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Remand
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Shenzhen Xinboda Industrial Co., Ltd. v. United States
U.S. Court of International Trade Consol. Ct. No. 12-00174, Slip Op. 20-50 (April 17, 2020)

FINAL RESULTS OF REDETERMINATION
PURSUANT TO REMAND

I. SUMMARY

These final results of redetermination (*Final Remand Results*) were prepared by the Department of Commerce (Commerce) pursuant to the decision and remand order issued by the U.S. Court of International Trade (the Court) on April 17, 2020.[1] This action arises from the final results of the 16th administrative review of the antidumping duty (AD) order on fresh garlic (garlic) from the People's Republic of China (China).[2] Pursuant to the Court's opinion, Commerce has further considered and explained its selection of the Tata Global Beverages Limited (Tata Tea) financial statement for use in the calculation of the surrogate financial ratios used to determine Shenzhen Xinboda Industrial Co., Ltd.'s (Xinboda) dumping margin calculation.

On June 15, 2020, Commerce released a draft version of these *Final Remand Results*, to interested parties, and gave them an opportunity to comment.[3] On June 22, 2020, both Xinboda

[1] *See Shenzhen Xinboda Industrial Co. v. United States*, Consol. Ct. No. 12-00174, CIT Slip Op. 20-50 (April 17, 2020) (*Xinboda 2009-10*).
[2] *See Fresh Garlic from the People's Republic of China: Final Results of the 2009-2010 Administrative Review of the Antidumping Duty Order*, 77 FR 34346 (June 11, 2012) (*Garlic 16 Final Results*), and accompanying Issues and Decision Memorandum (IDM).
[3] *See* Memorandum, "*Shenzhen Xinboda Industrial Co., Ltd. v. United States*, Consol. Court No. 12-00174, Slip Op. 20-50 – Draft Results of Redetermination Pursuant to Court Remand," dated June 15, 2020 (*Draft Remand Results*).

and the Fresh Garlic Producers Association (FGPA)[4] submitted comments on the *Draft Remand Results*.[5] We have addressed these comments in section IV below.

II. BACKGROUND

On June 11, 2012, Commerce published the *Garlic 16 Final Results* pertaining to mandatory respondent Xinboda, along with other exporters.[6] The period of review (POR) for this administrative review is November 1, 2009 through October 31, 2010. We applied financial ratios taken from the 2010-2011 unconsolidated financial statements of Tata Tea, an Indian tea processor.[7]

In its April 17, 2020 opinion, the Court sustained Commerce's selection of surrogate values (SV) for Xinboda's garlic bulbs as an intermediate input. However, the Court remanded the final results to Commerce with instructions to further explain or consider its decision to rely on Tata Tea's 2010-2011 unconsolidated financial statements for the calculation of surrogate financial ratios.[8]

Regarding the financial statements, the Court held that Commerce did not adequately "address record evidence of possible subsidization" or "explain why such evidence would not suffice to constitute a 'reason to believe or suspect' that the reported prices in Tata Tea's

[4] The individual members of the FGPA are Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc. (collectively, the petitioners).
[5] *See* Xinboda's Letter, "Fresh Garlic from the People's Republic of China: Comments re Draft Remand Redetermination Pursuant to Slip Op. 20-50, CIT Ct. No. 12-00174 (*Shenzhen Xinboda Industrial Co., Ltd. v. United States*)," dated June 22, 2020 (Xinboda's Remand Comments); *see also* Petitioners' Letter, "Remand of the Final Results of the 16th Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China – Petitioners' Comments on Draft Redetermination Pursuant to Remand," dated June 22, 2020.
[6] *See Garlic 16 Final Results*.
[7] The financial statements show that in May/June 2010 Tata Tea Limited changed its name to Tata Global Beverages Limited. *See* Chengwu County Yuanxiang Industry & Commerce Co., Ltd.'s Letter, "Fresh Garlic from the People's Republic of China Administrative Review," dated August 11, 2011 (Chengwu's August 11, 2011 SV Submission) at Exhibit 2 page 84.
[8] *See Xinboda 2009-10* at 33.

statements are subsidized."[9] Furthermore, the Court held that, if it is Commerce's position to "rely on the financial statements of a company that 'may have received export incentive or other general subsidies' so long as {Commerce} has not previously found 'that the subsidies were received pursuant to a specific program determined to be countervailable,'" then "Commerce should clarify its practice and, further, explain why it is reasonable, in light of evidence of countervailable subsidies in this case."[10]

Commerce continues to rely on financial ratios calculated from Tata Tea's 2010-2011 unconsolidated financial statements and further explains its practice below regarding when it is appropriate to disregard financial statements due to evidence of countervailable subsidies.

III. ANALYSIS

Selection of Surrogate Financial Statements

At the time of the *Garlic 16 Final Results*, as the Court recognized, and in accordance with the legislative history of the antidumping duty statute, Commerce avoided using "any prices which it ha{d} reason to believe or suspect may be dumped or subsidized prices."[11] The legislative history also explains that Congress did "not intend for Commerce to conduct a formal investigation to ensure that such prices are not dumped or subsidized," but rather that "Commerce base its decision on information generally available to it at that time."[12] Since the *Garlic 16 Final Results*, however, Congress has amended the Tariff Act of 1930 (the Act) with

[9] *Id.* at 32.
[10] *Id*. at 31.
[11] *See* Omnibus Trade and Competitiveness Act of 1988, H.R. Rep. No. 100-576 at 590-91, reprinted in 1988 U.S.C.C.A.N. 1547, 1623-24; *see also Weishan Hongda Aquatic Food Co. v. United States*, 917 F.3d 1353, 1365-66 (Fed. Cir. 2019) (*Weishan Hongda*); *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1378 (Fed. Cir. 1999);); *Dupont Teijin Films v. United States*, 896 F. Supp. 2d 1302, 1310 (CIT 2013) (*Dupont Teijin*); *Clearon Corp. v. United States*, 800 F. Supp. 2d 1355, 1358-59 (CIT 2011) (*Clearon*); *Catfish Farmers of America v. United States*, 641 F. Supp. 2d 1362, 1379-80 (CIT 2009) (*Catfish Farmers*); and *Peer Bearing Company-Changshan v. United States*, 298 F. Supp. 2d 1328, 1334 (CIT 2003).
[12] *See* H.R. Rep. No. 100-576 at 590-91, reprinted in 1988 U.S.C.C.A.N. 1547, 1623-24.

respect to Commerce's selection of surrogate values. Specifically, section 505 of the Trade Preferences Extension Act of 2015 (TPEA) added section 773(c)(5) to the Act that states the following:

> In valuing the factors of production under {section 773(c)(1) of the Act} for the subject merchandise, the administering authority may disregard price or cost values without further investigation if the administering authority has determined that broadly available export subsidies existed or particular instances of subsidization occurred with respect to those price or cost values or if those price or cost values were subject to an antidumping order.

Additionally, Commerce explained, in an interpretive rule promulgated on August 6, 2015, that it would begin applying section 773(c)(5) of the Act to determinations made on or after August 6, 2015.[13] Because these *Final Remand Results* are conducted after August 6, 2015, section 773(c)(5) of the Act applies. Moreover, because the Court has viewed section 773(c)(5) of the Act as a codification of Commerce's practice that existed prior to the Trade Preferences Extension Act of 2015, applying section 773(c)(5) of the Act would not require the statute to have retroactive effect.[14] Moreover, the Court in its opinion leading to this remand cited to

[13] *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793, 46795 (August 6, 2015).

[14] *See e.g.*, *Jacobi Carbons AB v. United States*, 313 F. Supp. 3d 1308, 1331 n.32 (CIT 2018) (*Jacobi Carbons*) (citing to a determination by Commerce stating that section 773(c)(5) of the Act simply clarifies Commerce's authority for its existing practice and does not impose any new requirements); *Weishan Hongda Aquatic Food Co. v. United States*, 273 F. Supp. 3d at 1286 n.7 (CIT 2017), aff'd, 917 F.3d 1353 (Fed. Cir. 2019) (characterizing section 773(c)(5) of the Act as a "codification of Commerce's discretion to reject subsidy-tainted financial statements" and observing that the section does not impose any new requirements on parties to antidumping proceedings); and *Fresh Garlic Producers Ass'n v. United States*, 121 F. Supp. 3d 1313, 1328 (CIT 2015) (*FGPA*) (reading *Landgraf* to mean that "when a statute does not have express retroactive language, the court determines whether applying the statute to the case at hand would allow the statute to have retroactive effect.") (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)). Here, because section 773(c)(5) of the Act codified Commerce's practice on when to disregard surrogate financial statements, Commerce's practice before the amendment and after the amendment similarly require Commerce to only disregard financial statements where a program, which Commerce has previously countervailed, is named in the financial statements and the surrogate company benefitted from that program. But *see Shenzhen Xinboda Indus. Co. v. United States*, 361 F. Supp. 3d 1337, 1359-60 (CIT 2019) (*Xinboda 2008-9 III*) (holding that *FGPA* "squarely rejects the application of a parallel provision of the TPEA to remand determinations in situations such as this, where the Commerce determination that is being litigated predates the new TPEA standard.") (citing *FGPA*, 121 F. Supp. 3d at 1328-33).

section 773(c)(5) of the Act as being applicable here.[15]

A. Legal and Analytical Framework

Commerce has consistently applied a practice of only disregarding financial statements where they contain explicit evidence that a surrogate company benefitted from a previously countervailed subsidy.[16] Section 773(c)(5) of the Act added statutory language clarifying that Congress agrees with this practice. Specifically, section 773(c)(5) of the Act states that Commerce "may disregard price or cost values without further investigation if {Commerce} has determined that broadly available export subsidies existed or particular instances of subsidization occurred." The use of the phrase "has determined" in section 773(c)(5) of the Act makes clear that this provision applies to instances of subsidization that Commerce has already found to have

[15] *See Xinboda 2009-10* at 28.

[16] *See Weishan Hongda*, 917 F.3d at 1365-66 (affirming the CIT's judgment to sustain Commerce's determination to disregard two Thai financial statements because both statements indicated that each company received a benefit under the Thai government's "Investment Promotion Act," which Commerce had previously determined to be countervailable); *see also Fine Furniture (Shanghai) Ltd v. United States*, 353 F. Supp. 3d 1323, 1351-52 (CIT 2018) (*Fine Furniture*) (holding that not all subsidies are countervailable and sustaining Commerce's determination not to disregard financial statements where there is only a mention of a subsidy in financial statements); *Clearon*, 800 F. Supp. 2d at 1358-59, 1368 (CIT 2011) (holding that it was reasonable for Commerce to either determine that a surrogate company received countervailable subsidies or did not receive countervailable subsidies based on evidence in its financial statements); *Catfish Farmers*, 641 F. Supp. 2d at 1379-80 (holding that Commerce reasonably relied on financial statements that contained a mere mention of a subsidy without additional substantiating evidence of countervailability); *Dupont Teijin*, 896 F. Supp. 2d at 1312 (sustaining Commerce's decision to not disregard a financial statement because it was reasonable to conclude that the statement did not contain direct evidence that a surrogate company received a benefit); *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Third New Shipper Reviews*, 74 FR 29473 (June 22, 2009) and accompanying IDM (*Fish Fillets from Vietnam NSRs*) at 4-5; and *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 40485 (July 15, 2008) and accompanying IDM at 37-38. While the Court may have at times disagreed with Commerce's interpretation of the "reason to believe or suspect standard," *see e.g.*, *Shenzhen Xinboda Indus. Co. v. United States*, 976 F. Supp. 2d 1333, 1372-76 (CIT 2014) (*Xinboda 2008-9 I*); *Shenzhen Xinboda Indus. Co. v. United States*, 279 F. Supp. 3d 1265, 1312-15 (CIT 2017) (*Xinboda 2008-9 II*); and *Xinboda 2008-9 III*, 361 F. Supp. 3d at 1359-64, Commerce's practice in implementing the standard, to only disregard financial statements when they contain explicit evidence of a previously countervailed subsidy and the surrogate company has benefited from that subsidy, has been reaffirmed by Congress's passage of section 773(c)(5) of the Act, and, as explained above, passage of this section of the Act merely clarifies Commerce's practice.

occurred, and therefore, it is logical that Commerce looks to its past countervailing duty (CVD) findings as evidence of when it "has determined" that subsidization occurred. The Court has also recognized that section 773(c)(5) of the Act codified language clarifying Commerce's existing practice regarding when it may disregard surrogate values due to the existence of export subsidies.[17] Thus, Commerce's explanation in these *Final Remand Results* complies with the Act, as amended, and with its practice prior to the passage of section 773(c)(5) in the Trade Preferences Extension Act of 2015.

With respect to why Commerce looks to financial statements for evidence of subsidies, Commerce views financial statements as necessary evidence of whether a company has been subsidized by a previously determined countervailable subsidy program. Subsidies frequently constitute revenue that must be accounted for in a company's books and records and acknowledged as subsidy or non-operational income, counterbalanced through offsetting accounts.[18] To comingle subsidy income with operational income or subsidized expenses with non-subsidized expenses would provide a misleading picture of a company's performance; thus, separate accounting for such income is called for by GAAP. In short, a company's stakeholders,

[17] *See e.g.*, *Jacobi Carbons*, 313 F. Supp. 3d at 1331 n.32 (citing to a determination by Commerce stating that section 773(c)(5) of the Act simply clarifies Commerce's authority for its existing practice and does not impose any new requirements); and *Weishan Hongda*, 273 F. Supp. 3d at 1286 n.7 (characterizing section 773(c)(5) of the Act as a "codification of Commerce's discretion to reject subsidy-tainted financial statements" and observing that the section does not impose any new requirements on parties to antidumping proceedings).

[18] There is no evidence on the record of this review addressing how Indian companies are required to account for subsidies under Indian generally accepted accounting principles (GAAP). However, the principle, which Commerce believes to be nearly universal, is illustrated in our China CVD determinations. For example, "{t}he {Chinese} GAAP (at least in the past) required that cash grants received by an enterprise be accounted for by the company through an adjustment to 'special payables.' This offsetting entry brings liabilities into balance with the increased assets value attributable to the receipt of the cash grant. Therefore, {Commerce} reviews 'special payables' to confirm that all grants have been reported." *See, e.g.*, *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 FR 63788 (October 17, 2012) (*Photovoltaic Cells from China*) and accompanying IDM at Comment 24. In reference to one solar cell producer, Commerce noted "its audited {} balance sheet includes a balance for 'Government Grants.' Moreover, a number of the grants at issue were booked into accounts traditionally used to account for {Government of China (GOC)} subsides under {Chinese} GAAP, such as 'other' or 'special' payables, 'government subsidies,' and 'subsidy income.'" *Id.* at Comment 23.

the primary audience for the financial statements, have an interest in knowing the various sources of the company's financing. As such, aside from a full CVD investigation, which Congress expressly stated that it did not intend for Commerce to conduct in the context of an AD proceeding, and for which neither the time nor the resources exist in AD proceedings, a company's financial statements will often be the best source of information regarding its receipt of these subsidies. Indeed, were Commerce to attempt to engage in CVD investigations and findings in the context of AD proceedings, it is unlikely the agency could meet its own statutory deadlines.

Regarding the "reason to believe or suspect" standard in the 1988 legislative history, Commerce observes that this is also the standard for making a preliminary affirmative determination of countervailable subsidies in a CVD investigation.[19] Thus, Commerce has generally interpreted this standard, along with the fact that Congress "did not intend for Commerce to conduct a formal investigation," to provide Commerce with discretion to only disregard financial statements where they demonstrate specific evidence of a named subsidy program that Commerce previously countervailed, or where there is other evidence that the surrogate company received a countervailed subsidy.

For these reasons, the 1988 legislative history and the current section 773(c)(5) of the Act provide Commerce with discretion to determine when it is appropriate to disregard information in an AD proceeding. In reaching a determination to disregard a financial statement in the context of an AD proceeding, Commerce's evaluation entails the following:

[19] *See* section 703(b)(1) of the Act (stating that Commerce "shall make a determination" in a CVD investigation "of whether there is a reasonable basis to believe or suspect that a countervailable subsidy is being provided with respect to the subject merchandise."); *see also* H.R. Rep. No. 100-576 at 590-91, reprinted in 1988 U.S.C.C.A.N. 1547, 1623-24.

> (1) If a financial statement contains a reference to a specific subsidy program found to be countervailable in a formal CVD determination, Commerce will exclude that financial statement from consideration. (2) If a financial statement contains only a mere mention that a subsidy was received, and for which there is no additional information as to the specific nature of the subsidy, Commerce will not exclude the financial statement from consideration.[20]

Thus, if a specific subsidy program was referenced or identified within a company's financial statements, with a dollar amount received, and that subsidy program had been determined to be countervailable in a prior CVD investigation, Commerce disregards the financial statements and would not rely on them, assuming there was a better alternative financial statement on the record. Here, because Commerce was conducting an administrative review of an AD order, Commerce appropriately did not initiate a formal inquiry into the presence of a countervailable subsidy based on the loan documents that Xinboda provided. Furthermore, mere mention of a possible subsidy, without information that the company actually received the subsidy, or information as to the specific nature of the subsidy is not sufficient evidence for Commerce to disregard financial statements.[21]

Moreover, if the "reason to believe or suspect" standard, and by extension section 773(c)(5) of the Act, requires Commerce to reject every financial statement that merely mentions the word "subsidy," or even words that could be interpreted as naming a recognized subsidy program, Commerce would, in many circumstances, have no record financial statements from which to calculate surrogate financial ratios. This would likely require Commerce to resort to

[20] *See Clearon*, 800 F. Supp. 2d at 1359 (citing *Fish Fillets from Vietnam NSRs*, and accompanying IDM).
[21] *See DuPont Teijin*, 896 F. Supp. 2d at 1312-13 (upholding Commerce's determination that the "reason to believe or suspect" standard was not satisfied when the surrogate company's financial statements included line items to account for specific subsidies, but showed no actual dollar amount of the subsidies received); *see also Catfish Farmers*, 641 F. Supp. 2d at 1380 (holding that Commerce reasonably relied on a financial statements that contained a mere mention of a subsidy without additional substantiating evidence of countervailability).

less desirable financial statements which may lead to inaccuracies in calculating financial ratios. In this review, if the "reason to believe or suspect standard" from the 1988 legislative history were interpreted to require such a practice, there would be no financial statements on the record from which to determine surrogate ratios.[22] Thus, given the information available, Commerce chose the best available financial statement on the record.

The Court has also sustained Commerce's practice to disregard financial statements only when there is evidence that a surrogate company benefitted from a previously countervailed subsidy. In *Dupont Teijin*, Commerce relied on financial statements that indicated how a company would account for a subsidy countervailed under the Indian Duty Entitlement Passbook (DEPB) program, if the surrogate company received a benefit.[23] The Court sustained Commerce's determination to not disregard the company's financial statements for two reasons: (1) it held that Commerce's interpretation of the financial statements, that there was no evidence indicating that the company received a benefit under the DEPB program, was reasonable; and, (2) the financial statements were the best information available on the record because the alternative financial statements on the record contained explicit line-item evidence that surrogate companies received a benefit from previously countervailed subsidies.[24] The Court explained that Commerce's determination to rely on a financial statement that referenced a countervailable subsidy was reasonable because, "{a}lthough the statement mentions how countervailable subsidies would be accounted for, the statement does not indicate that any benefit was

[22] *See Garlic 16 Final Results*, and accompanying IDM at 43-45 (explaining that Limtex India Limited, REI Agro Limited, and LT Foods Ltd.'s statements indicate that they benefitted from subsidy programs that Commerce has found to be countervailable).
[23] *See Dupont Teijin*, 896 F. Supp. 2d at 1310-1313.
[24] *Id.* at 1311-13.

received."[25] Further, the Court held that "it is reasonable for Commerce not to reject financial statements that include a policy for accounting for subsidies because the receipt of the subsidy, and not the policy itself, causes the distortion in the financial statement that impacts the calculation of surrogate financial ratios."[26] In sum, *Dupont Teijin* demonstrates that Commerce may reasonably decline to disregard financial statements when there is a reference to subsidies, but no direct statement in a surrogate company's financial statements that the company received a benefit pursuant to a countervailed subsidy. Here, Tata Tea's 2010-2011 financial statements do not contain a direct statement identifying a previously countervailed subsidy, or any indication that Tata Tea received a benefit from such a countervailed subsidy program.

With respect to Commerce's practice *i.e.*, to only disregard financial statements where there is specific evidence of a previously countervailed subsidy and the surrogate company received a benefit, section 773(c)(5) of the Act did not seek to alter the practice, but merely communicated Congress's intent that the Act should conform with the practice. Section 773(c)(5) of the Act confirms that Commerce's choice of when to disregard surrogate values is discretionary because it uses the word "may" rather than "shall."

Section 773(c)(5) of the Act also makes clear that Commerce's discretionary decision of whether to disregard certain values will be based on whether Commerce "has determined that … particular instances of subsidization occurred," and Commerce's decision in this current determination is fully consistent with congressional intent. Thus, Commerce has reexamined Tata Tea's 2010-2011 financial statements, in light of the evidence that Xinboda placed on the record in this review, and does not find a direct link supporting the conclusion that Tata Tea received a benefit based on Xinboda's proffered "hypothecation agreements," because the

[25] *Id*. at 1312-13.
[26] *Id*. at 1311-12.

financial statements do not mention a previously countervailed subsidy program, and do not indicate a rupee amount received by Tata Tea from a previously countervailed subsidy program.

B. Xinboda's Proffered Evidence

As directed by section 773(c)(1) of the Act, when subject merchandise is exported from a non-market economy, Commerce determines normal value based on the values of the factors of production, and it values the factors of production based on the best available information in a market economy country. Factors of production in a surrogate market economy country include "hours of labor required," "quantities of raw materials employed," "amounts of energy and other utilities consumed," and representative capital cost, including depreciation."[27] After calculating the total value of the factors of production, Commerce adds to normal value "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses."[28] To value general expenses and profit, Commerce calculates surrogate financial ratios that the agency calculates from the financial statements of one or more companies that produce identical or comparable merchandise in the primary surrogate country.[29] Specifically, Commerce calculates separate surrogate financial ratios from the surrogate financial statement for selling, general, and administrative expenses (SG&A), manufacturing overhead, and profit.[30]

As set forth above, pursuant to section 773(c)(5) of the Act and the 1988 legislative history of the Act, Commerce "disregards" or "avoids using" financial statements that display evidence of subsidies. Here, in light of section 773(c)(5) of the Act, the 1988 legislative history, and Commerce's practice, regarding when to disregard surrogate financial statements due to

[27] *See* section 773(c)(3) of the Act.
[28] *See* section 773(c)(1) of the Act.
[29] *See Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368 (Fed. Cir. 2010); *see also* 19 CFR 351.408(c)(4).
[30] *See Xinboda 2009-2010* at 27 (citing *Manganese Metal from the People's Republic of China: Final Results of Second Antidumping Administrative Review*, 64 FR 49447, 49448 (September 13, 1999)).

countervailable subsidies, Commerce has examined and evaluated record evidence that Xinboda has proffered allegedly indicating that Tata Tea received a subsidy from a previously countervailed subsidy program. Based on this reexamination, Commerce continues to determine that there is no evidence in Tata Tea's 2010-2011 financial statements that Tata Tea received subsidies.

In *Xinboda 2009-10*, the Court states that "record loan documents filed with the Government of India {} show {Tata Tea's} receipt of packing credits and export credits."[31] Specifically, the Court recognizes that a subsidy "may take the form of a loan by a government authority," and that "the loan documents and financial statements, together, suggest that Tata Tea's financial statements reflect subsidized prices."[32] The Court also observes that, if Commerce has a policy of relying on a surrogate company's financial statements when Commerce finds that the subsidies were not received pursuant to a previously countervailed subsidy program, then "Commerce should clarify its practice and, further, explain why it is reasonable, in light of evidence of countervailable subsidies in this case."[33] Thus, Commerce respectfully resubmits that this is a practice upon which it relies, and further explains why it is reasonable not to disregard Tata Tea's 2010-2011 financial statements on the instant record.

The Court notes that Tata Tea's 2010-2011 financial statements "appear to catalogue receipt of these loans at Schedule 3 under the line item 'Working Capital Facilities.'"[34] While Schedule 3 of the 2010-2011 financial statements describes "secured loans" and "working capital facilities" "{s}ecured by way of hypothecation of raw materials, finished products, stores and

[31] *Id*. at 29.
[32] *Id*. at 30-31.
[33] *Id*. at 31.
[34] *Id*. at 30.

spares, crop, book debts and movable assets, other than plant and machinery and furniture," there is insufficient information on the record to support a finding that Schedule 3 catalogues receipt of any countervailed loans based on the documents provided by Xinboda.[35]

Generally, as explained above, Commerce considers a company's financial statements to be the best source of information regarding its receipt of subsidies.[36] Thus, Commerce examines financial statements on the record of a proceeding in order to determine whether alleged subsidies are directly named in surrogate financial statements and whether a surrogate company actually received the alleged subsidy from a countervailed program.[37] While Commerce has examined Tata Tea's financial statements and Xinboda's proffered loan documents, Commerce has not found evidence of a previously countervailed subsidy program in Tata Tea's financial statements.[38] Although Tata Tea *may* have received subsidies under a previously countervailed program, based on the documents that Xinboda proffered, in order to

[35] *See* Chengwu's August 11, 2011 SV Submission at Exhibit 2 page 71; *see also* Xinboda's Letter, "Fresh Garlic from China – Surrogate Value Submission – Final," dated January 6, 2012 at Exhibit 33.
[36] *See* n.18 *supra* and accompanying text.
[37] *See Weishan Hongda*, 917 F.3d at 1365-66 (affirming the CIT's judgment to sustain Commerce's determination to disregard two Thai financial statements because both statements indicated that each company received a benefit under the Thai government's "Investment Promotion Act," which Commerce had previously determined to be countervailable); *see also Fine Furniture*, 353 F. Supp. 3d at 1351-52 (CIT 2018) (holding that not all subsidies are countervailable and sustaining Commerce's determination not to disregard financial statements where there is only a mention of a subsidy in financial statements); *Clearon*, 800 F. Supp. 2d at 1358-59, 1361-62 (CIT 2011) (holding that it was reasonable for Commerce to either determine that a surrogate company received countervailable subsidies or did not receive countervailable subsidies based on evidence in its financial statements, and that plaintiffs failed to exhaust their administrative remedies with respect to the argument that Commerce violated its policy to require a reference to specific subsidy programs before excluding financial statements); *Catfish Farmers*, 641 F. Supp. 2d at 1379-80 (CIT 2009) (holding that Commerce reasonably relied on financial statements that contained a mere mention of a subsidy without additional substantiating evidence of countervailability); *Dupont Teijin*, 896 F. Supp. 2d at 1312 (sustaining Commerce's decision to not disregard a financial statement because it was reasonable to conclude that the statement did not contain direct evidence that a surrogate company received a benefit); and *Fish Fillets from Vietnam NSRs*, and accompanying IDM at 4-5.
[38] *See* Chengwu's August 11, 2011 SV Submission at Exhibit 2.

disregard Tata Tea's financial statements Commerce requires evidence that would only be attainable from additional investigation not required pursuant to section 773(c)(5) of the Act.[39]

Here, Xinboda has provided three loan agreements, one of which is almost entirely illegible, and Tata Tea's 2010-2011 financial statements are on the record.[40] No additional information on these loans are on the record. There is nothing in these submitted documents to show that Tata Tea received benefits from a program that Commerce has determined to be countervailable. Therefore, Commerce would need to conduct a full investigation of these loans, which would entail an examination and verification of Tata Tea's short-term loan vouchers, short-term loan subledgers, and bank statements providing details of its individual loans, as well as the solicitation, and possible verification, of information from the Government of India. Thus, Commerce cannot confirm whether Tata Tea's Schedule 3 demonstrates that Tata Tea received loans stemming from the agreements provided by Xinboda pursuant to a previously countervailed subsidy program.[41]

As discussed above, the Court indicates that Xinboda's proffered documents "include the

[39] Pursuant to section 773(c)(5) of the Act, Commerce may disregard price or cost values "without further investigation." The 1988 legislative history also states that "the conferees do not intend for Commerce to conduct a formal investigation to ensure that such prices are not dumped or subsidized, but rather intend that Commerce base its decision on information generally available to it at that time." *See* H.R. Rep. No. 100-576 at 590-91, reprinted in 1988 U.S.C.C.A.N. 1547, 1623-24.

[40] *See* Chengwu's August 11, 2011 SV Submission at Exhibit 2 page 71; *see also* Xinboda's Letter, "Fresh Garlic from China – Surrogate Value Submission – Final," dated January 6, 2012 at Exhibit 33.

[41] Schedule 3 of Tata Tea's 2010-2011 financial statements forms part of its balance sheet. The purpose of the balance sheet is to reveal the financial status of a business at a specific point in time. (In this case, Tata Tea's financial status on March 31, 2011.) The balance sheet shows what an entity owns (assets) and how much it owes (liabilities), as well as the amount invested in the business (equity). Schedule 3 of Tata Tea's 2010-2011 balance sheet shows that Tata Tea owed a total of 18,046.83 lakhs in "Working Capital Facilities" to banks on March 31, 2011. Working capital facilities are loans taken to finance a company's everyday operations and short-term operational needs. There is insufficient detail in Tata Tea's Schedule 3 to determine: (1) the types of short-term loans; (2) the loan amounts; or (3) the banks who made the loans to Tata Tea during the 2010-2011 fiscal year. Rather, Schedule 3 merely shows that, as of March 31, 2011, Tata Tea owed a total of 18,046.83 lakhs in short-term loans to banks.

receipt of export credits, packing credits, and export packing credits," and references Xinboda's argument that Commerce has, in the past, determined that export credits and packing credits constitute countervailable subsidies" in *PET Film from India* and *Hot-Rolled Steel from India*.[42] In both cases, *PET Film from India* and *Hot-Rolled Steel from India*, Commerce countervailed certain export credits and packing credits provided by the Government of India's (GOI) Pre- and Post-Shipment Program. In this specific program, the Reserve Bank of India (RBI), through commercial banks, provided short-term pre-shipment financing, or "packing credits," to exporters.[43] The RBI also provided post-shipment export financing, which consists of loans in the form of discounted trade bills or advances by commercial banks.[44] Although Commerce determined the GOI's Pre- and Post-Shipment Program countervailable, Commerce considers export credits and packing credits to be a type of short term credit, and short term credit is not necessarily countervailable.[45] For instance, commercial banks regularly provide short term

[42] *See Xinboda 2009-10* at 29; *see also Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review*, 73 FR 75672 (December 12, 2008) (*PET Film from India*) and accompanying IDM at 4-5; and *Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results and Partial Rescission of Countervailing Duty Administrative Review*, 74 FR 20923 (May 6, 2009) (*Hot-Rolled Steel from India*).

[43] *See PET Film from India*, and accompanying IDM at 4-11. Upon presentation of a confirmed export order or letter of credit to a bank, companies may receive pre-shipment loans from commercial banks for working capital purposes (*i.e.*, purchasing raw materials, warehousing, packing, transportation, etc.) for merchandise destined for exportation. Companies could also establish pre-shipment credit lines upon which they can draw as needed. Limits on credit lines are established by commercial banks and are based on a company's creditworthiness and past export performance. Credit lines could be denominated either in Indian rupees or in a foreign currency. Commercial banks extending export credit to Indian companies must, by law, charge interest at rates determined by the RBI.

[44] *Id*. Exporters qualified for this program by presenting their export documents to a lending bank. The credit covers the period from the date of shipment of the goods to the date of realization of the proceeds from the sale to the overseas customer. Under the Foreign Exchange Management Act of 1999, exporters are required to realize proceeds from their export sales within 180 days of shipment. Post-shipment financing was, therefore, a working capital program used to finance export receivables. There is no indication that the loans must be secured by way of a hypothecation agreement or otherwise.

[45] For example, Indian companies may also receive "cash credit loans" and "Inland Bill Discount Loans" which have not been found to be countervailable, and have been used as loan benchmarks for short-term loans. *See, e.g.*, *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from India*, 64 FR 73131, 73137 (December 29, 1999); and *Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review*, 76 FR 76948 (December 9, 2011) and accompany IDM

credit (*e.g.*, packing credit) and there is no evidence on the record, or in past proceedings, indicating that short term credit always results in a subsidy.[46]

Initially, Commerce notes that the documents on the record are hypothecation agreements which are, by definition, pledges of security or collateral.[47] The Tata Tea hypothecation agreements appear to be pledges of security as a prerequisite to Tata Tea receiving packing credits or to increase the limit of packing credits that are or may become available to Tata Tea.[48] The hypothecation agreements do not conclusively show the "receipt of export credits, packing credits, and export packing credits" by Tata Tea. Moreover, the hypothecation agreements at issue were countersigned by either the State Bank of India or the Bank of Baroda and give no indication that either the State Bank of India or the Bank of Baroda entered into the agreements with Tata Tea as part of the GOI's Pre- and Post-Shipment Program.[49] There is no evidence that the export credits and packing credits discussed in the documents provided by Xinboda relate to

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at Comment 4. Each of these types of working capital loans are denominated in rupees and take the form of a line of credit which can be drawn down by the recipient.

[46] *See, e.g., Certain Corrosion-Resistant Steel Products from India: Preliminary Results of the Countervailing Duty Administrative Review; 2015-2016*, 83 FR 39670 (August 10, 2018) (*CORE from India 2015-2016 Prelim*) and accompanying PDM at 8 ("Based on JSW's responses, we preliminarily determine that it took out comparable rupee-denominated short-term or long-term loans from commercial banks for certain years for which we must calculate benchmark and discount rates. Because these short- and long-term commercial loans originated in the year the subsidy was provided and have similar maturity periods, we will use these commercial loans pursuant to 19 CFR 351.505(a)(2)(i).") (unchanged in *Certain Corrosion-Resistant Steel Products from India: Final Results of Countervailing Duty Administrative Review; 2015-2016*, 84 FR 11053 (March 25, 2019) (*CORE from India 2015-2016 Final*)).

[47] "Hypothecate" means "{t}o pledge property as security or collateral for a debt, without delivery of title or possession." *See Black's Law Dictionary*, 11th Edition.

[48] There is not enough information in the hypothecation agreements to identify whether these packing credits are part of the Pre- and Post-Shipment Program, which Commerce previously countervailed. *See, e.g., PET Film from India*, and accompanying IDM at 4-11; and *Hot-Rolled Steel from India*, and accompanying IDM.

[49] *See* Xinboda's Letter, "Fresh Garlic from China – Surrogate Value Submission – Final," dated January 6, 2012 at Exhibit 33. While the Court states in *Xinboda 2009-10* that the "Deed of Hypothecation of Current Assets" dated October 30, 2009, was with "Axis Bank Limited of Kolkata," Commerce has reevaluated this document and does not see any mention of Axis Bank Limited of Kolkata. *See also Xinboda 2009-10* at 29-30, n.32 and n.34. Further, Commerce determines that the "Deed of Hypothecation of Current Assets" dated October 30, 2009, is almost completely illegible (absent a few words, such as "deed of hypothecation"). *Id.*

a program that Commerce previously countervailed. In addition, there is no information on the record of this review indicating that either the State Bank of India or the Bank of Baroda is a commercial bank or that either one was ever involved in the GOI's Pre- and Post-Shipment Program that Commerce has found countervailable. The record gives no indication as to why the State Bank of India, the Bank of Baroda, and Tata Tea entered into these hypothecation agreements.

The Court also noted "{a}t least one loan document stipulates that the loan {was} provided at below market rate."[50] However, since the record of this review does not define the acronym SBAR, we have no way of knowing whether the SBAR rate is a market rate.[51] We note that *PET Film from India* and *Hot-Rolled from India* are also silent with respect to any link between SBAR and the interest rates charged in the GOI's Pre- and Post-Shipment Program. Finally, the same page of the hypothecation agreement, which stated that the rate of interest for export credits is "2.75% below SBAR," shows "EPC/PCFC/FBD/EBR" as the "Nature of Facility" and that "EPCs" and "FBDs" loans have rates "2.75% below the SBAR,"[52] but the acronyms "EPC," "PCFC," "FED," and "EBR" are not defined on this record. So, Commerce also has no way of knowing what the other terms mean, or whether the 2.75% rate is below a market rate.

According to either section 773(c)(5) of the Act or the 1988 legislative history there is insufficient evidence that Tata Tea received a countervailable subsidy because the financial

[50] *See Xinboda 2009-2010* at 30 and n.35 (citing Xinboda's Letter, "Fresh Garlic from China – Surrogate Value Submission – Final," dated January 6, 2012 at Exhibit 33). The court stated that "the 'Supplemental Agreement of Hypothecation of Goods and Assets for Increase in the Overall Limit' specifies that the loan is provided at '2.75% below SBAR,' when SBAR is 13%."
[51] We note that *PET Film from India* and *Hot-Rolled from India* are also silent with respect to any link between EPC/PCFC/FED/EBR, SBAR and the Pre- and Post-Shipment Program.
[52] *See* Xinboda's Letter, "Fresh Garlic from China – Surrogate Value Submission – Final," dated January 6, 2012 at Exhibit 33.

statements do not mention the Pre- and Post-Shipment program and do not establish a measurable benefit received by Tata Tea. In short, a surrogate company's eligibility to receive subsidies alone is not sufficient to meet the standards set out in either section 773(c)(5) of the Act or the 1988 legislative history, and generally, Commerce only disregards financial statements when a previously countervailed subsidy program is directly named therein. Therefore, Commerce continues to find that Tata Tea's financial statements are the best available information on the record for calculating financial ratios.

C. Garlico's Financial Statements Are Not the Best Available Information

Apart from Commerce's analysis of whether Commerce should disregard Tata Tea's financial statements due to evidence of countervailable subsidies, this court held that Commerce reasonably disregarded Garlico's financial statements with respect to valuing garlic bulb inputs, in part, because the financial statements contained several discrepancies (*e.g.*, Garlico incurred the exact same purchase expenses for raw garlic and raw onion in two consecutive fiscal years) that call into question the overall reliability of Garlico's financial statements.[53]

Commerce's analysis of Garlico's financial statements showed that the statements contained significant discrepancies that called into question their reliability. First, Schedule XVIII (Purchases & Expenses (for trading of goods)) of Garlico's financial statement listed identical purchase costs for raw garlic and raw onion for 2008/2009 and 2009/2010. Specifically, Garlico reported purchasing expenses for the "Cost of Raw Garlic Sold" as 8,754,086 Rs in both 2008/2009 and 2009/2010 and purchasing expenses for the "Cost of Raw Onion Sold" as 1,341,243 Rs in both 2008/2009 and 2009/2010.[54] Commerce noted that all

[53] *See Xinboda 2009-10* at 12-13 and n.17; *see also* Memorandum, "Fresh Garlic from the People's Republic of China: Surrogate Value Memorandum for the Final Results of Antidumping Duty Administrative Review," dated June 4, 2012 (Final SV Memorandum).
[54] *See* Final SV Memorandum.

other purchases on this schedule show different figures for each year. Considering that all other purchase expenses varied between 2008/2009 and 2009/2010, Commerce found it unlikely that Garlico could have incurred the exact same purchase expenses, down to the single rupee, in two consecutive years for two different agricultural products - garlic and onions. Thus, it appeared that the figures for raw garlic and raw onion purchases (products that are most comparable to subject merchandise) were reported inaccurately for at least one of these years.[55] Further, Commerce identified discrepancies in the reported purchase of traded goods when Schedule XVIII is compared to the figures listed at "trading activity" (under "Additional information pursuant to the provision to the schedule VI to the companies Act, 1956"). None of the purchase values reported for raw garlic and raw onion in Schedule XVIII corresponded to the reported purchase in "trading activity." Specifically:

- Schedule XVIII reported the cost of raw garlic as 8,754,086 Rs for 2008/2009, where as the "trading activity" reported purchases of 8,206,800 Rs;
- Schedule XVIII reported the cost of raw garlic as 8,754,086 Rs. for 2009/2010, where as the "trading activity" reported purchases of 3,380,754 Rs;
- Schedule XVIII reported the cost of raw onion as 1,341,243 Rs. for 2008/2009, where as the "trading activity" reported purchases of 1,242,980 Rs;
- Schedule XVIII reports the cost of raw onion as 1,341,243 Rs. for 2009/2010, where as the "trading activity" reported purchases of 1,508,928 Rs.[56]

Commerce noted, in particular, that Schedule XVIII's reported purchase of raw garlic for 2009/2010 was 8,754,086 Rs. However, "trading activity" listed purchases at 3,380,457 Rs and sales at 4,435,311 Rs. The differences in these two numbers represent a significant discrepancy as both "trading activity" and Schedule VII (Inventories) state that the company had no raw garlic in inventory at the beginning or end of the fiscal year.[57] Additionally, Commerce noted

[55] *Id*.
[56] *Id*.
[57] *Id*.

that the cost of raw garlic Garlico purchased, reported in Schedule XVIII (8,754,086 Rs) for 2008/2009, matches the sales figure for raw garlic for that year. Also, the reported raw onion sold during 2009 in the "trading activity" worksheet (1,242,980 Rs) is different than the raw onion sales reported in Schedule XIII, Sales (1,341,243 Rs).[58]

The discrepancies in the value of a company's raw material purchases are of particular concern because raw material costs are used to calculate all three surrogate financial ratios (*i.e.*, factory overhead, SG&A, and profit).[59] Because Garlico's financial statements contain significant inconsistencies and inaccuracies, including its main raw material purchases which would be part of the surrogate factory overhead, SG&A, and profit calculations, Commerce does not consider them to be reliable or usable for the purposes of calculating surrogate financial ratios.

Commerce also continues to find that Garlico's production experience is less similar to that of Xinboda's than that of Tata Tea's. Commerce finds that the merchandise produced and sold by Tata Tea is more comparable to the merchandise produced and sold by the respondents than what Garlico produces and sells. Initially, as the Court sustained in *Xinboda 2009-10* and Commerce sets out above, Commerce observed flaws in Garlico's financial statements that undermine their credibility. Specifically, Garlico incurred the exact same purchase expenses for two different agricultural products in two consecutive years, the reported purchases of traded goods in one section do not match the purchase values in another section of the financial

[58] *Id*.
[59] Factory overhead is calculated as a percentage of raw material, direct labor and energy expenses. SG&A is calculated as a percent of raw material, direct labor, energy and factory overhead expenses. Finally, profit is calculated as a percent of raw material, direct labor, energy, factory overhead, and SG&A expenses. *See* Memorandum, "Fresh Garlic from the People's Republic of China – 16th Administrative Review – Surrogate Values for the Preliminary Results," dated November 30, 2011 at Exhibit 9.

statements, the cost of raw garlic purchased matches the sales figure, and the reported raw onion sales in one section do not correspond to the raw onion sales in another.[60]

Additionally, while Commerce acknowledges that Tata Tea is primarily a tea producer and does not produce or process garlic, Commerce determines that Tata Tea's production process for tea is more similar to Xinboda's garlic production process than Garlico's garlic production process. Garlico's financial statements indicate that the company is primarily a food dehydrator,[61] and we note that the International Trade Commission (ITC) has stated that fresh and dehydrated garlic do not share common production methods or facilities.[62] The financial statements show that Garlico is a food dehydrator that produces flakes and powders from fresh vegetables.[63] Furthermore, as we noted in the *Garlic 16 Final Results*, Garlico's financial statements indicate that its yield loss for its garlic production was over 77 percent.[64] Information provided during the instant review indicates that peeled garlic's yield loss is between 15 and 20 percent.[65] The record evidence shows that the yield loss for Garlico's products, which Xinboda claims are "comparable," are much higher than the yield loss for Tata Tea, and that Tata Tea's

[60] *See Xinboda 2009-10* at 12-13, n.17.
[61] *See* Final SV Memorandum.
[62] *See Fresh Garlic from the People's Republic of China*, Investigation No. 731-TA-683 (Final), ITC Publication 2825 (November 1994) at I-6 to I-12 (*ITC Report*) (finding that the domestic industry producing garlic for dehydration and seed garlic was not materially injured or threatened with material injury; "there is virtually no overlap between fresh and {dehydrated} producers, and therefore no overlap in production facilities or employees"; dehydrated garlic is planted more densely than fresh garlic, water shut-off is earlier for fresh garlic, fresh garlic is left to dry for one to three weeks, while dehydrated garlic is left to dry for six weeks, dehydrated garlic is topped mechanically prior to harvesting, whereas fresh plants are topped after they have been harvested and cured; and fresh garlic is harvest primarily by hand and dehydrated garlic is harvested in an entirely mechanized manner using equipment dedicated to dehydrated garlic.).
[63] *See* Final SV Memorandum. Only a small portion of Garlico's overall sales are of fresh vegetables, which it trades rather than processes.
[64] *Id*. at 3, n.15 ("Total garlic products 7,498 quintal (3,450 quintals (powder)) + 4,048 quintals (flakes)) divided by 33,156 quintals of garlic consumed equals 77.39 percent.").
[65] *See* Petitioners' Letter, "Petitioners' Case Brief," dated April 20, 2012 at 17 (stating that yield loss is between 14.5 and 19.3 percent); *see also* Xinboda's November 16, 2011 Second Supplemental Questionnaire Response at 23 (stating something similar as business proprietary information).

yield loss for processing is much more in line with the respondents' yield loss during fresh garlic processing. Tata Tea's unconsolidated financial statements show that Tata Tea's yield loss for tea was around 17 percent, which is within the range of yield losses for peeled garlic.[66]

While Xinboda argued that Garlico's processing and trading activities are similar to its own, there is no record evidence that supports this conclusion. Xinboda also provides no support for its conclusion that it shares similar purchasing power and position as Garlico. Garlico's financial statements indicate that the company is primarily a food dehydrator and, as we noted above, the *ITC Report* stated that fresh and dehydrated garlic do not share common production methods or facilities.[67]

Finally, Xinboda contends that Tata Tea's production process is more extensive by demonstrating the process by which green leaves are processed.[68] Specifically, Xinboda argues that green leaves go through an "extensive" production process which includes pan firing/steaming; rolling; firing; and packing. However, green leaves encompass only a fifth of the tea processed by Tata Tea.[69] Additionally, while the production process for peeled garlic (clipping/stemming; peeling; washing; cooling; and packing) is not identical to that of green leaves, the production process is not so dissimilar that it would cause Commerce to disregard Tata Tea as a source for surrogate financial ratios. In contrast, Garlico's financial statements reflect a company that produces and sells garlic with a more complex production process. The

[66] *See* Final SV Memorandum at 4, n. 24, n. 25, and n. 26. (Total tea produced 881.73 kgs. (in lakhs) divided by 1,070.65 kgs. (in lakhs) equals 17.65 percent.) (citing Chengwu's August 11, 2011 SV Submission at Exhibit 2 page 86-87).
[67] *See ITC Report* at I-6 to I-12; *see also* Final SV Memorandum.
[68] *See* Xinboda's Letter, "Fresh Garlic from the People's Republic of China – Case Brief Shenzhen Xinboda – Redacted Version," dated May 1, 2012 (Xinboda's Case Brief) at 68-69, 73-74.
[69] *See* Final SV Memorandum at 4, n. 24.

financial statements show that Garlico is a food dehydrator that produces flakes and powders from fresh vegetables.[70] As such, Commerce continues to find that Tata Tea's production experience is much more similar to the respondents' production process.

IV. COMMENTS ON *DRAFT REMAND RESULTS*[71]

Comment 1: Whether Commerce Properly Relied on Section 505 of the TPEA, Section 773(c)(5) of the Act, as a Basis for this Remand Redetermination

Xinboda's Comments:

- After the TPEA was enacted, the CAFC "determined that Section 505 of the TPEA applied only to determinations that {Commerce} made after the date of enactment."[72]
- Furthermore, the CIT clarified that "'although the Federal Circuit did not directly address whether {section} 502 applies to remand determinations in *Ad Hoc Shrimp*, the analysis the court conducted in holding that {section} 502 does not apply to determinations currently subject to judicial review is instructive.' . . . '{section} 502 of the Act does not apply to the remand determination ordered in this case and Commerce is instructed not to apply the standards contained in {section} 502 on remand.'"[73]
- Section 505, like section 502, concerns the decision-making standards that Commerce applies in certain situations. Additionally, Congress did not provide dates of application

[70] Only a small portion of Garlico's overall sales are of fresh vegetables, which it trades rather than processes. *See* Final SV Memorandum at 3.
[71] We note that the petitioners' comments on the *Draft Remand Results*, only included a statement in support of the *Draft Remand Results*, without additional arguments. Therefore, we have not summarized the petitioners' comments for these *Final Remand Results*. *See* Petitioners' Letter, "Remand of the Final Results of the 16th Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China – Petitioners' Comments on the Draft Redetermination Pursuant to Remand," dated June 22, 2020.
[72] *See* Xinboda's Remand Comments at 2 (citing *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1352 (CAFC 2015) (*Ad Hoc Shrimp*)).
[73] *Id*. (citing *FGPA*, 121 F. Supp. 3d at 1331 and 1333).

for the section 505 amendment. "Thus, the findings and opinions of the Federal Circuit and the {CIT} regarding Section 502 of the TPEA apply equally to Section 505 of the TPEA."[74]

- Since the underlying administrative review results in this proceeding were determined prior to the passing of the TPEA in 2015, Commerce must "disregard Tata Tea's financial statement because it has {a} 'reason to believe or suspect' that Tata Tea's price was a subsidized price.'"[75]

Commerce's Position:

We disagree with Xinboda's arguments that the amendments found in Section 505 of the Act only apply to determinations made after the date of enactment of the amendments. As we stated above, since the Court has viewed section 773(c)(5) of the Act as a codification of Commerce's practice that existed prior to the Trade Preferences Extension Act of 2015, applying section 773(c)(5) of the Act would not require the statute to have retroactive effect. We note that Xinboda did not comment on our reliance on *Jacobi Carbons* or *Weishan Hongda* to support our conclusion in this matter. Furthermore, the Court in its opinion leading to this remand cited to section 773(c)(5) of the Act as being applicable here.[76]

Additionally, Xinboda contends that the Federal Circuit's holding in *Ad Hoc Shrimp* stands for the proposition that "Section 502 of the TPEA applied only to determinations that

[74] *Id*. at 2-3; *see also Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Act of 2015*, 80 FR 46793 (August 6, 2015).
[75] *See* Xinboda's Remand Comments at 3.
[76] *See Xinboda 2009-10* at 28 ("By statute, Commerce 'may disregard price or cost values without further investigation if {it} has determined that broadly available export subsidies existed or particular instances of subsidization occurred with respect to those price of cost values or if those price or cost values were subject to an antidumping order.'" (citing section 773(c)(5) of the Act)).

{Commerce} made after the date of enactment," and that *FGPA* held that Commerce was "instructed not to apply the standards contained in {section} 502 {of the TPEA} on remand."[77] However, Commerce does not view these cases as binding on its ability to rely on section 505 of the TPEA, section 773(c)(5) of the Act, here. Specifically, Commerce reads *FGPA* to hold that "when a statute does not have express retroactive language, the court determines whether applying the statute to the case at hand would allow the statute to have retroactive effect."[78] Here, applying section 773(c)(5) of the Act to the instant circumstances would not require the statute to have retroactive effect because, as the Court has stated, section 773(c)(5) of the Act was merely a codification of Commerce's existing practice.[79]

Moreover, the Court instructed Commerce to "clarify its practice and, further, explain why it is reasonable, in light of evidence of countervailable subsidies in this case."[80] We have followed the Court's instructions, and continue to find that Commerce's explanation in these *Final Remand Results* complies with the Act, as amended, and with its practice prior to the passage of section 773(c)(5) in the Trade Preferences Extension Act of 2015.

Comment 2: Whether Commerce's Determination that Tata Tea Did Not Receive Previously Countervailed Subsidies is Supported by Record Evidence.

Xinboda's Comments:

- "Merely having a reason to suspect or believe a company received subsidies does not rise

[77] *See* Xinboda's Remand Comments at 2.
[78] *See FGPA*, 121 F. Supp. 3d at 1328 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)).
[79] *See Jacobi Carbons*, 313 F. Supp. 3d at 1331 n.32 (citing to a determination by Commerce stating that section 773(c)(5) of the Act simply clarifies Commerce's authority for its existing practice and does not impose any new requirements); *see also Weishan Hongda*, 273 F. Supp. 3d at 1286 n.7, aff'd, 917 F.3d 1353 (characterizing section 773(c)(5) of the Act as a "codification of Commerce's discretion to reject subsidy-tainted financial statements" and observing that the section does not impose any new requirements on parties to antidumping proceedings.).
[80] *See Xinboda 2009-10* at 31.

to the level of finding direct a {sic} link or evidence that a company received subsidies. These are two different standards."[81]

- In addition, Commerce's statement that "'a surrogate company's eligibility to receive subsidies alone is not sufficient to meet the standards set out in either section 773(c)(5) of the Act or the 1988 legislative history' does not conform to the 'reason to believe or suspect' standard."[82]
- The hypothecation agreements on the record, and the fact that Commerce has, "in the past, determined that export and packing credits constitute countervailable subsidies, lead to more than sufficient evidence to suspect that Tata Tea received subsidies."[83]
- Since Congress did not intend for Commerce to conduct a formal investigation into whether the surrogate company received subsidies, Congress would not have imposed the burden on Xinboda to obtain another company's vouchers, subledgers, or bank statements to show that the company's financial statements are unusable.[84]
- In addition, "'as a practical matter, Tata Tea would have had no reason to enter into three separate financing agreements concerning 'packing credits' or to renew and increase its credit limits over time, if the company had not made use of them.'"[85]
- Tata Tea's 2010/2011 annual reports indicated that it received loans secured by way of

[81] *See* Xinboda's Remand Comments at 4.
[82] *Id*.; *see also Shenzhen Xinboda Indus. Co. v. United States*, 361 F. Supp. 3d 1337, 1365-66 (CIT 2019) (*Xinboda III*) (stating that Commerce's statement is in direct conflict with Commerce's previously stated view that a company "will not leave money on the table" when a benefit is available to the company. (citing *Gold East Paper (Jiangsu) Co. v. United States*, 61 F. Supp. 3d 1289, SLIP OP. 15-37 (CIT 2015), Final Results of Redetermination Pursuant to Court Remand (July 10, 2015) at 17).
[83] *See* Xinboda's Remand Comments at 5.
[84] *Id*. at 6.
[85] *Id*. (citing *Xinboda III*, 361 F. Supp. 3d at 1366-67).

hypothecation agreements. Schedule 3 of the annual report shows that "{t}hese funds clearly pertain to the export packing credits granted through the loan agreements {on the record}.'"[86]

- The hypothecation agreements placed on the record by Xinboda clearly involve the grant of countervailable export packing credits from banks to Tata Tea.[87]
- Commerce states that there is no evidence that the export credits and packing credits from the loan documents, relate to a program that Commerce previously countervailed. "However, the fact that these are export credits and packing credits suffice the 'reason to believe or suspect' standard, especially given that {Commerce} has specifically countervailed both pre-shipment and post-shipment export credits and packing credits in other CVD investigations."[88]
- Commerce's reliance on *CORE from India 2015-2016 Prelim* does not support its finding in this case as "{b}oth the Bank of India and the Bank of Baroda are state-owned banks, not privately-owned commercial banks. There is no doubt that export credits obtained from a state-owned bank reasonably indicate that Tata Tea received subsidies."[89]
- Commerce's reliance on *Clearon* does not fit to the facts of this case. In *Clearon*, Commerce excluded an Indian company's financial statements because the annual report had a "capital subsidy" line item. The CIT sustained Commerce's exclusion of the financial statements in that case because Commerce did not have any documentation on

[86] *Id*. at 6-7 (citing Tata Tea's Financial Statements at Schedule 3, p. 71).
[87] *Id*. at 7.
[88] *Id*. at 7 (citing *PET Film from India*, and accompanying IDM at 4-5; and *Hot-Rolled Steel from India*, and accompanying IDM).
[89] *Id*. at 8 (citing *Draft Remand Results* at 14 and N. 40; and *CORE from India 2015-2016 Prelim*, and accompanying PDM at 8 (unchanged in *CORE from India 2015-2016 Final*)).

the record to show that capital subsidies were not government subsidies.[90]

- Unlike *Dupont Teijin*, Tata Tea's financial statements are full of evidence showing subsidization. "With record evidence clearly indicating that Tata Tea received subsidies, {Commerce} must reject Tata Tea's financial statements as instructed by the legislative history controlling at the time of the administrative review."[91]
- Finally, if Commerce insists that the "may" disregard standard applies to this remand, Commerce "must include all the other financial statements on the record." "As {Commerce} refused to dismiss Tata Tea's loan documents because 'the acronyms 'EPC,' 'PCFC,' 'FED,' and 'EBR' are not defined on this record,' the acronym 'EPCG' in LT Foods' financial statements, although not defined on the record, cannot be grounds for disregarding LT Foods' financial statements."[92]

Commerce's Position:

We note that our practice, as explained here, is to disregard financial statements where they demonstrate evidence of a named subsidy program that Commerce previously countervailed or where there is other evidence that the surrogate company received a countervailable subsidy. As we stated in the *Draft Remand Results*, and again above, there is no evidence that the export credits and packing credits discussed in the documents provided by Xinboda relate to a program that Commerce previously countervailed.

Xinboda argues that section 773(c)(5) of the Act, also referred to as section 505 of the TPEA, and the "reason to believe or suspect" standard[93] "are two different standards."[94] As

[90] *Id*. at 8-9 (citing *Clearon*, 800 F. Supp. 2d at 1360).
[91] *Id*. at 9-11 (citing *Dupont Teijin*).
[92] *Id*. at 11-12 (citing *Draft Remand Results* at 16; and *Final Results*, IDM at 44 and N. 205).
[93] *See* Omnibus Trade and Competitiveness Act of 1988, H.R. Rep. No. 100-576 at 590-91, reprinted in 1988 U.S.C.C.A.N. 1547, 1623-24.
[94] *See* Xinboda's Remand Comments at 3-4.

Commerce has explained above, we view section 773(c)(5) of the Act as a codification of Commerce's practice regarding when to reject financial statements due to evidence of particular instances of subsidization. For this reason, and because Commerce views section 773(c)(5) of the Act as demonstrating Congress' regard for its practice prior to the amendment of the Act by the TPEA, we have continued to determine that there is insufficient evidence of a countervailable subsidy program in Tata Tea's financial statements or that Tata Tea received a benefit under a previously countervailed subsidy program.

Xinboda also contends that "Tata Tea would have had no reason to enter into three separate financing arrangements concerning 'packing credits' or to renew and increase its credit limits over time, if the company had not made use of them."[95] However, Commerce has evaluated Tata Tea's financial statements in light of record evidence of possible subsidization and has determined that, because Tata Tea's financial statements do not indicate that Tata Tea received a benefit pursuant to a previously countervailed subsidy program, it is reasonable to continue relying on Tata Tea's 2010-2011 financial statements. Further, as stated above, there is no evidence on the record that would lead Commerce to conclude that the loans are not commercial in nature. While we agree that *Xinboda III* stands for the proposition that a company will not leave money on the table,[96] the important distinction here is that there is no evidence that the loans received by Tata Tea are part of a countervailable subsidy program.

Xinboda next alleges that Commerce has not provided support for its conclusion that "commercial banks regularly provide packing credits outside of government programs."[97]

[95] *Id.* at 6.
[96] *See* Xinboda's Remand Comments at 4; *see also Xinboda III*, 361 F. Supp. 3d at 1365-66.
[97] *See* Xinboda's Remand Comments at 8.

Commerce clarifies that its citation to the *CORE from India Prelim* refers generally to short term credit and that Commerce considers packing credits to be a form of short term credit.[98] Additionally, Commerce further determines that there is no evidence in the hypothecation agreements that would identify the export and packing credits mentioned as provided under the Pre- and Post-Shipment Program, which Commerce previously countervailed.[99]

Further, Xinboda contends that purported evidence in Tata Tea's 2010-2011 financial statements satisfies the "reason to believe or suspect" standard because financial statements that Commerce disregarded in *Clearon* "simply mention{ed} the word 'subsidy.'"[100] Commerce disagrees. In *Clearon*, the Court sustained Commerce's determination to disregard a surrogate Indian company's financial statements because Commerce determined that the surrogate company's financial statements "clearly indicat{ed} that {the surrogate company} receive{d} multiple types of aid through 'Capital subsidy/Government grants.'"[101] The Court also held that "Commerce reasonably concluded that the three forms of Capital subsidies identified in the annual report . . . constituted evidence that {the surrogate company} received multiple forms of government aid."[102] Moreover, Commerce explained in its decision memorandum that it disregarded the surrogate company's financial statements because they made "several references to "Capital Subsidy," which "{i}s a specific Government of India program that {Commerce} has previously found provides countervailable benefits."[103] In *Chlorinated Isos from China*,

[98] *See Draft Remand Results* at 14 n.40 (citing *CORE from India 2015-2016 Prelim* and accompanying PDM at 8 (unchanged in *CORE from India 2015-2016 Final*)).
[99] *See, e.g., PET Film from India* and accompanying IDM; and *Hot-Rolled Steel from India* and accompanying IDM.
[100] *See* Xinboda's Remand Comments at 8-9.
[101] *See Clearon*, 800 F. Supp. 2d at 1360 (citing *Chlorinated Isocyanurates from the People's Republic of China: Final Results of 2008-2009 Antidumping Duty Administrative Review*, 75 FR 70212 (November 17, 2010) (*Chlorinated Isos from China*) and accompanying IDM at 18).
[102] *Id*. at 1360-61.
[103] *See Chlorinated Isos from China*, and accompanying IDM at 17-18.

Commerce also cited to an Indian CVD review that identified "Capital Subsidy" as a countervailable program.[104] Commerce also explained that "if a financial statement contains a reference to a specific subsidy program that {Commerce} found countervailable in a formal CVD determination, that would constitute a reasonable basis to believe or suspect that the prices may be subsidized."[105] Thus, Commerce views *Clearon* as applicable here, as it demonstrates an instance where Commerce, consistent with practice, disregarded financial statements containing evidence that a surrogate company received a subsidy that Commerce previously countervailed.

Xinboda also argues that *Dupont Teijin* is distinguishable from the present circumstances because Tata Tea's financial statements are "replete with evidence of subsidization."[106] Xinboda points to several quotations in Tata Tea's 2010-2011 financial statements alleging that these quotations support a conclusion that Tata Tea received "export incentives" and "packing credits."[107] However, none of the pages that Xinboda quotes refers directly to a program that Commerce has previously countervailed, and several could be interpreted merely to provide examples of how Tata Tea would list, for instance, export incentives if it received any.

In addition, there is no information on the record of this review, nor did Xinboda cite to any evidence to support its claim, that the State Bank of India or the Bank of Baroda were ever involved in the GOI's Pre- and Post-Shipment Program that Commerce has found countervailable. Regardless of whether Xinboda is correct that the State Bank of India and the Bank of Baroda are state owned banks, 19 CFR 351.505(a)(2)(ii) states, in part, that Commerce "will treat a loan from a government-owned bank as a commercial loan, unless there is evidence

[104] *Id*. at 17 n.57 (citing *Final Results of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 71 FR 7534 (February 13, 2006) and accompanying IDM at 6 (countervailing a program named "Capital Subsidy.").
[105] *Id*. at 17.
[106] *See* Xinboda's Remand Comments at 9-10.
[107] *Id*. at 10.

that the loan . . . is provided on non-commercial terms or at the direction of the government." Moreover, the record gives no indication as to why the banks and Tata Tea entered into these hypothecation agreements.

Xinboda's continued reliance on our findings in *PET Film from India* is also misplaced.[108] Although Commerce has determined the GOI's Pre- and Post-Shipment Program to be countervailable,[109] Commerce determines that it is unclear whether any credit, extended to Tata Tea in the loan documents provided by Xinboda, is countervailable, and further there is no evidence on the record that the credit granted to Tata Tea was in fact received or that it relates to the Pre- and Post-Shipment Program. Therefore, Xinboda's allegations that Commerce previously countervailed a program as evidenced in the loan documents, which it provided, do not demonstrate, in line with Commerce's practice, that Tata Tea received subsidies under a program that Commerce has previously countervailed.

Xinboda also claims that "Schedule 3" of Tata Tea's 2010-2011 financial statements demonstrates that Tata Tea received subsidies pursuant to the loan documents it has provided.[110] Furthermore, Xinboda alleges that Tata Tea received 18,046.83 lakhs, in 2011, and 17,144.50 lakhs, in 2010. Commerce disagrees that Schedule 3 of Tata Tea's 2010-2011 financial statements supports this conclusion. While these are amounts listed next to the category in Schedule 3 for "Working Capital Facilities," and appear to be "From Banks," there is no indication that Tata Tea received these amounts of money pursuant to the Pre- and Post-Shipment Program that Commerce has previously countervailed. While Xinboda's loan documents provide a range of credit that the banks have extended to Tata Tea, there is no

[108] *See* Xinboda's Remand Comments at 7-8.
[109] *See PET Film from India*, and accompanying IDM at 4-11.
[110] *See* Xinboda's Remand Comments at 6-8.

evidence on the record of an amount that Tata Tea borrowed pursuant to credit obtained under these documents and, therefore, no support for the conclusion that Tata Tea received a subsidy from these loans either. As explained above, Schedule 3 of Tata Tea's 2010-2011 balance sheet shows that Tata Tea owed a total of 18,046.83 lakhs in "Working Capital Facilities" to banks on March 31, 2011. However, working capital facilities are loans drawn to finance a company's everyday operations and short-term operational needs. Thus, there is insufficient detail in Schedule 3 of Tata Tea's 2010-2011 financial statements to provide evidence for Commerce to determine: (1) the types of short-term loans received; (2) the loan amounts; or (3) the banks who made the loans to Tata Tea during the 2010-2011 fiscal year. Rather, Schedule 3 merely shows that, as of March 31, 2011, Tata Tea owed a total of 18,046.83 lakhs in short-term loans to banks. Furthermore, although this category mentions that these facilities are secured "by way of hypothecation" of Tata Tea's assets, the Pre- and Post-Shipment Program that Xinboda points to is not mentioned, and there is no indication as to the nature of the money Tata Tea has received in this category of Schedule 3.[111]

Finally, in response to Xinboda's argument that if Commerce continues to find that it cannot exclude Tata Tea's financial statements because certain acronyms are not defined on the record, then it should also refuse to disregard Limtex India Limited's, REI Argo Limited's (REI Argo), and LT Foods Ltd.'s (LT Foods) financial statements,[112] we disagree. Generally, Commerce continues to rely on its determination, in *Garlic 16 Final Results*, to disregard these three sets of financial records because all three contained evidence of subsidies under a program

[111] *See* Chengwu's August 11, 2011 SV Submission at Exhibit 2 page 71.
[112] *See* Xinboda Remand Comments at 11-12.

that Commerce has previously countervailed.[113] Commerce, here, addresses the purported example that Xinboda provided regarding LT Foods financial statements.[114] Regarding LT Foods, Commerce first determined that LT Foods' financial statements indicate that it received subsidies under the "Export Promotion Capital Goods Scheme" program, which Commerce previously countervailed, in line with its practice.[115] While Xinboda argues that the acronym "EPCG," which Commerce relied on to determine LT Foods financial statements indicated that LT Foods received subsidies, was not defined in the relevant financial statements, in fact, Xinboda itself defined EPCG as Export Promotion Capital Goods Scheme in its case brief.[116] Since LT Foods' financial statements clearly reference a previously countervailed subsidy program that is defined on the record, unlike Tata Tea's financial statements, Commerce reasonably excluded them from its calculations of the surrogate financial ratios in this case. Additionally, Commerce determined that neither LT Foods nor REI Argo had a similar production experience to companies, like Xinboda, that produce peeled garlic.[117] Commerce also determined LT Foods and REI Argo's financial statements to be less contemporaneous to the POR than Tata Tea's.[118]

Comment 3: Whether Tata Tea's Financial Statements Are More Suitable Than Garlico's for

[113] *See Garlic 16 Final Results* and accompanying IDM at 43-45 and n.198; *see also* Memorandum, "Fresh Garlic from the People's Republic of China – 16th Administrative Review – Surrogate Values for the Preliminary Results," dated November 30, 2011.
[114] *See* Xinboda's Remand Comments at 11.
[115] *See Garlic 16 Final Results* and accompanying IDM at 44-45 (citing *Commodity Matchbooks from India: Final Affirmative Countervailing Duty Determination*, 74 FR 54547 (October 22, 2009) and accompanying IDM at 4).
[116] *See* Xinboda's Case Brief at 90.
[117] *See Garlic 16 Final Results* and accompanying IDM at 44.
[118] *Id*. at 45.

Calculating Financial Ratios

Xinboda's Comments:

- The fact that Garlico had "the same purchasing expenses for raw garlic sold and raw onion sold in two fiscal year {sic} while all other purchasing expenses varies {sic} supports that {Garlico's} financial statements are authentic and unaltered."[119]
- The discrepancy in the purchase vales reported for raw garlic and raw onion can also be easily explained. "Garlico not only purchased raw garlic to trade but also processed and sold raw garlic."[120]
- The "record is clear that Garlico processed and sold garlic, the company's financial statements are publicly available, audited, and they are contemporaneous. There is no other financial statement of a producer or seller of garlic on the record of this case."[121]
- Commerce's reliance on the ITC's finding that fresh garlic and dehydrated garlic do not share common production methods or facilities "simply does not support {Commerce's} conclusion that branded and bagged tea production is more similar to Xinboda's production process."[122]
- Garlico's financial statements show that it recorded labor expenses for cutting and sorting various vegetables. "This is highly comparable, if not identical, to the work performed on the whole garlic (*i.e.*, destemming, de-rooting, cleaning) and the peeled garlic (*i.e.*, hand sorting at the skinning stage and the cleaning stage)."[123]

[119] *See* Xinboda's Remand Comments at 12.
[120] *Id*. at 12-13.
[121] *Id*. at 13.
[122] *Id*.
[123] *Id*.

- Thus, the record evidence shows that the garlic purchased by Garlico is identical or similar to the whole garlic bought by Xinboda, it is minimally processed, and sold. Furthermore, Garlico's business operations closely resemble those of Xinboda.[124]
- Finally, there is no evidence that Garlico markets and sells its own brands of raw and processed garlic and other vegetables. In contrast, "Tata Tea spent over 1 billion rupees on advertising its mostly branded line of products."[125]

Commerce's Position:

We continue to find that Garlico's financial statements were reasonably excluded from consideration for use in our surrogate value calculations. Furthermore, we continue to find that Tata Tea's production process is more similar to Xinboda's production process than Garlico's. We note that the Court stated that we reasonably concluded that Garlico's financial statements were unreliable.[126]

First, Commerce continues to determine that the fact that Garlico's financial statements demonstrate that it incurred the exact same purchase expenses for raw garlic and raw onion in two consecutive fiscal years calls into question the overall reliability of Garlico's financial statements. While Xinboda argues that "{i}t could very well be that Garlico allocated and spent

[124] *Id*. at 14.
[125] *Id*.
[126] *See Xinboda 2009-10* at 15-16 ("Yet, to the extent that Garlico and Xinboda purchase similar large quantities of raw garlic, Xinboda does not explain why 'the correspondence between the two companies' is paramount in the selection of a SV data source . . . especially when, as Commerce reasonably determines, Garlico's financial statements do not satisfy its selection criteria and are unreliable."). Commerce also notes that even if Tata Tea's 2010-2011 financial statements were found to contain evidence that Tata Tea received a subsidy under a previously countervailed program, due to the unreliability of Garlico's financial statements, it would still be an open question whether Tata Tea's financial statements are preferable to Garlico's because, even with a distortion arising from subsidies, they may still be more reliable than Garlico's. *See CP Kelco U.S. Inc. v. United States*, 949 F.3d 1348 (Fed. Cir. 2020) (Reinstating Commerce's third remand results where Commerce determined that financial statements with evidence of export subsidies were preferable to financial statements that contained other flaws in their data and that the financial statements, thus, constituted the best available information on the record.).

the same amount of money in the second fiscal year to purchase raw garlic and onion as it did in the prior fiscal year," Commerce determines that to be highly unlikely. Furthermore, because "{t}he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence," and the question is whether the choice Commerce made is reasonable, not whether an alternative may also have been reasonable,[127] Commerce continues to determine that it is unlikely these amounts were the exact same in two consecutive fiscal years, drawing into question the reliability of Garlico's financial statements.

While Xinboda points out that Garlico recorded labor expenses for certain activities that Xinboda also performed,[128] Xinboda fails to recognize that Garlico's garlic must undergo additional processing because Garlico's financial statements indicate that the company is primarily a food dehydrator that produces flakes and powders from fresh vegetables,[129] whereas Xinboda produces fresh garlic, which requires less processing.[130] We further disagree that the garlic purchased by Garlico is "minimally processed" before Garlico sells it. As we noted above, and in the *Garlic 16 Final Results*, Garlico's financial statements indicate that its yield loss for its garlic production was over 77 percent.[131] Peeled garlic's yield loss is between 15 and 20

[127] *See Consolo v. Federal Maritime Com.*, 383 U.S. 607, 620 (1966); *see also Catfish Farmer*, 641 F. Supp. 2d at 1261.
[128] *See* Xinboda's Remand Comments at 13.
[129] *See* Final SV Memorandum. Only a small portion of Garlico's overall sales are of fresh vegetables, which it trades rather than processes.
[130] For example, the electricity consumption differences between Garlico, Xinboda, and Tata Tea. *See* Xinboda's May 18, 2011 Section D Questionnaire Response at Exhibit D-3; *see also* Hebei Golden Bird Trading Co., Ltd.'s Letter, "Fresh Garlic from the People's Republic of China – Golden Bird's Submission of Comments and Information Related to Surrogate Country and Value Selection," dated July 29, 2011 at Exhibit 13, Annexure A, part C; and Chengwu's August 11, 2011 SV Submission at Exhibit 2.
[131] *See* Final SV Memorandum at 3, n.15 ("Total garlic products 7,498 quintal (3,450 quintals (powder)) + 4,048 quintals (flakes)) divided by 33,156 quintals of garlic consumed equals 77.39 percent.").

percent.[132] The record evidence shows that the yield loss for Garlico's products, which Xinboda claims are "comparable," are much higher than the yield loss for Tata Tea, and that Tata Tea's yield loss for processing is much more in line with the respondents' yield loss during fresh garlic processing. Tata Tea's unconsolidated financial statements show that Tata Tea's yield loss for tea was around 17 percent, which is within the range of yield losses for peeled garlic.[133] In response to Xinboda's argument that Tata Tea spent over one billion rupees on advertising,[134] we again note that this figure comes from Tata Tea's consolidated financial statements, which were not used in the *Final Results*. Rather, Commerce relied on Tata Tea's unconsolidated financial statements.[135]

V. FINAL RESULTS

Per the Court's instructions, we have provided further explanation supporting Commerce's practice, in light of section 773(c)(5) of the Act and the 1988 "reason to believe or suspect" standard, in selecting surrogate financial ratios and applied it to the facts of this case. Consequently, and for the foregoing reasons, we have continued to rely on Tata Tea's financial statements.

7/16/2020

X

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

[132] *See* Petitioners' Letter, "Petitioners' Case Brief," dated April 20, 2012 at 17 (stating that yield loss is between 14.5 and 19.3 percent); *see also* Xinboda's November 16, 2011 Second Supplemental Questionnaire Response at 23 (stating something similar as business proprietary information).
[133] *See* Final SV Memorandum at 4, n.24, n.25, and n.26. Total tea produced 881.73 kgs. (in lakhs) divided by 1,070.65 kgs. (in lakhs) equals 17.65 percent.
[134] *See* Xinboda's Remand Comments at 14.
[135] *See, e.g., Garlic 16 Final Results*, and accompanying IDM at 41-42.