

**Fresh Garlic Producers Association, et al., v. United States**  
**U.S. Court of International Trade Consol. Ct. No. 14-00180**

FINAL RESULTS OF REDETERMINATION  
PURSUANT TO REMAND

**I. SUMMARY**

These final results of redetermination (*Final Remand Results*) were prepared by the Department of Commerce (the Department) pursuant to the decision and remand order issued by the U.S. Court of International Trade (the Court) on November 30, 2015.<sup>1</sup> This action arises from the final results of the 18<sup>th</sup> administrative review of the antidumping duty (AD) order on fresh garlic (garlic) from the People’s Republic of China (PRC).<sup>2</sup> In accordance with these *Final Remand Results*, the Department finds, under protest, that Hebei Golden Bird Trading Co., Ltd. (Golden Bird) is not part of the PRC wide entity, and is assigning to it a total AFA rate of \$2.24 per kilogram. Further, we have complied with the Court’s opinion regarding our determination of whether the Philippines was a significant producer of garlic during the relevant period. We continue to find that the Philippines was a significant producer, taking into account the “comparative” analysis required by the Court and the specific facts of this case. Finally, the Department provides additional explanation of its use of prices based on net weight that appeared

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<sup>1</sup> See *Fresh Garlic Producers Association, et al., v. United States*, CIT Slip Op. 15-133, Consol. Ct. No. 14-00180 (November 20, 2015) (*Garlic 18 Remand*).

<sup>2</sup> See *Fresh Garlic from the People’s Republic of China: Final Results and Partial Rescission of the 18<sup>th</sup> Antidumping Duty Administrative Review; 2011-2012*, 79 FR 36721 (June 30, 2014) (*Final Results*), and accompanying Issues and Decision Memorandum (IDM).

in the Philippine import data, in response to the Court's suggestion that the Department do so in the event it continued to rely on Philippine data for the *Final Remand Results*.

## II. BACKGROUND

On June 30, 2014, the Department published its *Final Results* pertaining to mandatory respondents Golden Bird and Shenzhen Xinboda Industrial Co., Ltd. (Xinboda), along with other exporters.<sup>3</sup> The period of review (POR) for this administrative review is November 1, 2011, through October 31, 2012. Following our non-market economy (NME) methodology, we selected the Philippines as the primary surrogate country.<sup>4</sup>

In the *Final Results*, the Department relied on total adverse facts available (AFA) with respect to Golden Bird and found that the company was part of the PRC-wide entity. The Department calculated a rate of \$1.82 per kilogram for Xinboda.

In its November 30, 2015 opinion, the Court remanded the *Final Results* to the Department to: (1) consider evidence on the record concerning Golden Bird's independence from government control to determine whether the company is entitled to separate rate status based solely on that evidence, and if so, to determine an appropriate AD margin specific to Golden Bird, taking into consideration the Department's sustained determination to select total AFA and applying the law extant at the time of the *Final Results*; (2) reconsider its surrogate country selection in the light of the Court's ruling concerning its interpretation of "significant producer."

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<sup>3</sup> See IDM.

<sup>4</sup> See *Fresh Garlic from the People's Republic of China: Preliminary Results and Partial Rescission of the 18<sup>th</sup> Antidumping Duty Administrative Review; 2011-2012*, 78 FR 77653 (December 24, 2013) (*Preliminary Results*), and accompanying preliminary decision memorandum (PDM).

On January 27, 2016 we released a draft version of these Remand Results to interested parties for comment.<sup>5</sup> Xinboda<sup>6</sup> and the Fresh Garlic Producers Association and its individual members (Petitioners)<sup>7</sup> both submitted comments on February 8, 2016. Golden Bird<sup>8</sup> and Petitioners<sup>9</sup> both submitted rebuttal comments on February 11, 2016. Complete responses to all comments received are provided below, following the Final Remand Results.

Pursuant to the Court's instructions, we are providing further explanations and addressing the deficiencies identified by the Court. As a result of these modifications to the *Final Results*, we select a total AFA dumping margin of \$2.24 per kilogram for Golden Bird.

### **III. ANALYSIS**

#### **A. Golden Bird**

In the *Preliminary Results*, the Department determined that Golden Bird was eligible for a separate rate, and calculated a weighted-average dumping margin of \$1.17 per kilogram.<sup>10</sup> However, after receiving evidence from petitioners that Golden Bird reported to the Chinese government that it exported significantly less garlic than the amount it had declared to the Department,<sup>11</sup> the Department issued a supplemental questionnaire to Golden Bird.<sup>12</sup> The

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<sup>5</sup> See Memorandum to the File from Thomas Gilgunn through Edward Yang, Re: *Draft Results of Redetermination Pursuant to Remand: Fresh Garlic from the People's Republic of China*, dated January 22, 2016.

<sup>6</sup> See Letter on Behalf of Shenzhen Xinboda Industrial Co., Ltd. re: *Fresh Garlic from the People's Republic of China: Xinboda Comments on Draft Remand Redetermination Pursuant to Slip Op. 15-133, CIT Consol. Ct. No. 14-00180 (Fresh Garlic Producers Association, et al. v. United States*, dated February 8, 2016 (Xinboda's Comments).

<sup>7</sup> See Letter on Behalf of the Fresh Garlic Producers Association re: *Remand of the 18<sup>th</sup> Administrative Review of Fresh Garlic from the Peoples Republic of China (Fresh Garlic Producers Ass'n, et al. v. United States, Court No. 14-00180) - Petitioners' Comments on Draft Remand Results of Redetermination Pursuant to Remand*, dated February 8, 2016 (Petitioners' Comments).

<sup>8</sup> See Letter from consolidated plaintiffs, re: *Rebuttal Comments on the Draft Remand Determination in the 2011-2012 Administrative Review (18<sup>th</sup> Administrative Review) of Fresh Garlic from the People's Republic of China in connection with Fresh Garlic Producers Association et. Al. v. United States, Consol. Court No. 14-00180, Slip Op. 15-133 (November 30, 2015)*, dated February 11, 2016 (Golden Bird's Rebuttal Comments).

<sup>9</sup> See Letter from Petitioners, re: *Remand of the 18<sup>th</sup> Administrative Review of Fresh Garlic from the Peoples Republic of China (Fresh Garlic Producers Ass'n, et al. v. United States, Court No. 14-00180) - Petitioners' Rebuttal Comments Regarding Draft Results of Redetermination Pursuant to Remand*, dated February 11, 2016 (Petitioners' Rebuttal Comments).

<sup>10</sup> See *Preliminary Results*, 78 FR at 77654.

<sup>11</sup> See Letter from Petitioners, "18<sup>th</sup> Administrative Review of Fresh Garlic from the People's Republic of

supplemental questionnaire requested that Golden Bird provide Chinese customs export declaration forms (CEDFs) and any other related documentation, demonstrating the amount of garlic exports it declared to the GACC (General Administration of the Customs of China) and what it reported to the Department and to CBP.

After receiving 16 days to respond to the supplemental questionnaire, Golden Bird disclosed that it did not have all of the documents that were requested. Golden Bird produced CEDFs that were only partially-completed and lacked the required stamps or chops that would appear on versions approved by the government of the PRC, and accounted for only a fraction of the U.S. sales during the POR it reported to the Department and to CBP.<sup>13</sup> Furthermore, Golden Bird admitted to intentionally reporting false pricing information to the Chinese government in its CEDFs, which it said it did to mislead its Chinese competitors.<sup>14</sup>

In the *Final Results*, the Department applied total adverse facts available to Golden Bird because the company repeatedly failed to provide sufficient documentation corroborating the majority of its purported sales during the POR and had significantly impeded the proceeding.<sup>15</sup> The Department determined that it could not rely on any of Golden Bird's questionnaire responses, including its Section A separate rate status response. Accordingly, the Department found that Golden Bird had not demonstrated its separate rate status and was part of the PRC-wide entity, which was assigned a rate of \$4.71 per kilogram.

The Court found that the Department's selection of total AFA was supported by substantial evidence. However, the Court held that the selection of the PRC-wide rate as Golden

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China – Petitioners' Response to Golden Bird's April 16, 2014 Submission" (April 28, 2014).

<sup>12</sup> See Letter from Edward C. Yang, Director AD/CVD Operations Office VII, to Golden Bird, "2011-2012 Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: Supplemental Questionnaire" (May 7, 2014) (Supplemental Questionnaire Letter).

<sup>13</sup> See IDM at 32-33.

<sup>14</sup> See *Id.* at 33.

<sup>15</sup> See *Id.* at 3.

Bird's total AFA rate was not supported by substantial evidence.<sup>16</sup> The Court held that it was improper for Commerce to reject Golden Bird's separate rate status "based solely on the discrepancies in its questionnaire responses and supplemental questionnaire responses related to sales volume, neither of which concerned Golden Bird's independence from government control."<sup>17</sup> The Court stated that the Department improperly ignored Golden Bird's Separate Rate Certification in selecting the PRC-wide rate as Golden Bird's total AFA rate, after having found that certification sufficient in the *Preliminary Results*.<sup>18</sup> The Court held that "{w}hen Commerce fails to make findings that a respondent's separate rate responses were inaccurate or deficient, its denial of a separate rate is unsupported by substantial evidence."<sup>19</sup>

The Department continues to believe that Golden Bird's inability to corroborate the majority of its U.S. sales tainted all of its responses. Golden Bird was never able to substantiate its Section A questionnaire response regarding the specific quantity of subject merchandise it exported to the United States during the period of review,<sup>20</sup> and the Section A response is also what contained Golden Bird's separate rate information.

Although the Department disagrees that such a fundamental defect in sales volume responses does not render responses relating to government control unreliable, it is obligated to comply with the Court's order to base its selection of an AFA rate on record evidence specific to the question of whether Golden Bird is subject to state control. The Department finds, under respectful protest,<sup>21</sup> that Golden Bird is eligible for separate rate status.

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<sup>16</sup> *Fresh Garlic Producers Association et. al. v. United States*, 2015 Ct. Int'l Trade 133, p 21 (Slip Op).

<sup>17</sup> *Id.* at 24.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 23.

<sup>20</sup> See IDM at 29-39.

<sup>21</sup> See *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

Under protest, the Department has complied with the Court’s instruction to apply the version of Section 776 of the Tariff Act of 1930, as amended (the Act), that governed at the time it issued the *Final Results*, *i.e.* absent recent amendments to provisions addressing selection and corroboration of information that may be used as an adverse inference in applying facts otherwise available.<sup>22</sup> The Department has selected Xinboda’s highest transaction-specific margin from the instant review to be used as Golden Bird’s AFA rate.<sup>23</sup> The margin of 153.65% led to a unit rate of \$2.24 per kilogram for Golden Bird. Finally, because we are relying on a calculated margin of another respondent, Xinboda, in the same review, there is no need to corroborate this information pursuant to section 776(c) of the Act.<sup>24</sup> This margin is based on a non-aberrational sale reported by Xinboda during the course of the same review. The Department has selected the highest such margin on the record because Golden Bird should “not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”<sup>25</sup>

## **B. Surrogate Country**

Under section 773(c)(4) of the Act, in valuing an NME producer’s factors of production, the Department shall utilize, to the extent possible, the prices or costs of the FOPs in one or more surrogate, market economy countries that are (a) at a level of economic development comparable to that of the NME country and (b) are significant producers of comparable merchandise. Moreover, in Policy Bulletin 04.1, the Department developed a surrogate country selection policy, in which it: (1) compiles a list of countries that are at a level of economic development comparable to the nonmarket economy country at issue; (2) ascertains which of the listed countries produce merchandise comparable to the subject merchandise; (3) determines which of

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<sup>22</sup> See Trade Preferences Extension Act of 2015, Pub. Law No. 114-27, 129 Stat. 362, § 502 (June 29, 2015).

<sup>23</sup> See Section 776(b)(4) of the Act.

<sup>24</sup> See *Nan Ya Plastics Corp. v. United States*, 810 F. 3d 1333 (Fed. Cir. 2016).

<sup>25</sup> See Statement of Administrative Action, H.R. Doc No. 103-316, 870, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199 (1994).

the listed countries are significant producers of such merchandise; and (4) evaluates the reliability and availability of the data from these countries.<sup>26</sup>

In May 2013, the Department placed the list of countries considered economically comparable to China on the record.<sup>27</sup> In the *Preliminary Results*, the Department relied on the 2011 United Nations Food and Agriculture Organization (FAO) production data for fresh garlic for those countries to determine whether they constituted significant producers of comparable merchandise: Colombia (6,170 metric tons (MT)), Costa Rica (0 MT), Indonesia (14,179 MT), the Philippines (9,056 MT), South Africa (0 MT), and Thailand (75,589 MT).<sup>28</sup> The Department determined that all of these countries were significant producers, with the exception of Costa Rica and South Africa.<sup>29</sup> Of these, the Department had sufficient data only from the Philippines and Thailand, and selected the Philippine surrogate value data because the Department was able to confirm the source to which it was attributed and that it was tax and duty exclusive.<sup>30</sup>

In the *Final Results*, the Department explained its determination that the Philippines qualified as a significant producer of comparable merchandise. At the outset, the Department rejected the notion that “some production equals significant production.”<sup>31</sup> The Department addressed Policy Bulletin 04.1, acknowledging that its reference to judging significant production consistent with the characteristics of world production of, or trade in, comparable merchandise was not instructive under the circumstances. The Department explained that, “Although production in the Philippines may only be a small percentage of the overall world

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<sup>26</sup> Import Administration Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process, (Mar. 1, 2004), available at [http://enforcement.trade.gov/Lp\\_policy/bull04-1.html](http://enforcement.trade.gov/Lp_policy/bull04-1.html) (Policy Bulletin 04.1).

<sup>27</sup> See Letter to All Interested Parties, “Fresh Garlic from the People’s Republic of China: Surrogate Countries and Surrogate Value Information” (May 2, 2013).

<sup>28</sup> PDM at 10.

<sup>29</sup> The Department stated that South Africa would be a significant producer based on data from South Africa’s Department of Agriculture, Forestry, and Fisheries that indicated the country produced 1,500 MT of fresh garlic in 2011, but discounted that information based on the discrepancy with the FAO data. PDM at 10-11.

<sup>30</sup> PDM at 11-12.

<sup>31</sup> IDM at 7.

production, the PRC accounts for, by far, the most garlic production, and thus most other countries will appear to have minimal production when measured as a percentage of total worldwide production.”<sup>32</sup> The Department further explained that Policy Bulletin 04.1 is not exhaustive, but rather a list of suggested methods not applicable to the specific facts of this review. Thus, the Department relied on a dictionary definition of “significant,” *i.e.*, “of a noticeably or measurably large amount.”<sup>33</sup> Because the Philippines produced over 9,000 MT, or nine million kilograms, of subject merchandise during 2011, the Department concluded that this quantity data indicated the country was a significant producer.<sup>34</sup>

The Court found that the Department failed to explain the criteria it applied in concluding that the Philippines was a significant producer, and that Commerce’s analysis of the quantity of the Philippines’ production improperly determined that a country was a significant producer if it had “any commercially meaningful production.”<sup>35</sup> The Court cited a dictionary definition of significant as “having or likely to have influence or effect,” and suggested on that basis that “an interpretation of ‘significant producer’ countries as those whose domestic production could influence or affect world trade would be a permissible construction of the statute.”<sup>36</sup> The Court noted that the Philippines’ .04% share of worldwide production cannot plausibly be considered “significant” under such a construction.<sup>37</sup> The Court explained, however, that the Department may employ an alternate methodology, as long as it rests on a reasonable interpretation of the

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 8-9 & n.22.

<sup>34</sup> *Id.* at 9.

<sup>35</sup> Slip Op. at 43.

<sup>36</sup> *Id.* at 42.

<sup>37</sup> *Id.* at 43.



statute.<sup>38</sup> The Court further indicated that a reasonable interpretation of the statute must include an element of comparative analysis.<sup>39</sup>

To comply with the Court's order, the Department will further explain how it interpreted section 773(c)(4) of the Act to conclude that the Philippines qualified as a significant producer. The Department considered the dictionary definition of "significant" as "a noticeably or measurably large amount," and evaluated the production data to determine whether the data was sufficiently large in volume such that Philippine price data could provide reliable surrogate values reflecting the commercial market reality of producing the subject merchandise in that country. The Department determined that the production level of 9,056 MT of garlic was significant because that amount was "noticeably or measurably large" enough to reasonably assume that the data reflect transactions among buyers and suppliers in a normal marketplace. This interpretation follows from the underlying purpose of section 773(c)(4) of the Act to identify reliable market-based prices upon which to value a NME producer's factors of production. In this regard, the Court is correct that the Department evaluated whether the Philippine production quantity was "commercially meaningful." However, the Department's analysis did not merely distinguish between artisanal and commercial production, but rather evaluated whether the level of commercial production was significant.

The Department's interpretation is also based on the reality of paucity of candidates to serve as surrogate market economy countries, especially from countries at the same level of economic development. The Department's flexible approach increases the chance of finding surrogate values to match the various factors of production without sacrificing the gain in representativeness because the values are from a country at the same level of economic

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<sup>38</sup> *Id.* at 45.

<sup>39</sup> *Id.*

development as the country under the investigation. Such a gain is lost when the Department selects a country that is not at the same level of economic development.

As noted by the Court, an interpretation of “significant producer” as those countries whose domestic production could influence or affect world trade is a permissible construction of the undefined statutory term “significant producer.” But it is not the only such permissible construction. Given the facts of this case, we find that it is reasonable to rely on a different construction of the term “significant producer,” one that takes into account the dictionary definition that “significant” can mean “of a noticeably or measurably large amount.” China’s production level is far and away the largest in the world – over eighteen times larger than the next largest producing country, India. Given that extreme disparity, it is arguable that no other country qualifies as a significant producer using the interpretation that “significant” means the ability to influence or affect world trade. Although Policy Bulletin 04.1 advises that the Department should evaluate “significant production” “consistent with the characteristics of world production of, and trade in, comparable merchandise,” it also underscores that the Department must retain flexibility in interpreting the term. Policy Bulletin 04.1 notes that “meaning of ‘significant producer’ can differ significantly from case to case” and that “the specific criteria and supporting factual information used to determine whether a potential surrogate country is a significant producer is left to the discretion of the operations team.” We note that the Court’s suggested statutory construction may be appropriate where the largest producers are also at the same level of economic development as the producer of the subject merchandise. In some cases, such as this one, this construction will be unnecessarily strict because it will eliminate from consideration surrogate values from an economically comparable country and leave only surrogate values from a less economically comparable country, or leave none at all.

For similar reasons, the Department respectfully disagrees with the Court that there is an inherent “comparative aspect of the significant producer analysis.”<sup>40</sup> The statute does not specify that such an analysis is required. Moreover, the legislative history states only that the “term ‘significant producer’ *includes* any country that is a significant net exporter and, if appropriate, Commerce may use a significant net exporting country in valuing factors.”<sup>41</sup> Consistent with this language, a country not among the largest producers can be a producer significant enough to provide meaningful market-based values. Nevertheless, to comply with the Court’s order, the Department will explain why a comparative analysis also supports its determination that the Philippines was a significant producer of garlic during the POR.

The Department notes that, under Policy Bulletin 04.1 “the extent to which a country is a *significant* producer should not be judged against the NME country’s production level.”<sup>42</sup> Based on this, the Policy Bulletin makes clear that a comparison should not be made between China’s garlic production and that of the Philippines (19,219,939 MT vs. 9,056 MT). China is the country under review for whether its sales of garlic are dumped sales, and therefore its portion of world production (approximately 19 of 23 million MT) should be disregarded. However, according to the FAO data, ninety-five other countries produced garlic in 2011, and the Philippines’ production volume of 9,056 MT placed it above the median among countries (43<sup>rd</sup> among the 95 other countries).<sup>43</sup> Reviewing the overall list, we view the Philippines’ 2011 production volume as significant among producing countries. Furthermore, consistent with the Department’s statutory interpretation outlined above, it is reasonable to assume that this amount

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<sup>40</sup> Slip Op. at 45.

<sup>41</sup> Omnibus Trade and Competitiveness Act of 1988, H.R. CONF. REP. 100-576 at 590 (Apr. 20, 1988) (emphasis added).

<sup>42</sup> Policy Bulletin 04.1 (emphasis in original).

<sup>43</sup> See Letter to the Acting Secretary, “18th Administrative Review of Fresh Garlic from the People’s Republic of China – Petitioners’ Comments on the Selection of a Surrogate Country and Surrogate Factor Values,” dated June 28, 2013 (Petitioners’ SV Submission) at page 5.

of garlic production reflects an adequate number of garlic producers who are commercially viable, and their transactions reflect market values that can be used for surrogate values.

In sum, we find that it is reasonable to interpret the term “significant producer” as meaning a country with a “noticeably or measurably large amount” of production. This is particularly appropriate in this case, where China so dominated world production during the POR. We have also included a comparative aspect in our analysis. The meaning of the term “significant,” the large volume of Philippine production of garlic, and the rank of the Philippines compared to other countries all support our finding here. Accordingly, we continue to find that the Philippines was a significant producer of garlic during the POR.

#### **IV. COMMENTS ON DRAFT REMAND RESULTS**

##### **Issue 1: Golden Bird**

###### *Petitioners’ Comments:*

- The CIT, “did not direct the Department to find on remand that Golden Bird is eligible for a separate rate. Instead, the court instructed the Department to revisit this issue by considering the record evidence related to the exporter’s independence from government control.”<sup>44</sup>
- Petitioners contend that “a finding by the Department that {Golden Bird’s General Manager’s} company certifications for Golden Bird’s submissions related to the calculation of its dumping rate are neither credible nor reliable would provide the Department with an ample basis on which to further find that {the General Manager’s} certification for Golden Bird’s SRC also is neither credible nor reliable.”<sup>45</sup>

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<sup>44</sup> See Petitioners’ Remand Comments at 7.

<sup>45</sup> *Id.* at 8-9.

- Petitioners state that “it is common sense that no one should rely on a person’s word concerning any important fact who has proven to be unreliable and not credible on many other facts.”<sup>46</sup> Petitioners state that it is the Department’s responsibility to weigh the credibility of all record evidence, including the source of said evidence, to be used as the basis for its determinations.
- Petitioners state that Golden Bird’s submissions concerning calculation of its dumping rate overlap with its SRC. Petitioners cite the General Manager’s affirmation that Golden Bird had valid export certificates (*i.e.*, CEDFs) during the period of review, that its prices were not in any way controlled by a government entity during that time, and that it would provide any and all documents in support of its separate rate status, as statements in the SRC that are contradicted by record evidence and that support a finding that its General Manager “was not a credible or reliable guarantor of the truthfulness of Golden Bird’s SRC.”<sup>47</sup>
- Petitioners cite to *Ad Hoc Shrimp*,<sup>48</sup> where the Federal Circuit “determined that (the respondent company’s) withholding of information and misrepresentations ‘undermined all of (the respondent company’s) submissions regarding its ownership and corporate structure, as well as Commerce’s ability to rely on (the General Manager’s) certifications of those submissions.’”<sup>49</sup> Petitioners also cite *Jiangsu Changbao*,<sup>50</sup> in which the CIT sustained the Department’s decision to reject the respondent’s separate rate application where the Department found the respondent’s officials were not credible because they

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<sup>46</sup> *Id.* at 9.

<sup>47</sup> *Id.* at 10-11.

<sup>48</sup> See *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d. 1339 (Fed. Cir. 2015) (*Ad Hoc Shrimp*).

<sup>49</sup> See Petitioners’ Remand Comments at 13.

<sup>50</sup> *Jiangsu Changbao Steel Tube Co. v. United States*, 884 F. Supp. 2d 1295, 1309 (Ct. Int’l Trade 2012).

lied during verification and designed its computer accounting software to corroborate its material misrepresentations.<sup>51</sup>

- The Department should find that “(1) Golden Bird’s misrepresentations render the entirety of its submissions unreliable; (2) its failure to adequately respond to the Department’s requests for information about its sales volume prevented the Department from evaluating the impact of Golden Bird’s misrepresentations; and (3) it cannot rely upon Golden Bird’s SRC and its Section A questionnaire response.” Petitioners conclude that the Department should assign Golden Bird the China-wide rate.<sup>52</sup>

*Golden Bird’s Rebuttal Comments:*

- Petitioners’ comments “are totally inappropriate, are beyond the scope of the Department’s request for comments, involve issues already addressed by the Court, and are untimely since (Petitioners) participated fully in the Court action with the opportunity to make the same points before that forum.”<sup>53</sup>
- Petitioners “provide not one fact that shows Golden Bird has been either *de jure* or *de facto* under Chinese government control...If Golden Bird were under Chinese government control, the (Petitioners) would have provided specific evidence to that effect during the POR.”<sup>54</sup>

*Department’s Position:*

The Department continues to find, under protest, that Golden Bird is eligible for a separate rate under the limitation that its determination be based solely on record evidence of Golden Bird’s independence from government control. The Department has not identified

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<sup>51</sup> Petitioners’ Remand Comments at 13-14.

<sup>52</sup> *Id.* at 14.

<sup>53</sup> See Golden Bird’s Rebuttal Comments at 2.

<sup>54</sup> *Id.* at 2-3.

deficiencies in Golden Bird's SRC or Section A responses specific to government control of its export activities, and declines to accept Petitioners' suggestion that it make certain new factual findings supporting the responses' invalidity.

The Department continues to believe that fundamental deficiencies it identified in the *Final Results* provided sufficient basis for rejection of Golden Bird's separate rate information.<sup>55</sup> On appeal, the Court acknowledged "the severity of Golden Bird's failure to cooperate and the centrality of the deficient response to the calculation of a dumping margin," and that "Golden Bird's sales volume is fundamental to the AD analysis, and was a critical component in Golden Bird's selection as a mandatory respondent."<sup>56</sup> Furthermore, the Court noted the relevance of Golden Bird's intentional reporting of false pricing information in the CEDFs it submitted.<sup>57</sup>

However, the Court rejected the Department's position that these defects were severe and cross-cutting such that they tainted all of Golden Bird's responses, as well as the Department's position that it could not rely in particular on Golden Bird's Section A responses, which included Golden Bird's separate rate information, because the export volume discrepancies arose in Golden Bird's Section A and supplemental Section A responses.<sup>58</sup> Rather, the Court found that the deficiencies were "akin to the failure to provide product-specific sales and cost data," and consistently characterized the issue as limited to a sales volume discrepancy.<sup>59</sup> The Court held that "Commerce cannot ignore a party's separate rate information solely because it selects total AFA, due to defects related to sales data."<sup>60</sup> Accordingly, the Court concluded that it was

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<sup>55</sup> IDM at 33-39.

<sup>56</sup> Slip Op. at 20.

<sup>57</sup> *Id.* at 21.

<sup>58</sup> See IDM at 38-39; Slip Op. at 20-24.

<sup>59</sup> Slip Op. at 20-21, 23-24.

<sup>60</sup> *Id.* at 23.

unreasonable for the Department to reject “Golden Bird’s rebuttal evidence on the discrete point of government control.”<sup>61</sup>

Petitioners suggest that the Department should make additional factual findings to provide a new basis to reject Golden Bird’s separate rate information, each of which hinges on the fact that the same individual signed the company certification for the SRC and Section A and Golden Bird’s supplemental questionnaire responses. Under the Court’s reasoning set forth above, the Department does not see a meaningful distinction between its previous explanation that crucial discrepancies arose in the very document (Section A) that contained Golden Bird’s separate rate responses,<sup>62</sup> and the Petitioners’ proposed findings meant to tie the export volume issue to the same responses, as well as the more abbreviated responses in the SRC. In particular, Petitioners suggest that the Department find the Golden Bird General Manager’s “company certifications for Golden Bird’s submissions related to the calculation of its dumping rate are neither credible nor reliable,” which in turn, “would provide the Department with an ample basis on which to further find that {the General Manager’s} certification for Golden Bird’s SRC also is neither credible nor reliable.”<sup>63</sup> But such proposed findings appear to follow the same logic that the Department applied in the *Final Results* and the Court rejected, insofar as they rely on using the major export volume discrepancies as grounds to invalidate Golden Bird’s responses with respect to independence from government control.

The Department declines, on this record, to make further factual findings concerning Golden Bird’s General Manager’s credibility. The Department previously articulated serious concerns about Golden Bird’s credibility, noting that the prices reflected in Golden Bird’s CEDFs did not match those in its U.S. sales database, which was not an issue for the other,

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<sup>61</sup> *Id.* at 24.

<sup>62</sup> *See* IDM 38.

<sup>63</sup> Petitioners’ Remand Comments at 8-9.



cooperating respondent.<sup>64</sup> The Department determined that Golden Bird provided it “partial information, at best,” and that all of its explanations for its failure to meet the Department’s information requests were unsubstantiated.<sup>65</sup> Thus, the Department agrees with Petitioners that Golden Bird’s credibility was at issue. Furthermore, the cases cited by Petitioners lend support to the Department’s argument that it acted appropriately when it, in part based on these concerns relating to Golden Bird’s credibility, determined that all of Golden Bird’s information was unusable.<sup>66</sup> However, Petitioners’ proposed findings are more akin to an affirmative finding of deceit or fraud, which the Department hesitates to make on this record. In this review, Golden Bird’s deficiencies were exposed in a compressed timeframe immediately prior to the *Final Results* and the record was not as developed as those in *Ad Hoc Shrimp* or *Jiangsu Changbao*. Moreover, unlike the respondents in *Ad Hoc Shrimp* or *Jiangsu Changbao*, Golden Bird never conceded that it lied to the Department.<sup>67</sup>

## **Issue 2: Surrogate Country Selection:**

### *Xinboda’s Comments:*

- The Department failed to adequately address the Court’s concerns regarding the comparative aspect of the significant producer analysis.<sup>68</sup>
- The Department is relying on any amount (of production) that the Department itself notices and declares is “measurably large,” without providing an explanation of what a “noticeable or measurably large amount” should be.<sup>69</sup>

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<sup>64</sup> See IDM at 33.

<sup>65</sup> See *id.* at 33-34.

<sup>66</sup> In addition, the Department notes that *Ad Hoc Shrimp* supports its position that, where the basis for its selection of total AFA related to “core” information, the Department may conclude that the deficiency cuts across all aspects of the respondent’s data. See *Ad Hoc Shrimp*, 802 F. 3d at 1357; see also *Ad Hoc Shrimp Trade Action Comm. v. United States*, 992 F. Supp. 2d 1285, 1293 (Ct. Int’l Trade 2014).

<sup>67</sup> See *Ad Hoc Shrimp*, 802 F.3d at 1345-46; *Jiangsu Changbao*, 884 F. Supp. 2d at 1301.

<sup>68</sup> See Xinboda’s Remand Comments at 3.

<sup>69</sup> *Id.* at 3.

- Xinboda further argues that “the Department’s claim that ‘a comparative analysis also supports its determination that the Philippines was a significant producer of garlic during the POR’ is not supported by substantial evidence and has no merit.”<sup>70</sup> Xinboda argues that the Philippines ranks of 43<sup>rd</sup> out of 95 other producing countries does not mean that Philippine garlic production is “above the median” of world production.<sup>71</sup>
- Xinboda states that “excluding both of the top producers, India and China, the Philippines still only produces 0.26 percent of the remaining garlic production. From every possible perspective, an analysis of world garlic production leaves the Philippines as an insignificant player, unable to ‘influence or affect world trade.’”<sup>72</sup>
- The Philippine garlic market is not a normal marketplace. Xinboda states that “almost half of the garlic on the Philippine market is imported from China.”<sup>73</sup>
- Xinboda states that the “Department also fails to consider that the Philippine Government is heavily involved in subsidizing and controlling the garlic market and that much of the Philippine garlic production is of seed garlic which is not subject merchandise...”<sup>74</sup> The Department “fails to analyze the effect of the pervasive smuggling of garlic into the Philippines on the transactions between buyers and sellers.”<sup>75</sup>
- Finally, Xinboda concludes that “the Department cannot support with substantial evidence its finding that the Philippines is a significant producer of fresh garlic based

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<sup>70</sup> *Id.* at 7.

<sup>71</sup> *Id.* at 6.

<sup>72</sup> *Id.* at 7.

<sup>73</sup> *Id.* at 8.

<sup>74</sup> *Id.* at 8.

<sup>75</sup> *Id.* at 9.

upon either previous accepted definitions, as acknowledged by the court, or under the Department’s own Policy Bulletin 04.1”<sup>76</sup>

*Petitioners’ Rebuttal Comments:*

- Petitioners state that the Department, “does explain that Philippine production, ‘was significant because that amount was ‘noticeably or measurably large’ enough to reasonably assume that the data reflect transactions among buyers and suppliers in a normal marketplace.”<sup>77</sup>
- Petitioners argue that the “court did not require the Department to conduct a ‘comparative analysis’ on remand....(and) that the Department may reasonably interpret the statute differently, which might not ‘necessarily require{ } comparing potential surrogate countries’ production to world production.”<sup>78</sup>
- Petitioners further argue that the Department did in fact conduct a comparative analysis in explaining that the Philippines was the 43<sup>rd</sup> largest producer of garlic in the world. That rank further supports the Department’s finding.<sup>79</sup>
- Petitioners address Xinboda’s suggested comparisons (*e.g.*, excluding China and India): “those alternative comparisons, would result in the Department removing a country from consideration that is equally economically comparable to China, is a significant producer of comparable merchandise, and that provides quality and reliable data in favor of countries that are either not equally economically comparable (India) or do not provide quality and reliable data for comparable merchandise (India and Thailand).”<sup>80</sup>

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<sup>76</sup> *Id.* at 10.

<sup>77</sup> *See* Petitioners’ Rebuttal Comments at 5.

<sup>78</sup> *Id.* at 5-6.

<sup>79</sup> *Id.* at 6.

<sup>80</sup> *Id.* at 8.

- Petitioners rebut Xinboda’s arguments concerning the normalcy of the garlic market in the Philippines. “The Department uses the phrase ‘normal marketplace’ to further explain why its definition of ‘significant’ is a permissible construction of the statute in this case...the Department finds that there was enough production in the Philippines for it to proceed with its surrogate country selection process to an analysis of Philippines value date for the Chinese factors of production.”<sup>81</sup>
- Petitioners argue that “because the Department determines that the Philippines satisfies all of its criteria, the Department should reject Xinboda’s attempts to expand the scope of this remand beyond the ‘significant producer’ criterion.”<sup>82</sup>
- Petitioners also make the point that the Department has already rejected Xinboda’s argument that there is pervasive smuggling of garlic into the Philippines in the *Final Results*.<sup>83</sup>
- Finally, the Petitioners contend that because the Department has already explained that the Philippine source for input garlic was superior to the Thai source, and that India was not considered as an appropriate surrogate country because it was not as economically comparable to China, “Xinboda’s preferred sources of data, Thailand and India, are not more, or even equally appropriate to the Philippines.”<sup>84</sup>

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<sup>81</sup> *Id.* at 9.

<sup>82</sup> *Id.* at 10.

<sup>83</sup> *Id.* at 10.

<sup>84</sup> *Id.* at 10-11.

*Department's Position:*

In the *Draft Remand Results*, the Department indicated that it read the Court's opinion to require an element of comparative analysis, but that it respectfully disagreed that such an analysis is required under the applicable statute.<sup>85</sup> To the extent that the Court did not require such an analysis, the Department agrees with Petitioners that the Court should affirm the Department's proffered statutory interpretation.

The Department disagrees with Xinboda's arguments that the Department failed to adequately address the Court's concerns regarding the comparative aspect of the significant producer analysis. The Department addressed the "significant producer" issue in two parts. First, the Department considered whether the Philippines was a "significant producer" because it produced "a noticeably or measurably large amount" of comparable merchandise, such that it would provide reliable surrogate values. Reliable values require the prices of the merchandise produced to reflect the commercial market reality of producing such merchandise in a world market. Clearly criteria for such a determination vary by case and by the merchandise in question. The Department believes that 9,056 MT of garlic produced and sold in the Philippine market reflects the fact that the Philippines is a country that has viable garlic sector.

Second, the Department, nevertheless, proceeded to complete a comparative analysis to the best of our ability given the record of this proceeding. As we pointed out above, the Philippines was ranked 43rd out of 95 world producers of garlic. It is a mid-range producer of garlic in the world market, and therefore it is also reasonable to assume that this amount of garlic production reflects an adequate number of garlic producers who are commercially viable, and their transactions reflect market values that can be used for surrogate values. Xinboda's claim

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<sup>85</sup> See *Draft Remand Results* at 8 (citing Slip Op. at 45), 10.

that the Philippine rank of 43rd out of 95 is not above the median is incorrect.<sup>86</sup> The median of 95 is between 47 and 48; therefore, as the 43<sup>rd</sup> largest producer of garlic, the Philippines is in the top half of garlic-producing countries worldwide. Xinboda's argument that Philippine garlic production comes to 0.26 percent of the world total during the POR if China and India were removed is not dispositive; after removing India and China, 94 countries remained and garlic production was relatively even divided among them. In sum, the meaning of the term "significant," the large volume of Philippine production of garlic, and the rank of the Philippines compared to other countries all support our finding here.

Xinboda's comments also raise a number of issues beyond the scope of the Court's remand concerning whether the Philippines qualified as a "significant producer." The Department notes that, in the *Final Results*, we addressed Xinboda's claim that the Philippine garlic market was distorted due to smuggling during the POR.<sup>87</sup> We have also already explained that the Philippine source for input garlic was superior to the Thai source.<sup>88</sup> In the *Final Results*, we addressed the quality of input garlic in the Philippine market, and found no record evidence to support the allegation that the Philippine companies received actionable subsidies.<sup>89</sup>

Accordingly, we continue to find that the Philippines was a significant producer of garlic during the POR, and that the Philippines was the best possible choice for a surrogate country for the 18<sup>th</sup> Administrative Review.

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<sup>86</sup> See Webster's Online Dictionary, <http://www.merriam-webster.com/dictionary/median> (defining median as "a value in an ordered set of values below and above which there is an equal number of values or which is the arithmetic mean of the two middle values if there is no one middle number").

<sup>87</sup> See IDM at 10.

<sup>88</sup> *Id.* at 9-13.

<sup>89</sup> *Id.* In addition, we note that Xinboda did not argue during the underlying administrative review that LM Arenas' financial statement should not be used because part of its production was non-subject seed garlic. In any event, Xinboda does not claim that any portion of the Philippines' 9,056 MT garlic production during 2011 reflected seed garlic production, and the fact that a Philippine company produced seed garlic is not relevant to the Department's conclusion that the above quantity was significant.

Finally, the Department will provide further explanation of its use of certain net weight values contained in GTA import data for the Philippines, in response to the Court's suggestion that the Department do so in the event it continued to use the Philippines as a surrogate country. As stated in the Final Results, the NME questionnaire requires information on the quantity of inputs actually used to produce the subject merchandise in the NME ("the Department's questionnaire asks respondents to report their FOPs 'based on the actual inputs used by your company,' *i.e.*, net quantity in kilograms"). Thus, the FOP is the actual amount of an input consumed in the production of the subject merchandise. So, a respondent reports only the amount of nitrogen used as its FOP for peeled garlic even though the nitrogen is delivered to the respondent in a canister, which is part of its overall nitrogen cost.

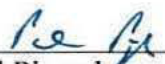
As discussed in the IDM, the surrogate value for each input material cost is calculated on a delivered-to-producer (*i.e.*, respondent) basis. Therefore, the surrogate value used to value a respondent's FOP should include packaging costs. The Department then adds a freight cost to surrogate values derived from import data, so that the total surrogate value reflects delivered-to-producer costs.

As Xinboda notes in its supplemental court brief, the vast majority of GTA import data (a primary source for surrogate values) is only reported on a gross value and gross weight basis. Thus, because of data limitations, the Department normally calculates surrogate values using gross value and gross weight, which somewhat understates the per unit cost of the FOP (input) used by the respondents. For example, while a respondent pays \$2,000 for 1,000 kgs of nitrogen inclusive of packaging which weighs 50 kgs (*i.e.*, gross value), it only reports that it uses 1,000 kgs of nitrogen (net weight). Dividing gross value of \$2,000 by a gross weight of 1,050 kgs understates the per kg value of the input used.

However, the Philippine GTA import data reported for most of the relevant inputs at issue was also reported on a net weight basis. Thus, in this instance, the Department was able to calculate a more accurate per unit value for the “packaged” input by dividing the GTA reported gross value by the reported net weight for each input. As indicated above, the Department calculates input material costs on a “delivered-to-producer basis,” so the per unit cost of the inputs used by the respondent should reflect packaging costs and transportation costs.

#### V. FINAL RESULTS OF REDETERMINATION

Per the Court’s instructions, we reviewed solely Golden Bird’s responses relating to independence from government control, and found Golden Bird to be eligible for separate rate status. Applying law extant at the time of the *Final Results*, we selected Xinboda’s highest-transaction specific margin on the record, \$2.24 per kilogram, as Golden Bird’s AFA rate. Finally, we explained why we continue to find that the Philippines was a significant producer of garlic for purposes of surrogate country selection.

  
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Paul Piquado  
Assistant Secretary  
for Enforcement and Compliance

29 FEBRUARY 2016  
Date