 Final*, IDM at 47).
[288] *See* Yudi's Case Brief at 5-9.
[289] *Id*. at 7-8.

prices are actually "wholesale," not farmgate.[290] Indeed, Commerce previously determined that the Romanian garlic bulb data prices were not farmgate, as the garlic was sold throughout the year. Specifically, Commerce has found "{g}iven that Romanian garlic is also semi-perishable, any raw garlic sold in Romania from October through early July would also require either cold storage or controlled CA storage facilities in order to remain viable."[291]

We note that the record of this review shows that because Yudi purchases its garlic in the latter part of the POR, that the price paid by Yudi includes further processing (*e.g.* cold storage or controlled atmosphere (CA) facilities in order to remain viable for processing outside of the summer harvest months).[292] This finding with respect to Yudi is consistent with prior reviews of this order.[293] Accordingly, we continue to find that the wholesale price of Romanian garlic is a reliable SV for Yudi's purchases of garlic bulbs.

Thus, Yudi's reliance on Commerce's use of farmgate prices in the new shipper reviews for Jinxiang Merry Vegetable Co., Ltd. (Jinxiang) and Cangshan Qingshui Vegetable Foods Co., Ltd (Cangshan) in support of using Mexican garlic farmgate prices for Yudi's SV in this review is misplaced.[294] There is no information on the record of this review with respect to Jinxiang's or Cangshan's respective garlic purchasing and production practices (*e.g.*, what month they purchased/processed garlic in China).[295] Yudi purchased and processed garlic that had been further processed, cold stored and or CA-stored throughout the POR.[296] However, information on this record indicates Mexico sells the vast majority of its garlic during a 4-6-month time range each year.[297] As such, Mexican farmgate garlic prices are less reflective of the price paid by Yudi for Chinese garlic than the Romanian garlic data, which also includes further processing, cold storage, or CA storage.

We agree with Yudi's argument that the Mexican garlic bulb data are reliable because they are the source for the UN FAO data.[298] Commerce has relied on the UN FAO data in the past, and continues to find that the UN FAO data are reliable because they are (1) specific; (2) based on a broad market average; (3) contemporaneous; (4) exclusive of taxes and duties; and (5) publicly available.[299] We note however, that the Romanian garlic data is reported by the INSSE to the UN FAO, so it is also (1) specific; (2) based on a broad market average; (3) contemporaneous; (4) exclusive of taxes and duties; and (5) publicly available.[300]

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[290] *Id.* at 7-8 (*citing Merry Vegetable and Cangshan Qingshui*, IDM at 8; *Garlic 17 Final*, IDM at 13-16; *FGPA I.*
[291] *See Fresh Garlic from the People's Republic of China Final Results and Final Rescission of the 20th Antidumping Duty Administrative Review; 2013-2014*, 81 FR 39897 (June 20, 2016) (*Garlic 20 Final*), and accompanying Issues and Decision Memorandum at 28-29; *see also Garlic 21 Final*, IDM at 50.
[292] *See* Yudi's Prelim *Bona Fides* Memorandum at 5.
[293] *See Garlic 20 Final*, IDM at 28-29; *see also Garlic 21 Final*¸ IDM at 50-53.
[294] *See* Yudi's Case Brief at 5-6.
[295] *See Merry Vegetable and Cangshan Qingshui*, IDM at 8 (*citing Garlic 17 Final*, IDM at 13-16; *see also FGPA I*).
[296] *See* Yudi's Prelim *Bona Fides* Memorandum at 5.
[297] *See* the Petitioners' Final SVs at Exhibit SV-Supp-3.
[298] *See* Yudi's Case Brief at 30-132 (citing PDM at 22; *see also Merry Vegetable and Cangshan Qingshui*, IDM at 8).
[299] *See* PDM at 32.
[300] *Id*.

In past reviews and the *Preliminary Results*, Commerce addressed Yudi's arguments regarding the EU's tariff quota on imported garlic, as well as allegations regarding smuggled garlic into Romania.[301] In previous reviews, Commerce noted that respondents provided speculation regarding garlic pricing and import trends since Romania's accession to the EU, but had "not provided any information demonstrating a relationship between the presence of tariffs and any change in Romanian prices, or quantifying such a relationship… {the respondent} has not demonstrated any causal link or distortion, as opposed to a temporal correlation between prices and the imposition of tariffs."[302] In the instant review, Yudi provides little additional information to support its claim regarding the EU tariff quota and the resulting smuggling that it alleges. Yudi asks Commerce to make a logical leap to conclude that because no evidence exists to the contrary, Commerce should find that there is a causal link between the EU tariff quota and the garlic pricing data.[303] Accordingly, Commerce continues to find that there is insufficient evidence to demonstrate a causal relationship between the EU tariff quota, and garlic smuggling, which has been alleged by Yudi.[304]

VIII. RECOMMENDATION

We recommend adopting the above positions. If these recommendations are accepted, we will publish the *Final Results* of this administrative review in the *Federal Register*.

☒ ☐

Agree Disagree

6/8/2018

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Signed by: GARY TAVERMAN