

Jinan Yipin Corporation, Ltd. and

Shandong Heze International Trade and Developing Company v. United States

Consol. Court No. 04-00240

Slip Op. 09-70 (CIT July 2, 2009)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

SUMMARY

The Department of Commerce (“the Department”) has prepared these final results of redetermination pursuant to a remand order from the Court of International Trade (“the Court”) in *Jinan Yipin Corporation and Shandong Heze International Trade and Developing Company v. United States*, 637 F. Supp. 2d 1183 (Ct. Int’l Trade 2009) (“*Jinan Yipin II*”).

In *Jinan Yipin II*, the Court remanded to the Department the following issues: the surrogate value applied to Jinan Yipin Corporation Ltd.’s (“Jinan Yipin”) and Shandong Heze International Trade and Developing Company’s (“Shandong Heze”) use of garlic seed, the method of valuation and surrogate value applied to Jinan Yipin’s and Shandong Heze’s use of water, and the surrogate value applied to Jinan Yipin’s packing cartons. In addition, the Court also directed the Department to determine whether an alleged ministerial error in the calculation of surrogate financial ratios exists, and to make any necessary correction.

The Department has reconsidered the surrogate value for garlic seed and packing cartons, but has made no changes to these values. With respect to water, the Department has determined that it is appropriate to value the energy costs associated with pumping water instead of valuing the water itself. Finally, the Department has corrected a ministerial error in the calculation of the surrogate financial ratios.

BACKGROUND

On June 16, 2004, the Department published the final results of the 2001-2002 administrative review of the antidumping duty order on fresh garlic from the People's Republic of China. *See Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews*, 69 FR 33626 (June 16, 2004) (“*Final Results*”). Jinan Yipin and Shandong Heze subsequently challenged several decisions from the final results before the Court.

On November 15, 2007, the Court remanded seven issues to the Department in *Jinan Yipin Corporation, Ltd. and Shandong Heze International Trade and Developing Company v. United States*, 526 F. Supp. 2d 1347 (CIT November 15, 2007) (“*Jinan Yipin I*”).¹ The Department filed its first remand results with the Court on March 14, 2008. *See Remand Redetermination Jinan Yipin Corporation, Ltd. and Shandong Heze International Trade and Developing Company v. United States*, (March 14, 2008) (“*Final Redetermination of Jinan Yipin I*”). On July 2, 2009, the Court issued its decision in *Jinan Yipin II*, and again remanded the Department's valuation of garlic seed, water and packing cartons. The Court also ordered the Department to correct a ministerial error in the surrogate financial ratios calculation, if it determined that one existed.

On January 6, 2010, the Department released to parties a draft redetermination for the valuation of garlic seed, water, and cardboard carton, as well as the correction of ministerial errors (“*Draft Redetermination of Jinan Yipin II*”). We requested that parties comment on the

¹ The Court remanded the following issues: 1) treatment of sales between Jinan Yipin and Houston Seafood negotiated after March 29, 2002; 2) affiliation based on the date Henry Lee began his employment with American Yipin; 3) reconsideration of the facts available rate with an adverse inference applied to sales to Houston Seafood; 4) calculation of Jinan Yipin's indirect selling expenses; 5) valuation of garlic seed; 6) valuation of water or the energy cost of producing water; and 7) valuation of packing cartons.

draft redetermination by January 13, 2010. On January 15, 2010, Jinan Yipin requested an extension until January 21, 2010 to submit comments. The Department granted all Interested Parties an extension to submit comments by January 21, 2010. *See* Memorandum from Analyst regarding: Release of materials related to Draft Redetermination Pursuant to Court Remand, dated January 19, 2010. Jinan Yipin submitted comments on January 21, 2010, and the Department has addressed these comments below. *See* Letter from Grundfeld, Desiderio, Lebowitz, Silverman, and Klestadt, LLP, regarding: Comments on Second Draft Remand Redetermination: Fresh Garlic from the People’s Republic of China (A-570-831), dated January 21, 2010 (“*Jinan Yipin Comments*”). No other party commented on the draft redetermination. We have addressed Jinan Yipin’s comments in section VI, Comments from Interested Parties, below.

ANALYSIS

I. Valuation of Garlic Seed

In the *Final Results*, the Department valued the garlic seed used by respondents with the Agrifound Parvati and the Yamuna Safed-3 varieties from the National Horticultural Research and Development Foundation (“NHRDF”) data because it determined the bulb diameter and number of cloves per bulb match the seed used by the respondents in these key characteristics. *See Final Results* at 9. The Department declined to use Indian import data to value garlic seed because they were not as product specific as the pricing information for the two varieties within the NHRDF data.

In *Jinan Yipin I*, the Court remanded the valuation of garlic seed to the Department, holding that the Department did not provide sufficient findings of fact supported by substantial evidence to support its claim that the NHRDF price, unlike the Indian import data contained in

the *Market Research Report on Fresh Whole Garlic in India* (“*Market Research Report*”), represents the best available information for valuing garlic seed. *Id.* at 1370 (citing Letter from Collier Shannon Scott re Petitioners’ Submission of Surrogate Values, dated June 30, 2003, at Exhibit 7).

In the *Final Redetermination of Jinan Yipin I*, the Department reconsidered the following surrogate values on the record for garlic seed: 1) Indian Import Statistics data from the *Monthly Statistics of the Foreign Trade of India* (“MSFTI”) as reported by the World Trade Atlas (“WTA”) for Harmonized Tariff Schedule (“HTS”) category 0703.20.00 “Garlic Fresh or Chilled”; 2) prices for Indian varieties of garlic as set forth in several “News Letters” of NHRDF; and 3) import, export and Indian domestic price data included in the *Market Research Report*.² See *Final Redetermination of Jinan Yipin I* at 8. Of the three sources for garlic seed on the record, the Department found that both the NHRDF price and the Indian import statistics are period-wide prices, net of taxes and import duties, contemporaneous, and publicly available. However, the Department concluded that only the NHRDF data were product specific and, therefore constituted the best available information. *Id.* at 9-10.³

In *Jinan Yipin II*, the Court remanded the issue to the Department a second time, ordering Commerce to “reconsider its decision to use the NHRDF data and base a new determination on a

² The record contains two sources for Indian import statistics regarding garlic seed: the MSFTI import data and the import prices provided in the *Market Research Report*.

³ The Court states in *Jinan Yipin II* that the Department, “in a departure from the Final Results, found that the MSFTI data pertaining to imports from China were product-specific.” *Jinan Yipin II* at 10 (citing *Final Redetermination of Jinan Yipin I* at 9). However, the Department respectfully disagrees with the Court that it made such a determination. At page 10 of *Final Redetermination of Jinan Yipin I*, although the Department stated that “the Indian import data originally included garlic seed that is, *perhaps*, identical to the Chinese garlic seed being valued,” (emphasis added) the Department did not actually conclude that the Indian import data were product specific.

fair comparison of the three data sets.” See *Jinan Yipin II*, 637 F. Supp. 2d 1183 at 1192. The Court specifically concluded that the Department’s rejections of the two alternate data sources “rely on overly broad practices, lack key findings and sound reasoning, and rely on certain findings that are unsupported by substantial record evidence.” *Id.* at 16. On remand, in accordance with the Court’s order, the Department has reevaluated the three data sources and continues to find that the NHRDF data are the best available for valuing respondents’ garlic seed.

A. NHRDF Data

In reconsidering the surrogate values on the record for garlic seed, section 773(c)(1) of the Tariff Act of 1930, as amended (“Act”) instructs the Department to use “the best available information” from the appropriate market economy. With respect to surrogate value selection, “it is the Department’s stated practice to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data.”

See Non-Market Economy (“NME”) Surrogate Country Selection Policy Bulletin

(<http://ia.ita.doc.gov/policy/index.html>), at page 4 of the website version (“*NME Policy Bulletin*”).

We believe the NHRDF data most accurately reflect the garlic seed input in question, and therefore best fulfill the Department’s standards for surrogate value selection listed above. The record throughout the underlying review demonstrates that the size of respondents’ garlic bulb ranges from 50 to 65 mm in diameter, with anywhere from 10 to 15 cloves per bulb, as demonstrated in the questionnaire responses of the respondents. See, e.g., Letter from Lee and Xiao re: Fresh Garlic from the People’s Republic of China: Administrative Review dated June

20, 2003 at Exhibit SA-1; Supplemental Questionnaire Response of Jinan Yipin Corporation: Administrative Review of Fresh Garlic from the People’s Republic of China (A-570-831), dated June 10, 2003, at 79; Memorandum regarding: Fresh Garlic from the People’s Republic of China – Jinan Yipin Corporation, Ltd. – Verification of Jinan Yipin’s Factors-of-Production Data, dated March 10, 2004, at page 6. Record evidence additionally demonstrates that with a bulb size in excess of 50 mm in diameter, the garlic bulbs grown by respondents are far larger than typical native Indian garlic strains, which usually have a bulb diameter between 20 and 40 mm. *See Fresh Garlic From the People’s Republic of China: Final results of Antidumping Duty Administrative Review and New Shipper Reviews*, 69 FR 33626 (June 16, 2004), and accompanying Issues and Decision Memorandum (“*Final Results*”) at 10; *see also Market Research Report* at 4. For this reason, the Department has opted to continue to use a data source that values the particularly large, high-quality bulb grown by respondents.

There is evidence on the record to suggest that, despite the higher cost, compared with native strains of Indian garlic, Indian garlic producers are still willing to purchase the NHRDF’s clonal varieties of garlic. Of the two varieties the Department selected from the NHRDF price list, the data supporting the *Market Research Report* submitted by Petitioners indicate that both are currently popular and increasingly used in a wide range of areas. Specifically, the first variety the Department used to value respondents’ garlic seed, the Agrifound Parvati variety, is “very popular in {Himachal Pradesh}.” *See* Letter regarding: Eighth Administrative and New Shipper Reviews of the Antidumping Duty Order on Fresh Garlic from the People’s Republic of China: Publicly-available source information relating to foreign market research report, dated August 8, 2003 (“*Supporting Data*”) at 12. The *Supporting Data* confirm that the area under cultivation using Agrifound Parvati is increasing rapidly. The other variety the Department used

to derive a surrogate value for garlic seed – Yamuna Safed-3 – was in fact developed from southern strains of native Indian garlic, and “has gained wide popularity” throughout at least eight Indian states. *See id.* at 12. Notwithstanding the higher price, the record suggests that these high-yield strains are frequently used by Indian garlic producers.

B. Market Research Report

In the *Final Redetermination of Jinan Yipin I*, the Department reiterated its finding that the domestic, import and export garlic prices contained in the *Market Research Report* were not publicly available and, as such were not preferable sources for surrogate values. *See Final Redetermination of Jinan Yipin I* at 9; *see also* 19 CFR 351.408(c)(1). In *Jinan Yipin II*, the Court emphasized that, on August 8, 2003, in response to a request from the Department, Petitioners submitted publicly available background information related to the *Market Research Report* during the course of the review. *See* Letter regarding: June 30, 2003 Petitioner submission of surrogate values, dated August 1, 2003; *see also Supporting Data*. The Court ordered the Department to specifically address the public availability of the *Market Research Report* in light of Petitioners’ *Supporting Data*. *See Jinan Yipin II*, 637 F. Supp. 2d at 1190.

In addition, in *Jinan Yipin II*, the Court sustained the Department’s determination that the NHRDF data are more specific than the *Market Research Report* data on domestic garlic prices. *Jinan Yipin II*, 637 F. Supp. 2d at 1192. However, the Court “conclude{d} that the Department’s rejections of the two alternate data sources rely on overly broad practices, lack key findings and sound reasoning, and rely on certain findings that are unsupported by substantial record

evidence.” *Id.* Specifically, with regard to the import data contained in the *Market Research Report*, the Court held that the Department “relied on an overly broad practice without making findings specific to this review and without comparing the import data to the other data sets on the record.” *See Jinan Yipin*, 637 F. Supp. 2d at 1192. With regard to the export statistics contained in the *Market Research Report*, the Court held that the Department relied upon its longstanding practice to eliminate exports from India from consideration in its surrogate value calculations, but “did not find, based on record evidence, that India subsidized the production of garlic for export or that any other identified export subsidy affected garlic exported from India.” *Id.* at 1191.

Thus, on remand, in addition to addressing the public availability of the *Market Research Report*, the Department has addressed the Court’s concern with regard to our assessment of the export data and import data from the *Market Research Report*.

1. Public Availability of the *Market Research Report*

As stated above, in determining surrogate values for respondent inputs, it is the Department’s policy “to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and *publicly available data*.” *See NME Policy Bulletin* {emphasis added}. The use of publicly available information helps to ensure that the Department’s reasoning in surrogate value selection is verifiable by all interested parties. The *Market Research Report* contains a number of broad assertions regarding the domestic Indian garlic industry, which, if they were to be taken on face, would have significant implications for respondents’ final dumping margins. The acceptance of this non-publicly

available information as fact without corroborating source data would lessen the overall transparency of the Department's final determination. In the *Final Redetermination of Jinan Yipin I*, the Department determined that the *Market Research Report* submitted by petitioners was not publicly available. Upon careful review, in light of the Court's comments regarding the *Supporting Data*, the Department finds that, while the *Market Research Report* is not publicly available, certain claims made in the *Market Research Report* are substantiated by publicly available source information in the *Supporting Data*. Specifically, the Department finds that the Indian import and export prices for garlic are corroborated by material included in the *Supporting Data*.

The data presented in "Appendix 4.1: Garlic Exports from India" and "Appendix 4.2: Garlic Imports in India" of the *Supporting Data* do corroborate several charts and graphs in the *Market Research Report*, particularly "Exhibit 6.1: Trends in Export of Garlic from India," "Exhibit 6.2: Destination-wise Analysis of Indian Garlic Exports," "Exhibit 6.3: Trend in Import of Raw Garlic to India" and "Exhibit 6.4: Origin-wise Analysis of Indian Garlic Imports." See *Market Research Report* at 23 and 28; see also *Supporting Data* at 155-166. For this reason, we now find the export and import price data presented in Exhibits 6.2 and 6.4 are reliable because they are supported by publicly available information.

In addition to the import and export prices in the *Market Research Report*, we continue to find "Appendix 2: Garlic Varieties Developed by NHRDF" of the *Supporting Data* to be publicly available. See Memorandum regarding: Fresh Garlic from the People's Republic of China; Administrative Review and New Shipper Reviews for the Period 11/1/01-10/31/02: Factors Valuations for the Preliminary Results of the Administrative Review and New Shipper

Reviews, dated December 1, 2003 (“*Prelim FOP Memo*”), at 3 (unchanged in final results). “Appendix 2” of the *Supporting Data*, contains reports relating to garlic bulb size, yields, and geographic information relating to the Indian garlic industry. See *Supporting Data* at 9-12. We can directly tie this information to the charts on pages 14 and 15 of the *Market Research Report*, which outline the varieties of garlic typically grown in India, their bulb sizes, the number of cloves typically produced, the regions in which they are grown, as well as other, more general, background information. See *Supporting Data* at Exhibit 1. Included in these *Market Research Report* charts are the physical characteristics of the particular garlic strains the Department is using to value garlic seed, which played a substantial part in our initial decision to select the Agrifound Parvati and Yamuna Safed-3 strains from the NHRDF data. See *Prelim FOP Memo* at 2 & 3. For this reason, we find the *Market Research Report* to be reliable to the extent that it provides information regarding the number of cloves per bulb and bulb diameter of the strains featured in the NHRDF data.

Although we now find the Indian import and export prices listed in the *Market Research Report* to be both reliable and supported by publicly available information, we still do not find them to be the best surrogate value sources on the record. As discussed in section 2, despite their public availability, the Indian import statistics in the *Market Research Report* are not sufficiently specific to respondents’ very particular type of large-sized, high-quality garlic bulb. The export prices listed in the *Market Research Report*, as discussed further in section 3 below, are unsuitable sources for surrogate values because of the generally available export subsidies imposed by the Indian government which impact the market value of Indian export prices for garlic.

With regard to the domestic Indian garlic prices provided in the *Market Research Report*, we find that they are neither publicly available nor the best surrogate value sources for garlic seed on the record. In its current state, the sections of the *Supporting Data* meant to substantiate the domestic prices are incomplete. On several of the pages, significant portions of the data are not legible. *See Supporting Data* at 67-81. Regardless, even if the *Supporting Data* completely confirmed the domestic prices outlined in the *Market Research Report*, we still would not find the domestic Indian prices for garlic seed to be the best surrogate value sources on the record of this review. As was noted in the *Final Redetermination of Jinan Yipin I* and upheld in *Jinan Yipin II*, the domestic garlic values are not as product specific as the NHRDF data. Since the record demonstrates that respondents' high-yield garlic seed differs from that used by domestic Indian garlic producers, we continue to find that the domestic Indian prices are not the best surrogate value sources for respondents' garlic seed inputs. *See Final Redetermination of Jinan Yipin I* at 12; *see also Jinan Yipin II*, 637 F. Supp. 2d at 1192.

2. Import Statistics and MSFTI Data

In *Jinan Yipin II*, the Court held that the Department's decision to reject the Indian imports from China listed in the market research report is unsupported by findings of fact grounded in record evidence and is unsupported by adequate reasoning. *See Jinan Yipin II*, 637 F. Supp. 2d at 1189. The Court found that a blanket policy of refusing to use import data pertaining to products exported from an NME country is inconsistent with the statutory obligation to value factors of production ("FOP") according to the best available information on the individual record in the specific investigation or review. *Id.* (citing section 773(c)(1)(B) of the Act).

The Court noted that the Department may reasonably infer, based on findings regarding the presence of government control on various aspects of NMEs, that import data from an NME country is inferior to import data from a market economy country. However, the Court stated that a fair comparison of the competing data sets on the record in a review, in which all available information is affected by at least one flaw, could lead to a finding that data on imports from an NME country are the best available information with which to value an FOP. See *Jinan Yipin II*, 637 F. Supp. 2d at 1189. Additionally, the Court found that the analogy that the Department draws between an NME producer's costs as an element of normal value, and prices in a market economy country of products imported from an NME country, is not meaningful. *Id.* Therefore, the Court held that the Department foreclosed the opportunity to make a qualitative comparison between the NHRDF price, the Indian imports from China listed in the *Market Research Report*, and the other datasets on the record. Accordingly, the Court remanded this issue back to the Department for reconsideration.

In this redetermination on remand, we have followed the clear instruction of the Court and have reconsidered whether the Indian imports from China listed in the *Market Research Report* in comparison to the NHRDF price and other datasets on the record represents the best available information for valuing garlic seed. Section 773(c) of the Act states that if the subject merchandise is exported from an NME country, and the administering authority finds that the available information does not permit normal value of the subject merchandise to be determined on the basis of prices and costs of that merchandise, the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority. The Department does not use internal NME prices and costs, pursuant to section 773(a) of the Act,

unless the record evidence shows that a market oriented industry exists. *See* 19 CFR 351.408. Thus, when the Department finds that the available information is inadequate for purposes of determining the normal value of subject merchandise, pursuant to section 773(c)(1) of the Act, the Department shall determine the normal value on the basis of the price at which merchandise that is comparable to the subject merchandise, and produced in one or more market economy countries that are at a level of economic development comparable to that of the nonmarket economy country, is sold in other countries, including the United States. *See* section 773(c)(2) of the Act.

For this remand, the Department notes that in the preliminary and final results of the 8th administrative review, the Department based normal value on the NME producers' FOPs valued in India, the surrogate market-economy country considered to be appropriate by the Department. *See Fresh Garlic from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and New Shipper*, 68 FR 68868, 68872 (December 10, 2003), and accompanying *Issues and Decision Memorandum* (unchanged in *Final Results*). In selecting the most appropriate surrogate market economy values for valuing the NME producer's FOPs, the Department considers several factors, including whether the surrogate value is publicly available, contemporaneous with the POR, represents a broad market average, chosen from an approved surrogate country, is tax and duty-exclusive, and specific to the input. *See* section 773(c)(1)(B) of the Act.

However, in selecting the most appropriate surrogate market economy value, it is the Department's established practice to exclude imports of that FOP from NMEs to the surrogate market economy country. *See, e.g., Tapered Roller Bearings and Parts Thereof, Finished or*

Unfinished, From Romania: Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 37194, 37195 (July 11, 1997). Section 771(18) of the Act defines an NME country as “any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.” In making a determination that a country, such as the PRC, is an NME country, the Department takes into account a variety of factors, including “the extent of government control over the allocation of resources and over the price and output decisions of enterprises.” See section 771(18)(B) of the Act. Therefore, because NME countries are defined, under section 771(18) of the Act, as countries that do not operate on “market principles of cost and pricing structures,” the Department has established a policy of excluding imports from NME countries when selecting the most appropriate market economy surrogate value.

Moreover, the Department’s policy of excluding imports and prices from NME countries has been found by the courts to be in accordance with Congressional intent. It is evident that Congress did not want prices from non-market economy countries to be relied upon for valuation of a producer’s FOPs when “{t}he supply and demand forces {in state-controlled economies} do not operate to produce prices, either in the home market or in third countries, which can be relied upon for comparison purposes.” See S. Rep. No. 93-1298, at 174 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7186, 7311. Additionally, the courts have found that it was Congress’s intent that the Department should avoid using distorted surrogate prices and thus should avoid “using any prices which it has reason to believe or suspect may be dumped or subsidized prices.” See *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1378 (CAFC 1999) (“*Nation Ford*”) (citing to H.R. Conf. Rep. 100-576, at 590 (1988)); *Taiyuan Heavy Mach. Import & Export Corp. v. United States*, 23 CIT 701, 708 (1999). Based on Congress’s intent to base the

valuation of an NME producer's FOPs on prices and costs governed by market principles, the court has previously upheld the Department's practice of excluding import prices from NME countries for consideration in selecting the best available information for surrogate value purposes. *See Taiyuan Heavy Mach. Import & Export Corp.*, 23 CIT at 708.

However, for purposes of this remand, the Department has reconsidered whether the Indian imports, including the imports from China, listed in the *Market Research Report* represents the best available information for valuing garlic seed. Over the course of the underlying review, we have repeatedly noted that over 94 percent of India's garlic imports are from China. *See Final Redetermination of Jinan Yipin I* at 9. Consistent with Department policy, as discussed above, we omit the exports of NMEs, as well as those countries with generally available export subsidies, from surrogate value calculations in order to determine a normal, market economy price. However, after consideration of the facts on the record, the antidumping statute, Congressional intent, and prior judicial proceedings, the Department finds that the Indian imports, of which 94 percent are imports from China, listed in the MSFTI data and the *Market Research Report* do not represent the best available information on the record for valuing garlic seed because they are not specific, and because they are not prices based on market principles.

On reevaluation, even if the Department were to include the Chinese imports, the Department continues to find that the Indian MSFTI import statistics are not as specific to respondents' product as the NHRDF data. We stated in the *Final Redetermination of Jinan Yipin I* that there is no information on the record which speaks to the quality, size, or number of cloves in the garlic imports from the market economy countries contained in the Indian import data. *See Final Redetermination of Jinan Yipin I* at 10. The Court held that the Department "was

justified in determining that the record lacked sufficient information on the physical characteristics of the garlic represented by the MSFTI import data pertaining to countries other than China.” *See Jinan Yipin II*, 637 F. Supp. 2d at 1190. Although the Court observes in *Jinan Yipin II* that the *Market Research Report* contained evidence that “Chinese garlic is imported in the form of whole bulbs, not loose cloves, and that these imports are comparable to the subject merchandise with respect to bulb diameter and number of cloves per bulb,” (*Jinan Yipin II*, 637 F. Supp. 2d at 1187) there is no corroborating data submitted to the record by any party during the course of the review. At no point in any of its nine appendices does the *Supporting Data* describe the nature of Chinese garlic imports into India or the manner in which such imports are shipped. As was the case with the domestic price data contained in the *Market Research Report*, the *Market Research Report*’s claim regarding the form of garlic imported into India from China is not substantiated by publicly available information. Because publicly-available source data for the particular claims regarding the quality and form of garlic imports from China to India have not been submitted to the record, that particular claim does not meet the Department’s standards for public availability. *See NME Policy Bulletin*.

Furthermore, when considering the best available information for valuing an NME producer’s FOPs, the Department, in essence, is creating a relationship between the market structure of the surrogate country and the “hypothetical” free-market structure of the NME producer under investigation. *See Nation Ford*, 166 F.3d at 1377. In choosing the best available information, the Department bases its selection on a surrogate value that most accurately represents the fair-market value of the FOP in a hypothetical market economy country, *i.e.*, China. *See id.*

Based on Congress's intent that the Department value an NME producer's FOPs on prices and costs governed by market principles, as discussed above, the Department finds that valuing garlic seed using the Indian import data, including China imports that represent the majority of the data, would not fulfill this objective. China is considered an NME, the Department finds that the Indian import prices, including the prices from China, listed in the MSFTI data and *Market Research Report*, pursuant to section 771(18) of the Act, are prices that are not based on "market principles of cost and pricing structure and thus are inherently unreliable."

As discussed above, the antidumping statute and Congress direct the Department to value the FOPs of an NME producer using prices from a surrogate market economy that operates on market principles of cost and pricing structures. The Department finds that using the Indian import prices, including the prices from China, listed in the market research report would not result in a surrogate market economy value that is based on market economy principles. Specifically, the Department finds that using the Indian import prices, which are overwhelmingly prices from China, would taint the surrogate value. The Department finds that for a purchase of a product sourced in, and priced by, an NME country, there is room for price manipulation that would not reflect the realities of a market economy industry. In contrast, no such concerns arise with respect to prices of a product sourced in, and priced by, a market economy country because these are not individual transactions prone to underlying NME cost influences. *See Notice of Final Determination of Sales at Less Than Fair Value: Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation*, 65 FR 42669 (July 11, 2000), and accompanying Issues and Decision Memorandum at Comment 1.

Therefore, based on the above analysis, the Department finds that the Indian import prices, which are overwhelmingly prices from China, do not represent the best available information for valuing garlic seed because 1) the overwhelming majority of the prices are prices from an NME country and thus are not based on market-determined factors; and 2) they are not specific to the type of garlic sold by the respondents.

3. Export Statistics

In the *Final Redetermination of Jinan Yipin I*, the Department stated that it would not consider the Indian export data contained within the *Market Research Report* for valuing garlic seed because we have found that India is a country with generally available export subsidies and it is the Department's longstanding practice to eliminate exports from India from consideration in our surrogate value calculations. *See Final Redetermination of Jinan Yipin I* at 11. Upon reconsideration, the Department continues to find that the Indian export data contained within the market research report should not be considered for valuing garlic seed because India has generally available export subsidies.

In *Jinan Yipin II*, the Court held that the Department failed to comply with the remand ordered by *Jinan Yipin I*, and remanded the issue to the Department for a second time, stating that the Department's unsupported finding that generally available export subsidies possibly affected garlic production in India does not justify the Department's decision to reject the export data on garlic without comparing the data set to other available data sets. *See Jinan Yipin II*, 637 F. Supp. 2d at 1191. Specifically, the Court found that the Department "did not find, based on record evidence, that India subsidized the production of garlic for export or that any other identified export subsidy affected garlic exported from India." *See id.*

In this redetermination on remand, we have followed the instruction of the Court and have reconsidered whether the Indian exports of garlic listed in the *Market Research Report* should be excluded because there is substantial record evidence, *i.e.*, the Department's own countervailing duty ("CVD") findings, that generally available export subsidies may affect garlic exported from India. Based on this assessment, we have determined that there is reasonable evidence on the record to infer that there is "reason to believe or suspect" that Indian garlic exports may be subsidized, pursuant to the standard outlined in *Al Tech*. See *Al Tech Specialty Steel Corp. v. United States*, 575 F. Supp. 1277, 1280 (CIT 1983) ("*Al Tech*") ("In order for reasonable suspicion to exist there must be 'a particularized and objective basis for suspecting' the existence of certain proscribed behavior, taking into account the totality of the circumstances -- the whole picture.").

Besides the factors outlined in the antidumping statute, and as discussed above, the legislative history has been instructive in how the Department selects the most appropriate surrogate market economy value. The legislative history states in relevant part that when selecting from the information on the record for the best information available for surrogate value selection, "{the Department} shall avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices." See Omnibus Trade and Competitiveness Act of 1988, H.R. Conf. Rep. No. 100-576 at 590-91 (1988) ("House Conf. Rep."). Although this section of the Act has since been revised, the changes made to section 773(c) of the Act in the URAA were minor. See, *e.g.*, S. Rep. 103-412, 2d. Sess. at 73 (1994) (explaining that the minor modifications were made to conform the terminology to that in the Antidumping Agreement).

The Department has articulated its application of the House Conference Report to reject for surrogate value selection purposes imports from countries that may be dumped or subsidized in several proceedings. *See, e.g., Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Notice of Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review*, 70 FR 54007, 54011 (September 13, 2005) (unchanged in final results). In February 2002, the Department articulated this policy in an Import Administration Office of Policy Memorandum. This memorandum advised that for all non-market economy investigations, factor input prices from India, South Korea, Thailand, and Indonesia should be disregarded, whether they are market economy purchases or import statistics into the surrogate country, due to the fact that these countries maintain broadly available, non-industry specific export subsidies. *See* Memorandum from Office of Policy to DAS and Office Directors: “NME investigations: procedures for disregarding subsidized factor input prices” (February 2002), which will be included in the remand record.

In upholding the Department’s practice to reject prices the Department has reason to believe may be dumped or subsidized, the courts have required “particular, specific and objective evidence in support of its suspicion that the prices are distorted,” as is being required by this Court. *See China National Machinery Import & Export Corporation v. United States*, 293 F. Supp. 2d 1334, 1339 (CIT 2003) (“*China National*”), *aff’d*, 104 Fed. Appx. 183 (Fed. Cir. 2004); *Kerr-McGee Chemical Corp. v. United States*, 985 F. Supp. 1166 (CIT 1997) (“*Kerr-McGee*”). A reason to believe or suspect requires less evidence than an actual finding of subsidies in fact. *See Al Tech*, 575 F. Supp. at 1279. The Department notes that the courts have found the fact that CVD programs exist in the specific country at question suffices to meet the evidentiary standard in support of the Department’s suspicion that the prices are distorted. *See id.*;

Tehnoimportexport v. United States, 783 F. Supp. 1401, 1406 (CIT 1992) (“*Tehnoimportexport*”) (finding the existence of product-specific antidumping duty orders and non-product specific subsidies as determined by CVD orders provides a reasonable basis to believe or suspect surrogate export prices were dumped or subsidized).

In linking the subsidy to the price from the country in question, the Department has only needed to show that the industry at question may have benefitted from these generally available subsidies. *See China National*, at 293 F. Supp. 2d at 1339 (emphasis added). The statute does not provide any particular criteria for the Department to consider in making a determination to avoid subsidized prices. As is explained in the legislative history, Congress’s intent in applying the suspicion policy was not for the Department to “conduct a formal investigation to ensure that such prices are not dumped or subsidized, but rather that {the Department} base its decision on information generally available to it at that time.” *See House Conf. Rep.* at 590-1. This has further been articulated by the courts, *i.e.*, stating that Congress clearly instructed that no formal investigation is necessary for prices that the Department has reason to believe or suspect may be distorted. *See China National*, at 12-13. Thus, the courts have found that Congress has clearly provided the Department with ample discretion to disregard suspected distorted prices, as long as this finding is supported by substantial record evidence.

Based on Congress’s intent that the Department should disregard prices that it has reason to believe or suspect may be dumped or subsidized for surrogate value purposes, as discussed above, and absent a formal investigation of Indian garlic exports, the Department relied on its own CVD findings as a basis for rejecting the Indian garlic export data within the market research report for surrogate value consideration of garlic seed. Through these proceedings, the

Department established that there is substantial record evidence that Indian garlic exporters could have benefitted from generally available subsidies found to exist in India during the period of the underlying garlic administrative review (“the relevant period of review”).

The Department found that there were generally available export subsidies in existence during the relevant period of review. *See Notice of Preliminary Affirmative Countervailing Duty Determination: Prestressed Concrete Steel Wire Strand from India*, 68 FR 40629, 40633-5 (July 8, 2003), (“*PC Strand from India Prelim*”) (unchanged in *Final Affirmative Countervailing Duty Determination: Prestressed Concrete Steel Wire Strand From India*, 68 FR 68356 (December 8, 2003), and accompanying Issues and Decision Memorandum at Section II.A (Government of India Programs) (“*PC Wire Strand from India Final*”); *Final Results of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 69 FR 51063 (August 17, 2004), and accompanying Issues and Decision Memorandum at Section IV (Analysis of Programs) (“*PET Film from India Final*”); *Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India*, 69 FR 26549 (May 13, 2004), and accompanying Issues and Decision Memorandum at Section II.A (Analysis of Programs Conferring Subsidies) (“*Hot-Rolled Steel from India Final*”). In *PC Wire Strand from India Final*, these programs were pre-shipment and post-shipment export financing, export promotion capital goods scheme (“EPCGS”), and duty entitlement passbook scheme (“DEPS”). *See PC Wire Strand from India Final*, at Section II.A. Additionally, in *PET Film from India Final*, these programs were pre-shipment and post-shipment export financing, DEPS, EPCGS, Income Tax Exemption scheme (Section 80 HHC), and capital subsidy. *See PET Film from India Final*, at Section IV. Furthermore, in *Hot-Rolled Steel from India Final*, these programs were pre-shipment and post-shipment export financing, DEPS, and EPCGS. *See Hot-Rolled*

Steel from India Final, at Section II.A. These subsidy programs have been found to be generally available to exporters and producers in India during the relevant period of review. *See PC Strand from India Prelim*, 68 FR 40629, 40633-5 (July 8, 2003) (unchanged in *PC Strand from India Final*); *Hot-Rolled Steel from India Final*, at Section II.A; *PET Film from India Final*, at Section IV. The CVD proceedings on which the Department relied were conducted in accordance with United States trade law and provide substantial, specific and objective evidence which could reasonably be interpreted to support a suspicion that the Indian export prices of garlic seed may have been distorted.

Based on the existence of these subsidy programs that were generally available to all exporters and producers in India at the time of the POR, the Department finds that it is reasonable to infer that all exporters, including garlic exporters, from India may have benefitted from these subsidies. For instance, in *Hot-Rolled Steel from India Prelim*, pre-shipment financing was found to exist, specifically, the Reserve Bank of India (“RBI”), through commercial banks, provided short-term pre-shipment financing to exporters, and upon presentation of a confirmed export order or letter of credit to a bank, companies could receive pre-shipment loans for working capital purposes and exporters could also establish pre-shipment credit lines upon which they may draw as needed. *See Notice of Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India*, 69 FR 907, 909-910 (January 7, 2004) (“*Hot Rolled Steel from India Prelim*”) (unchanged in *Hot-Rolled Steel from India*, at Section II.A). Additionally, this program was found to confer a subsidy benefit to a company, pursuant to section 771(5A) of the Act.

The Department finds that it is reasonable to believe that a garlic company located in a market economy country operating under normal, *i.e.*, competitive market principles, would take advantage of such benefits available to it. Moreover, given the competitive environment in which the garlic market operates in India, it is reasonable to infer that garlic exporters would have taken advantage of these programs. It is important to note that these export subsidy programs were offered to domestic companies engaged in foreign trade. Enrollment in these export subsidy programs was not based on the merchandise produced or a particular industry but was contingent on a company's export performance. *See Hot Rolled Steel from India Prelim*, 69 FR at 910; *Notice of Preliminary Results and Rescission in Part of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip From India*, 69 FR 18542, 18544-6 (April 8, 2004) (unchanged in *Pet Film from India Final*).

There is no evidence on the record to lead the Department to infer that garlic exporters in India were not eligible to participate in any of these subsidy programs. Instead, there is substantial, specific, and objective evidence on the record to support a reason to believe or suspect that Indian garlic exports may have been subsidized. Additionally, any attempt by the Department to re-examine those findings of subsidization for this remand would be tantamount to conducting a formal investigation, or re-investigation, of our past findings and in direct contradiction to the legislative intent. Moreover, our reliance on CVD findings of non-product specific subsidies to establish our finding that there is a reason to believe or suspect the Indian export prices of garlic within the market research report may have been subsidized prices is supported by the holding in *Tehnoimportexport*.

After considering the evidence of broadly available export subsidies in our CVD findings that were in effect during the POR, the Department finds that there is reason to believe or suspect that Indian garlic exporters may have benefitted from these subsidies. Consequently, in accordance with Congressional intent and Departmental practice, we have not considered the Indian garlic export data listed within the *Market Research Report* for purposes of selecting the most appropriate surrogate value for garlic seed. Therefore, we find that, based on record evidence, the Indian garlic export data listed in the *Market Research Report* is not the best available information for valuing the garlic seed used by the respondents.

In sum, given the incompleteness of the background information provided in the *Supporting Data*, we find the domestic, import and export prices provided in the *Market Research Report* to not be the best surrogate value sources available for respondents' garlic seed. Due to the fact that the MSFTI import data include garlic that no record evidence suggests is representative of the large, high-quality bulb respondents export to the United States, we also continue to find them not sufficiently representative to be surrogate values. While we recognize that the *Market Research Report* describes the Chinese garlic imported into India as "imported in the bulb form itself," we note that nowhere on the record is publicly available source information provided for this claim – including in the *Supporting Data*. By contrast, the NHRDF price list provides a product specific, contemporaneous surrogate value source that, given the information submitted on pages 14 and 15 of the *Supporting Data*, is publicly verifiable. For these reasons, we continue to find the NHRDF data is the most suitable surrogate value for respondents' garlic seed on the record of the underlying review.

II. Valuation of Water

In the *Final Results*, the Department valued Jinan Yipin's consumption of irrigation water for garlic cultivation by averaging municipal water rates in India obtained from a reference issued by the Asian Development Bank. *See Final Results* at Comment 2. In *Jinan Yipin I*, the Court remanded the valuation of water to the Department, stating that the Department did not provide sufficient findings of fact supported by substantial record evidence to support its claim that water represents a raw material rather than an overhead expense. *Jinan Yipin I* at 1374.

In the *Final Redetermination of Jinan Yipin I*, the Department again treated water as a material input in the production of garlic. *Final Redetermination of Jinan Yipin I* at 15. The Department found that water was not included as an expense on Parry Agro's financial statements and that there was no record evidence that demonstrated that tea cultivation requires irrigation; therefore, the Department concluded that double counting does not occur by valuing water as a direct material. *Id.* at 18. Accordingly, the Department used Indian municipal water rates to value water for Jinan Yipin. *Id.* at 18-19.

In *Jinan Yipin II*, the Court held that the Department failed to comply with the remand order in *Jinan Yipin I*, and remanded the issue to the Department for a second time. The Court found that the Department's methodology does not "approximate the price that would be paid for the input in a market-economy country," as stated in the *Final Redetermination of Jinan Yipin I*, but rather "values water according to a method that is not linked by any factual finding to irrigation methods typically employed by garlic producers in India." *Jinan Yipin II*, 637 F. Supp. 2d at 1193. The Court held that the Department failed to justify its surrogate value selection by failing to make a finding that Indian garlic producers typically use water from a municipal water

utility to irrigate their crops. Thus, the Court found the Department's choice of municipal water rates as the surrogate value for irrigation water to be arbitrary and speculative and not in accordance with the statutory requirement to use the best available information. *Id.*

Moreover, the Court noted that Jinan Yipin attempted, in its reply to the Department's draft remand results, to place on the record new information regarding agricultural water use in India and that the Department rejected this information as an untimely submission of new information. *See id.* at 1194. Thus, the Court stated, that the Department cannot be sustained in a decision that is based on the lack of record information after it declined to reopen the record. *Id.*

With respect to double counting, the Court holds that in *Jinan Yipin I*, the Court determined that the Department's conclusion that double counting of water did not occur as a result of its calculation of a surrogate value for water was unsupported by factual findings. *Jinan Yipin I* at 1375. The Court states that the *Final Redetermination of Jinan Yipin I* points to no record evidence establishing that irrigation is not required and makes a speculative assumption concerning categories on the financial statements. *Id.* at 21.

Thus, the Court concludes that although the Department has considerable discretion in the valuation of factors of production, it must exercise that discretion reasonably, according to actual findings of fact, and must not act arbitrarily or speculatively. The Court stated that if the Department determines that it must value Jinan Yipin's irrigation water according to a cost specific to irrigation water, it must reopen the record and make findings of fact, supported by new evidence, linking the value it chooses with the irrigation practice of garlic producers in India or another surrogate country that it chooses. *Id.* at 21. Should the Department choose not to

reopen the record, the Court stated that the Department must value the water according to another method that is supportable on the current record, *e.g.*, a method that accounts for the record fact that Jinan Yipin incurred only a pumping cost in obtaining irrigation water. *Id.*

In this remand, the Department has followed the Court's order and has decided not to reopen the record but, instead, to recalculate the margin using the irrigation pumping costs reported by Jinan Yipin and Shandong Heze as the surrogate value for irrigation water. The information provided on the record of the review concerning Jinan Yipin's pumping costs consists of the following. On March 3, 2003, Jinan Yipin reported the consumption of diesel fuel used to produce one metric ton of garlic. *See* Section D Response of Jinan Yipin: Fresh Garlic from the People's Republic of China (A-570-831) ("Jinan Yipin's DQR") dated March 3, 2003, at 15. In addition, it provided detailed calculations for its diesel costs in Exhibit D-5. *See* Jinan Yipin's DQR at Exhibit 5. Jinan Yipin revised those figures, and provided additional explanation of its pumping costs in its first supplemental questionnaire response. *See* Supplemental Questionnaire Response of Jinan Yipin Corp.: Administrative Review of Fresh Garlic from the People's Republic of China (A-570-831), dated June 10, 2003, at 34 and Exhibit 25. In March 2004, the Department verified Jinan Yipin's fuel consumption rate, stating that we "found no discrepancies in Jinan Yipin's reporting of its diesel fuel or water consumption rates." *See* Fresh Garlic from the People's Republic of China (PRC) – Jinan Yipin Corporation, Ltd (Jinan Yipin) – Verification of Jinan Yipin's Factors-of-Production Data, dated March 10, 2004, at 7 and Exhibit 12.

The information provided on the record of the review concerning Shandong Heze's pumping costs consists of the following. On February 18, 2003, Shandong Heze reported the

consumption of electricity used to produce one metric ton of garlic. *See* Shandong Heze's section D response, dated February 18, 2003, at 15. In addition, it provided detailed calculations for its electricity costs in Exhibit D-3. Shandong Heze revised those figures in its first supplemental questionnaire response, dated June 20, 2003, at SD-1 and SD-6. Shandong Heze revised these figures a second time in its second supplemental questionnaire response, dated July 29, 2003, at 5 and SSD-1. In November 2003, The Department verified Shandong Heze's electricity consumption rate for irrigation water. *See* Verification of the Response of Shandong Heze International Trade and Developing Company in the Antidumping Duty Administrative Review of Fresh Garlic from the People's Republic of China, ("Shandong Heze Verification Report"), dated January 5, 2004, at 13-16 and Exhibit 26.

Therefore, in accordance with the remand order, we have calculated a value for Jinan Yipin's consumption of diesel fuel used to pump water by allocating the diesel consumption rates reported by Jinan Yipin, its 9 affiliated farmers and its one unaffiliated farmer to the production of white and purple garlic based on the total production of each farm. We then calculated a separate consumption factor for Jinan Yipin and its 9 affiliated farmers (MFGR =1), and Jinan Yipin's single unaffiliated farmer (MFGR =2). We applied these figures to all reported products in the FOP database based on manufacturer type (MFGR =1) or (MFGR =2). We multiplied the consumption factor for diesel fuel by the surrogate value for diesel fuel. We attributed freight expenses to each product based on the distance from the diesel supplier to the farm and added the amount to the surrogate value for diesel fuel. Finally, we excluded the surrogate value for water from our calculations.

In addition, in accordance with the remand order, we have valued irrigation water by calculating a surrogate value for electric consumption used to pump water for Shandong Heze. We applied the surrogate value for electricity to Shandong Heze's reported consumption factor for electricity used to pump water. We excluded the surrogate value for water from our calculations.

III. Valuation of Packing Cartons

In the *Final Redetermination of Jinan Yipin I*, the Department stated that it would not include Indian imports of packing cartons from Indonesia, South Korea, and Thailand in the surrogate value calculation because we have found them to be countries with generally available export subsidies. *See Final Redetermination of Jinan Yipin I* at 20. The Department also stated that its longstanding practice is to eliminate exports from Indonesia, South Korea, and Thailand from consideration in our surrogate value calculations. *See id.* In the *Final Redetermination of Jinan Yipin I*, the Department also excluded import values from Finland, China and an "Unspecified" category. *See id.* at 20. In *Jinan Yipin II*, the Court affirmed Commerce's exclusion of these data, with the exception of those from Indonesia, South Korea and Thailand. *See Jinan Yipin II*, 637 F. Supp. 2d at 1196. The Court held that the Department failed to comply with the remand ordered by *Jinan Yipin I*, and remanded the issue to the Department for a second time, stating that the Department's unsupported finding that generally available export subsidies affected or likely affected exports of garlic in Indonesia, South Korea, and Thailand does not justify the Department's decision to reject the Indian imports of packing cartons from these three countries. *See id.* Specifically, the Court found that the Department did not find based on substantial record evidence that Indonesia, South Korea, and Thailand, respectively,

subsidized the production of cartons or that any other identified export subsidy affects packing cartons exported from Indonesia, South Korea, and Thailand.⁴

In this redetermination on remand, we have followed the clear instruction of the Court and have reconsidered whether the Indian imports of packing cartons from Indonesia, South Korea, and Thailand should be excluded because there is substantial record evidence, *i.e.*, the Department's own CVD findings, that generally available export subsidies affect packing cartons that were imported into India. Based on this assessment, we have determined that there is reasonable evidence on the record to infer that there is "reason to believe or suspect" that Indonesian, South Korean, and Thai packing carton exports may be subsidized, pursuant to the standard outlined in *Al Tech*. See *Al Tech Specialty Steel Corp. v. United States*, 575 F. Supp. 1277, 1280 (CIT 1983) ("*Al Tech*") ("In order for reasonable suspicion to exist there must be 'a particularized and objective basis for suspecting' the existence of certain proscribed behavior, taking into account the totality of the circumstances--the whole picture.").

For discussion of the factors outlined in the statute, the legislative history in how the Department selects the most appropriate surrogate market economy value, and the court's standard for disregarding subsidized prices, please see above, section I.B.3. for the discussion of this issue in context of garlic seed. Based on Congress's intent that the Department should disregard prices that it has reason to believe or suspect may be dumped or subsidized for

⁴ In its opinion, the Court states that the Department "failed to make a finding, supported by substantial evidence on the record of this administrative review, that export subsidy programs exist in these three countries that affected or likely affected exports of garlic." See *Jinan Yipin II* at 24. As this sentence occurs in a segment dedicated to the discussion of export subsidy programs for cartons, the Department has taken the Court's intended meaning to be that the Department has failed to demonstrate that export subsidy programs exist in these three countries that affected or likely affected exports of *cartons*.

surrogate value purposes, as discussed above, and absent a formal investigation of Indonesian, South Korean, and Thai packing carton exports, the Department relied on its own CVD findings as a basis for rejecting the Indian imports of packing cartons exported from Indonesia, South Korea, and Thailand for surrogate value consideration with respect to packing cartons. Through these proceedings, the Department established that there is substantial record evidence that Indonesian, South Korean, and Thai packing carton exporters could have benefitted from generally available export subsidies found to exist in these three countries during the relevant period of review.

During the relevant period of review, the Department notes that, with respect to Indonesia in *Steel Plate from Indonesia*, the Department found that generally available export subsidies continue to exist and are being used in Indonesia. *See Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia: Final Results of Expedited Sunset Review*, 70 FR 45692 (August 8, 2005) and accompanying Issues and Decision Memorandum at Comment 1 (“*Steel Plate from Indonesia*”). Specifically, the Department found that there was a rediscount loan program where the government of Indonesia and the Bank of Indonesia provide working capital for certain exporters through the sale of letters of credit or export drafts at lower interest rates than they would normally pay on short-term interest loans. *See id.* at 4. Additionally, in *Steel Plate from Indonesia*, there was no evidence submitted to the Department that the rediscount loan program found countervailable during the investigation had been terminated. *See id.* at 3. Thus, the Department finds that it is reasonable to assume that this program continued to exist and was utilized by exporters in Indonesia during the relevant period of review. *See Certain Helical Spring Lockwashers from the People’s Republic of China; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Antidumping Duty Order, In Part*,

69 FR 12119 (March 15, 2004), and accompanying Issues and Decision Memorandum, Comment 1 at 9 (“*Helical Lockwashers Final*”) (citing to *Certain Cut-to-Length Carbon Steel Plate from Spain and the United Kingdom: Final Results of Expedited Sunset Review*, 65 FR 18056 (April 7, 2000), and accompanying Issues and Decision Memorandum at Comment 1, the Department noted, absent evidence that the program had been terminated, it was reasonable to assume that these subsidy programs continued to exist and were utilized).

Additionally, with respect to South Korea, during the relevant period of review, in *Stainless Steel from South Korea*, the Department found that there were generally available export subsidies in existence in South Korea. See *Final Results of Countervailing Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from the Republic of Korea*, 69 FR 2113 (January 14, 2004), and accompanying Issues and Decision Memorandum at Section III.A.2-5 (“*Stainless Steel from Korea*”). These programs were Article 17 (Reserve for Overseas Market Development of the Tax Exemption and Reduction Control Act (“TERCL”)), Technical Development Fund under Restriction of Special Taxation Act (“RSTA”) Article 9 (formerly TERCL Article 8), and Article 56(2) of TERCL (“Asset Revaluation”). Based on the existence of these subsidy programs that were generally available to all exporters and producers in South Korea during the relevant period of review, the Department finds that it is reasonable to infer that all exporters, including packing carton exporters, from South Korea may have benefitted from these subsidies. For instance, under Article 17 of the TERCL, a domestic person engaged in a foreign trade business is allowed to establish a foreign reserve fund equal to one percent of its foreign exchange earnings from its export business for the respective tax year. The balance of the reserve fund is not subject to corporate income tax during a grace period, which amounts to an interest free loan equal to the company’s tax savings. This program is available only to

exporters. See *Preliminary Results of Countervailing Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from the Republic of Korea*, 68 FR 53116, 53121-22 (September 9, 2003) (unchanged in *Stainless Steel from Korea*). Additionally, this program was found to confer a subsidy benefit to a company, pursuant to section 771(5A) of the Act, because it was contingent on export performance. See *Stainless Steel from Korea* at Section III.A.3.

With respect to Thailand, during the relevant period of review, in *Hot-Rolled Steel from Thailand* the Department found that there were generally available export subsidies in existence in Thailand. See *Hot-Rolled Carbon Steel Flat Products from Argentina, India, Indonesia, South Africa, and Thailand: Final Results of Expedited Five-Year (Sunset) Reviews of the Countervailing Duty Orders*, 71 FR 70960 (December 7, 2006), and accompanying Issues and Decision Memorandum, Sections 1 and 3 at 15-16 (“*Hot-Rolled Steel from Thailand*”). These programs were IPA Section 28, IPA Section 30, IPA Section 35(3), IPA Section 36(1) and provision of electricity for less than adequate remuneration. Based on the existence of these subsidy programs that were generally available to all exporters and producers in Thailand during the relevant period of review, the Department finds that it is reasonable to infer that all exporters, including packing carton exporters, from Thailand may have benefitted from these subsidies. For instance, in *Hot-Rolled Steel from Thailand*, IPA Section 35(3) was found to be an export subsidy because the promoted company is allowed various income tax deductions and exemptions on its tax returns for ten years after the company first derived income revenue. See *Hot-Rolled Steel from Thailand*, Section 3 at 15. Additionally, in *Hot-Rolled Steel from Thailand*, the Department determined that benefits from allocable countervailable subsidies continued past the end of the period of the sunset reviews. See *Hot-Rolled Steel from Thailand*,

at Issue 1. Thus, the Department finds that it is reasonable to assume that these programs continued to exist and were utilized by exporters in Thailand during the relevant period of review.

The Department finds that there were subsidy programs that have been found to be generally available to exporters and producers in Indonesia, South Korea, and Thailand during the relevant period of review. The CVD proceedings on which the Department relied were conducted in accordance with United States trade law and provide substantial, specific and objective evidence, which could reasonably be interpreted to support a suspicion that the Indian import prices of packing carton exports from Indonesia, South Korea, and Thailand may have been distorted.

Based on the existence of these subsidy programs that were generally available to all exporters and producers in Indonesia, South Korea, and Thailand, respectively, during the relevant period of review, the Department finds that it is reasonable to infer that all exporters, including exporters of packing cartons, from Indonesia, South Korea, and Thailand may have benefitted from these countries' respective subsidies. The Department finds that it is reasonable to believe that a packing carton company operating under normal, *i.e.*, competitive market principles, would take advantage of such benefits available to it. It is important to note that these export subsidy programs were offered to domestic companies engaged in foreign trade. Enrollment in these export subsidy programs was not based on the merchandise produced or a particular industry but was contingent on a company's export performance.

There is no evidence on the record to lead the Department to infer that packing carton exporters in Indonesia, South Korea, and Thailand were not eligible to participate in any of these subsidy programs. Instead, there is substantial, specific, and objective evidence on the record to

support a reason to believe or suspect that Indonesian, Thai and South Korean packing carton exports may have been subsidized. Additionally, any attempt by the Department to re-examine those findings of subsidization for this remand would be tantamount to conducting a formal investigation, or re-investigation, of our past findings and in direct contradiction to the legislative history. *See* House Conf. Rep. at 590-1. Moreover, our reliance on CVD findings of non-product specific subsidies to establish our finding that there is a reason to believe or suspect the Indonesian, South Korean, and Thai export prices of packing cartons may have been subsidized prices is supported by the holding in *Tehnoimportexport*. Therefore, we find that the information on the record supports the Department's decision to exclude these subsidized prices from the surrogate value calculation of packing cartons.

After considering the evidence of broadly available export subsidies in our CVD findings that were in effect during the POR, the Department finds that there is reason to believe or suspect that Indonesian, South Korean, and Thai packing carton exporters may have benefitted from these subsidies. Consequently, in accordance with Congressional intent and Departmental practice, we have not included the Indonesian, South Korean, and Thai prices in the surrogate value calculation of packing cartons.

IV. Correction of Ministerial Error

The Court ordered the Department to determine whether there is a ministerial error with regards to the Department's calculation of the surrogate financial ratios, and to correct the error if one exists. *See Jinan Yipin II*, 637 F. Supp.2d at 1197-98.

Jinan Yipin claimed in its comments on the *Draft Redetermination of Jinan Yipin I* that the Department inadvertently excluded "Power and Fuel" from the materials, labor and energy ("MLE") denominator in its surrogate financial ratios calculation. *See Final Redetermination of*

Jinan Yipin I at 35-36. Jinan Yipin argued that the Department should recalculate the margin results using the corrected financial ratios. *Id.* at 36. Upon review of the surrogate financial ratios calculation on remand, the Department concludes that it did make a ministerial error in the *Final Results*. On remand, the Department has included all energy expenses reported in the Parry Agro Industries Ltd. (“Parry Agro”) surrogate financial statements in the denominator of the surrogate financial ratios because the “Power and Fuel” line item is clearly identified as an energy expense. *See* Letter from Grunfeld, Desiderio, Lebowitz, Silverman and Klestadt, LLP, regarding: Surrogate Value Submission of Jinan Yipin and Harmoni: Administrative Review and New Shipper Review of Fresh Garlic from the People’s Republic of China (A-570-831), submitted June 25, 2003, at Exhibit 20, p. 12 and 28. Specifically, the Department has calculated the manufacturing overhead ratio as a percentage of direct materials, direct labor, and energy costs (all of which are included in the denominator). Second, the selling, general and administrative (“SG&A”) expense ratio is expressed as a percentage of direct materials, direct labor, energy, and manufacturing overhead costs. Finally, the profit ratio is calculated as a percentage of direct materials, direct labor, energy, manufacturing overhead, and SG&A expenses. Accordingly, we have corrected the surrogate financial ratio calculations based on Parry Agro’s financial statements to treat this expense as part of MLE.

VI. Comments on the *Draft Redetermination of Jinan Yipin II* from Interested Parties

Comment 1: NHRDF Prices as a Surrogate Value for Garlic Seed

Jinan Yipin argues that, as the *Market Research Report* claims, “the smaller diameter of Indian garlic is largely a consequence of growth in the ‘short day zone.’”⁵ Jinan Yipin further

⁵ *See Jinan Yipin Comments* at 2-3, citing the *Market Research Report* at 4. The *Market Research Report* notes that India’s so-called “long day zone” (*i.e.*, above 30 degrees north latitude) produces garlic with larger bulbs compared

asserts that the NHRDF varieties the Department used as a surrogate value for respondents' garlic seed were specifically grown for cultivation in the hilly, cooler temperatures of the long day zone. Citing *Nation Ford Chemical Co. v. United States*, 166 F.3d 1373, 1377-78 (Fed. Cir. 1999) ("*Nation Ford*"), Jinan Yipin argues that Chinese garlic varieties are already suited to the long day zone in which garlic is grown in China and, as a result, "it is unreasonable to burden Jinan Yipin with the very high cost of genetically modified garlic." See *Jinan Yipin Comments* at 4.

Jinan Yipin continues to claim that, as the record contains no documentation of a sale made by NHRDF to Indian farmers, there is no evidence that Indian garlic growers are paying NHRDF prices for high yield varieties of garlic. See *Jinan Yipin Comments* at 4. Jinan Yipin argues that this is demonstrated by the domestic prices listed in the *Market Research Report*, which list "grade A" garlic "with a typical bulb diameter between 40-60 mm," as costing less than the 50 Rs/kg price listed by the NHRDF. Jinan Yipin claims that the Department's grounds for disregarding the supporting documentation provided for the *Market Research Report's* domestic prices – that they are largely incomplete and in parts illegible – is "disingenuous," as the Department has had time to request further clarification. See *Jinan Yipin Comments* at 5.

Department's Position:

Regardless of whether or not Jinan Yipin needed "to incur the cost of specially designed garlic seed," the Department maintains, and record evidence continues to support, that the NHRDF price lists provide the best market economy price for garlic bulb with physical characteristics similar to Jinan Yipin's product. In fact, in its comments on the *Draft Redetermination of Jinan Yipin II*, Jinan Yipin confirms that the so-called "long day zone" in

with the rest of the country. The *Market Research Report* also states, and Jinan Yipin affirms, that Chinese garlic is typically grown in a similar long day zone. See *Market Research Report* at 4; see also *Jinan Yipin Comments* at 3.

which the NHRDF varieties appear to be used heavily is similar to the climate and terrain in which Jinan Yipin operates. *See Jinan Yipin Comments* at 3. Jinan Yipin goes on to claim that the NHRDF varieties are necessary in the long day zone precisely because of this climate and terrain. *See Jinan Yipin Comments* at 3. Notwithstanding Jinan Yipin's arguments that it is being burdened with a high surrogate value that represents a cost for specially developed garlic, the record evidence and Jinan Yipin's own statements support the use of the NHRDF varieties as the best available information with which to value Jinan Yipin's garlic seed inputs. In establishing a surrogate value for inputs in NME antidumping cases, the Department is bound to use the best available surrogate value on the record. *See* section 773(c) of the Act. The record in this case demonstrates that the NHRDF varieties used by the Department as a surrogate value are highly similar to those actually used by Jinan Yipin, as the long day zone in India is highly similar to the climatic conditions pervasive in China's garlic growing regions. Jinan Yipin's argument that there is a great deal of such garlic seed in China is not supported by record evidence but, more to the point, it in no way refutes the fact that the NHRDF price lists are the only values on the record for such specific garlic seed inputs.

Section 773(c)(1) of the Act states that "the valuation of the factors of production shall be based on the best available information regarding the values of such factors..." The Department considers several factors when choosing the most appropriate surrogate values, including the quality, specificity, and contemporaneity of the data. *Nation Ford* further affirms that the Department is given broad discretion in the application of these guidelines. While we acknowledge that the high quality seed used in long day regions might be more common in China due to the pervasiveness of long day growing conditions there, the Department must balance this against considerable record evidence indicating Jinan Yipin produces a higher

quality, larger bulb under long day growing conditions. As such, we must use the best available information on the record to value high yield garlic seed. The only seed prices on the record with such characteristics are those contained in the NHRDF price lists.

We continue to disagree with Jinan Yipin's argument that the NHRDF price lists do not represent actual sales. The NHRDF price lists, in contrast to the price quotes provided by respondents for surrogate values for cartons, were not generated specifically for a party involved in this investigation. *See Jinan Yipin I* at 21; *see also Final Results* at 11. Rather, the NHRDF price lists were compiled from a years' worth of price lists generated by NHRDF, as part of a normal course of business, in order to communicate prices to Indian garlic growers. As noted specifically by the NHRDF newsletters, the NHRDF prices are in fact listed as "sales prices." *See* Letter from Collier Shannon Scott PLLC, dated June 30, 2003, at Exhibit 2. The Department takes this to be sufficient evidence that the NHRDF price lists are intended for market transactions.

Jinan Yipin's second argument regarding NHRDF price lists – that the lower domestic Indian price listed in the *Market Research Report* demonstrates that the NHRDF prices are too high to be market values – is without merit. As the Department noted in the *Draft Redetermination of Jinan Yipin II*, and reiterated in the *Final Results*, the *Supporting Data* submitted by parties in an attempt to validate the *Market Research Report* domestic prices were incomplete. The Department has, in fact, stated numerous times throughout the underlying review that the *Supporting Data* did not contain all of the information necessary to render the *Market Research Report* domestic prices reliable. *See Final Results* at 9. At no point in either of the two remand determinations, nor during the course of the review itself, did any party seek to add further information to the record to validate the *Market Research Report* domestic prices.

Even if the Department were to accept the domestic prices in the *Market Research* report as reliable data, we still would not find Jinan Yipin's argument that the domestic prices demonstrate the NHRDF prices are too high to be compelling. As was stated in the *Final Redetermination of Jinan Yipin I*, the domestic prices in the *Market Research Report* clearly describe grade A garlic to have a bulb diameter typically ranging between 40-60 mm. See *Market Research Report* at 22; see also *Final Redetermination of Jinan Yipin I* at 12. The *Market Research Report* further notes that garlic imported from China typically has a bulb diameter of 50-65 mm. See *Market Research Report* at 22. As the *Market Research Report's* domestic prices include garlic that may be up to 10 mm in diameter smaller than the NHRDF varieties, we find it is reasonable to conclude that the domestic prices list grade A garlic as less expensive than the NHRDF varieties. As Jinan Yipin's typical product is larger than much of the grade A garlic listed in the *Market Research Report*, we do not believe the prices listed for grade A garlic accurately represent Jinan Yipin's seed inputs.

Comment 2: Rejection of Import Statistics as a Surrogate Value for Garlic Seed

Jinan Yipin additionally claims that the Department did not satisfy the Court's concerns that imports into India may still be driven by market forces, regardless of whether or not their source country is an NME. Jinan Yipin claims that the Department "merely reiterated its blanket policy that prices from NME sources is {sic} deemed to be distortive." See *Jinan Yipin Comments* at 5.

Jinan Yipin further argues that the Department's qualitative comparison between the MSFTI data and the NHRDF prices is inadequate. Jinan Yipin argues: (1) that, even disregarding imports from NME countries, there is a sufficient volume of subject merchandise to serve as a surrogate value; (2) the import statistics represent market transactions, while there is

no evidence to indicate that the NHRDF price lists represent actual sales; and (3) the Indian import statistics are country-wide, while the NHRDF prices are not. *See Jinan Yipin Comments* at 6.

Finally, Jinan Yipin argues that, since the Department is seeking to value Jinan Yipin's garlic seed inputs and *not* its final product, the Department's claim that the imports are not representative of the kind of garlic *sold* by Jinan Yipin is irrelevant.

Department's Position:

In *Jinan Yipin II*, the Court found that the Department "reasonably may infer, based on its findings regarding the presence of government control on various aspects of NMEs, that import data on goods from an NME country are inferior to import data for goods from a market economy country" provided that the Department performs a fair comparison of the various competing sets of data on the record. *See Jinan Yipin II*, 637 F. Supp. 2d at 1189. The Department has performed a fair comparison in this final redetermination. As stated above, while the exclusion of NME exports from import data is consistent with Department policy and has been upheld by the courts to be in accordance with Congressional intent, we have, for the purposes of this remand, followed the instruction of the Court and reconsidered whether Indian imports, including imports from China, constitute the best surrogate value source on the record for respondents' garlic seed. *See supra* at 12. As has been stated and explained both above and in the *Draft Redetermination of Jinan Yipin II*, the import data, even including imports from China, are not as product specific as other data sources on the record. *See Draft Redetermination of Jinan Yipin II* at 12. Contrary to Jinan Yipin's assertion, the Department need not address whether imports into India from NME countries are driven by the market forces of the Indian market because the Department has already complied with the Court's order by making a

qualitative comparison of the NHRDF data, the MSFTI data, including imports from China, and the other data on the administrative record.

Jinan Yipin's argument that, even if we continue to disregard imports from NME countries there is a sufficient volume of subject merchandise to serve as a surrogate value for garlic seed, misses the point. As we explained in the *Draft Redetermination of Jinan Yipin II*, and continue to find above, even if the Department were to include the Chinese imports, the Department continues to find that the Indian MSFTI import statistics are not as specific to respondents' product as the NHRDF data, and, consequently, are not the best available information with which to value respondents' input. The Court also found that the Department "was justified in determining that the record lacked sufficient information on the physical characteristics of the garlic represented by the MSFTI import data pertaining to countries other than China." See *Jinan Yipin II*, 637 F. Supp. 2d at 1190. As we explained further, the Indian import prices, which are overwhelmingly prices from China, do not represent the best available information for valuing garlic seed because 1) the overwhelming majority of the prices are prices from an NME country and thus are not based on market-determined factors; and 2) are not specific to the type of garlic sold by the respondents. Thus, we have not changed our position from the draft remand redetermination.

Jinan Yipin's second argument, that the MSFTI data are better suited as a surrogate value for garlic seed because they represent actual sales, whereas (as Jinan Yipin claims) the NHRDF data do not, has been addressed in Comment 1, above. The Department finds that, because the NHRDF price lists were provided to producers in a market economy as an attempt to increase the use of NHRDF seed varieties, they are sufficiently representative of market economy sales to serve as surrogate values.

While we recognize that the MSFTI data do represent country-wide prices, we also continue to find that the NHRDF price lists represent country-wide data for these seed varieties. As we concluded in the *Final Results*, there is no information on the record to indicate that these particular seed varieties are not country-wide prices. *See Final Results* at 11. Further, record evidence clearly notes that high yield seed varieties are, in general, distributed across multiple provinces. *See Market Research Report* at 14-15. As such, we find that the NHRDF price list represents prices for high yield garlic varieties across India.

Finally, while we recognize that the purpose of a surrogate value for garlic seed is to value respondents' inputs, not the subject merchandise itself, we have continuously stated throughout the underlying review that the quality and size of the bulb is strongly determined by the kind of seed used. There is a correlation between the specific varieties of garlic seed and the resulting garlic bulb that is grown and harvested. Notable variations exist between strains in terms of bulb size, time to maturation, number of cloves, and even bulb color. *See Market Research Report* at 12, 14-15. Accordingly, we find it reasonable to seek out a surrogate value for garlic seed that could be used to produce a product similar to that of respondents.

Comment 3: Valuation of cardboard cartons

Jinan Yipin argues that the Department ought to disregard imports from Singapore in its surrogate value calculation for packing cartons, as the Department has, in the past, found generally available export subsidy programs to be provided to exporters in Singapore. *See Jinan Yipin Comments* at 7-8.

Department's Position:

In the *Draft Redetermination of Jinan Yipin II* and again above, the Department further explained its reasoning for its exclusion in the *Final Results* of NME countries or countries that maintain broadly available export subsidies from import data when determining surrogate values. *See Draft Redetermination of Jinan Yipin II* at 29-30; *see also supra* at 21. We specifically examined the Department's own CVD findings against Indonesia, South Korea and Thailand at the direct instruction of the Court, in order to demonstrate why these specific countries were excluded from the MSFTI data in our surrogate value calculations. *See Jinan Yipin II*, 637 F. Supp. 2d at 1196. As no such specific instructions regarding the examination of Singapore's possible export subsidy program was given to the Department by the Court, we find such an evaluation in this case to be outside the scope of this remand proceeding.

Comment 4: The Department's valuation of labor

Jinan Yipin argues that the Department's current methodology for valuing labor does not comport with the explicit instructions contained in the Department's statute for the valuation of factors of production. *See Jinan Yipin Comments* at 9. Jinan Yipin claims that the regression-based methodology the Department used in the underlying review does not effectively value labor from countries that are both economically comparable to the NME country being reviewed and are significant producers of merchandise comparable to the subject merchandise.

Department's Position:

Prior to the submission of its comments on the *Draft Redetermination of Jinan Yipin II*, at no point over the course of this remand redetermination, nor during the underlying administrative

review, has Jinan Yipin challenged the Department's wage rate methodology. Jinan Yipin itself admits that it did not previously challenge this issue before the Court. See *Jinan Yipin Comments* at 11. Lacking specific instructions from the Court to reexamine its wage rate methodology, the Department finds any reevaluation of its wage rate methodology to be outside the scope of this remand proceeding.

Comment 5: Ministerial Errors

A. Adverse Facts Available (“AFA”) for Sales to Houston Seafood, AFA in Jinan’s Indirect Selling Expenses Calculation, and Constructed Export Price (“CEP”) Profit Ratio

Jinan Yipin argues that the Department should correct various ministerial errors contained in the calculation of its margin for this final redetermination. Jinan Yipin argues that the Department reactivated the SAS language which applies adverse facts available for sales to Houston Seafood, but in the *Final Redetermination of Jinan Yipin I* the Department determined that no facts otherwise available or adverse inferences should be applied to the Houston Seafood sales. Jinan Yipin also claims that, concerning its U.S. indirect selling expense ratio, the Department used the ratio used in the final results rather than the rate that was recalculated for the *Final Redetermination of Jinan Yipin I*. Jinan Yipin contends that the Department should recalculate the margin results using the indirect selling expenses ratio used in the first remand, which has been affirmed by the court in *Jinan Yipin I*. Finally, Jinan Yipin argues that the Department calculated a new surrogate profit ratio for the second draft remand, but did not use the revised ratio for the CEP profit ratio calculations.

Department’s Position:

The Department inadvertently used a prior SAS program, from the final results, that did not include the changes made in the *Final Redetermination of Jinan Yipin I* and which were upheld by the court in *Jinan Yipin II*. The Department has corrected this error for this final redetermination. In addition, the Department has revised the SAS program to use the adjusted surrogate financial ratios for the CEP profit ratio calculations.

B. Calculation of PRC Inland Freight for Certain Inputs and Insecticide Surrogate Value

Jinan Yipin argues that the Department should correct two newly alleged ministerial errors contained in the calculation of its margin for the *above redetermination*. First, Jinan Yipin claims that the Department has overvalued freight for herbicide, pesticide, plastic film, mesh bag, carton, banding, jar, and tape inputs by not properly converting the surrogate value for freight. Second, Jinan Yipin argues that the calculated surrogate value of insecticide was not used in the SAS program.

Department's Position:

The Department first released the SAS program with the calculations for inland freight with the preliminary results of review. *See* Memorandum from Analyst through Program Manager: Analysis for the Preliminary Results of the Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: Jinan Yipin Corporation, Ltd., dated December 1, 2003. Jinan Yipin had the opportunity to identify the alleged ministerial error in its case brief to the Department. However, it did not do so. The Department released the same calculations for inland freight for the second time with the final results of review. In the final results the insecticide surrogate value in question was also included in the SAS program. Section 351.224(c)(2) of the Department's regulations allows parties to submit comments regarding errors in the released calculations within five days of the

release of that information. *See* Memorandum from Analyst through Program Manager regarding: Analysis for the Final Results of the Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People’s Republic of China: Jinan Yipin Corporation, Ltd., dated June 7, 2004, at Attachment 2. Again, Jinan Yipin did not comment on these alleged ministerial errors. Furthermore, in its comments regarding the *Draft Redetermination of Jinan Yipin I*, Jinan Yipin noted a possible error in the calculation of surrogate financial ratios, but did not argue that there were errors with the calculations for inland freight and the insecticide surrogate value. In its comments on the *Draft Redetermination of Jinan Yipin II*, almost six years after the release of the calculations in the *Final Results*, Jinan Yipin included a request that the Department correct these alleged ministerial errors unrelated to the issues being remanded to the Department.

The Department disagrees that it is appropriate to make any corrections, ministerial or otherwise, that have not been raised previously and specifically remanded by the Court. The alleged ministerial errors were not raised during the administrative proceeding pursuant to our regulations (19 CFR 351.224), nor was this allegation raised in Jinan Yipin’s complaint in this litigation, or in the comments that the Department received in response to the *Draft Redetermination in Jinan Yipin I*. Because these issues were not raised previously, the Court has not remanded these issues, and therefore, they are not before the Department on remand. It is well-settled that, absent the possibility of grave injustice, failure to brief an argument constitutes a waiver of the issue. *See Ta Chen Stainless Steel Pipe v. United States*, 342 F. Supp. 2d 1191, 1207 (2004) (“By its silence, {the plaintiff} waived its right to raise the issue on appeal.”).

The Department has neither examined the merits of these ministerial error allegations, nor made any changes resulting from these allegations in the final remand results. In addition,

the Department does not have the administrative resources to continually re-examine the record of the review to test the authenticity and legitimacy of new ministerial error allegations that are untimely filed, not the basis of any of the parties' challenges before the Court, and not subject to a remand determination by Court order. The CIT has recently affirmed Commerce's decision not to evaluate and address untimely ministerial error allegations. *See Dorbest Ltd. et al. v. United States*, 547 F. Supp. 2d 1321, 1348 (Ct. Int'l Trade 2008). Therefore, we are not addressing these ministerial error allegations in the *Final Redetermination in Jinan Yipin II*.

VII. Conclusion

Pursuant to the Court's opinion, we have reconsidered and recalculated Jinan Yipin's and Shandong Heze's weighted-average antidumping duty margins from the *Final Results*. In order to recalculate Jinan Yipin's and Shandong Heze's margins, we have adjusted the surrogate value for water and the surrogate financial ratios, as discussed above. Based on these changes (and taking into account the changes made to the margin in the *Final Redetermination of Jinan Yipin I*), Jinan Yipin's margin from the *Final Results* has changed to 6.58 percent. Shandong Heze's margin has changed to 40.66 percent.

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date