



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

A-570-831

Remand

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MEMORANDUM TO: The File

THROUGH: Edward Yang
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SUBJECT: Final Results of Redetermination Pursuant to Remand:
Fresh Garlic from the People's Republic of China,
Shenzhen Xinboda Industrial Co., Ltd., et al., v. United
States, U.S. Court of International Trade, Consol Ct. No.
15-00179, Slip Op. 16-74

Attached are the final results from the Department of Commerce (the Department) in the redetermination pursuant to remand, in accordance with *Shenzhen Xinboda Industrial Co., Ltd., et al. v. United States*,¹ regarding the Department's final results in the antidumping duty administrative review of fresh garlic from the People's Republic of China. The applicable period of review is November 1, 2012, through October 31, 2013.

¹ *Shenzhen Xinboda Industrial Co., Ltd., et al. v. United States*, CIT Slip Op. 16-74, Consol. Ct. No. 15-00179 (July 27, 2016).



ATTACHMENT

Final Redetermination

Shenzhen Xinboda Industrial Co., et al., v. United States
U.S. Court of International Trade Consol. Ct. No. 15-00179

FINAL RESULTS OF REDETERMINATION
PURSUANT TO REMAND

I. SUMMARY

These final results of redetermination (*Final Remand Results*) were prepared by the Department of Commerce (the Department) pursuant to the decision and remand order issued by the U.S. Court of International Trade (the Court) on July 27, 2016.¹ This action arises from the final results of the 19th administrative review of the antidumping duty (AD) order on fresh garlic (garlic) from the People’s Republic of China (PRC).²

Pursuant to the Court’s opinion, the Department has, under respectful protest,³ reexamined Hebei Golden Bird Trading Co., Ltd.’s (Golden Bird) eligibility for a separate rate, and continues to find Golden Bird ineligible. The record evidence indicates a duty evasion scheme of extraordinary scope, under which approximately sixty percent of all entries during the period of review were exported by companies subject to the PRC-wide cash deposit rate, but entered at a much lower rate or zero rate, including Golden Bird’s. The Department concludes that Golden Bird misrepresented the volume of its exports and the nature of its operations in its responses to the Department. Based, in part, on its analysis of new evidence available in this remand proceeding, the Department determines that Golden Bird engaged in a duty evasion scheme in which it provided paperwork such that other companies could claim its low rate, for which it acted as a “service agent.”

¹ See *Shenzhen Xinboda Industrial Co., et al., v. United States*, CIT Slip Op. 16-74, Consol. Ct. No. 15-00179 (July 27, 2016) (*Garlic 19 Remand*).

² See *Fresh Garlic from the People’s Republic of China: Final Results and Partial Rescission of the 19th Antidumping Duty Administrative Review; 2012-2013*, 80 FR 34141 (June 15, 2015) (*Final Results*), and accompanying Issues and Decision Memorandum (IDM).

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

The Department concludes that Golden Bird's misrepresentations are pervasive in nature and impeach the credibility of all its submissions, including its separate rate information. In addition, the information is incomplete, even if it could be considered credible. The Department continues to apply facts otherwise available, with adverse inferences, to conclude that Golden Bird has failed to rebut the presumption that is part of the PRC-wide entity, and is assigned the \$4.71 per kilogram PRC-wide entity rate.

For non-examined separate rate companies, the Department determines that it will establish their rate by applying the updated separate rate determined in the remand of the 18th administrative review, pursuant to *Fresh Garlic Producers Association II*, CIT 14-00180, Slip Op. 16-68. The rate was calculated for Shenzhen Xinboda Industrial Co., Ltd. (Xinboda) using its sales information and new surrogate values from Ukraine, in light of the Court's opinion that the Department had not sufficiently supported its finding that its prior surrogate country, the Philippines, was a significant producer of subject merchandise.⁴ As such, the Department assigns the non-examined separate rate companies a rate of \$2.19 per kilogram.

II. BACKGROUND

On June 15, 2015, the Department published its *Final Results* pertaining to mandatory respondents Golden Bird and Jinxiang Hejia Co., Ltd. (Hejia) along with other exporters, including Xinboda.⁵ The period of review (POR) is November 1, 2012, through October 31, 2013.

⁴ See *Fresh Garlic Producers Association v. United States*, CIT 14-00180, Slip Op. 16-68 at 19 (July 7, 2016) (*FGPA II*).

⁵ See *Final Results*, 80 FR at 34141-42.

In light of the Court’s remand order, on April 20, 2017, the Department released a draft version of these *Final Remand Results* to interested parties for comment.⁶ On April 25, 2017, FGPA, Golden Bird, and Xinboda submitted comments on the draft version of these *Final Remand Results*. FGPA agreed with the *Draft Remand Results*. Complete responses to Golden Bird and Xinboda’s comments received are provided below, following these *Final Remand Results*.

A. Treatment of Golden Bird as Part of the PRC-Wide Entity

1. The Final Results

In its June 11, 2014, response to section A of the Department’s questionnaire, Golden Bird certified that it is controlled by Yang Tao, its general manager and executive director who bears responsibility for its day-to-day commercial activities.⁷ Golden Bird stated that it has no relationship with any other exporter or producer, and obtained all of its garlic from its unaffiliated supplier, Cangshan Hongyang Vegetables and Foods Co., Ltd. (Cangshan).⁸ Golden Bird certified that it exported [] kilograms of fresh garlic from China during the period of review, or a publicly ranged volume of 20,000,000 kilograms.⁹

Petitioners, the Fresh Garlic Producers Association and its individual members (collectively FGPA), submitted General Administration of Customs of the PRC (GACC) data that indicated that Golden Bird was the exporter of only a fraction of its purported entries. Specifically, the GACC data indicated that Golden Bird exported only 5,991,897 kilograms

⁶ See Memorandum to the File, “Draft Results of Redetermination Pursuant to Remand: Fresh Garlic from the People’s Republic of China, Shenzhen Xinboda Industrial Co., Ltd., et al., v. United States, U.S. Court of International Trade, Consol Ct. No. 15-000179, Slip Op. 16-74,” dated April 20, 2017 (*Draft Remand Results*).

⁷ See Letter from Golden Bird, “Fresh Garlic from the People’s Republic of China – SAQR in 19th Antidumping Duty Administrative Review filed on Behalf of Hebei Golden Bird Trading Co., Ltd.,” dated June 11, 2014, at A-2 (SAQR).

⁸ *Id.* at A-3, A-24.

⁹ *Id.* at Exhibit A-1.

during the November 2012-October 2013 period of review,¹⁰ or 4,362,075 kilograms when adjusting the time period of Chinese data by one month (to October 2012-September 2013) to account for the lag of shipping time.¹¹ This is a discrepancy of [] kilograms. The data for Hejia showed a similar discrepancy.¹² Furthermore, the one-month lag GACC data showed massive shipments – from four of the top five exporters – by companies subject to the PRC-wide cash deposit rate of \$4.71 per kilogram.¹³ An additional two companies subject to the PRC-wide cash deposit rate had exports in excess of 1,000,000 kilograms according to these data.¹⁴ However, data from U.S. Customs and Border Protection (CBP) indicated that five of these six companies [], and one entered [] kilograms.¹⁵ FGPA alleged that a comparison of GACC and CBP data demonstrated that certain Chinese garlic companies, including Golden Bird, were engaged in schemes to circumvent antidumping duties on the subject merchandise.¹⁶

As we did in the preceding review,¹⁷ the Department requested documentation from Golden Bird to evaluate its claim that it was the exporter. Specifically, the Department sought

¹⁰ See Letter from Petitioners, “19th Administrative Review of Fresh Garlic from the People’s Republic of China – Petitioners’ Submission of New Factual Information Concerning Shipments Volumes Reported by Mandatory Respondents,” dated June 25, 2014, at Exhibit 1 (June 25, 2014 NFI).

¹¹ See Letter from Petitioners, “19th Administrative Review of Fresh Garlic from the People’s Republic of China – Petitioners’ Submission of Relevant Documents from Preceding Annual Administrative Review,” dated July 9, 2014, at Attachment 1, Exhibit 1 (July 9, 2014 NFI).

¹² *Id.* The GACC export quantity for Hejia was 1,687,285 kilograms, compared to its publicly ranged volume of 20,100,000 kilograms.

¹³ *Id.* The fifth company was Zhengzhou Harmoni Spice Co., Ltd. (Harmoni). The Department rescinded its review of Harmoni because all review requests were timely withdrawn. See *Fresh Garlic from the People’s Republic of China: Partial Rescission of the 19th Administrative Review; 2012-2013*, 79 FR 30819, 30819-20 (May 29, 2014).

¹⁴ July 9, 2014 NFI at Attachment 1, Exhibit 1.

¹⁵ See Memorandum to the File from Hilary E. Sadler, Esq., Re “Customs Entries from November 1, 2012, to October 31, 2013,” dated February 19, 2014. (CBP data).

¹⁶ July 9, 2014 NFI at 14-15.

¹⁷ The Department requested Golden Bird’s CEDFs in the preceding review. See *Fresh Garlic from the People’s Republic of China: Final Results and Partial Rescission of the 19th Administrative Review*, 79 FR 36721 (June, 30, 2014), and accompanying Issues and Decision Memorandum at 26-27 (Garlic 18 IDM). Golden Bird failed to provide the requested CEDFs and other documentation in the eighteenth administrative review, and therefore Commerce applied total adverse facts available. *Id.* at 32-39.

the Chinese customs export declaration forms (CEDFs) and China Inspection Quality (CIQ) Bureau phyto-sanitary certificates pertaining to Golden Bird's alleged exports. The Department provided multiple extensions of time, but Golden Bird responded with only a small fraction of the relevant documents – [] CEDFs reflecting a net weight of [] kilograms, or [] percent of its reported sales and [] phyto-sanitary certificates reflecting a net weight of [] kilograms or [] percent.¹⁸ When the Department gave Golden Bird a second chance to provide these documents – for a total of sixty days,¹⁹ not counting the prior notice of the preceding review²⁰ – Golden Bird could only provide a small, additional fraction of the relevant documents. Golden Bird provided [] CEDFs reflecting a net weight of [] kilograms, or [] percent of its reported sales, and [] phyto-sanitary certificates reflecting a net weight of [] kilograms or [] percent of its purported sales.²¹

Golden Bird stated that it did not retain these documents because they did not serve a business need.²² However, Golden Bird acknowledged that it was subject to GACC's regulations, which require that it maintain CEDFs for at least three years.²³ Golden Bird claimed that its freight forwarders and importers may have these documents and that more could be retrieved with time.²⁴ However, the Department twice asked Golden Bird to explain why it could not timely retrieve the documents and to “submit any supporting documents that

¹⁸ See Memorandum to the File, “2012-2013 Administrative Review of Fresh Garlic from the People’s Republic of China: Golden Bird Analysis Memorandum,” dated Dec. 1, 2014, at 2 (Golden Bird Analysis Memo).

¹⁹ The Department issued a supplemental questionnaire to Golden Bird on August 15, 2014. Its final supplemental questionnaire response was filed October 14, 2014.

²⁰ See Garlic 18 IDM.

²¹ See Golden Bird Analysis Memo at 2.

²² See Letter from Golden Bird, “19th Administrative Review Fresh Garlic from the People’s Republic of China - Partial Response to the Department’s August 15, 2014 Supplemental Questionnaire on Behalf of Hebei Golden Bird Trading Co., Ltd.,” dated Sept. 5, 2014, at 1-3 (Sept. 5, 2014 SQR).

²³ See Letter from Golden Bird, “19th Administrative Review Fresh Garlic from the People’s Republic of China - Second Partial Response to the Department’s August 15, 2014 Supplemental Questionnaire on Behalf of Hebei Golden Bird Trading Co., Ltd.,” dated Sept. 11, 2014, at 1-2.

²⁴ See Sept. 5, 2014 SQR at 1-2.

substantiate {its} explanation.”²⁵ The Department also observed that the unit price in the CEDFs Golden Bird provided did not match the company’s sales database, and asked Golden Bird to explain these discrepancies.²⁶

Golden Bird failed to provide documentation of its inability to collect the CEDFs and phyto-sanitary certificates, such as letters from Golden Bird to its forwarders.²⁷ Golden Bird stated that it could provide reconciliation statements or other U.S. import documentation that would confirm its export amounts,²⁸ but never provided such documents. Golden Bird stated that the inaccurate prices were intentional, claiming that it had declared false “pro forma” prices to Chinese customs to keep competitors from learning its actual prices.²⁹

In the *Final Results*, which were unchanged from the *Preliminary Results*, the Department found that Golden Bird failed to cooperate to the best of its ability when it failed to provide the requested authenticated government documents.³⁰ The Department explained that within the ample time provided, Golden Bird should have been able to provide, or recover if not readily available, the CEDFs it was legally required to maintain.³¹ Similarly, it should have been able to recover the relevant phyto-sanitary certificates, or at a minimum, provide evidence substantiating its explanation that it attempted to procure the certificates from its customers and brokers but was unable to do so.³² Rather, there was no evidence indicating that Golden Bird

²⁵ See Sept. 5, 2014 SQR at 1-2; See also Letter from Golden Bird, “19th Administrative Review Fresh Garlic from the People’s Republic of China - Response to the Department’s September 29, 2014, Second Supplemental Questionnaire on Behalf of Hebei Golden Bird Trading Co., Ltd.,” dated Oct. 14, 2014, at 5 (Oct. 14, 2014 SQR).

²⁶ See Oct. 14, 2014 SQR at 3.

²⁷ See Oct. 14, 2014 SQR.

²⁸ See Sept. 5, 2014 SQR at 2.

²⁹ See Oct. 14, 2014 SQR at 3.

³⁰ See IDM at 3.

³¹ *Id.* at 4.

³² *Id.*

attempted to gather the relevant documents in the manner it claimed.³³

Accordingly, the Department found that necessary information was missing from the record within the meaning of section 776(a)(1) of the Tariff Act of 1930, as amended (the Act), and that Golden Bird withheld requested information, failed to provide requested information by the established deadlines, and significantly impeded the proceeding, within the meaning of section 776(a)(2)(A)-(C) of the Act.³⁴ Furthermore, the Department found that Golden Bird failed to cooperate to the best of its ability, warranting the application of facts otherwise available, with adverse inferences, pursuant to section 776(b) of the Act.³⁵

The Department explained that Golden Bird's status as the exporter of record of the subject merchandise was "a fundamental component and basis of our administrative review process."³⁶ Moreover, the company reported its export volume in section A response, which is the same response in which it reported its separate rate information and other core information regarding the company.³⁷ The Department concluded: "Golden Bird's failures in reporting Section A information taint its reported separate rate information, as well. Because we determine that the entirety of Golden Bird's information is unusable, including its separate rate information, we find that Golden Bird has failed to rebut the presumption that it is part of the PRC-wide entity."³⁸

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 5.

³⁷ Golden Bird also filed a separate rate certification, but that certification made clear that, in the event it was chosen as a mandatory respondent, Golden Bird must respond to the Department's questionnaire in full to retain its separate rate eligibility. *See* Letter from Golden Bird, "Fresh Garlic from the People's Republic of China – Separate Rate Certification filed on Behalf of Hebei Golden Bird Trading Co., Ltd.," dated Feb. 4, 2014, at 2.

³⁸ *See* IDM at 5.

2. The Court's Order to Reexamine Golden Bird's Separate Rate Status

In its July 27, 2016, opinion, the Court held that the Department lawfully used facts available to fill gaps in the record, and the Department's application of an adverse inference was supported by substantial evidence, because Golden Bird failed to cooperate to the best of its ability when it did not provide CEDFs and phyto-sanitary certificates, and did not substantiate its reasons for failing to provide these documents.³⁹ The Court explained that Golden Bird's export volume "is at the core of an AD duty calculation," and that Golden Bird had failed to corroborate over three quarters of its exports during the period of review by net weight.⁴⁰ The Court further explained that Golden Bird's pricing data were potentially unreliable, because Golden Bird admitted to potentially providing false price information to the GACC.⁴¹

However, the Court held that the Department's decision to reject Golden Bird's separate rate information was unsupported by substantial evidence. The Court held that the Department "improperly disregarded Golden Bird's separate rate information as 'tainted' solely because it identified deficiencies in information related to Golden Bird's sales data."⁴² The Court noted that the Department has repeatedly found Golden Bird eligible for a separate rate when it has considered its information.⁴³ The Court explained that it is unreasonable for the Department to reject information on the discrete topic of independence of government control because it finds sales data or a declared export quantity unreliable.⁴⁴

³⁹ See *Garlic 19 Remand* at 11-13.

⁴⁰ *Id.* at 14-15.

⁴¹ *Id.* at 15.

⁴² *Id.* at 17.

⁴³ *Id.* at 18.

⁴⁴ *Id.* at 18 & n.12.

In so holding, the Court noted that the Department had not made a “finding of fraud on the proceeding” or of “bad faith.”⁴⁵ As such, the Court expressly did “not decide how such a finding would impact this case.”⁴⁶ The Court further noted that the Department did not make a finding that Golden Bird exported goods produced by entities subject to the PRC-wide rate.⁴⁷ The Court stated that such a finding could likely be considered in selecting a total adverse facts available rate for Golden Bird, noting that deterrence is a relevant factor in selecting such a rate.⁴⁸

Thus, the Court remanded the *Final Results* to the Department to consider evidence on the record concerning Golden Bird’s independence from government control to determine whether the company is entitled to separate rate status.⁴⁹ The Court instructed that the Department “may not rely on a finding of unreliable sales data.”⁵⁰ If the Department finds Golden Bird eligible for a separate rate, the Department must determine an appropriate AFA margin, applying the law extant at the time of the *Final Results*.⁵¹

3. The Reopening of the Administrative Record Upon Remand to Consider Further Evidence of Alleged Duty Evasion

On December 20, 2016, the Department reopened the record of this administrative review to consider information submitted in the 21st administrative review of the AD order on garlic from the PRC concerning Golden Bird’s alleged involvement in a scheme to evade AD duties during the POR, and permit interested parties to submit responsive information and comments.⁵²

⁴⁵ *Id.* at 18, n.12.

⁴⁶ *Id.* at 18, n.12.

⁴⁷ *Id.* at 18-19, n.13.

⁴⁸ *Id.* at 18-19, n.13.

⁴⁹ *Id.* at 30.

⁵⁰ *Id.*

⁵¹ *Id.* at 30-31; *Id.* at 19, n.14.

⁵² See Memorandum to the File, “Placing Documents on the Record of the Nineteenth Antidumping Duty Administrative Review of Fresh Garlic from the People’s Republic of China,” dated Dec. 20, 2016, at 1-2

Specifically, the Department placed on the remand record relevant portions of Zhengzhou Harmoni Spice Co., Ltd.'s (Harmoni) April 13, 2016, submission (Harmoni Fraud Allegation) in the later administrative review alleging that Golden Bird engaged in a "funneling scheme" that resulted in evasion of AD cash deposits totaling \$141.6 million from the 17th POR through the 19th POR.⁵³ Harmoni is an exporter of Chinese garlic, which was subject to the 19th administrative review, until the Department issued a rescission with respect to the review of Harmoni on May 29, 2014.⁵⁴ Harmoni alleged that Golden Bird was owned and controlled by Wenxuan Bai and Ruopeng Wang, contrary to its representations to the Department.⁵⁵ Harmoni provided Golden Bird's business registration form from the government of Hebei province's online portal, which indicated that Mr. Wang became the official owner and legal representative of Golden Bird on November 2, 2015.⁵⁶

Harmoni provided a declaration, sworn under penalty of perjury, from the owner of a U.S. garlic distributor who purchased garlic from Mr. Bai using Golden Bird's zero or near zero cash deposit rate from 2010 to 2012.⁵⁷ Harmoni designated the declaration as proprietary, *i.e.*, releasable under the Department's administrative protective order, but described the proprietary testimony in the public version of its fraud allegation. The declarant's name and other identifying information was "double-bracketed," meaning that Harmoni did not consent to the

(Document Placement Memo). Attachment 1 to the Document Placement Memo is the Harmoni Fraud Allegation, and Attachment 2 is the exhibits to the Harmoni Fraud Allegation.

⁵³ See Harmoni Fraud Allegation at 9-10.

⁵⁴ See *Fresh Garlic from the People's Republic of China: Partial Rescission of the 19th Administrative Review; 2012-2013*, 79 FR 30819, 30819-20 (May 29, 2014).

⁵⁵ See Harmoni Fraud Allegation at 10.

⁵⁶ *Id.* at 10, Exhibit 6.

⁵⁷ *Id.* at 11; *Id.* at Exhibit 5 (sworn declaration dated []).

information's release under the administrative protective order, citing the interest of the declarant's safety and the safety of its family in China.⁵⁸

The declarant described an arrangement where it could purchase garlic from any Chinese producer without consideration of its antidumping duty rate.⁵⁹ Specifically, [

].⁶⁰ Harmoni alleged that Golden Bird's services involved the preparation of fraudulent documents showing itself as the exporter, and its purported supplier, Cangshan, as the processor and packer.⁶¹ Harmoni asserted that U.S. purchasers paid Messrs. Bai and Wang for their role as "service agents" through Qingdao Lianghe International Trade Co., Ltd. (Lianghe), a company allegedly owned by Mr. Bai's wife, Hongxia Chen.⁶²

Harmoni further alleged that Messrs. Bai and Wang were in "operational control" of importers that declared to CBP that they purchased garlic from Golden Bird, and that these importers likely never made any payments to Golden Bird. The declarant stated that Golden Bird [

].⁶³

⁵⁸ *Id.* at 21. The declarant [

]. *Id.* at Exhibit 5 ¶¶ 1-2.

⁵⁹ *Id.* at 14.

⁶⁰ *Id.* at 14; *id.* at Exhibit 5 ¶ 8-a.

⁶¹ *Id.* at 15.

⁶² *Id.* at 15. *See also* Letter from Lianghe, "Fresh Garlic from the People's Republic of China – Separate Rate Application Filed on Behalf of Qingdao Lianghe International Trade Co., Ltd.," dated February 18, 2014, at 13-14.

⁶³ *Id.* at 15; *Id.* at Exhibit 5 ¶ 8d.

The declarant stated that [

].⁶⁴ However, the declarant provided illustrative

documents indicating the following process was used:

- [

],⁶⁵

- [

],⁶⁶

- [

];⁶⁷ and

- [

].⁶⁸

⁶⁴ *Id.* at Exhibit 5 ¶ 8.

⁶⁵ *Id.* at Exhibit 5 ¶ 8c; *Id.* at Exhibit 5, Internal Exhibit 1.

⁶⁶ *Id.* at Exhibit 5 ¶ 8d-8e; *Id.* at Exhibit 5, Internal Exhibit 2.

⁶⁷ *Id.* at Exhibit 5 ¶ 8f; *Id.* at Exhibit 5, Internal Exhibits 3-4.

⁶⁸ *Id.* at Exhibit 5 ¶ 8g; *Id.* at Exhibit 5, Internal Exhibit 5.

Relevant to the instant 19th POR, these supporting documents indicate that [redacted],⁶⁹ [redacted].⁷⁰ This message shows that the shipment covered [redacted], and gives shipment details (container number [redacted] and the bill of lading number [redacted]).⁷¹ The [redacted] shipping date and quantities of fresh garlic and peeled garlic match that of a sale to [redacted] in Golden Bird’s U.S. sales database from this administrative review.⁷² Moreover, the declarant provided an email from [redacted] dated [redacted] stating that the container at issue was ready for pick up.⁷³ CBP information indicates that the shipment cleared customs under entry [redacted] dated [redacted] under Hebei Golden Bird’s case number [redacted].⁷⁴ Documents in the entry package confirm that [redacted], the importer of record, entered [redacted] kg of peeled garlic and [redacted] kg of whole garlic which arrived in container number [redacted] under bill of lading number [redacted].⁷⁵ The bill of lading shows a shipment date of [redacted], [redacted] as the shipper and

⁶⁹ CBP data for the POR shows [redacted] entries totaling [redacted] kilograms, to equal an average shipment size of [redacted] kilograms. Based on this average shipment size, a PRC-wide entity company would be required to post \$[redacted] in AD cash deposits. *See* CBP Data.

⁷⁰ *Id.* at Exhibit 5, Internal Exhibit 1.

⁷¹ *Id.*

⁷² *See* Letter from Golden Bird, “Fresh Garlic from the People’s Republic of China – SCQR in 19th Antidumping Administrative Review filed on Behalf of Hebei Golden Bird Trading Co., Ltd.,” dated June 25, 2014, at Exhibit C-1. (Golden Bird’s Section C Response).

⁷³ [redacted].
See

Harmoni Fraud Allegation Attachment 2, Exhibit 1 at 3.

⁷⁴ *See* Memorandum to the File, “Redetermination Pursuant to Remand: 19th Administrative Review of Fresh Garlic from the People’s Republic of China: Hebei Golden Bird Trading Co., Ltd. (Golden Bird) Customs Entry Documentation,” dated April 20, 2017, (Golden Bird’s Customs Entry Documentation).

⁷⁵ We note that the bill of lading shows that [redacted]. *See* Golden Bird’s Customs Entry Documentation. Golden Bird reported that its terms of sale were [redacted] and did not report any international freight expense in its Section C database. *See* Golden Bird’s Section C Response at C-12 and Exhibit C-1. Information provided by the declarant indicates that [redacted].

[redacted]. *See* Harmoni Fraud Allegation at Attachment 1, Exhibit 5.

[] as the consignee. The bill of lading also shows [] as the party to be notified. Commercial invoice number [] ties to observations [] of Golden Bird's U.S sales database.⁷⁶ We note that it shows that [] sold []

].⁷⁷ Finally, []

].⁷⁸

Following placement of Harmoni's allegation on the record, the Department received responsive information and comments from FGPA on December 30, 2016.⁷⁹ Golden Bird did not timely respond to the Department's Document Placement Memo, but, at its request, was provided an additional two weeks to submit a rebuttal of both the Harmoni Fraud Allegation and FGPA's December 30, 2016, submission, which Golden Bird did on January 12, 2017.⁸⁰ Finally, FGPA submitted further comments on February 27, 2017.⁸¹ On April 13, 2017, CBP provided entry documentation.⁸²

B. The Separate Rate for Non-Examined Companies, Including Xinboda

In the *Final Results*, the Department assigned the separate rate companies, including Xinboda, the sole calculated rate from the preceding administrative review, \$1.82 per kilogram,

⁷⁶ *Id.*

⁷⁷ See Golden Bird's Section C Response. *Id.*

⁷⁸ *Id.* at Exhibit 5, Internal Exhibit 4.

⁷⁹ Petitioners' Submission of Factual Information Pursuant to 19 CFR § 351.304(c)(4) in Response to the Department's Placement of New Evidence on This Segment's Record, Dec. 30, 2016.

⁸⁰ See Letter from Golden Bird, "Rebuttal Comments to December 30, 2016, Submission by the FGPA in Response to the Department's Placement of Documents on the Record of the 19th Administrative Review in Remand," dated Jan. 12, 2017 (Golden Bird Rebuttal Comments).

⁸¹ See Letter from Petitioners, "Petitioners' Response to Golden Bird's Rebuttal Comments to Petitioners December 30, 2016 Submission," dated Feb. 27, 2017.

⁸² See Golden Bird's Customs Entry Documentation.

which was based on Xinboda's sales information and surrogate values from the Philippines.⁸³

On appeal, the Court held that Commerce reasonably did not apply the Statement of Administrative Action's⁸⁴ "expected method" of averaging the rates of the mandatory respondents, which both received rates based on the application of total adverse facts available.⁸⁵ The Court stated that, although the Department's "methodology to use the separate rate from the previous review, *i.e.* the most contemporaneous separate rate information available" "appears reasonable," it was not under the circumstances of this review because the particular rate has since been invalidated in litigation.⁸⁶ Specifically, the Court has twice remanded the final results of the 18th administrative review, because it found the Department's selection of surrogate country (the Philippines) was not supported by substantial evidence.⁸⁷ The Court held, therefore, that the Department had improperly established the separate rate for the 19th administrative review by relying on a rate calculated using data from the Philippines, even though that country does not appear to be a significant producer of subject merchandise.⁸⁸

The Court ordered the Department to select a separate rate for the non-examined companies "by either employing a different reasonable method to calculate the separate rate, such as reopening the record to examine new mandatory respondents, reopening the record to collect information from which to calculate a reliable separate rate, or if it results in a non-punitive rate for separate respondents, adjusting the separate rate assigned based on the results of

⁸³ See IDM at 6-8.

⁸⁴ See Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1, at 873, reprinted in 1994 U.S.C.C.A.N. 4040, 4201.

⁸⁵ See *Garlic 19 Remand* at 26-27.

⁸⁶ *Id.* at 27-29.

⁸⁷ See *Fresh Garlic Producers Association v. United States*, CIT 14-00180, Slip Op. 15-133 (Nov. 30, 2015); *FGPA II*.

⁸⁸ See *Garlic 19 Remand* at 29.

the remand pursuant to *FGPA II*.⁸⁹ The Court instructed the Department to inform the Court of its intended approach by August 15, 2016.

On August 15, 2016, the Department advised the Court that it intended to establish the separate rate for non-examined companies by applying the rate calculated pursuant to the remand order in *FGPA II*.

III. ANALYSIS

Pursuant to the Court's instructions, we are providing further explanations and addressing the deficiencies identified by the Court.

A. Golden Bird

Under respectful protest,⁹⁰ the Department further explains its finding that Golden Bird continues to be ineligible for a separate rate. As an initial matter, the Department respectfully notes its disagreement that the *Final Results* identified a deficiency solely with respect to Golden Bird's sales data. Golden Bird's export volume implicated its standing as the exporter whose entries were subject to the administrative review, and its selection as a mandatory respondent. As such, the information was fundamental, and the Department disagrees that a deficiency in such information cannot be imputed to the respondent's separate rate information.

However, because the Department rejected all of Golden Bird's information as "unreliable," the Department did not make further findings regarding the credibility of Golden Bird's submissions, and did not reach the issue of whether the GACC data indicated that Golden Bird engaged in export funneling. Neither did the Department address whether Golden Bird's failure to cooperate amounted to "bad faith" or a "fraud on the proceeding."

⁸⁹ See *Garlic 19 Remand* at 30-31.

⁹⁰ See *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

The totality of record evidence indicates that Golden Bird's failure to produce the authenticated government documentation associated with its exports, *i.e.*, its CEDFs and phyto-sanitary certificates, was not merely a product of faulty record keeping. Golden Bird was provided an extraordinary amount of time to produce the documents, consuming the entire time available for supplemental questions in this administrative review, and had prior notice of the CEDFs' relevance to the review. In addition, GACC rules required Golden Bird to maintain these CEDFs.⁹¹ The Department clarifies that Golden Bird's explanations for not providing the documents the Department requested are not merely unreliable, but also not credible: despite the Department's requests, Golden Bird never provided any documentation that would substantiate its purported efforts to obtain the CEDFs and phyto-sanitary certificates from its freight forwarders and importers, and it never provided reconciliation statements it stated would corroborate its export volume.⁹² It offered no explanation as to why the GACC export data for Golden Bird diverged drastically from its own reporting.

In this remand proceeding, the Department has analyzed the GACC data and Harmoni Fraud Allegation, and determines that each provides evidence that Golden Bird misrepresented its export volume and the essential nature of its business operations. Accordingly, the Department finds that Golden Bird cannot be relied upon to provide truthful and accurate information. As discussed in more detail below, we continue to apply adverse facts available to reject Golden Bird's separate rate information. Accordingly, we continue to find Golden Bird to be a part of the PRC-wide entity.

⁹¹ See July 9, 2014 NFI at Attachments 1-2.

⁹² See Sept. 5, 2014 SQR at 2; See also Oct. 14, 2014 SQR.

1. GACC Data

The Department has analyzed the GACC data on the record of this proceeding, and finds that they provide substantial, un rebutted evidence of duty evasion by Chinese exporters and, in particular, by Golden Bird.

The Department notes that Golden Bird has not challenged the authenticity or reliability of the GACC data. FGPA obtained the GACC data on the record of this proceeding through the subscription PIERS Trade Intelligence service (PIERS). PIERS obtained the underlying data from [

] to distribute the import and export data collected by GACC.⁹³ GACC regulations require exporters to attest to the accuracy of their declarations.⁹⁴ There is no evidence suggesting that exporters misreported information to GACC. Golden Bird notes that “{c}ompliance with the GACC rules and regulations is a precondition of the Chinese government authorities allowing a company to export,”⁹⁵ which suggests an incentive exists to identify accurately the exporter of goods passing through customs.

Although the overall shipment quantities for the POR reflected in the GACC and CBP data are [], the identity of the largest exporters do not align.⁹⁶ Specifically, in the one-month lag GACC data, six exporters subject to the PRC-wide cash deposit rate account for over sixty percent of exports to the United States.⁹⁷ However, by the time of entry into the United States [] of entries were declared as

⁹³ See July 9, 2014, NFI at Attachment 3, Declaration of Richard E. Hanft.

⁹⁴ See July 9, 2014, NFI at 11 & Attachment 6, Customs Law of the PRC.

⁹⁵ See Sept. 11, 2014 SQR at 1.

⁹⁶ See July 9, 2014, NFI at Attachment 1, One-Month Lag GACC Data for POR 19; *see also* CBP data. The difference in total quantity is approximately [].

⁹⁷ See July 9, 2014, NFI at Attachment 1, One-Month Lag GACC Data for POR 19.

subject to the PRC-wide cash deposit rate.⁹⁸ FGPA placed GACC data on the record of this proceeding from the 17th and 18th periods of review, which likewise illustrate massive shipments by companies subject to the PRC-wide cash deposit rate.

No explanation other than duty evasion has been offered for this pattern. Other separate rate companies, including Harmoni and Xinboda,⁹⁹ show [] export totals in the CBP and GACC data.¹⁰⁰ Golden Bird's exports under the GACC data diverge from those it declared to the Department in each of the 17th to 19th reviews.¹⁰¹ Golden Bird's GACC export total surged in the 20th POR, during which time it was alerted to the GACC versus CBP discrepancy by the Department's 18th administrative review.¹⁰²

As noted in the chart below, there is a [] kilogram difference between the CBP data for exporters subject to the PRC-wide cash deposit rate and the one-month lag GACC data for such companies.

PRC-Wide Entity Exporters	GACC QTY (kgs)	CBP QTY (kgs)	Difference
Jinxiang Chengda Import&Export Co., Ltd.	14,625,598	[]	[]
Jinxiang Xian Baishite Trade Co., Ltd.	7,163,492	[]	[]
Qingdao Lianghe Int'l Trade Co., Ltd.	7,122,263	[]	[]
Jinxiang Dongyun I&E Co., Ltd.	6,514,525	[]	[]
Shandong Yongjia Vegetables and Fruits Co., Ltd.	1,373,772	[]	[]
Weifeng Naike Food Co., Ltd.	1,075,236	[]	[]

⁹⁸ See Feb. 19, 2014 CBP data (indicating that PRC-wide exporters accounted for [] kilograms out of [] kilograms entered).

⁹⁹ One separate rate company, Qingdao Xintianfeng Food Co., Ltd. (QXF), appears in the GACC data but reported no shipments to the Department []. QXF's no shipment certification was signed by Bai Wenxuan. See Letter from Qingdao Sea-line International Trading Co., et al, "Fresh Garlic from the People's Republic of China – No Sales Certifications in Connection with the Garlic 19 (2012-2013) Administrative Review," dated January 8, 2014 at Appendix 4. Although the Department does not address QXF in these *Draft Remand Results*, it notes that Harmoni names QXF as one in a group of companies participating in Mr. Bai's alleged funneling scheme. See Harmoni Fraud Allegation at 7.

¹⁰⁰ See July 9, 2014, NFI at Attachment 1, One-Month Lag GACC Data for POR 19 (comparing GACC and CBP figures).

¹⁰¹ See Dec. 30, 2016 NFI at 4-11.

¹⁰² *Id.* at 10 (noting that the GACC data listed Golden Bird as exporter-of-record for 1,780 MT in POR 17; 2,323 MT in POR 18; 4,362 MT in POR 19; and 29,674 MT in POR 20).

Jinxiang Infarm Fruits & Vegetables Co., Ltd.	30,000	[]	[]
Jining Dongyun Foods Co., Ltd.	25,496	[]	[]
Jinxiang Merry Vegetable Co., Ltd.	25,424	[]	[]
Zhong Lianfarming Product (Qingdao) Co., Ltd.	24,000	[]	[]
Cangshan Qingshui Vegetables Foods Co., Ltd.	23,535	[]	[]
Qingdao Ritai Food Co., Ltd.	4,250	[]	[]
TOTALS	38,007,591	[]	(37,955,908)

As noted above, there is a discrepancy of [] kilograms between the CBP data for Golden Bird and the one-month lag GACC data for Golden Bird. The Department’s analysis indicates that much of the difference between Golden Bird’s CBP data and the GACC data is due to its export funneling of PRC-wide companies’ subject merchandise. We note that the FGPA alleged that Hejia engaged in export funneling.¹⁰³ After the Department issued a supplemental questionnaire asking Hejia to submit its CEDFs and phyto-sanitary certificates, it declined to participate further in the administrative review.¹⁰⁴ CBP data on the record show that Hejia entered [] kg during the POR, while the GACC data showed that Hejia exported only 1,687,285 kg. Even if the Department attributes the [] kg discrepancy between Hejia’s entered volume in the CBP data and its export total in the GACC data entirely to PRC-wide exporters, this still leaves a/n [] kg discrepancy. The Department finds that this figure represents a conservative estimate of the extent of Golden Bird’s export funneling of PRC- wide companies’ subject merchandise.

As noted in the chart above, there is a [] kilogram difference for Lianghe, the company []

¹⁰³ See July 9, 2014, NFI at 1-2.

¹⁰⁴ See Letter from Hejia, “Fresh Garlic from the People’s Republic of China - Withdrawal from Review,” dated Sept. 12, 2014.

].” Lianghe’s exports were subject to the PRC-wide cash deposit rate during the POR. There is also a [] kilogram difference for Shandong Yongjia Vegetables and Fruits Co., Ltd. (Shandong Yongjia), which is part of the PRC-wide entity. Shandong Yongjia’s trading company, []¹⁰⁵ []¹⁰⁶

2. Harmoni Fraud Allegation

Upon examination of Harmoni’s Fraud Allegation in this remand proceeding, the Department finds that the submission provides additional substantial evidence that Golden Bird engaged in export funneling and, thus, misrepresented its export volume and its business operations to the Department.

Harmoni’s Fraud Allegation is wide-ranging in scope, and directly contradicts Golden Bird’s representations regarding its business model, corporate ownership and control, identity of garlic suppliers, and export volume. The Department is not able to corroborate all aspects of Harmoni’s submission or the U.S. garlic distributor’s declaration contained therein using the information and tools at its disposal, and in the time available, and, therefore, has not drawn specific conclusions regarding whether, for example, Messrs. Bai and Wang control Golden Bird. Nonetheless, the information that the Department has corroborated further supports FGPA’s allegation that Golden Bird engaged in export funneling, and indicates that Golden Bird has submitted false and/or incomplete information regarding its ownership, control, affiliations, suppliers, sales process, and export volume.

In the underlying administrative review, Golden Bird reported that it sold subject

¹⁰⁵ See Memorandum to the File, “Documentation Concerning Shandong Yongjia Vegetables and Fruits Co., Ltd.,” dated April 20, 2017.

¹⁰⁶ See Harmoni Fraud Allegation, Attachment 2 at 3.

merchandise to [] U.S. customers: [

].¹⁰⁷ We note that Golden

Bird submitted CEDFs reflecting [] kilograms of its reported sales. Of the CEDFs provided by Golden Bird, all identify [

] as the consignee.¹⁰⁸ In addition, the CEDFs match invoice numbers in Golden Bird's U.S. sales database that correspond with the same customers as listed on the CEDFs. These CEDFs reflect only a portion of Golden Bird's reported [] of sales to [

]. However, Golden Bird submitted no CEDFs whatsoever for any of its reported sales to [

]. Finally, we are unable to substantiate Golden Bird's claim that it reported inaccurate "pro forma" prices to Chinese customs on its CEDFs to keep competitors from learning its actual prices.¹⁰⁹ Harmoni has argued that the [] comes out to [] percent of the value of the garlic.¹¹⁰ Our analysis shows that for the [] U.S. sales which Golden Bird provided a CEDF, the prices on the CEDFs were an average of [

].¹¹¹ We note that we do not know if the sales for which Golden Bird provided a CEDF, all of which reported it as the exporter, were legitimate or funneled.

As stated above, a U.S. garlic distributor claims to have [

]. Under this arrangement, the distributor []. In return, Golden Bird

¹⁰⁷ See Golden Bird's Section C Response at exhibit C-1.

¹⁰⁸ See Sept. 5, 2014 SQR at Exhibit 1; see also Oct. 14 SQR at Exhibit 7.

¹⁰⁹ See Oct. 14, 2014 SQR at 3.

¹¹⁰ See Harmoni Fraud Allegation Attachment 1 at 15.

¹¹¹ See Memorandum to the File, "Analysis of Golden Bird's CEDFs," dated April 20, 2017.

[

]. A shipment and subsequent payment that was tied to Golden Bird's U.S. sales database was claimed to be sold by a different Chinese garlic producer/exporter. The payment was made by [], another company that is said to be owned and controlled by Mr. Bai and Mr. Wang. Golden Bird reported this sale in its U.S. database as one of its own, that was produced by Cangshan and exported by Golden Bird. Relevant to the instant 19th POR, these supporting documents indicate that []¹¹² This message shows that the shipment covered [], and gives shipment details (*e.g.*, bill of lading and container number).¹¹³ The [] shipping date and quantities of fresh garlic and peeled garlic match that of a sale to [] in Golden Bird's U.S. sales database from this administrative review.¹¹⁴ Moreover, the declarant provided an email from [] dated [] stating the container at issue was ready for pick up. The email chain originated with [] the party to be notified on the bill of lading in the entry package. CBP information indicates that the shipment cleared customs under entry [], dated [], under Hebei Golden Bird's case number, []. The entry was filed by []. The importer

¹¹² See Harmoni Fraud Allegation. at Exhibit 5, Internal Exhibit 1.

¹¹³ *Id.*

¹¹⁴ See Golden Bird's Section C Response, at Exhibit C-1. (Golden Bird's Section C Response).

of record on the entry was [].¹¹⁵ Finally, [].¹¹⁶

The specific and proprietary shipment details provided by the declarant, which have been fully corroborated by information obtained from CBP, would not have been available to the declarant if [] were not party to the shipment at issue, which was reported by Golden Bird as its U.S. sale to the Department. The [] provided by the declarant indicate that [

]. These inconsistencies along with the fact that Golden Bird [] lend credibility to the declarant's statements about Golden Bird's funneling of other companies' exports of subject merchandise to the United States.

* * *

Based on the information submitted, including the GACC data and Harmoni's Fraud Allegation, we determine that Golden Bird has misrepresented its export volume by claiming exports attributable to other exporters, particularly exporters that are part of the PRC-wide entity. Golden Bird certified to the accuracy of submissions, including its section A questionnaire response containing its separate rate information, that contained repeated, material misrepresentations regarding its export volume and business operations. Accordingly, the Department finds that Golden Bird has exhibited bad faith and perpetrated a fraud on the proceeding. Under these circumstances, it is not inconsistent with the Court's opinion to

¹¹⁵ See Golden Bird's Customs Entry Documentation.

¹¹⁶ See Harmoni Fraud Allegation at Exhibit 5, Internal Exhibits 1 and 4.

continue to reject Golden Bird's rebuttal evidence on the issue of government control, and to continue to find Golden Bird to be a part of the PRC-wide entity.

Thus, we continue to find that necessary information concerning Golden Bird's eligibility for a separate rate is missing from the record within the meaning of section 776(a)(1) of the Act, and that Golden Bird withheld requested information, failed to provide requested information by the established deadlines, and significantly impeded the proceeding, within the meaning of section 776(a)(2)(A)-(C) of the Act.¹¹⁷ Furthermore, we continue to find that Golden Bird failed to cooperate to the best of its ability, warranting the application of facts otherwise available, with adverse inferences, pursuant to section 776(b) of the Act.

We note that the U.S. garlic distributor's declaration indicates that Golden Bird is controlled by Messrs. Bai and Wang, and provides [

]. Although Golden Bird denies that either Mr. Bai or Mr. Wang controlled Golden Bird at the relevant time,¹¹⁸ we cannot rely on Golden Bird's assertions, as explained above.

Furthermore, record evidence demonstrates that, at a minimum, a majority of Golden Bird's purported entries were actually exports of companies that were not found to be independent of the PRC-wide entity. As such, the Department is unable to complete its separate rate analysis for the additional reason that it does not have information regarding which specific entities or individuals controlled those export activities. Indeed, the U.S. garlic distributor

¹¹⁷ *Id.*

¹¹⁸ *See* Golden Bird Rebuttal Comments at 8. Golden Bird acknowledges that it was formally sold to Mr. Wang on November 2, 2015, after the POR. *Id.* at 13.

declarant indicated that [

].¹¹⁹ Under these

circumstances, it is impossible to determine which, if any, of the sales reported by Golden Bird to the Department were negotiated and controlled by Golden Bird. Thus, even if Golden Bird's separate rate submission could be credited, the record indicates that it is substantially incomplete.

B. Separate Rate for Non-Examined Companies

On January 6, 2017, the Department submitted its remand results pursuant to the Court's order in *FGPA II*. The Department selected Ukraine as the new primary surrogate market economy country in which to value the respondents' factors of production, and calculated a new weighted-average dumping margin for mandatory respondent Xinboda based on that data. The Department determines that it intends to select this rate, \$2.19 per kilogram, for the non-examined separate rate companies in the instant review, consistent with the Court's instruction that the Department may apply the *FGPA II* rate so long as it "results in a non-punitive rate."¹²⁰ The *FGPA II* rate was calculated consistent with the Department's methodology, using the best surrogate value information available, and without application of facts available. The Department finds that there is no indication that it is "punitive," and, therefore, its selection is consistent with the Court's instructions for this remand.¹²¹

¹¹⁹ See Harmoni Fraud Allegation at 14; *id.* at Exhibit 5 ¶ 8-a.

¹²⁰ See *Garlic 19 Remand* at 31.

¹²¹ The Court has not yet reviewed the Department's remand results in *FGPA II*.

IV. COMMENTS ON *DRAFT REMAND RESULTS*

Issue 1: Whether the Department Was Permitted to Consider the Harmoni Fraud Allegation in this Remand

Golden Bird:

- The Department should remove the Harmoni Fraud Allegation from the record of this proceeding. The record of the instant remand must be limited to information contemporaneous with the 2012-2014 period of review.¹²²
- Each review stands alone. Commerce has a long-standing practice to treat each segment of a proceeding as independent, with separate records that lead to independent determinations.¹²³ Commerce should remove the entire allegation from the record. Failing that, Commerce should remove the declaration by the person whose identity was not disclosed.¹²⁴
- The Department deprived Golden Bird of a reasonable opportunity to comment on the Harmoni Fraud Allegation, which was arbitrary and capricious.¹²⁵

Department's Position:

The Department placed Harmoni's Fraud Allegation on the record of the 19th administrative review because it was directly relevant to the issue it examined in this review, *i.e.*, whether Golden Bird was the exporter of the entries the company reported to the Department. Moreover, the Harmoni Fraud Allegation was relevant to the specific issue the Court remanded to the Department, which was whether Golden Bird was eligible for a separate rate, or whether

¹²² See Letter from Golden Bird, "Comments on Draft Redetermination Pursuant to Remand: Fresh Garlic from the People's Republic of China, Shenzhen Xinboda Industrial Co., Ltd., et al., v. United States, U.S. Court of International Trade, Consol. Ct. No. 15-00179, Slip Op. 16074" (April 25, 2017) (Golden Bird Draft Remand Comments) at 6.

¹²³ *Id.* at 6.

¹²⁴ *Id.* at 6.

¹²⁵ *Id.* at 9.

its prior responses constituted a “fraud on the proceeding.” There is no limitation that information submitted in an administrative review be contemporaneous to the period under review. In any event, the declaration contained in the Harmoni Fraud Allegation was not available until after the completion of the underlying review, and is supported by documentation that is contemporaneous with the period of review.

The Department agrees with the general principle that each administrative review “stands alone.” Accordingly, the Department placed the Harmoni Fraud Allegation on the record of the instant review, and permitted the parties to submit information and comments responding to the allegation *in this review*. The Department has not relied on any information contained solely in the record of the administrative review of the 21st POR.

Specifically, on December 20, 2016, the Department provided ten days for interested parties to submit factual information that rebuts, clarifies, or corrects the information in the Harmoni Fraud Allegation.¹²⁶ Golden Bird neither responded, nor requested an extension of time. On December 30, 2016, FGPA responded with extensive information that clarified Harmoni’s information. On January 5, 2017, Golden Bird requested that the Department reject FGPA’s submission, or, failing that, provide until January 13, 2017, for Golden Bird to respond to FGPA’s December 30 submission.¹²⁷ The Department granted Golden Bird’s request,¹²⁸ and on January 12, 2017, Golden Bird submitted comments and factual information addressing both FGPA’s submission and the Harmoni Fraud Allegation.¹²⁹

¹²⁶ See Document Placement Memorandum at 2.

¹²⁷ See Request that the Department Reject the FGPA’s December 30, 2016, Submission of Factual Information (January 5, 2017).

¹²⁸ Rebuttal Schedule for Information (January 6, 2017).

¹²⁹ Golden Bird’s January 12, 2017 Letter.

Accordingly, the Department provided Golden Bird two opportunities in this remand proceeding to respond to the Harmoni Fraud Allegation, spanning December 20, 2016, to January 13, 2017, and to the extent that Golden Bird sought an additional opportunity or additional time to respond, the Department granted its request. The Department finds no basis in fact for Golden Bird’s claim that it arbitrarily cut short the company’s time to respond to the Harmoni Fraud Allegation. Indeed, Golden Bird and its counsel have been aware of the Harmoni Fraud Allegation since it was filed on the record of the 21st administrative review approximately one year ago. Nevertheless, Golden Bird has offered no substantive rebuttal on the record of this remand. The documents accompanying the declaration [_____], but Golden Bird did not dispute or otherwise analyze these documents.¹³⁰

Issue 2: Whether the Department’s Acceptance of Harmoni’s Bracketing of Information Deprived Golden Bird of Its Fifth Amendment Due Process Rights

Golden Bird:

- The Department violated Golden Bird’s Fifth Amendment right not to be “deprived of life, liberty or property without due process of law” by denying it access to statements that specifically referred to the company.¹³¹ Harmoni and FGPA made “criminal accusations,” but the Department did not permit Golden Bird to see the evidence against it.¹³²

¹³⁰ Additionally, although Golden Bird asserts that five days was insufficient time to comment on the *Draft Remand Results*, the Department notes that at the time of the draft’s issuance, only eight days remained prior to the Court’s deadline of April 28, 2017, for filing the *Final Remand Results*, of which the Department allocated five for comment and merely three days for the Department to respond to comments and finalize the remand. Unlike the Department, Golden Bird had not previously sought an extension of the Court’s deadline and could have opted to do so.

¹³¹ *Id.* at 11 citing U.S. Constitution, amend. V.

¹³² *Id.* at 11.

- The Department abused its administrative protective order (APO) provisions by granting the declarant’s request for double-bracketing of its identity without any evidence that the declarant’s security was in danger.¹³³ Golden Bird’s counsel consulted with Golden Bird and was advised that no threats had been made.¹³⁴
- The Department accepted information from an individual whose identity was not disclosed and whose declaration could not reasonably be challenged. The information was submitted by Harmoni and served its interests.
- The Department accepted hearsay statements without allowing parties a reasonable opportunity to contest those allegations.¹³⁵ Unlike *SKF USA Inc.*, where the Court rejected SKF’s argument that the Department’s APO procedures “prejudiced SKF to such an extent as to constitute a denial of procedural fairness,” in this instance, the Department’s conclusion that Golden Bird acted in “bad faith” and has “perpetrated a fraud on the proceeding” relies on the allegations.¹³⁶
- With respect to information offered by FGPA, “{m}uch of the information had already been vetted and had been determined by the Court not to constitute ‘substantial evidence.’”¹³⁷

Golden Bird references its comments submitted on January 12, 2017, in which it speculated as to the identity of the declarant and attacked the credibility of that individual.¹³⁸ Specifically, Golden Bird alleges that the declarant

[

¹³³ *Id.* at 19-20.

¹³⁴ *Id.* at 20.

¹³⁵ *Id.* at 12-13 citing to *SKF USA Inc. v. United States*, 659 F. Supp. 2d 1338, 1345 (CIT 2009) (*SKF USA Inc.*).

¹³⁶ *Id.* at 12-13 citing to *SKF USA Inc.*

¹³⁷ *Id.* at 12.

¹³⁸ *Id.* at 3

] ¹³⁹ Golden Bird requests that the Department incorporate its prior comments with its comments on the Draft Remand Results.¹⁴⁰

Department's Position:

The Department disagrees that it has violated Golden Bird's Fifth Amendment right not to be deprived of life, liberty, or property without due process of law. Golden Bird has not explained the basis for its allegation. It has not identified any relevant right – to property or otherwise. The Supreme Court held in *Buttfield v. Stranahan*,¹⁴¹ that “no individual has a vested right to trade with foreign nations. . . .” and that importing merchandise is not a fundamental right that is protected by other constitutional privileges such as due process. Furthermore, the Supreme Court held in *Norwegian Nitrogen Products Co.* that no party has a legal right to a particular rate of duty.¹⁴² Although Golden Bird states that its particular due process right arises from the “criminal accusations” leveled against it, the Department is not conducting a criminal proceeding and has not made any findings under U.S. criminal law.

Golden Bird challenges both the withholding from its counsel of the declarant's identity, which was not released under APO, and the withholding of statements referring to Golden Bird from the company that were only released to its counsel under APO. However, the Department

¹³⁹ *Id.* at 3 citing to Letter from Golden Bird, “Rebuttal Comments to December 30, 2016, Submission by the FGPA in Response to the Department's Placement of Documents on the Record of the 19th Administrative Review in Remand – filed on Behalf of Hebei Golden Bird Trading Co., Ltd.” (January 12, 2017) (Golden Bird's January 12 Letter).

¹⁴⁰ *Id.* at 3 citing to Golden Bird's January 12 Letter at 6-7.

¹⁴¹ *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904); *see also NEC Corp. v. United States*, 151 F.3d 1361, 1369 (Fed. Cir. 1998).

¹⁴² *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 318 (1933).

followed its APO procedures in accepting Harmoni's proprietary single and double-bracketed information designations, and in maintaining such designations when it placed the Harmoni Fraud Allegation on the record of this remand proceeding.

Under 19 CFR 351.104(a)(1), the official record "will contain material that is public, business proprietary, privileged, and classified." "In general, public information is information that may be made available to the public, whereas business proprietary information may be disclosed (if at all) only to authorized applicants under an APO."¹⁴³ Such business proprietary information will be reflected in single brackets throughout the proceeding and will be releasable to authorized applicants under an APO.¹⁴⁴ However, "if the submitting person claims that there is a clear and compelling need to withhold certain information from disclosure under an {APO}, the submitting person must identify the information by enclosing the information within double brackets, and must include a full explanation of the reasons for the claim."¹⁴⁵ The Department will generally accept or reject a party's designations within 30 days, otherwise the Department will treat information the information as proprietary until it decides the matter.¹⁴⁶ The Department's practice is not to rely on double bracketed information in reaching its determination.¹⁴⁷

The Department examined Harmoni's double bracketing of the identity of the declarant, and certain other details that may disclose the declarant's identity, and determined that

¹⁴³ 19 CFR 351.105(a).

¹⁴⁴ See 19 CFR 351.304(b)(1)(i).

¹⁴⁵ See 19 CFR 351.304(b)(2)(i); see also section 777(c)(1)(A) of the Act.

¹⁴⁶ See 19 CFR 351.304(d).

¹⁴⁷ See, e.g., *Stainless Steel Bar from India: Final Results of Antidumping Duty Administrative Review*, 74 FR 47198 (September 15, 2009), and accompanying Issues and Decision Memorandum at Comment 9; *Certain Oil Country Tubular Goods From the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination*, 74 FR 64045 (December 7, 2009), and accompanying Issues and Decision Memorandum at Comment 7.

Harmoni's designations were reasonable. The Harmoni Fraud Allegation related to a large number of Chinese exporters and included highly damaging allegations and information, such that Harmoni's claim that the safety of the declarant and its family in China was in danger was credible.¹⁴⁸ The prospect of such danger provided a "clear and compelling need" to withhold the information from disclosure. In addition, the Harmoni Fraud Allegation referenced an alleged extortion attempt involving some of the parties referenced in the declarant's testimony, and Harmoni's filing of a civil RICO action in the U.S. District Court for the Central District of California, which further demonstrated to the Department the potentially high stakes attached to the declarant's testimony and possibility of harm to the declarant or its family.¹⁴⁹

For the following reasons, we find no merit in Golden Bird's claim that it could not rebut the declaration without knowing the declarant's identity and without allowing counsel to provide certain statements referring to Golden Bird to the company. First, Harmoni described the essential structure of the alleged fraud in the public version of the narrative of its fraud allegation, including by paraphrasing certain aspects of the declaration.¹⁵⁰ This counsel could provide to Golden Bird.

Second, the declaration [_____], and Golden Bird's counsel could have worked with his client to retrieve rebuttal information without disclosing proprietary information. The challenge of rebutting proprietary information is routine, and these circumstances were not unique or unfair to Golden Bird. Indeed, the Department's *Draft Remand Results* address a specific sale in Golden Bird's U.S. sales database, and Golden Bird is presumably aware of the individuals associated

¹⁴⁸ See Harmoni Fraud Allegation at 20-22.

¹⁴⁹ See Harmoni Fraud Allegation at 8-9.

¹⁵⁰ See Harmoni Fraud Allegation.

with the sale and any related documentation. Golden Bird’s counsel has failed to provide specific examples of lines of inquiry he was unable to pursue with his client because of Harmoni’s proprietary information designations.

Third, although the declarant’s identity is not disclosed, the declarant provided the declaration under penalty of perjury. Notwithstanding the fact that the declaration was submitted by Harmoni and serves Harmoni’s interests, this provides an assurance of the reliability of the testimony. Golden Bird does not explain what in the Harmoni Fraud Allegation constitutes “hearsay,” or how the Department’s acceptance of “hearsay” impacts its ability to respond. Golden Bird’s citation to *SKF USA Inc.* does not advance its argument. In that case, the CIT explained that the Department “routinely follows APO procedures in numerous contexts that arise in administering the antidumping laws because such procedures are necessary to ensure protection of proprietary information submitted by interested parties and the willingness of these parties to submit such information.”¹⁵¹ The CIT held that the plaintiff had not demonstrated why the Court should order the Department to follow a different procedure in that case.¹⁵²

Fourth, the Department did not accept the declarant’s testimony or the documents it provided without substantial scrutiny. As explained above, the Department focused on the supporting documentation provided by the declarant, and sought to corroborate details provided therein by examining Golden Bird’s U.S. sales database and by seeking to obtain the entry package from CBP for []. Although the Department has noted that these corroborated aspects lend credibility to the declaration as a whole, the Department’s analysis in the *Final Remand Results* relies only on the specific, corroborated information.

¹⁵¹ *SKF USA Inc.*, 659 F. Supp. 2d at 1345.

¹⁵² *Id.* at 1345-46.

Fifth, the Department notes that Golden Bird has speculated as to the identity of the declarant and attempted to impeach its credibility. Golden Bird offered documents that [] but which it said indicated [].

Golden Bird did not explain []. This accusation regarding the alleged declarant is not relevant to the Department’s analysis of Golden Bird’s business activities. Regardless of the declarant’s identity, other record evidence supports the information contained in its declaration.

Finally, and most fundamentally, it is inaccurate for Golden Bird to characterize the Department’s findings as based exclusively upon the Harmoni Fraud Allegation. The *Final Remand Results* explain that Golden Bird cannot be relied upon to provide truthful and accurate information, a conclusion which is based upon three independent grounds: the Department’s finding in this remand that Golden Bird’s responses during the underlying review were not merely unreliable, but also not credible; its analysis of the GACC data in this remand; and its analysis of the Harmoni Fraud Allegation in this remand. Golden Bird does not comment upon the first two grounds for the Department’s *Final Remand Results*, other than to say that FGPA’s information – presumably, the GACC data – was “vetted” by the Court and found not to constitute substantial evidence.¹⁵³ However, as explained above, the *Final Results* did not analyze the GACC data or make a finding interpreting the GACC data. The Court’s opinion acknowledged that this issue was left open.¹⁵⁴

¹⁵³ Golden Bird Draft Remand Comments at 12.

¹⁵⁴ See *Garlic 19 Remand* at 18-19, n. 13.

Issue 3: Whether the Department’s Use of the PRC-Wide Rate is Valid

Golden Bird:

- The courts have held that Commerce on remand shall apply the law in effect at the time of Commerce’s original decision that Golden Bird had failed to cooperate to the best of its ability. The underlying preliminary results were signed on December 8, 2014, prior to the Trade Preferences Extension Act of 2015 which was signed on June 29, 2015. Therefore, the TPEA does not apply to this remand.¹⁵⁵
- The purpose of antidumping duty law is to determine margins accurately based on a relationship with actual sales information, not to act as a penal statute or to select unreasonably high rates with no relationship to the respondent’s actual dumping margin.¹⁵⁶
- Nowhere has the Court said only the highest rates reflect what the current margins would be.¹⁵⁷ The Courts reverse a final determination if it is unsupported by substantial evidence, or “where Commerce has failed to carry out its duties properly, relied on inadequate facts or reasoning or failed to provide an adequate basis for its conclusions.”¹⁵⁸
- In *Tianjin Machinery*, the Court questioned the Department’s basis for simply selecting the “highest prior margin,” noting that in *Rhone Poulenc*, the law changed with

¹⁵⁵ *Id.* at 7.

¹⁵⁶ *Id.* at 13-14 citing to *Final Results and Partial Rescission of Antidumping Duty Administrative Review and Final Results of New Shipper Reviews*, 71 FR 26329 (May 4, 2006) (8th Administrative Review); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990) (*Rhone Poulenc*); *Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994); *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1340 (Fed. Cir. 2002); *F. Lli De Cecco Di Filippo v. United States*, 216 F.3d 1032 (Fed. Cir. 2000).

¹⁵⁷ *Id.* at 14.

¹⁵⁸ *Id.* at 14-15 citing to 19 USC 1516a(b)(1)(B)(I); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984); *Rhone Poulenc* at 451, 454.

enactment of the Uruguay Round so that the Department, to the extent practicable, should corroborate the rates assigned.¹⁵⁹ The Court determined in *Tianjin Machinery* that the Department must “select secondary information {i.e., a rate} that has some grounding in {...} commercial reality.”¹⁶⁰

- The Department must select a PRC-wide rate that has a rational relationship to “commercial reality,” and not use a rate that is based on information that is 23 years old when intervening reviews have resulted in verified, calculated rates many times less than the petition rate.¹⁶¹

Department’s Position:

Golden Bird repeats arguments it made in the underlying administrative proceedings, and which the Department addressed in the *Final Results*.¹⁶² The parties to the litigation have briefed this issue for the Court, but it has not yet reached the issue. The Department acknowledges that the Court’s remand order instructs it to apply the law extant at the time of the issuance of the *Final Results*, i.e., to disregard the amendments to the Act contained in the Trade Preferences Extension Act of 2015.¹⁶³ The Department adopts its prior analysis of Golden Bird’s arguments contained in the *Final Results*.¹⁶⁴

Issue 4: Whether the Department Has Considered the Biases of Harmoni and FGPA

Golden Bird:

¹⁵⁹ *Id.* at 15 citing to *Tianjin Machinery Import & Export Corp. v. United States*, 752 F. Supp 2d 1336 (CIT 2011) (*Tianjin Machinery*); *Rhone Poulenc* at 1190; section 777(c) of the Act; The Uruguay Round Agreements Acts, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

¹⁶⁰ *Id.* at 16 citing to *Tianjin Machinery* at 1347 quoting *Gallant Ocean (Thailand) v. United States*, 602 F.3d 1319 (Fed. Cir. 2010); *KYD, Inc. v. United States*, 607 F.3d 760 (Fed. Cir. 2010).

¹⁶¹ *Id.* at 17.

¹⁶² IDM at 11-14.

¹⁶³ *Garlic 19 Remand* at 19, n.14.

¹⁶⁴ *See* IDM at 11-14.

- Golden Bird disagrees with the Department’s preliminary conclusion that it “exhibited bad faith and perpetrated a fraud on the proceeding.”¹⁶⁵
- In order to protect their cartel arrangement, Harmoni and FGPA have spent millions of dollars attacking Golden Bird and other Chinese exporters and buying third parties to make declarations averse to Golden Bird and other defendants in the RICO case.¹⁶⁶ Harmoni has held a separate rate status since the tenth administrative review.¹⁶⁷ Both FGPA and Harmoni have requested and rescinded their requests for review of Harmoni.
- Information on the record showing cooperation between FGPA and Harmoni directly contradicts their argument that Golden Bird was funneling other companies’ garlic.¹⁶⁸

Department’s Position:

Golden Bird has not provided any evidence supporting its assertion that Harmoni has “bought third parties to make declarations adverse to Golden Bird.”¹⁶⁹ Golden Bird’s reference to an alliance between Harmoni and FGPA is not relevant to the Department’s remand redetermination pertaining to Golden Bird. Moreover, the document submitted by Golden Bird which it claims “directly contradicts” claims that it was funneling other companies’ garlic has no bearing on this issue.¹⁷⁰ The Department has not relied on any information supplied by FGPA or Harmoni without exercising appropriate scrutiny.

¹⁶⁵ Golden Bird Draft Remand Comments at 6.

¹⁶⁶ *Id.* at 18.

¹⁶⁷ *Id.* at 18-19.

¹⁶⁸ See Golden Bird’s January 12, 2017 submission at page 11 and exhibit 5.

¹⁶⁹ In its January 12, 2017, submission, Golden Bird stated that the individual it believed to be the declarant [], but did not provide any evidence on this point. See

Golden Bird’s January 12, 2017 Letter at 5.

¹⁷⁰ The document at issue [

]. See Golden Bird’s January 12, 2017 submission at page 11 and exhibit 5.

Issue 5: Golden Bird's Comments on the Department's Supporting Memoranda

Golden Bird:

- The Department's memorandum regarding the entry documents placed on the record does not specify what type or how many documents the Department requested from Customs and Border Patrol (CBP), and thus, Golden Bird prefers not to engage in speculation regarding the documents.¹⁷¹
- Unlike CBP Data, the GACC data reflect unofficial, not official, Chinese government data. Release of "official" Chinese data is protected.¹⁷²
- Golden Bird offers no further comment on the remaining memoranda.

Department's Position:

The Department sought from CBP the entry package relating to [_____]. Golden Bird offers no substantive rebuttal of the CBP entry package, or of the Department's interpretation of the documents therein.

The source of the GACC data on the record was explained in the *Draft Remand Results*, and in the Declaration of Richard E. Hanft, provided as Attachment 3 to FGPA's July 9, 2014, submission of new factual information. Based on Mr. Hanft's declaration, the Department understands that the GACC data on the record reflect data collected by that agency. Mr. Hanft's declaration and the relevant GACC data for the 19th POR have been on the record since July 2014 and, thus, Golden Bird has had ample opportunity to address the reliability of the data. It has failed to provide reasons that the data are unreliable.

Issue 6: Whether the Selection of the Separate Rate from the 18th AR Remand is Valid

¹⁷¹ *Id.* at 3-4.

¹⁷² *Id.* at 4

Xinboda:

- “The AR18 remand rate is not final and still remains inappropriate as a margin in AR19.”¹⁷³
- If the Department uses the rate from the 18th AR remand, it should use a more contemporaneous garlic price.
- The garlic prices relied upon in the 18th AR remand were aberrantly high, and “did not follow world garlic trends.”¹⁷⁴
- “The garlic bulb is the most critical surrogate value and essentially is most of the margin. The Department can easily update the garlic bulb price in the AR18 margin run to the contemporaneous 2013 Ukraine garlic price.”¹⁷⁵
- The application of a margin that is reflective of the abnormally expensive garlic market conditions in Ukraine in 2011-2012 that were not present in the underlying period of review would be punitive.

Department’s Position:

The Department acknowledges that the rate it intends to apply to the non-examined separate rate companies – the separate rate determined in the remand of the 18th administrative review, pursuant to *Fresh Garlic Producers Association II*, CIT 14-00180, Slip Op. 16-68 – is subject to review of the Court. Normally, the Department would not rely on a rate or a finding in a remand proceeding, unless or until that rate or finding is affirmed by the Court. However, this case presents an unusual situation, where the Court has instructed that the Department may base

¹⁷³ See Letter from Xinboda, “Fresh Garlic from the People’s Republic of China: Xinboda Comments on Draft Remand Redetermination Pursuant to Slip Op. 16-74, CIT Consol. Ct. No. 15-00179 (*Shenzhen Xinboda Industrial Co. v. United States*),” dated April 25, 2017 (Xinboda Draft Comments), at 2.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

the non-examined separate rate “on the results of the remand pursuant to *FGPA II*.”¹⁷⁶

Accordingly, we are following the Court’s instruction and announcing our intent to rely on this rate as the non-selected separate rate in this review.

The separate rate calculated in the 18th administrative review is based on Ukrainian garlic bulb data, factors of production, and U.S. prices that were POR-contemporaneous. Moreover, we note that Xinboda has not established how the Ukrainian garlic bulb prices from the 18th POR are aberrational. Presumably, Xinboda will present its arguments to the Court in the separate litigation concerning the 18th POR. Finally, we disagree with Xinboda’s request that the Department substitute the Ukrainian garlic bulb pricing data from the 18th POR with that of the 19th POR. Xinboda’s contemporaneous U.S. price and factors of production information for the 19th POR do not exist on the record of this review. Substituting Ukrainian garlic bulb pricing data from the 19th POR for that of the 18th POR while still using Xinboda’s factors of production and U.S. prices from the 18th POR in the Department’s calculations would not result in a reliable antidumping duty margin.

Issue 7: Whether the Department Should Calculate a Separate Margin for Xinboda

Xinboda:

- The Department improperly refused to select Xinboda as a mandatory or voluntary respondent in the underlying administrative review. Xinboda acknowledges that Court ruled against it, but preserves this issue for appeal.

Department’s Position:

The Court has already addressed this argument and upheld the Department’s decision to decline to select Xinboda as a mandatory or voluntary respondent. The Court held that it would

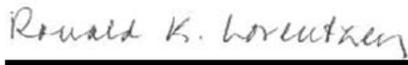
¹⁷⁶ *Garlic 19 Remand* at 31.

be reasonable for the Department to establish the separate rate for non-examined companies by, “if it results in a non-punitive rate for separate respondents, adjusting the separate rate assigned based on the results of the remand pursuant to *FGPA II*.”¹⁷⁷ Accordingly, the Department’s *Final Remand Results* are fully consistent with the Court’s opinion.

V. FINAL RESULTS

As explained above, the Department determines that Golden Bird continues to be ineligible for a separate rate. Thus, the Department continues to treat Golden Bird as part of the PRC-wide entity, which is subject to a \$4.71 per kilogram rate. Furthermore, the Department determines that it intends to select the calculated rate in the remand of preceding administrative review, *FGPA II*, to establish the separate rate for non-examined companies in this review.

4/27/2017



Ronald K. Lorentzen

Signed by: RONALD LORENTZEN

Ronald K. Lorentzen
Acting Assistant Secretary
For Enforcement and Compliance

¹⁷⁷ See *Garlic 19 Remand* at 31.