A-570-831
New Shipper Review
POR: 11/01/2016- 4/30/2017
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DATE: October 1, 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 Rescission of Antidumping Duty Semiannual New Shipper Review on Fresh Garlic from the People's Republic of China: Qingdao Doo Won Foods Co., Ltd.

I. SUMMARY

The Department of Commerce (Commerce) analyzed the case and rebuttal briefs submitted by interested parties in the new shipper review (NSR) of Qingdao Doo Won Foods Co., Ltd. (Doo Won) with respect to the antidumping duty order on fresh garlic from the People's Republic of China (China). As a result of this analysis, we continue to recommend finding that Doo Won was not the producer of the subject merchandise sold. Accordingly, we recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum and rescind the NSR with respect to Doo Won.

Below is a complete list of the issues in this NSR on which we received comments from parties:

Comment 1:	Whether Doo Won was the Producer of the Subject Merchandise
Comment 2:	Whether Commerce's Reliance on "Inconsistencies" in Doo Won's Responses to Substantiate its Cancellation of Verification is Reasonable
Comment 3:	Whether Commerce is Obligated to Verify or Utilize Doo Won's Reported Information
Comment 4:	Whether Commerce Wrongfully Rejected Doo Won's New Factual Information

II. BACKGROUND

On May 17, 2018, Commerce published the preliminary results of the NSR of Doo Won.[1] The period of review (POR) is November 1, 2016, through April 30, 2017. The deadline for the final results was extended on June 26, 2018 to October 1, 2018.[2] On June 27, 2018, we issued a supplemental questionnaire to Doo Won, to which it timely responded on July 10, 2018.[3] Between July 17, 2018, and July 21, 2018, the petitioners and Doo Won submitted comments regarding Doo Won's third supplemental questionnaire response.[4] On July 24, 2018, Doo Won submitted additional comments, which were rejected for containing untimely new factual information.[5] On July 29, 2018, Doo Won refiled its comments without the untimely new factual information;[6] on July 30, 2018, Doo Won submitted further comments.[7]

On August 1, 2018, Commerce issued a letter cancelling the verification of Doo Won because "the information regarding {Doo Won's} alleged production is grossly deficient and not credible due {to} the numerous inconsistencies in the information provided by Doo Won."[8] On August 8, 2018, Doo Won filed rebuttal comments regarding Commerce's cancellation of its verification.[9]

On August 17, 2018, Doo Won filed a case brief;[10] on August 24, 2018, the petitioners filed a rebuttal brief.[11]

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

[1] *See Fresh Garlic from the People's Republic of China: Preliminary Rescission of the New Shipper Review*, 83 FR 22959 (May 17, 2018) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum (PDM).
[2] *See* Memorandum, "Fresh Garlic from the People's Republic of China – Semiannual Antidumping Duty New Shipper Review (2016-2017): Extension of Deadline for the Final Results," dated June 26, 2018.
[3] *See* Doo Won's July 10, 2018 Third Supplemental Questionnaire Response (Doo Won's July 10, 2018 SQR).
[4] *See* the Petitioners' Letter, "Petitioners' Withdrawal of Request for Verification" dated July 18, 2018; *see also* the Petitioners' Letter, "Petitioners' Comments on Doo Won's 3rd Supplemental Questionnaire Response and Request to Cancel Verification" dated July 18, 2018; *see also* Doo Won's Letter, "Rebuttal to Petitioners' Comments on Doo Won's 3rd Supplemental Questionnaire Response and Request to Cancel Verification" dated July 21, 2018.
[5] *See* Commerce's Letter, "Rejection of Doo Won's Rebuttal Comments" dated July 26, 2018.
[6] *See* Doo Won's Letter, "Second Rebuttal to Petitioners' Comments on Doo Won's 3rd Supplemental Questionnaire Response and Request to Cancel Verification" dated July 29, 2018.
[7] *See* Doo Won's Letter, "3rd Rebuttal to Petitioners' Comments on Doo Won's 3rd Supplemental Questionnaire Response and Request to Cancel Verification" dated July 30, 2018.
[8] *See* Doo Won's Letter, "Cancellation of Qingdao Doo Won Foods Co., Ltd.'s Verification" dated August 1, 2018 (Commerce's Cancellation Letter) at 1-2.
[9] *See* Doo Won's Letter, "Comments on Department of Commerce's Letter of Cancellation of Qingdao Doo Won Foods Co. Ltd.'s Verification" dated August 8, 2018 (Doo Won's August 8, 2018 Letter).
[10] *See* Doo Won's Letter, "Administrative Case Brief of Qingdao Doo Won Foods Co., Ltd." dated August 17, 2018 (Doo Won's Brief).
[11] The petitioners in this NSR are the Fresh Garlic Producers Association and its individual members: Christopher Ranch L.L.C., The Garlic Company, and Valley Garlic. *See* the Petitioners' Letter, "Petitioners' Rebuttal Brief" dated August 24, 2018 (the Petitioners' Rebuttal Brief).

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, 0703.20.0010, 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, and of the Harmonized Tariff Schedule of the United States (HTSUS).[12]

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 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. *BONA FIDES* ANALYSIS

Section 751(a)(2)(B)(iv) of the Tariff Act of 1930, as amended (the Act) provides that any weighted-average dumping margin determined for an exporter or producer in an NSR must be based solely on *bona fide* sales of that exporter or producer during the POR. In determining whether sales covered by an NSR were *bona fide*, Commerce shall consider, depending on the circumstances:

(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.

Accordingly, Commerce considers a number of factors in its *bona fides* analysis, "all of which may speak to the commercial realities surrounding an alleged sale of subject merchandise."[13] In *TTPC*, the Court of International Trade (CIT) also affirmed Commerce's decision that any factor indicating that the sale under consideration is not likely to be typical of those the exporter/producer will make in the future is relevant, and found that the weight given to each

[12] *See Antidumping Duty Order: Fresh Garlic from the People's Republic of China*, 59 FR 59209 (November 16, 1994).
[13] *See Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 374 F. Supp. 2d 1333, 1342 (CIT 2005) (*New Donghua*).

factor investigated will depend on the circumstances surrounding the sale.[14] Furthermore, in *New Donghua*, the CIT affirmed Commerce's practice of evaluating the circumstances surrounding a new shipper 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.[15] 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."[16]

In the *Preliminary Results*, we found Doo Won's sale of garlic to be *bona fide*. However, we are now concluding that Doo Won has not established that it was the producer of the garlic in question, and we are rescinding this review on that basis. Accordingly, for purposes of these final results, we find the *bona fide* question to be moot, and reach no conclusion as to the *bona fides* of Doo Won's sale.

V. FINDING THAT DOO WON IS NOT THE PRODUCER OF THE SUBJECT MERCHANDISE

For these final results, we find that Doo Won is not the producer of the shipment in question. Because much of the factual information used in our analysis involves business proprietary information, a full discussion of the basis for our decision to rescind is set forth in Doo Won's final analysis memorandum.[17]

As discussed in the PDM, in its NSR request, Doo Won certified that it was the producer and exporter of the garlic at issue in this this review.[18] In accordance with 19 CFR 351.214(b)(2)(i), Doo Won certified that did not export subject merchandise to the United States prior to or following the POR.[19] As noted below in Comment 1 and in Doo Won's final analysis memorandum, information on the record of this NSR indicates that Doo Won is not the producer of the garlic covered by this NSR.[20] On this basis, we determine that Doo Won's NSR request was deficient, pursuant to 19 CFR 351.214(b)(2)(ii)(B), which requires a certification from the person that produced or supplied the subject merchandise to the person requesting the review that that producer or supplier did not export the subject merchandise to the United States. Given that Doo Won's NSR request is deficient, pursuant to 19 CFR 351.214(b)(2)(ii)(B), we are rescinding the NSR of Doo Won.

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[14] *See Tianjin Tiancheng Pharmaceutical Co. v. United States*, 366 F. Supp. 2d 1246, 1250, 1263 (CIT 2005) (*TTPC*).
[15] *See New Donghua,* 341 F. Supp. 2d at 1344.
[16] *See TTPC,* 366 F. Supp. 2d at 1249.
[17] *See* Memorandum, "New Shipper Review in the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: Final Analysis Memorandum for the Final Results of Qingdao Doo Won Foods Co., Ltd.," dated concurrently with this memorandum *(*Doo Won Final Analysis Memorandum).
[18] *See Preliminary Results*, PDM at 4 (citing Doo Won's Letter, "Fresh Garlic from the People's Republic of China" dated May 19, 2017).
[19] *Id*.
[20] *See* Doo Won Final Analysis Memorandum.

VI. DISCUSSION OF THE ISSUES

The following comments were raised during this NSR.

Comment 1: Whether Doo Won was the Producer of the Subject Merchandise

Doo Won's Case Brief

- Commerce's conclusions must be supported by substantial record evidence.[21]
- Record evidence establishes that Doo Won was a producer of the subject merchandise during the POR, and that there are no inconsistencies regarding when it first produced subject merchandise.[22]
- Commerce did not articulate a clear definition of "producer," but rather compared Doo Won's reported production process to the production process of respondents in prior proceedings.[23]
- The information indicating that Doo Won was a producer of the subject merchandise during the POR is reconcilable to Doo Won's official records and is entirely verifiable.[24]
- Commerce and the petitioners miscalculated the labor hours in Doo Won's garlic processing stage because Doo Won clearly reports that each type of laborer worked a different number of hours.[25]
- Commerce also relied on the incorrect assumption that 1 cm = 1 gram of garlic, when, in fact, the increase of the volume/weight of a sphere is exponential, not linear.[26]
- Commerce's miscalculations led to an incredible speed of processing.[27]

The Petitioners' Rebuttal Brief

- Doo Won's responses relating to its production process are contradictory.[28]
- Based on Doo Won's description of its production process, Commerce correctly determined that the process described lacked any modification of the input bulbs.[29]
- In its post-preliminary supplemental response, Doo Won substantially revised its production process description, informing Commerce that workers: "use special knives to

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[21] *See* Doo Won's Case Brief at 8-11 (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984); *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997); *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002) (*Ta Chen*); *Suramerica De Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994); *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996); *Queen's Flowers de Colombia v. U.S.*, 981 F. Supp. 617, 627 (CIT 1997) (*Queen's Flowers*); *Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982) (*Hoffman Estates*)).

[22] *See* Doo Won's Case Brief at 9 (citing Doo Won's August 8, 2018 Letter at 10 and Doo Won's July 10, 2018 SQR at Exhibit SSS-1.

[23] *See* Doo Won's Case Brief at 10.

[24] *Id*. at 11.

[25] *See* Doo Won's Case Brief at 12 (citing Commerce's Cancellation Letter).

[26] *Id*.; we note that Doo Won cites to Commerce's Cancellation Letter at 2, wherein we state, "1 mm of bulb diameter = 1 gram of fresh garlic." *See* Commerce's Cancellation Letter at 2, footnote 16.

[27] *See* Doo Won's Case Brief at 12 (citing Commerce's Cancellation Letter).

[28] *See* the Petitioners' Rebuttal Brief at 7.

[29] *Id*.

cut the extra stems and remove remaining garlic roots," and "remove loose outer skin of the garlic bulbs by hand."[30]

- Doo Won claims that its original description of its production process was a discrepancy that was cured by its post-preliminary supplemental response. In other words, Doo Won reviewed Commerce's *Preliminary Results*, and submitted a completely new production process that undermines Commerce's finding that Doo Won was not the producer of the subject merchandise.[31]
- Commerce should conclude that Doo Won's submission of a completely new production process undermines the credibility of all of Doo Won's responses.[32]
- Contrary to Doo Won's claim, the petitioners' calculation of the average number of hours a Doo Won employee worked is not unreasonably low, since it includes all labor hours (excluding indirect labor hours) reported by Doo Won.[33]
- Even if Commerce were to use the numbers Doo Won argues should be used, the rate at which the employees would have had to process the garlic is still implausibly high.[34]
- Doo Won's argument concerning the size to weight ratio relied upon by Commerce lacks record evidence. In contrast, the weight ratio used by Commerce is supported by record evidence. In fact, Commerce's analysis is a conservative estimate of the number of bulbs Doo Won claims its employees processed.[35]

Commerce's Position:

We continue to find that Doo Won was not the producer of the subject merchandise. In its pre-preliminary responses regarding production, Doo Won's description of its production process lacked any modification to the garlic itself (*e.g.*, cleaning the garlic, removing the outside layer, trimming the roots, or cutting the stems), indicating that Doo Won serves as a packer instead of a producer of fresh garlic.[36] Following the *Preliminary Results*, in direct contrast to its previous reporting, Doo Won described its production process as "sorting, *processing*, {and} packing."[37] Doo Won's newly-reported processing stage included its workers using "special knives to cut the extra stems and remove remaining garlic roots and remove loose outer skin of the garlic bulbs by hand."[38] As noted in the letter cancelling Doo Won's verification, Doo Won did not revise the total number of hours worked or employees involved in the production process. Thus, Doo Won is asking Commerce to find it reasonable that in the same time and using the same number of laborers that it packed the garlic, it was actually able to complete full production of the subject merchandise. In adding the additional and time-consuming production processing steps, Doo Won has made its story of being the producer of the sale in question even more difficult to believe. Record evidence supports our continued finding that Doo Won was not the producer of the merchandise in question. Assuming, *arguendo*, that Doo Won was merely curing the

[30] *Id*. (citing Doo Won's July 10, 2018 SQR at Exhibit SSS-1).
[31] *See* the Petitioners' Rebuttal Brief at 7-8.
[32] *Id*. at 8.
[33] *Id*. at 10-11.
[34] *Id*. at 11.
[35] *Id*.
[36] *See* Doo Won's Preliminary Analysis Memorandum at 9.
[37] *See* Doo Won's July 10, 2018 SQR at Exhibit SSS-1 (emphasis added).
[38] *Id*.

deficiencies noted in its response, based on the new production process chart, as the petitioners note, the rate at which the employees would have had to process the garlic is still implausibly high when compared with the rate of production calculated in the preliminarily results.

Doo Won's revised production flow chart asked Commerce to find that its newly reported "production" occurred in the same time that Doo Won reported in its initial responses. Doo Won did not revise the total number of hours worked or employees involved in the production process.[39] Doo Won has stated that it completed the entire production process for the sale in question using very few labor hours.[40]

In response to Doo Won's argument concerning our speed of production calculation, we disagree. Commerce has relied on the "1mm = 1gr" ratio in many proceedings under this order.[41] Furthermore, if we were to use the calculation of bulbs/second with Doo Won's corrections, the production rate would still be implausible.[42]

Doo Won claims that this second description of its production process was submitted "to overcome the deficiency" that Commerce found in its initial questionnaire response.[43] In this case, we disagree. Rather than supplement or amend small portions of its response, in essence, Doo Won's revisions, when taken as a whole, so significantly altered its reporting as to constitute an entirely new response. Doo Won's supplemental questionnaire response altered the complexity of its reported operation and added previously unreported production processes. Instead of merely curing deficiencies, these additions created a completely alternative narrative description of Doo Won's production.

In addition, when asked about its history of producing garlic, Doo Won was unable to substantiate the claims it made in its April 3, 2018 questionnaire response.[44] Moreover, as discussed in Comment 2 below, Commerce's preliminary finding – that the garlic received by Doo Won had the same weight as the finished product garlic "produced" by Doo Won – is based on record evidence.

Doo Won claims that this production process is verifiable; however, it is clear from the abovementioned inconsistencies in Doo Won's reporting that we would not be able to accurately determine which story to verify. As stated in Commerce's Cancellation Letter, "{Commerce} has determined that the information regarding {Doo Won's} alleged production is grossly deficient and not credible due {to} the numerous inconsistencies in the information provided by

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[39] *Id*.
[40] For the business proprietary discussion of this issue, *see* Doo Won's Final Analysis Memorandum; *see also* Doo Won's August 11, 2017 AQR at A-16, A-18; *see also* Doo Won's February 9, 2018 SQR at Exhibit S-4.
[41] *See, e.g., 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, 2017), accompanying Issues and Decision Memorandum at 29.
[42] The production rate is proprietary in nature. For the business proprietary discussion of this issue, *see* Doo Won Final Analysis Memorandum at 2.
[43] *See* Doo Won's Case Brief at 5.
[44] *See* Doo Won's April 3, 2018 Supplemental Questionnaire Response (Doo Won's April 3, 2018 SQR) at Exhibit SS-9; *see also* Doo Won's July 10, 2018 SQR at 2.

Doo Won. The current record is therefore unverifiable."[45] As stated in Comment 2 below, Doo Won's contrasting narratives of its company history, production, and sales negotiation undermine the relevancy of any verification.

Doo Won's reliance on *Ta Chen*, *Fujitsu General*, and *Queen's Flowers* is misplaced. While we agree that the record should be viewed as a whole when making a determination, and that Commerce must explain how its factual findings support its determination, as discussed above, we have done so in this case. We note that *Ta Chen* relates to Commerce's application of AFA; the CAFC sustained Commerce's application of AFA for failing to provide older records, holding that "it is reasonable in this case for Commerce to expect {a respondent} to preserve its records in the event that Commerce itself would request them."[46] As addressed in Comment 2 below, Doo Won's argument that Commerce's requirement of old records was unreasonable is misplaced. Furthermore, with respect to Doo Won's argument that Commerce either has to confirm its prior decision, or explain its departure, we are confirming our preliminary decision in this instant review, so the citation to *Queen's Flowers* is moot.[47] As the records sought were Doo Won's to begin with, we find that Doo Won should have been able to provide them upon our request, especially given the amount of time allotted to Doo Won to respond to the supplemental questionnaire. Doo Won's reliance on *Fujitsu General*, is similarly misplaced. In *Fujitsu General*, the CAFC was reviewing the CIT's affirmation of Commerce's determination to use constructed value for certain sales where more than 90 percent of that particular model failed the cost test. We find no correlation between *Fujitsu General* and the facts and arguments of this review.

In addition, we note that *Atlantic Sugar*, *Gerald Metals*, and *Suramerica* all relate to the U.S. International Trade Commission's (ITC) determinations. *Atlantic Sugar* and *Gerald Metals* are both centered on the ITC's finding of material injury; while *Suramerica* relates to the ITC's finding of a threat of material injury.

Finally, we find that Doo Won's reliance on *Hoffman Estates* is inapposite. Doo Won's selective citation from *Hoffman Estates* fails to explain the full meaning of the quote pulled from the case.[48] The full quote provides the necessary clarity to show that Doo Won's reliance is misplaced: "a vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications."[49] It is unclear from Doo Won's submission what point it is making by referencing this quote.

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[45] *See* Commerce's Cancellation Letter at 1-2; *see also* Doo Won's Final Analysis Memorandum.
[46] *See Ta Chen*, 298 F.3d at 1349.
[47] *See* Doo Won's Case Brief at 11,
[48] *Id*. at 10. ("In failing to articulate its rationale, and how it conforms or differs from precedent and policy, {Commerce}, contrary to law, opens the door to conclusions made on 'ad hoc and subjective' bases, with the 'attendant dangers of arbitrary and discriminatory applications.'"); *see also Hoffman Estates*, 455 U.S. at 498.
[49] *See Hoffman Estates*, 455 U.S. at 498.

Comment 2: Whether Commerce's Reliance on "Inconsistencies" in Doo Won's Responses to Substantiate its Cancellation of Verification is Reasonable

Doo Won's Case Brief

- Commerce read Doo Won's finished product "warehouse-in" slips as the raw material garlic warehouse-in slips and erroneously calculated Doo Won's yield loss.[50]
- Commerce's requirement that Doo Won provide records that go back up to X[51] years is impermissibly vague and has no apparent parameters and unsupported by antidumping law.[52]
- Doo Won explained that it did not incur any costs associated with "branding" because the cartons were ordered and purchased with the design printed on them.[53]
- This packing material expense would likely be so small as to be immaterial – certainly not rising to such a level of significance as to justify canceling verification.[54]

The Petitioners' Rebuttal Brief

- In its September 5, 2017, CDQR, Doo Won provided production documents that included "Warehouse-In Slip, Warehouse-Out Slip," and "Finished Product Warehouse-In Slip."[55] There is not a single reference to any document called "Finished Product Warehouse-Out Slip," contrary to Doo Won's claims.[56]
- Hence, the titles of the documents identified in Doo Won's September 5, 2017, CDQR at Exhibit D-2 indicate that they are for products entering the company's facility for the first time.[57]
- The quantities listed on the documents indicate that Doo Won did not produce the merchandise, but merely sorted and packed the input garlic bulbs.[58]

Commerce's Position:

In the *Preliminary Results*, we noted various inconsistencies in Doo Won's responses that raised concerns regarding the reliability of its information.[59] Specifically, we stated that "{a}lthough these discrepancies *alone* do not indicate that Doo Won's shipment of fresh garlic was non-*bona fide*, their presence raised concerns in Commerce's analysis."[60] In Doo Won's response to Commerce's post-preliminary supplemental questionnaire, Doo Won did not remedy certain

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[50] *See* Doo Won's Case Brief at 13; *see also* Doo Won's August 8, 2018 Letter at 11-14.
[51] This information is business proprietary in nature. "X" is used as a public placeholder. For the business proprietary discussion of this issue, *see* Doo Won's Final Analysis Memorandum.
[52] *See* Doo Won's Case Brief at 15-16 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994). *See also Hontex Enterprises Inc. v. United States*, No. 02-00223, Slip Op. 03-17 at 41 (CIT 2003) (*Cf Hontex*); *Thai Pineapple Canning Indus. Corp. v. United States*, 273 F.3d 1077, 1083 (Fed. Cir. 2001); *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951)).
[53] *See* Doo Won's Case Brief at 16 (citing Doo Won's August 8, 2018 Letter at 14-15).
[54] *Id*. at 16.
[55] *See* the Petitioners' Rebuttal Brief at 9 (citing Doo Won's September 5, 2017 CDQR at Exhibit D-2).
[56] *Id*. at 9; *see also* Doo Won's Case Brief at 13.
[57] *See* the Petitioners' Rebuttal Brief at 9.
[58] *Id*. at 9-10.
[59] *See* Doo Won's Preliminary Analysis Memorandum at 7-8.
[60] *Id*. at 8 (emphasis added).

inconsistencies, notably: (1) whether its production documents supported its reported yield loss calculation; (2) whether it produced garlic for the first time during the POR; and (3) whether it incurred branding costs in the sale of the subject merchandise.[61] As explained in Commerce's Cancellation Letter, we cancelled the verification of Doo Won because "the information regarding its alleged production is grossly deficient and not credible due to the numerous inconsistencies in the information submitted by Doo Won."[62] Rather, we did not rely on one inconsistency alone in our determination to cancel the verification of Doo Won, but on the numerous inconsistencies and the dearth of credible production information to support Doo Won's claim that it was the producer of subject merchandise.[63] Moreover, Doo Won's contrasting narratives of its company history, production, and sales negotiation undermine the relevancy of any verification. Below we address the arguments regarding the inconsistencies in Doo Won's responses identified by Commerce.

Doo Won first posits that Commerce misread its production exhibits and that the warehouse slips we used to find inconsistencies in its yield loss calculation were for finished products, not input materials.[64] However, record evidence does not support Doo Won's argument. In its initial questionnaire response, Doo Won reported three occasions on which it creates warehouse slips: "Warehouse-In," (prior to garlic sorting) "Warehouse-Out," (prior to garlic sorting) and "Finished Product Warehouse-In" (after garlic sorting).[65] Based on the abovementioned descriptions of the accounting records provided by Doo Won, the warehouse slips it submitted, titled "Warehouse-In" and "Warehouse-Out" were created prior to garlic sorting, and not for finished products. Thus, Commerce's finding – that the garlic received by Doo Won had the same weight as the finished product garlic "produced" by Doo Won – is based on record evidence. In addition, as the petitioners note, the existence of a finished product warehouse-in slip does not undermine the proposition that Doo Won merely sorted and packed the input garlic bulbs, but rather, supports it. Doo Won reported that during the packing stage, after the cartons are sealed, the finished product warehouse-in slips are created.[66]

Doo Won next argues that because Commerce required X[67] year old records to substantiate its inconsistent claims of its production history, Commerce's finding was not "clear and definite," but "unreasonable."[68] This argument is misplaced. In its initial questionnaire response, Doo Won reported that it produced garlic for the first time during the POR.[69] In a supplemental questionnaire response, Doo Won provided production documents that indicated that it "produced and sold" garlic in prior years.[70] In the *Preliminary Results*, Commerce noted that the presence of this discrepancy, among others, raised concerns regarding our analysis of Doo

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[61] *See* Commerce's Cancellation Letter at 2-3.
[62] *Id*.
[63] *See* Comment 1.
[64] *See* Doo Won's Case Brief at 13.
[65] *See* Doo Won's September 5, 2017 CDQR at Exhibit 2; *see also* Doo Won's July 10, 2018 SQR at Exhibit SSS-1.
[66] *See* Doo Won's July 10, 2018 SQR at Exhibit SSS-1.
[67] This information is business proprietary in nature. "X" is used as a public placeholder. For the business proprietary discussion of this issue, *see* Doo Won's Final Analysis Memorandum.
[68] *See* Doo Won's Case Brief at 15-16 (citing *Cf. Thomas Jefferson*, 512 U.S. 504, 525 (1994); *see also Cf. Hontex*, No. 02-00223, Slip Op. 03-17 at 41 (CIT 2003) (citing *Queen's Flowers*, 981F. Supp. 617 at 628)).
[69] *See* Doo Won's August 11, 2017 AQR at A-11.
[70] *See* Doo Won's April 3, 2018 SQR at Exhibit SS-9.

Won's information.[71] Following the *Preliminary Results*, we requested that Doo Won clarify the discrepancies in its response and provide supporting documentation to refute the contradictory claims. Although Doo Won maintained records that demonstrated that it "produced and sold" garlic X years ago, it was unable to locate any documents that would substantiate its claim that the product list actually represented the "products produced *and/or* sold."[72] As explained above, in *Ta Chen*, the CAFC sustained Commerce's application of AFA for failing to provide older records, holding that "it is reasonable in this case for Commerce to expect {a respondent} to preserve its records in the event that Commerce itself would request them."[73]

Reliable production information is critical in Commerce's determination of whether a respondent qualifies as a new shipper within the meaning of 19 CFR 351.214. Accordingly, after Doo Won presented contradictory information regarding its production history, in the *Preliminary Results*, Commerce gave Doo Won and other interested parties "clear and definite" notice that the responses contained the abovementioned inconsistency.[74] Moreover, we provided Doo Won with an additional opportunity to cure the contradictions articulated by Commerce.[75] Thus, Doo Won's reliance on *Thomas Jefferson University* is misplaced for two reasons: (1) it is a proceeding which concerns whether certain approved educational costs can be reimbursed within Medicare program statutes and is therefore dissimilar from the facts of this case; and (2) Commerce's rules are been "clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law."[76] In addition, Doo Won's reliance on *Queen's Flowers* to support the proposition that Commerce's interpretation of the statute is unreasonable is strained. *Queen's Flowers* represents the proposition that an agency is granted the discretion to interpret its own statute, as long as it is reasonable.[77] In the instant review, Commerce requested necessary production information and clearly identified and outlined the discrepancy in Doo Won's records. Further, following the *Preliminary Results* in May, Commerce issued a supplemental questionnaire in June and permitted Doo Won until July to provide supplemental information to clarify its inconsistent responses.[78] Thus, Commerce's determination was clear, definitive, and reasonable.

Doo Won finally argues that it did not incur any costs associated with branding, and if it had, the expense would likely be so small as to be immaterial.[79] As noted above, Commerce's decision to cancel verification did not rest on an individual inconsistency, but the various inconsistencies which made Doo Won's responses unverifiable. Regarding the inconsistency in branding costs, we noted in the *Preliminary Results* that sample sales documentation detailed the specific branding requested by the customer; however, Doo Won did not report any branding or design

[71] *See* Doo Won's Preliminary Analysis Memorandum at 8.
[72] *See* Doo Won's August 8, 2018 Letter at 10 (emphasis added).
[73] *See Ta Chen*, 298 F.3d at 1349.
[74] *See Preliminary Results*, PDM at 4; *see also* Doo Won's Preliminary Analysis Memorandum at 8.
[75] *See* Commerce's Letter, "Semiannual New Shipper Review of Fresh Garlic from the People's Republic of China – Third Supplemental Questionnaire for Doo Won," dated June 27, 2018 (Doo Won's Post-Preliminary Supplemental Questionnaire).
[76] *See Thomas Jefferson University v. Shalala*, 512 U.S. 504, 525 (1994).
[77] *See Queen's Flowers*, 981 F. Supp. 617 at 628, citing *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994).
[78] *See* Doo Won's Post-Preliminary Supplemental Questionnaire.
[79] *See* Doo Won's Case Brief at 16.

costs in its initial questionnaire or when prompted in supplemental questionnaires.[80] Following the *Preliminary Results*, we requested that Doo Won remedy this discrepancy. Doo Won stated that the branding information was printed on the carton, but did not attempt to explain the discrepancy in the response or report any associated printing costs.[81] Following Commerce's cancellation of verification, Doo Won attempted to supplement its response, claiming that Doo Won purchased the cartons with the design already printed on them but did not refer to any evidence on the record that could substantiate this claim.[82] As Doo Won argues, the cost associated with branding would likely be very small.[83] However, it is not the size of the discrepancy that raises concerns regarding the reliability of Doo Won's data, but its presence following various requests from Commerce for further information. On several occasions, Doo Won failed to report branding costs or failed to provide a coherent explanation for why it did not incur such a cost when record evidence indicated that it did. Its unsubstantiated *post-hoc* explanation does not alleviate the concerns raised by its repeated obfuscation.

Comment 3: Whether Commerce is Obligated to Verify or Utilize Doo Won's Reported Information

Doo Won's Case Brief

- Commerce is legally required to apply the most accurate rates possible and to verify, in particular, where good cause exists.[84]
- The mere presence of correctable errors or deficiencies does not automatically make the information concerned unverifiable.[85]
- Commerce has not notified Doo Won that any deficiencies remain in the case; thus, if Commerce simply rescinds the NSR, it would be violating section 782 of the Act.[86]

The Petitioners' Rebuttal Brief

- The petitioners withdrew their request for verification in a timely manner, and Doo Won did not submit a timely request for verification, and Commerce reasonably concluded that good cause did not exist to conduct verification in this proceeding.[87]
- Doo Won's reliance on *Chia Far*, *Eregli Demir*, and *Hyundai Steel* is misplaced.[88]

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[80] *See* Doo Won's Preliminary Analysis Memorandum at 7-8.
[81] *See* Doo Won's July 10, 2018 SQR at 1-2.
[82] *See* Doo Won's August 8, 2018 Letter at 14-15
[83] *See* Doo Won's Case Brief at 16.
[84] *Id.* at 17 (citing, *e.g.*, *Shakeproof Assembly Components Div. of lll. Tool Works v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) (*Shakeproof Assembly*)). *See also GPX Intern. Tire Corp. v. United States*, 942 F.Supp.2d 1343, 1361 (2013) (*GPX Intern*). *See also Chia Far Indus. Factory Co., Ltd. v. United States*, 343 F.Supp.2d 1344, 1354 (2004) (*Chia Far*). *See also* 19 CFR 351.307(b)(1)(iv). *See also SNR Roulements v. United States*, 402 F.3d 1358, 1363 (Fed. Cir. 2005) (*SNR Roulements*). *See also Bowe Passat v. United States*, 17 CIT 335, 341 (1993) (*Bowe Passat*) (citing *NSK, Ltd. v. United States*, 16 CIT 745, 748, 798 F. Supp. 721, 724 (1992)).
[85] *See* Doo Won's Case Brief at 17-18 (citing *Hyundai Steel Company v. United States*, Slip Op. 18-77 at 6 (CIT 2018) (*Hyundai Steel*). *See also Eregli Demir Ve Celik Fabrikalari v. United States*, Slip Op 18-27 (CIT 2018) (*Eregli Demir*)).
[86] *Id*. at 19.
[87] *See* the Petitioners' Rebuttal Brief at 13.
[88] *Id*.

- In *Chia Far*, Commerce did conduct verification, but declined to accept information that the respondent attempted to submit at verification for the first time.[89] In fact, the CIT acknowledged that Commerce is not required to verify in all instances in *Chia Far*.[90]
- Both *Hyundai Steel* and *Eregli Demir* relate to Commerce's conduct of verification in original investigations. The statute and regulations regarding Commerce's obligation to verify information in an investigation are different from those for an NSR.[91]
- In fact, Commerce has cancelled verification in similar contexts where it found a respondent's submissions to be unreliable.[92]

Commerce's Position:

We agree that good cause does not exist to conduct a verification of Doo Won's reported information in this NSR. As indicated in Comments 1 and 2 above, Doo Won's reported information contained numerous inconsistencies and contradictions and lacked credible evidence for Commerce to conclude that Doo Won was the producer of the merchandise in question.

While we agree with Doo Won that Commerce should calculate antidumping duties on a fair and equitable basis,[93] the issue in this review is not a calculation issue. The issue here is whether Doo Won is the producer of the merchandise in question. *SNR Roulements*, therefore, is not relevant to the facts of this case. *SNR Roulements* concerned the calculation of U.S. credit expenses and inventory carrying costs, and the specific sentence quoted by Doo Won was directly related to the use of those expenses and costs in the margin calculation of the respondent.[94] Here, as stated above, we have determined that Doo Won was not the producer of the merchandise in question, and therefore, it is impossible to calculate a dumping margin based on Doo Won's reported information.

Similar issues plague Doo Won's reliance on *Shakeproof Assembly* and *Chia Far*. In *Shakeproof Assembly*, the arguments concerned the replacement of surrogate values with import prices of a particular factor of production into China.[95] In *Chia Far*, the arguments centered around a principle-agent relationship between the respondent and a U.S. company. Also, in *Chia Far*, Commerce did conduct a verification, but refused to accept new factual information at that verification.[96] Furthermore, Doo Won neglected to use the entire quote from *Chia Far* in its case brief. The full quote is as follows: "Commerce is obliged to calculate antidumping margins in the most accurate way possible. *To this end, the respondent must provide Commerce with the*

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[89] *Id*. at 14; *see also Chia Far*, 343 F. Supp. 2d at 1352.
[90] *See* the Petitioners' Rebuttal Brief at 14; *see also Chia Far*, 343 F. Supp. 2d at 1353.
[91] *See* the Petitioners' Rebuttal Brief at 14 (citing *also Hyundai Steel*; *see also Eregli Demir*).
[92] *Id*. at 15 (citing *see also Gourmet Equip. Corp. v. United States*, 24 CIT 572, 574-579 (CIT 2000) (*Gourmet Equip*); *see also Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture from the People's Republic of China*, 69 FR 67313 (November 17, 2004) and accompanying Issues and Decision Memorandum (*Wooden Bedroom Furniture from China*) at 84-86.; *see also Notice of Final Results of Antidumping Duty New Shipper Review: Certain In-Shell Raw Pistachios from Iran*, 68 FR 353 (January 3, 2003) and accompanying Issues and Decision Memorandum (*Pistachios from Iran*) at Comment 3).
[93] *See SNR Roulements*, 402 F.3d at 1363.
[94] *Id*.
[95] *See Shakeproof Assembly*, 268 F.3d at 1381-82.
[96] *See Chia Far*, 343 F. Supp. 2d at 1341.

most accurate, credible, verifiable information."[97] In this case, Doo Won did not provide accurate, credible, verifiable information concerning its production process nor did it remedy certain inconsistencies, notably: (1) whether its production documents supported its reported yield loss calculation; (2) whether it produced garlic for the first time during the POR; and (3) whether it incurred branding costs in the sale of the subject merchandise. The CIT has found that "{u}ltimately, the burden of creating an adequate record lies with the respondents, not Commerce."[98]

Doo Won's reliance on *Bowe Passat* is also misplaced. In *Bowe Passat*, the respondent provided new factual information in its pre-hearing brief intended to explain information concerning circumstance of sale adjustments, already on the record of the review.[99] In this instance, we have found that Doo Won's responses suffered from severe discrepancies and inconsistencies, which lead us to conclude that Doo Won was not the producer of the subject merchandise. The CIT found that the respondent in *Bowe Passat* was not given an opportunity to remedy its deficient response.[100] In the instant review, Doo Won was given an opportunity to remedy its deficiencies and inconsistencies, after the *Preliminary Results*, but failed to do so.[101]

Finally, we note that *GPX Intern*, *Eregli Demir*, and *Hyundai Steel* all relate to Commerce's verification procedures in original investigations. Section 351.307(b)(1)(iv) of Commerce's regulations states that Commerce will verify *if* good cause exists (emphasis added). Here we find that, since Doo Won's information is so replete with deficiencies and inconsistencies, good cause to verify does not exist. Importantly, the statute and regulations do not require Commerce to conduct verification in a NSR, especially if there is evidence that the information is unreliable.[102] This determination has been affirmed by the CIT and Commerce's practice in similar situations.[103]

Comment 4: Whether Commerce Wrongfully Rejected Doo Won's New Factual Information

Doo Won's Case Brief

- It was improper and not in accordance with the law for Commerce to reject Doo Won's April 28, 2018 comments because the interests of accuracy and fairness outweigh Commerce's interest in meeting its deadlines.[104]
- Commerce should accept Doo Won's July 29, 2018 submission to the record.[105]

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[97] *Id*. at 1354 (emphasis added, internal citations omitted).
[98] *See Tianjin Mach. Imp. & Exp. Corp. v. United States*, 806 F. Supp. 1008 (CIT 1992).
[99] *See Bowe Passat*, 17 CIT at 337.
[100] *Id*. at 343.
[101] *See* Doo Won's July 10, 2018 SQR.
[102] *See Pistachios from Iran*, accompanying Issues and Decision Memorandum at 10.
[103] *See, e.g., Gourmet Equip.* 24 CIT at 574-77; *see also Wooden Bedroom Furniture from China*, accompanying Issues and Decision Memorandum at 85-86; *see also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China, Final Results of 1997-1998 Antidumping Duty Administrative Review and Final Results of New Shipper Review*, 64 FR 61837, 61847 (November 15, 1999).
[104] *See* Doo Won's Case Brief at 20.
[105] *Id*.

The Petitioners' Rebuttal Brief

- Doo Won's arguments concerning the rejection of its new factual information ignore Commerce's regulations establishing time limits for the submission of new factual information.[106]
- The information in question was submitted in response to the petitioners' pre-preliminary comments addressing the *bona fides* of Doo Won's reported sale. The petitioners' comments did not contain new factual information. As such, the only justification for Doo Won's submission of new factual information would be 19 CFR 351.102(b)(21)(v).[107]
- Doo Won's submission of new factual information was filed within one week of Commerce's deadline to issue its preliminary results. As such, none of the time limits for new factual information applies to Doo Won's April 28, 2018, letter.[108]
- Finally, Commerce was justified in enforcing its rules and procedures in rejecting Doo Won's untimely filed new factual information.[109]

Commerce's Position:

Commerce disagrees with Doo Won that it erred as a matter of law in rejecting its April 28, 2018, submission. The submission contained new factual information not previously placed on the record. As new factual information, it is subject to 19 CFR 351.301, the regulatory provision that governs the time limits for the submission of factual information. Pursuant to 19 CFR 351.301(b), Doo Won failed to identify the subsection of 19 CFR 351.102(b)(21) under which the information was submitted. As the information was submitted in response to the petitioners' pre-preliminary comments, it does not qualify as any other type of new factual information under 19 CFR 351.102(b)(21)(i)-(iv) of Commerce's regulations. Therefore, such information is subject to the requirements of 19 CFR 351.301(c)(5), which explains that the deadline to file new factual information other than that described in 19 CFR 351.102(b)(21)(i)-(iv) is 30 days before the scheduled date of the preliminary results, or 14 days before verification, whichever is earlier. Accordingly, the deadline for Doo Won to file this form of new factual information was April 17, 2018. As the petitioners note, Commerce has broad discretion with respect to antidumping proceedings to fashion its own rules of administrative procedure, including authority to establish and enforce time limits concerning submissions of written information and data.[110] Thus, Commerce was justified in rejecting Doo Won's placement of untimely-filed factual information on the record.

VII. RECOMMENDATION

We recommend adopting the above positions, and rescinding Doo Won's NSR. If these recommendations are accepted, we will publish the final rescission of this NSR in the *Federal*

[106] *See* the Petitioners' Rebuttal Brief at 16.
[107] *Id*.
[108] *Id*. at 16-17.
[109] *Id*. at 17; *see also Yantai Timken Co. v. United States*, 521 F. Supp. 2d 1356, 1370-71 (CIT 2007) (*Yantai Timken*).
[110] *See* the Petitioners' Rebuttal Brief at 17 (citing *Yantai Timken*, 521 F. Supp. 2d 1356, 1370-71 (CIT 2007)); *see also Maui Pineapple Co., Ltd. v. United States*, 286 F.Supp.2d 1379(CIT 2003).

Register. We will instruct CBP to assess antidumping duties on Doo Won's entries covered by this NSR at the rate in effect at the time of entry, which was China-wide rate, and to discontinue the option of posting a bond or security in lieu of a cash deposit for entries of subject merchandise by Doo Won.

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Agree Disagree

10/1/2018

X

Signed by: GARY TAVERMAN

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