



A-570-831
Administrative Review
11/01/2010-10/31/2011
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DATE: June 10, 2013

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Christian Marsh 
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results and
Rescission, in Part, of the Antidumping Duty Administrative
Review of Fresh Garlic from the People's Republic of China

SUMMARY

The Department of Commerce (Department) has analyzed the comments submitted in this administrative review of the antidumping duty order on fresh garlic from the People's Republic of China (PRC) covering the period of review (POR) November 1, 2010, through October 31, 2011. As a result of our analysis, we have made changes to the Preliminary Results.¹ We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

BACKGROUND

Subsequent to the publication of the Preliminary Results, the Department conducted verification of Hebei Golden Bird Trading Co., Ltd. (Golden Bird) and its producer, Cangshan Hongyang Vegetables and Foods Co., Ltd. (Cangshan) in January 2013.² On January 30, 2013, Zhengzhou Huachao Industrial Co., Ltd. (Huachao) filed a no shipment letter stating that it had no shipments during the POR and that the Department should accept its late filing because Petitioners did not properly serve Huachao with its request for review filing. Petitioners submitted a letter on March 7, 2013, contending that they had properly served Huachao and that the Department should not accept Huachao's no shipment letter. On March 14, 2013, Huachao filed a response to Petitioners' March 7, 2013, letter reiterating that the Department should accept its January 30,

¹ See Fresh Garlic From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review: 2010-2011, 77 FR 73980 (December 12, 2012) (Preliminary Results), and accompanying Preliminary Decision Memorandum.

² See Memorandum to the File regarding "Verification of the Sales and Factors Response of Hebei Golden Bird Trading Co., Ltd. in the Antidumping Duty Administrative Review of Fresh Garlic from the People's Republic of China," dated April 9, 2013 (Verification Report).



2013 submission. After careful consideration of the facts, the Department determined that Huachao's January 30, 2013, no shipment letter was untimely and rejected it from the record of this case.³

On February 12, 2013, the Department received surrogate value submissions from Petitioners,⁴ Golden Bird and Shenzhen Xinboda Industrial Co., Ltd. (Xinboda). In response, the Department received rebuttal comments from Golden Bird, Petitioners, Xinboda and Weifang Hongqiao International Logistics Co., Ltd., Qingdao Sea-line International Trading Co., and Jinan Farmlady Trading Co., Ltd. (collectively, Hongqiao) between February 20 and 22, 2013. On March 7, 2013, Petitioners filed a request that the Department strike part of Xinboda's February 22, 2013, surrogate value rebuttal, to which Xinboda responded on March 11, 2013, that the Department should not reject the information in question. After analyzing the arguments and submissions, the Department notified Xinboda on April 9, 2013, that we were not rejecting any portion of its February 22, 2013, but did advise Xinboda that its February 22, 2013, submission could not be utilized as surrogate values for calculations, but would only be used to refute or rebut the appropriateness of the surrogate values appropriately on the record.⁵

Upon release of the verification report, the Department announced the briefing schedule for this case.⁶ The Department received case briefs from Petitioners, Golden Bird, Xinboda, Hongqiao and Huachao on April 25, 2013. Further, between April 30 and May 2, 2013, Petitioners, Golden Bird, Xinboda, Hongqiao, and Jinxiang Hejia Co., Ltd. (Hejia) filed rebuttal briefs. No other case or rebuttal briefs were filed by interested parties. On May 7, 2013, Petitioners requested that the Department reject portions of Xinboda's rebuttal brief that alleged support for the claims made by Hongqiao regarding the manner in which the Department initiates reviews. We determined on May 20, 2013, that we would not reject any portion of Xinboda's rebuttal brief, as it directly responded to an argument raised in another party's case brief in accordance with 19 CFR 351.309(d).

On March 25, 2013, the Department fully extended the time limit for these final results by 60 days to June 10, 2013.⁷ No party requested a hearing following the Preliminary Results.

SCOPE OF THE ORDER

The products covered by the order⁸ are all grades of garlic, whole or separated into constituent cloves, whether or not peeled, fresh, chilled, frozen, water or other neutral substance, but not

³ See Letter to Huachao regarding "Antidumping Duty Administrative Review of Fresh Garlic from People's Republic of China: Rejection of January 31, 2013 No Shipment Letter and Removal from the Record," dated April 4, 2013.

⁴ Petitioners are the Fresh Garlic Producers Association, its individual members being Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc.

⁵ See Letter to Xinboda regarding "Antidumping Duty Administrative Review of Fresh Garlic from People's Republic of China: Surrogate Value Rebuttal Submission," dated April 9, 2013.

⁶ See Memorandum to the File regarding "Fresh Garlic from the People's Republic of China: Case Brief Schedule," dated April 18, 2013.

⁷ See Memorandum to Edward Yang, Senior Director, China/Non-Market Economy Unit, "Fresh Garlic from the People's Republic of China: Extension of Deadline for Final Results of Antidumping Duty Administrative Review," dated March 25, 2013.

⁸ See Antidumping Duty Order: Fresh Garlic From the People's Republic of China, 59 FR 59209 (November 16, 1994).

prepared or preserved by the addition of other ingredients or heat processing. The differences between grades are based on color, size, sheathing, and level of decay. The scope of the order does not include the following: (a) Garlic that has been mechanically harvested and that is primarily, but not exclusively, destined for non-fresh use; or (b) garlic that has been specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed. The subject merchandise is used principally as a food product and for seasoning. The subject garlic is currently classifiable under subheadings 0703.20.0000, 0703.20.0010, 0703.20.0020, 0703.20.0090, 0710.80.7060, 0710.80.9750, 0711.90.6000, 0711.90.6500, 2005.90.9500, 2005.90.9700, 0703.20.0005, 2005.99.9700 and 0703.20.0015 of the Harmonized Tariff Schedule of the United States (HTSUS).⁹ Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive. In order to be excluded from the order, garlic entered under the HTSUS subheadings listed above that is (1) mechanically harvested and primarily, but not exclusively, destined for non-fresh use or (2) specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed must be accompanied by declarations to U.S. Customs and Border Protection (CBP) to that effect.

SEPARATE RATES

In proceedings involving non-market economy (NME) countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of subject merchandise in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be eligible for a separate rate.¹⁰ In the Preliminary Results, the Department found that Golden Bird, Xinboda, Qingdao Xintianfeng Foods Co., Ltd. (QXF), Hongqiao and Shandong Jinxiang Zhengyang Import & Export Co., Ltd. (Zhengyang) demonstrated their eligibility for a separate rate¹¹ upon their timely submission of a separate rate submissions, and remain subject to review as cooperative separate rate respondents.

We note that the statute and the Department's regulations do not directly address the establishment of a rate to be applied to individual companies not selected for examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. The Department's practice in cases involving limited selection based on exporters accounting for the largest volumes of trade has been to look to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance. Section 735(c)(5)(A) of the Act instructs that we are not to calculate an all-others rate using any zero or de minimis margins or any margins based entirely on facts available. Section 735(c)(5)(B) of the Act also provides that, where all margins are zero rates, de minimis rates, or rates based entirely on facts available, we may use "any reasonable method" for assigning the rate to non-selected respondents. In the Preliminary Results we calculated rates above de

⁹ Since the Preliminary Results, this scope has been updated to include two additional HTSUS subheadings. See Memorandum to the File regarding "Request to Update the ACE Case Reference File's HTS Tab for Garlic from China (A-570-831)," dated January 10, 2013.

¹⁰ See Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China, 56 FR 20588 (May 6, 1991), as further developed in Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China, 59 FR 22585 (May 2, 1994); see also 19 CFR 351.107(d).

¹¹ See Preliminary Results, 77 FR at 73981, and accompanying Preliminary Decision Memorandum at 4-8.

de minimis for both Golden Bird and Xinboda. Accordingly, consistent with the Department's practice,¹² the Department determined that the margin to be assigned to the separate rate recipients should be a simple average of the margins calculated for the two mandatory respondents, Golden Bird and Xinboda.

In these final results, however, we have calculated a de minimis rate for both of these mandatory respondents. In previous cases, when the rates of the respondents selected for individual examination are zero or de minimis, the Department has determined that a "reasonable method" to use is to apply to those companies not selected for individual examination the average of the most recently determined rates that are not zero, de minimis, or based entirely on facts available (which may be from a prior review or new shipper review).¹³ If any such non-selected company had its own calculated rate that is contemporaneous with or more recent than such prior determined rates, however, the Department has applied that company's individual rate to the non-selected company in the review in question, including when that rate is zero or de minimis.¹⁴ However, rates in prior proceedings were calculated using the methodology the Department abandoned in its Final Modification for Reviews¹⁵ pursuant to section 123 of the Uruguay Round Agreements Act. Therein, the Department stated that it will not use the prior "zeroing" methodology found to be WTO-inconsistent in administrative reviews with preliminary determinations issued after April 16, 2012.

Based on the facts of this review, as well as the history of positive margins found in this long-standing order, we conclude that averaging the de minimis rates of the mandatory respondents would not be reasonably reflective of the potential dumping margins of the companies not selected.¹⁶ Instead, consistent with our practice, we determine that a reasonable method for establishing the dumping margin for companies not selected for individual examination in this particular review is to apply the most recently calculated rate under this order which was not impacted by the Department's zeroing methodology. The most recent proceeding in which the Department calculated a rate not impacted by the zeroing methodology was the 08/09 Garlic NSR.¹⁷ The rate calculated in this new shipper review was \$1.28 per kilogram (kg.). On this basis, we are assigning a rate of \$1.28 per kg. to QXF, Hongqiao, and Zhengyang.

PRC-WIDE ENTITY

In the Preliminary Results, the Department determined that ten companies for whom a review was requested, which did not demonstrate eligibility for a separate rate by submitting a separate rate

¹² See Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (October 18, 2011).

¹³ See Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Reviews in Part, 73 FR 52823, 52824 (September 11, 2008), and accompanying Issues and Decision Memorandum at Comment 16.

¹⁴ Id.

¹⁵ See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification, 77 FR 8101 (February 14, 2012) (Final Modification for Reviews).

¹⁶ See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316 at 873, 1994 U.S.C.C.A.N. at 4201.

¹⁷ See Fresh Garlic From the People's Republic of China: Final Results of New Shipper Review, 75 FR 61130 (October 4, 2010) (08/09 Garlic NSR). Because the rate in this review was based on a single U.S. sale, it was not impacted by the zeroing methodology.

application or certification, are considered part of the PRC-wide entity. Since the Preliminary Results, the Department determined that three of those companies, Jining Yongjia Trade Co., Ltd., Qingdao Tiantaixing Foods Co., Ltd., and Yantai Jinyan Trading Co., Ltd., had, in fact, filed timely no shipment certifications. Of the remaining seven companies that were preliminarily assigned to the PRC-wide entity, one company, Huachao, submitted an untimely no-shipment claim following the Preliminary Results. We have evaluated these comments and we continue to treat these seven companies as part of the PRC-wide entity for these final results. Accordingly, these seven companies have been reviewed as part of the PRC-wide entity and have been assigned the PRC-wide rate of \$4.71 per kilogram.

DISCUSSION OF THE ISSUES

General Issues

Comment 1: The Department's Non-Market Economy Policy

Hongqiao's Arguments

- Section 751(a)(1) of the Tariff Act of 1930, as amended (the Act) mandates that the Department provide complete rates for all companies subject to review. The Department failed to disclose which of the 100 companies rescinded in the Partial Rescission¹⁸ filed and received a separate rate status, and what the cash deposit rates are for those rescinded companies.
- The Department did not provide an explanation for excluding specific companies from the administrative review in light of the Department's NME rules and without those companies establishing their entitlement to a separate rate.
- 19 CFR 351.213(b) requires that a domestic interested party must state why it wants a particular exporter or producer reviewed. Petitioners did not meet this burden when requesting reviews of companies in the instant review.
- Petitioners also did not provide sufficient explanation when they withdrew certain requests.
- Since all exporters during the POR are automatically included in the PRC-wide entity (unless they receive separate status), there is no reason for Petitioners to identify specific exporters for review.

Petitioners' Rebuttal

- The separate rate status and/or cash deposit rate for entities other than Hongqiao has no bearing on the status of Hongqiao.
- Rates assigned in previous reviews are easily determined by reviewing the Department's prior determinations under these proceedings.

Department's Position

The Department's initiation of this review was in accordance with its statute and regulations. Under section 751(a) of the Act, the Department is required to conduct reviews upon request. The Department's regulations require that domestic interested parties (i.e., Petitioners) name

¹⁸ See Fresh Garlic From the People's Republic of China: Partial Rescission of the 2010–2011 Antidumping Duty Administrative Review, 77 FR 36480 (June 19, 2012) (Partial Rescission).

specific exporters or producers in their request for an administrative review. The Department's regulations state:

Request for administrative review. (1) Each year during the anniversary month of the publication of an antidumping or countervailing duty order, a domestic interested party or an interested party described in section 771(9)(B) of the Act (foreign government) may request in writing that the Secretary conduct an administrative review under section 751(a)(1) of the Act of specified individual exporters or producers covered by an order (except for a countervailing duty order in which the investigation or prior administrative review was conducted on an aggregate basis), if the requesting person states why the person desires the Secretary to review those particular exporters or producers.¹⁹

The Department's regulations make clear that Petitioners' request for a review of specified individual companies in this case is precisely how the review request process is designed.²⁰ Therefore, we consider Petitioners' review requests to be in accordance with the Department's regulations.

Our review of the record of this administrative review shows that Petitioners' request for review complied with 19 CFR 351.213(b). We note that Petitioners' request named specific exporters or producers and provided a reason for their requests for review.²¹ Specifically, in their request, Petitioners indicated that their request was based upon their belief that the companies identified in their request for review "may have produced and/or exported fresh garlic shipped to the United States during the POR and that the cash deposits or estimated antidumping duties required on any such entries understate the actual assessable antidumping duties owed."²² The Department finds this type of statement to be reasonable and to meet the requirements under 19 CFR 351.213(b).

Furthermore, the regulations are also clear that any party (including Petitioners) requesting a review may withdraw any of its requests for review normally within 90 days from the date of publication of the initiation of review. If no other party has requested a review of that producer/exporter, we are then obliged to rescind the review of that producer/exporter.²³ Additionally, there is no requirement for parties to explain when they withdraw certain requests for review. As such, Petitioners have complied with the statutory and regulatory mandate for requesting and withdrawing reviews of certain parties.

There is no merit to Hongqiao's claim that the Department did not provide an explanation for excluding specific companies from the administrative review and without those companies establishing their entitlement to a separate rate.

¹⁹ See 19 CFR 351.213(b).

²⁰ See Floral Trade Council v. United States, Court No. 93-06-00372, Slip Op. 93-244 (CIT 1993) (affirming the Department's requirement that petitioners name specific producers and exporters).

²¹ See Letter to the Department from Petitioners regarding "17th Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China – Request for Review," dated November 30, 2011.

²² Id. at 2.

²³ See 19 CFR 351.213(d)(1).

Additionally, there is no merit to Hongqiao's argument that the Department failed to disclose which companies filed and received a separate rate status, and what the cash deposit rates for those companies are. The Department's Partial Rescission²⁴ notice identified the requests for review that were withdrawn within the 90-day period and rescinded the reviews as to these parties.²⁵ The Department stated that:

For those producers/exporters for which this review has been rescinded and which have a separate rate from a prior segment of this proceeding, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(2). For those producers/exporters for which this review has been rescinded and which have not been assigned a separate rate from a prior segment of the proceeding, the Department has stated that they belong to the PRC-wide entity and that the administrative review will continue for these companies.

As this information was previously published, any party can identify those companies that currently hold a separate rate and the cash deposit rate applicable to those companies that hold a separate rate. The information is publicly available and readily identifiable. Therefore, there is no need for the Department to re-publish this information.²⁶

Comment 2: Department's 15-Day Liquidation Instruction Policy

Hongqiao's Arguments

- The Department's 15-day liquidation instruction policy is contrary to law and must be modified unless the Department explains why expedited liquidation procedures are required in this segment of the proceeding.
- The Department's policy deprives Hongqiao of its right to review the results, request correction to errors, and determine whether to challenge the result in court.

Golden Bird's Arguments

- The expedited 15-day liquidation instruction policy is contrary to section 751 of the Act, 19 CFR 351.224 and Rule 3(a)(2) of the Rules of the United States Court of International Trade (CIT). Additionally, this policy has been subject to judicial review and the CIT has held that the policy is unlawful.²⁷
- The Statement of Administrative Action to Implement Article VI of the GATT (SAA) allows the Department to delay liquidation if the duty liability is subject to litigation.²⁸

²⁴ See Partial Rescission, 77 FR at 36480.

²⁵ Id.

²⁶ See, e.g., Rescission of administrative review, in part, of antidumping duty order on fresh garlic from the People's Republic of China (A-570-831): Message Number: 2192304, dated July 10, 2012; see also Memorandum to the File "Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: Draft Customs Instructions" dated December 5, 2012.

²⁷ See SKF USA Inc v. United States, 611 F. Supp. 2d, 1351 (CIT 2009) (SKF USA I); see also SKF USA Inc v. United States, 659 F. Supp. 2d 1338 (CIT 2009) (SKF USA II); see also Mittal Steel Galati S.A. v. United States, 502 F. Supp. 2d 1295, 1313-14 (CIT 2007) (Mittal Steel II).

²⁸ See SAA at 64.

- This policy must either be modified or the Department must explain why this expedited procedure is required.

Petitioners' Rebuttal

- The Department addressed (and rejected) this argument in the immediately preceding administrative review.²⁹

Department's Position

The Department intends to continue its policy of issuing liquidation instructions 15 days after the publication of these final results. We note that nothing in 19 CFR 351.224 provides for a delay in issuing liquidation instructions and that the CIT has already considered respondents' views regarding the lawfulness of the Department's 15-day liquidation policy. Specifically, in Mittal Steel II the CIT concluded that the Department's 15-day policy was a reasonable statutory interpretation.³⁰ After noting that the Department had developed the 15-day policy pursuant to section 751(a)(3) of the Act to facilitate timely liquidations,³¹ the CIT determined that “{c}ustoms cannot liquidate promptly if Commerce does not issue the instructions in a timely manner.”³² The CIT also determined that the 15-day policy advances the legislative intent behind the antidumping statutory framework to create more transparent antidumping review procedures and to further the protection of parties' rights through heightened due process “by informing affected parties of the Department's anticipated timetable for transmitting liquidation instructions to Customs” and “by encouraging affected parties to exercise their rights of judicial review in a timely manner.”³³ Finally, the CIT noted that the Department's action in adopting the 15-day policy “was within Commerce's area of particular expertise and statutory authority.”³⁴ Overall, the CIT sustained the Department's 15-day policy as reasonable because it “fill{ed} the statutory gap in a manner consistent with the statute's language and the legislative intent” and because the Department had adopted the policy “based on its own, special expertise.”³⁵ In doing so, the CIT also relied upon Mukand³⁶ and upon Mittal Steel I.³⁷

Furthermore, any other reading of the statute would render the CIT's injunctive powers superfluous, as there would be no need for injunctive relief if the Department were required to voluntarily refrain from issuing liquidation instructions pending litigation. “It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word.”³⁸ Injunctive relief is available only upon a proper showing that the requested relief should be granted, thus, there is no reason for the Department to voluntarily refrain from issuing

²⁹ See Fresh Garlic from the People's Republic of China: Final Results and Final Rescission, in Part, of the 2009-2010 Antidumping Duty Administrative Review, 77 FR 34346 (June 11, 2012) (Garlic 16), and accompanying Issues and Decision Memorandum (Garlic 16 IDM) at Comment 13.

³⁰ See Mittal Steel II at 1317.

³¹ Id. at 1314.

³² Id. at 1316.

³³ Id. (citation omitted).

³⁴ Id. at 1317.

³⁵ Id.

³⁶ See Mukand Int'l, Ltd. v. United States, 452 F. Supp. 2d 1329, 1334-35 (CIT 2006) (Mukand) (“Commerce's issuance of liquidation instructions within the combined 60-day period under 19 U.S.C. § 1516a(a)(2)(A) for commencement of an action in the United States Court of International Trade was not unlawful. . .”).

³⁷ See Mittal Steel Point Lisas Ltd. v. United States, 491 F.Supp.2d 1222 (CIT 2007) (sustaining 15-day policy).

³⁸ See Timken, 893 F.2d at 337 (citing United States v. Lexington Mill & Elevator Co., 232 U.S. 399, 410 (1914); United States v. Measche, 348 U.S. 528, 538 (1955)).

liquidation pending a party's decision to pursue judicial review and request injunctive relief. As the appellate court in Zenith stated, "without a preliminary injunction, all of the entries occurring during the review period will be liquidated immediately," in accordance with the review results.³⁹ Accordingly, the Department's interpretation of the statute to not require the agency to await a party's litigation decision before issuing liquidation instructions is reasonable.⁴⁰

We recognize that other decisions by the CIT have disagreed with the ruling in Mittal Steel II that the 15-day policy is reasonable.⁴¹ We respectfully disagree with those decisions. While the Department's policy at issue in Mittal Steel I, Mittal Steel II and Mukand was to issue liquidation instructions within 15 days of publishing its final results, the Department modified its policy in November 2010 to indicate that it will issue liquidation instructions after 15 days from publication elapse.⁴²

Comment 3: Zeroing

Golden Bird's Arguments

- If the Department finds any sales by Golden Bid during the POR had no margins, the Department must apply its new procedures and not "zero" out those sales in accordance with its Final Modification for Reviews.

Department's Position

Consistent with the Preliminary Results, the Department applied the weighted average dumping margin calculation method adopted in Final Modification for Reviews. In particular, the Department compared monthly weighted-average export prices (or constructed export prices) with monthly weighted-average normal values and granted offsets for non-dumped comparisons in the calculation of the weighted average dumping margin.

Comment 4: Differential Pricing

Petitioners' Rebuttal

- In response to Golden Bird's argument to not zero out sales, Petitioners request that the Department apply its differential pricing methodology in the final results.

Department's Position

Consistent with the Preliminary Results, the Department will not apply its differential pricing methodology to calculations in the final results of this review. As an initial matter, at no point prior to the Preliminary Results did any party in the review claim that there exists a pattern of export prices (or constructed export prices) for comparable merchandise that differs significantly among purchasers, regions, or time periods, which the Department should investigate. In order to apply differential pricing in this proceeding, the Department would have had to issue amended

³⁹ See Zenith Radio Corp. v. United States, 710 F.2d 806 (Fed. Cir. 1983) (Zenith).

⁴⁰ See Torrington Co. v. United States, 68 F.3d 1347, 1351 (Fed. Cir. 1995) (quoting Daewoo Elecs. Co. v. Int'l Union, 6 F.3d 1511, 1516 (Fed. Cir. 1993), cert. denied, 512 U.S. 1204 (1994)).

⁴¹ See e.g., Tianjin Machinery Import & Export Corp. v. United States, Slip Op. 04-125 (CIT 2004) (Tianjin Machinery).

⁴² See Announcement Concerning Issuance of Liquidation Instructions Reflecting Results of Administrative Reviews (August 9, 2010).

calculations (applying the differential pricing methodology) and allowed parties to submit comments on these results. As such, the Department is unable to apply differential pricing in the final results of this review.

The Department has implemented its differential pricing analysis on a case-by-case basis such that it has been applied in review and investigation preliminary results issued after March 4, 2013. This approach is consistent with other situations where we have adopted a new or revised price methodology/analysis (i.e., we ceased zeroing in investigations before we ceased zeroing in reviews, the Nails test⁴³ originated in an investigation before being expanded to reviews). It is important to proceed in a deliberate fashion with a new analysis, gaining experience applying the analysis incrementally in different factual circumstances and reflecting on parties' comments in response to the analysis.

We also note that while we have switched to a differential pricing analysis for preliminary results issued after March 4, the Nails test is still a statutorily-consistent and valid method for determining whether to apply an average to transaction comparison as an alternative to average to average comparisons. Even after our Preliminary Results published in December 2012, it was not until Petitioner's rebuttal comments in May of 2013 that they requested we apply differential pricing.

Accordingly, we do not find that departing from the analysis that was used in the Preliminary Results is warranted in this case. This would require the Department to perform a new analysis, issue post-preliminary results after briefing has been completed, and solicit and analyze comments pertaining thereto, which cannot be done within the statutory deadlines for completion of this review.

Surrogate Country and Value Issues

Comment 5: India as the Surrogate Country

Golden Bird's Arguments

- The Department should use India as the surrogate country or use Indian garlic prices as the price for garlic surrogate values (SVs) instead of Ukraine because: (1) Ukrainian prices are unreasonable when compared to contemporaneous US prices; (2) Ukraine experienced high rates of inflation leading up to the POR; and (3) market conditions are distorted in the Ukraine due to land ownership laws.

⁴³ See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008) and Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value, 73 FR 33985 (June 16, 2008) (collectively, Nails), as modified in more recent investigations, e.g., Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (October 18, 2011); see also Mid Continent Nail Corp. v. United States, Slip. Op. 2010-47 (CIT May 4, 2010) and Mid Continent Nail Corp. v. United States, 712 F. Supp. 2d 1370 (CIT 2010).

Xinboda's Rebuttal

- Selecting India as the surrogate country would be inappropriate because adequate data exists for one of the economically-comparable countries and the data from India is suspect.

Petitioners' Rebuttal

- India is not an appropriate surrogate country in this segment and the economic data does not support its selection. Additionally, the argument for using India is untimely.

Department's Position

When the Department is investigating imports from an NME country, section 773(c)(1) of the Act directs it to base normal value (NV), in most circumstances, on the NME producer's factors of production (FOP), valued in a surrogate market economy (ME) country or countries considered to be appropriate by the Department. In accordance with section 773(c)(4) of the Act, in valuing the FOPs, the Department shall utilize, to the extent possible, the prices or costs of FOPs in one or more ME countries that are: (1) at a level of economic development comparable to that of the NME country; and (2) significant producers of comparable merchandise.⁴⁴ Once the Department has identified the countries that are the most economically comparable to the PRC, it identifies those countries which are significant producers of comparable merchandise. From the countries which are both economically comparable and significant producers the Department will then select a primary surrogate country based upon whether the data for valuing FOPs are both available and reliable.

As explained in our Surrogate Country Letter,⁴⁵ the Department considers Colombia, Indonesia, Peru, the Philippines, South Africa, Thailand and Ukraine all comparable to the PRC in terms of economic development. Accordingly, unless we find that all of these countries are not significant producers of comparable merchandise, do not provide a reliable source of publicly available surrogate data or are unsuitable for use for other reasons, or we find that another equally comparable country is an appropriate surrogate, we will rely on data from one of these countries.

The Department has previously determined that India is less economically comparable to the PRC than the seven identified countries.⁴⁶ Consequently, we will not consider India as an appropriate surrogate country unless we are unable to find a more economically comparable surrogate country which satisfies all remaining criteria for selection.

Comment 6: Garlic Input Surrogate Value

Xinboda's Arguments

- Fruit Inform (FI) prices represent only 18 percent of all fresh garlic cultivated in Ukraine and are distorted as Chinese garlic has been commingled with domestic garlic.

⁴⁴ See Import Administration Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process (March 1, 2004) (Policy Bulletin) available on the Department's website at <http://ia.ita.doc.gov/policy/index.html>.

⁴⁵ See Letter from the Department "Fresh Garlic from the People's Republic of China: Surrogate Countries Selection and Surrogate Value Information," dated April 4, 2012 (Surrogate Country Letter).

⁴⁶ See Hand Trucks and Parts Thereof From the People's Republic of China: Preliminary Results of Antidumping Administrative Review, 77 FR 1464, 1466 (January 10, 2012).

- FI provides no information regarding the sizes, grades or volumes of garlic sold, so there is no information regarding specificity and prices are not weighted-average POR sales prices and thus, FI price data is not the best available information.
- Import data is disregarded only when the quantities cannot be considered commercial quantities; as there is no indication that is the case in this review, the Department should use GTA garlic import data into Ukraine during the POR.
- The United Nations' Food and Agricultural Organization's Statistical Division (FAOSTAT)⁴⁷ price provides a more reliable Ukraine garlic price than FI and represent all the garlic grown in Ukraine.
- Ukrainian FAOSTAT garlic data is specific to that of Chinese garlic and is presumed official and representative.
- Volume and level of trade are important to product specificity as the Ukrainian import quantities are more representative of Xinboda's level of trade.
- While FI and GTA prices are more contemporaneous than the FAOSTAT prices, specificity is more important than contemporaneity in the case of valuing garlic bulb inputs.
- FAOSTAT data is presumed official and representative of the country being reported.
- FI prices are not as representative because they are from regional wholesale markets operating similarly to retail garlic sellers.
- GTA and FAOSTAT data never include VAT or other taxes in the pricing data whereas some FI prices contain VAT and therefore are not entirely tax exclusive.

Golden Bird's Arguments

- The Department should not use FI prices on the basis that they do not include quantity and that they are the simple average between the high and low bid prices.

Petitioners' Rebuttal

- Ukrainian garlic is highly comparable, in both size and type, to Chinese garlic purchased by respondents for export to the United States.
- The GTA and FAOSTAT price data are inferior to FI as there is no information (i.e., size, color, etc.) to indicate the garlic they represent is similar to that purchased by respondents.
- FAOSTAT's data is not contemporaneous to the POR
- GTA import data is skewed by Chinese imports.
- There is no evidence that supports the conclusion that imported garlic is commingled with domestic garlic.

Department's Position

After weighing the information placed on the record of this case, as well as the arguments presented by interested parties following the Preliminary Results, the Department has determined that the best surrogate value for raw garlic bulb inputs is the 2009 FAOSTAT producer price.⁴⁸ Just as in the Preliminary Results and prior proceedings, the Department bases our selection of the surrogate values on the determination of which data source offers the best available information. When selecting the "best available information" for valuing FOPs for use in an NME proceeding, pursuant to section 773(c)(1) of the Act, the Department's practice, as

⁴⁷ See Xinboda's August 10, 2012, Rebuttal Surrogate Value Submission at Exhibit 8.

⁴⁸ We note that the 2009 FAOSTAT producer price is a single U.S. Dollars-per-ton price that covers the entire calendar year 2009 and is the most recent producer price that was placed on the record of this proceeding.

affirmed by the CIT, is to select values which are: (1) specific; (2) based on broad market average; (3) contemporaneous; (4) exclusive of taxes and duties; and (5) publicly available.⁴⁹ While there is no specific hierarchy in which we evaluate possible surrogate value sources against the five factors, the Department has typically placed greater emphasis on specificity of the garlic bulb size due to the importance it plays in determining the price of raw garlic bulb inputs. As discussed in detail below, the Department's determination that the FAOSTAT price is the best available information on the record is based on the five criteria above, with particular emphasis placed on specificity, in comparison to FI and GTA data.

Specificity

As noted above, specificity is of particular importance when selecting a surrogate value for raw garlic bulb inputs. During the course of past reviews, the Department has concluded that size and quality have significant influence on the value of the raw garlic bulb inputs.⁵⁰ As such, the Department's preference has been, whenever possible, to ensure that prices for raw garlic inputs are of a grade or size that is reflective of respondent's garlic bulb input.⁵¹ In the Preliminary Results, we found that garlic harvested in Ukraine is typically of the large variety that is similar to respondents' Chinese garlic and no party contests this conclusion. Thus, the record indicates that Ukrainian garlic is highly comparable to Chinese garlic purchased by respondents.

The FAOSTAT data are compiled with the cooperation of governments, who provide the data in the form of replies to annual FAO questionnaires. These data are "prices received by farmers (called Producer prices) for primary crops . . . at the point of initial sale (prices paid at the farm-gate)."⁵² The FAOSTAT website notes that, when countries do not collect farm-gate prices, they also may provide wholesale prices and unit values compiled for national accounts.⁵³ Likewise, the organization notes that, in some cases, the data provided in the questionnaire responses are also supplemented with official country publications and institutional databases. Along with the producer price, the FAOSTAT data also reports the annual production of the good; in the case of garlic, the corresponding 2009 FAOSTAT-reported for Ukraine was 150,100 tons.

Also, according to the data on the record, the eight FI markets throughout the country sell Ukrainian garlic. Evidence on the record indicates that some of the markets reported by FI also sell imported garlic. However, as Petitioners argue, even if all imports of garlic were sold at markets represented by FI, imports would account for less than a third of all the garlic sales represented by FI, the rest being Ukrainian garlic.⁵⁴ Moreover, as noted by evidence on the record, vendors at the markets represented in FI's prices are unable to tell the difference between

⁴⁹ See Notice of Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 from the People's Republic of China, 69 FR 67304 (November 17, 2004), and accompanying Issues and Decision Memorandum at Comment 3; see also Allied Pacific Food (Dalian) Co. Ltd. v. U.S., 716 F. Supp. 2d 1339, 1343 (CIT 2010).

⁵⁰ See, e.g., Fresh Garlic From the People's Republic of China: Final Results and Final Rescission, in Part, of the 2008-2009 Antidumping Duty Administrative Review, 76 FR 37321 (June 27, 2011) (Garlic 15), and accompanying Issues and Decision Memorandum at Comment 3; see also Garlic 16 IDM at Comment 5.

⁵¹ Id.

⁵² See Xinboda's August 10, 2012, Rebuttal Surrogate Value Submission at Exhibit 8.

⁵³ Id.

⁵⁴ According to the director of FI, 18 percent of all garlic cultivated in the Ukraine is represented in the FI data. Thus, of 157,400 tons produced in the 2010 FAO data, 18 percent would be approximately 30,600. Thus, 11,835 tons of garlic imported into the Ukraine during the POR, represents 28 percent of the total of these imports plus the amount represented by Ukrainian production in FI: $42,435 = 11,835 + 30,600$; 11,835 is 28 percent of 42,435.

Ukrainian and Chinese garlic when they are commingled; this lends additional support to the fact that Ukrainian garlic represented by FI is, in fact, comparable to Chinese garlic.

In contrast, of the 11,835 tons of imports in the GTA data, only 295 tons are not from China and they involve countries for which there is no information on the record regarding their comparability (e.g., size, variety, etc.) to respondents' garlic.⁵⁵ Thus, without additional information regarding the garlic from the countries in the filtered GTA import data, we are unable to determine whether the GTA import data is specific. While the Department has relied on GTA import data in this proceeding for other inputs, we do not find it to be the best available information for the garlic bulb input.

For these reasons, in this case, the record supports a finding that the FAOSTAT and FI prices are specific to raw garlic purchases made by respondents in the POR while the GTA import data is not, even though the data do not provide transactions identifying specific sizes. This is because the evidence on the record establishes that the FAOSTAT price is intended to represent all garlic produced in Ukraine, while FI represents only 18 percent of domestic production. In addition, Ukrainian garlic is comparable to respondents' garlic. Therefore, both the FAOSTAT price and FI data are specific to Chinese respondents' garlic.

With regard to the arguments about which possible surrogate value is farmgate⁵⁶ (i.e., at the same level of trade or processing) as that of respondents, the Department notes that no data on the record is at the exact level of processing as respondents. As noted above, the FAOSTAT price is intended to be a farmgate price (although it may reflect some other measures as well) while the FI price data are prices which reflect some level of preparation, transport and possibly storage. While Xinboda and Golden Bird both contend that their garlic is obtained at the farmgate, the Department found in the previous review that this is not the case.⁵⁷ Department officials conducted verification of Golden Bird during the instant review and, as part of verification, visited some of Golden Bird's producer's suppliers. It is clear from verification that while the suppliers may be farmers, the garlic they are selling to Golden Bird's producer has already been cleaned, transported, and kept in cold storage.

Likewise, while we did not verify Xinboda, we note that the fact that Xinboda was able to purchase garlic throughout the POR indicates that the garlic its producer purchases has been stored and therefore reflects a level of trade/processing beyond the farmgate. We note that the garlic harvest in the PRC takes place in the months of May and early June, after which raw garlic can be dry stored for up to three months, cold stored for up to six months, or cold atmosphere

⁵⁵ In using GTA import data we first removed all imports from NME countries as well as those countries providing generally-available export subsidies. After filtering the data, we are left with a list of imports of garlic into Ukraine from a number of countries; with the exception of the United States, we have no information on the garlic grown in those countries or whether they are at all comparable to Chinese- or Ukrainian-grown garlic.

⁵⁶ In Jinan Yipin, the definition of farmgate included therein states that a garlic farmgate price is the purchase price of raw garlic as it is harvested with no further processing or handling, and including no additional charges. See Jinan Yipin Corporation, Ltd. v. United States, Slip Op. 11-119 (CIT 2011) (Jinan Yipin). In other words, purchasing garlic at a farmgate price means that the garlic is priced to reflect its state immediately following harvest. It is garlic, immediately following harvest, that has not been sorted, cleaned, processed, stored, transported or in any other way handled or modified. The addition of any costs related to these actions results in the price no longer being a farmgate price. It is on this basis that the Department has conducted its analysis of the arguments regarding farmgate prices.

⁵⁷ See Garlic 16 IDM at Comment 5.

(CA) stored for up to 11 months.⁵⁸ It is reasonable to conclude that garlic processed by the respondents from June through mid-September was likely sold out of dry storage. By extension, we can surmise that garlic the respondents processed in the months of September through May came out of cold or CA storage. A review of the raw garlic bulb input purchases reported by both Xinboda and Golden Bird shows that both companies purchased and processed a significant portion of their raw garlic inputs during the period when cold storage would have been necessary. The fact that most of the raw garlic inputs were also cold stored further indicates that the respondents do not purchase raw garlic inputs at farmgate prices. As such, Xinboda's raw garlic has also been subject to some level of preparation (*i.e.*, bagging to be placed in storage) as well as transportation or labor to place the garlic in cold storage). Accordingly, the Department continues to find that the raw garlic purchased by both Golden Bird and Xinboda is not farmgate in nature.

As such, the FAOSTAT price is closer to a farmgate price (*i.e.*, contains little to no additional processing costs) than the garlic purchased by respondents. Likewise, information on the record indicates that the FI prices likely reflect some level of mark-up to the price between the farmer and the reporting market to account for middlemen costs not included in respondents' purchases of raw garlic bulb inputs. Consequently, both the FAOSTAT price and the FI price data appear to be at a different level of trade and processing than respondents' purchases and, without more information, it is not possible to determine whether one is more similar to respondent's purchases of processed garlic bulb over the other.

Accordingly, record evidence supports the finding that both the FI and FAOSTAT prices for Ukrainian garlic are specific to Chinese garlic. While we find that the FAOSTAT and FI price data are both specific, we can conclude that no party has sufficiently demonstrated the GTA data to be specific.

Broad Market Average

With respect to all three possible Ukrainian data sources, FAOSTAT, FI and GTA, the Department finds the FAOSTAT price to represent the broadest market average. We make this determination on the basis that the FAOSTAT price is a single annual price intended to represent all Ukrainian garlic production.

We preliminarily used the FI data because we found its eight markets, spread throughout the country, represented a broad market average. Since the Preliminary Results, a declaration by the director of FI notes that the FI prices represent about 18 percent of all garlic cultivated in Ukraine. Thus, while the FI price data represent 18 percent of all Ukrainian production, the FAOSTAT price is intended to represent all Ukrainian-produced garlic. With respect to the GTA import data, as discussed above, Chinese imports account for almost 98 percent of the total 11,835 tons of garlic imported into Ukraine, driving the value of the 295 tons of non-Chinese garlic imports, for which there is no information. As such, we find that the FAOSTAT price represents a broader market average.

Contemporaneity

Both the GTA and FI price data are contemporaneous with the POR while the FAOSTAT price is from calendar year 2009. The Department prefers contemporaneous data over non-

⁵⁸ *Id.* at 21.

contemporaneous data, all other factors being equal. Notwithstanding, when the other factors are not all equal, particularly with regard to specificity in this case, the Department has, in the past, relied on non-contemporaneous data over contemporaneous data.⁵⁹

Petitioners contend that Ukrainian markets have rapidly developed since 2009, thus making FI prices better suited as a source of surrogate values. Moreover, they claim that the FAOSTAT price covering five years shows a sharp decline from \$1.28 per kilogram (kg.) in 2006 to \$0.41 per kg. in 2008 before recovering to \$0.66 per kg. in 2009, which makes the FAOSTAT price less reliable. We note though that while the markets may have changed, there is no evidence indicating that the 2009 price, indexed to the POR, is any less indicative of the price of garlic in Ukraine as a result of market development in the intervening time period. Moreover, the Department placed information on the record in the Preliminary Results which provided a method of inflating non-contemporaneous prices; no party has disputed this information.⁶⁰ With an index on the record that no party has contested, we find that indexing the FAOSTAT price to the POR is reasonable. As such, there is no basis to conclude that applying an indexing factor to the 2009 FAOSTAT price to obtain a POR price will result in a less accurate surrogate value.

Tax and Duty Exclusivity

The Department has previously found that the GTA and FAOSTAT data are tax and duty exclusive; no party contests these conclusions in this proceeding.

With respect to the FI prices, Petitioners contend that the FI prices are tax and duty exclusive while respondents argue that taxes are, at some level either included or are influencing FI prices. Moreover, Xinboda argues that the FAOSTAT price necessarily must be tax exclusive while the Department has previously found the GTA price data to be tax and duty exclusive. FI's director clearly states on the record of this proceeding that the FI prices are tax exclusive because the small farmers and traders selling at the markets captured by FI are not required to pay VAT.⁶¹ Golden Bird contends that because Ukraine law requires a 20 percent VAT on agricultural products, the FI prices are obligated to include taxes.⁶² No party disagrees with the fact that Ukrainian law requires 20 percent VAT to be paid on agricultural products. However, FI's director states that the prices reported by FI are exclusive of VAT and no party has provided any evidence which demonstrates that any of the FI-reported prices are, in fact, tax inclusive. While Xinboda does contend that because commercial farmers are selling garlic through markets reported by FI (their distance sales would necessarily include VAT), it is not clear that the distance sales made by commercial farmers in Ukraine are inclusive of VAT. Therefore, while there is some lack of clarity regarding the VAT in FI, it is the uncontested that FAOSTAT data are tax exclusive.

With respect to the FAOSTAT price, we concur with Xinboda that it necessarily must be tax exclusive, based on the statement on the FAOSTAT's website which states that “{p}rices of agricultural products and by-products have a significant influence on formulation of production plans and policy decisions relating to taxes levied on agricultural income and subsidies provided

⁵⁹ See, e.g., Garlic 16.

⁶⁰ See Memorandum to the File “Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People’s Republic of China: Surrogate Values for the Preliminary Results” dated December 3, 2012, at page 3.

⁶¹ See Petitioners’ February 12, 2013, Post-Preliminary Surrogate Value Submission at Exhibit 1 (paragraph 11).

⁶² See Golden Bird April 25, 2013, Case Brief at 11-14.

to farmers on agricultural inputs.”⁶³ It is reasonable to conclude that the FAOSTAT price would be tax exclusive if the data is utilized for the purposes of levying taxes. Accordingly, record evidence leads the Department to a determination that the FAOSTAT price is, in fact, tax exclusive.

Public Availability

Xinboda contends that the GTA and FAOSTAT data are more publicly available than the FI price data. By extension, Xinboda argues that the fact that GTA and FAOSTAT are more established sources of data, that they are preferable vis-à-vis the public availability criterion. Whether a source is well established or relatively new has no bearing whatsoever on the consideration of whether a source is publicly available. We do concur that the GTA and FAOSTAT data are publicly available data sources but, the FI price data are publicly available as well. As such, while the GTA and FAOSTAT data are free, that does not make them preferable in terms of public availability. Moreover, both Petitioners and Xinboda have provided statements from FI’s director which clearly describe the data collection methods utilized by the company; no party has indicated that FI’s data collection or reporting is in any way inaccurate or flawed. To that end, we conclude that all three sources are publicly available.

Analysis

The Department finds that the FAOSTAT price is the best available information. Specifically, as discussed above, the FAOSTAT price is specific to respondent’s garlic bulb, represents all the garlic produced in Ukraine, is tax exclusive, and publicly available. Although FAOSTAT is not contemporaneous, it is close in time to the POR. We find that FAOSTAT is nonetheless superior to the FI data because it represents a broader market average than the FI data, and because there is some lack of clarity regarding whether the FI data is tax exclusive. It is superior to the GTA data because it is more specific and represents a broader market average. It is based on these factors that we find that the FAOSTAT price is the best available information for valuing raw garlic bulb inputs.

Comment 7: Price Adjustments to Fruit Inform

Golden Bird’s Arguments

- The Department should adjust the FI values to reflect what Golden Bird would have paid in the Ukrainian garlic market. Specifically, these values should be adjusted to remove the mark-up between farmgate and the market, as well as the 20 percent VAT applied to agricultural products.

Petitioners’ Arguments

Ukrainian prices quoted are not inclusive of VAT, so no adjustment for VAT should be made. Additionally, no adjustment to account for middlemen costs is warranted because the garlic input prices paid by respondents include such costs.

⁶³ See Xinboda’s August 10, 2012, Rebuttal Surrogate Value Submission at Exhibit 8.

Golden Bird's Rebuttal

- The FI prices necessarily reflect costs incurred for cold storage, or there would not be prices to report for the non-harvest periods of the year. Additionally, even if the FI prices are VAT exclusive, VAT is influencing the prices.

Petitioners' Rebuttal

- The Department should not adjust the FI prices as proposed by Golden Bird.

Xinboda's Rebuttal

- Arguments that Xinboda's producer, Zhengzhou Dadi Garlic Industry Co., Ltd., sources garlic from middlemen are wholly unsupported and cannot be based on the verification of Golden Bird's producer Cangshan.

Department's Position

The parties provided more detailed comments regarding specific adjustments to the FI prices. However, as explained in Comment 6, the Department is using FAOSTAT prices as the basis to calculate surrogate value for raw garlic bulbs. Since we are no longer using FI prices, issues regarding adjustments to FI prices are moot.

Comment 8: GTA Ukraine Import Statistics

Golden Bird's Arguments

- The Department should adjust the Ukrainian import data to ensure that the SVs represent Ukrainian in-country prices. All imports where the quantity reported is "0" as well as small quantity imports where the values differ substantially from other imports must be excluded.
- The Department's exclusion of certain imports on the basis that they are either from NME countries or countries with non-industry specific export subsidies violates the Act.

Petitioners' Rebuttal

- The Department's practice is to judge import data on a case-by-case basis, and the Department should continue to do so rather than establish a single bright-line test.
- The proposal to include imports from NME countries contradicts the Department's long-standing determination that NME prices are unreliable to value the factors of production.
- No authority or record evidence supports a departure from the long-standing practice of excluding import statistics from countries with generally-available export subsidies.

Department's Position

For purposes of these final results, we have continued to exclude import data of NME countries and countries with generally available export subsidies from Ukraine import statistics used for calculating SVs for the final results. Additionally, we have not excluded any import data with a zero or small quantity because we did not find these data to be unreliable, nonrepresentative, or aberrational.

The Department's preference for using ME prices is reflected in the agency's regulations requiring that:

where a factor is purchased from a market economy supplier and paid for in a market economy currency, {the Department} normally will use the price paid to the market economy supplier. In those instances where a portion of the factor is purchased from a market economy supplier and the remainder from a nonmarket economy supplier, {the Department} normally will value the factor using the price paid to the market economy supplier.⁶⁴

Legislative history indicates that Congress intended the Department to exclude from surrogate values prices that the Department believes or suspects may be subsidized.⁶⁵ The Department's practice, therefore, is to reject prices from NME countries and ME countries which the Department has a reasonable basis to believe provide broadly available export subsidies.⁶⁶ Including the NME and subsidized economy data runs counter to the reasons the Department is using a surrogate country in the first place. The Department has already determined that NME status does not permit the NV of the subject merchandise to be determined based on prices in the NME.⁶⁷ Indeed, precisely because China is a NME country not operating on market principles of costs or pricing structures, the statute requires the Department to value factors of production using prices in a surrogate market economy country.

The Department has determined that the NME prices are not reliable and for this reason has a long-standing policy to disregard suspected distorted prices it has determined are unreliable – NME and subsidized prices.⁶⁸

We disagree with Golden Bird's argument that the Department's policy of excluding import data of NME countries violates the Act, and distorts the surrogate values when these countries' import amounts are a substantial percentage of the total for each of the FOPs. Not to exclude data from these countries would contradict the Department's longstanding determination that NME prices are unreliable for valuing FOPs. Excluding NME countries' import data from a surrogate country's imports, regardless of the percentage of the total amount, is consistent with the selection of SVs based on the best available information, in accordance with section 773(c)(1) and (4) of the Act. As such, the Department has determined to exclude import data of NME countries from the Ukrainian import statistics.

We also disagree with Golden Bird's argument that the Department's policy of excluding the import data of South Korea, Thailand, Indonesia, and India, violates the Act, and distorts the surrogate values. Excluding import data of countries with generally available export subsidies

⁶⁴ See 19 CFR 351.408(c)(1).

⁶⁵ See Omnibus Trade and Competitiveness Act of 1988, Conf. Report to Accompany H.R. 3, H.R. Rep. No. 576, 100th Cong., 2nd Release. (1988) at 590.

⁶⁶ See Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 70 FR 12651 (March 15, 2005); see also Sebacic Acid From the People's Republic of China: Notice of Initiation of Changed Circumstances Review, 69 FR 39906 (July 1, 2004); see also Certain Cased Pencils from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 68 FR 43082 (July 21, 2003).

⁶⁷ See Sections 771(18)(A) and 773(c) of the Act.

⁶⁸ See China Nat'l Mach. Imp. & Exp. Corp. v United States, 264 F. Supp. 2d 1229 (CIT 2003) *aff'd by China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 293 F. Supp. 2d 1334 (CIT 2003); see also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of 1998-1999 Administrative Review, Partial Rescission of Review, and Determination Not To Revoke Order in Part, 66 FR 1953 (January 10, 2001), and accompanying Issues and Decision Memorandum at Comment 1.

from a surrogate country's import statistics used for calculating SVs, regardless of whether the amount is a small or large percentage of the total amount, is in accordance with the Omnibus Trade and Competitiveness Act of 1988 and long-standing practice. As noted above, the Department has previously found that it is appropriate to disregard such prices from Indonesia, South Korea, and Thailand because we have determined that these countries maintain broadly available, non-industry specific, export subsidies.⁶⁹ Based on the existence of these subsidy programs that were generally available to all exporters and producers in these countries at the time of the POR, the Department finds that it has reason to believe or suspect that all exporters from these countries may have benefitted from these subsidies.⁷⁰ Further, guided by the legislative history, it is the Department's practice not to conduct a formal investigation to ensure that such prices are not subsidized.⁷¹ Rather, the Department bases its decision on the information available at the time it makes its determination. As such, the Department has determined to continue to exclude these countries from the Ukrainian import statistics.

The Department disagrees with Golden Bird's argument to exclude import data with a value but zero quantity because the Department does not find these import data to be unreliable or to be aberrational. The Department has previously found that the import quantity is rounded to zero when it is less than 0.5 units of measure.⁷² In this case, six Harmonized Tariff Schedule (HTS) categories (containing 174 import data points) show 12 data points with a precise value and zero quantity.⁷³ Due to the correlation found between the values of these 12 data points (all among the lowest) and the quantities of the data points (all zero) the Department finds that these entries which have a value, list zero for quantity due to rounding, and are not unreliable or incorrectly entered data. Further, Golden Bird argued that including these import data in the calculation simply inflates the total value while leaving the total quantity unchanged, thus inflating the weighted-average unit value for a HTS category. Mathematically, rounding has both upward and downward effects. Some quantities are rounded to the next lower whole number (e.g., zero) and

⁶⁹ See, e.g., Carbazole Violet Pigment 23 from India: Final Results of the Expedited Five-year (Sunset) Review of the Countervailing Duty Order, 75 FR 13257 (March 19, 2010), and accompanying Issues and Decision Memorandum at 4–5; see also 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 4; see also Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 74 FR 2512 (January 15, 2009), and accompanying Issues and Decision Memorandum at 17, 19–20; see also Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From Thailand, 66 FR 50410 (October 3, 2001), and accompanying Issues and Decision Memorandum at 23.

⁷⁰ See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China, 69 FR 20594 (April 16, 2004), and accompanying Issues and Decision Memorandum at Comment 7.

⁷¹ See Omnibus Trade and Competitiveness Act of 1988, Conference Report to accompany H.R. Rep. 100–576 at 590 (1988) reprinted in 1988 U.S.C.C.A.N. 1547, 1623–24; see also Preliminary Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China, 72 FR 30758 (June 4, 2007), unchanged in Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China, 72 FR 60632 (October 25, 2007).

⁷² See Final Determination in the Antidumping Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the Peoples' Republic of China, 77 FR 63791 (October 17, 2012), and accompanying Issues and Decisions Memorandum at Comment 8.

⁷³ See Memorandum to the File regarding “Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: Surrogate Values for the Preliminary Results,” dated December 3, 2012 (Preliminary Surrogate Value Memorandum) at Exhibits 4a, 4b, 4d, 4e, 4i and 4j (HTS 630539, 761610, 281129, 482110, 481141, and 391910).

some quantities are rounded to the next higher whole number. This results in a negligible impact on weighted-average unit value for a HTS category. Additionally, any impact is further minimized by the small value of these data points. Finally, because the zero quantity is the quantity less than 0.5 units of measure, to develop a per unit value, we doubled the reported value and found the resulting per unit value is within the range of per unit value from other countries, which indicates import data with zero quantity are not aberrational. As such, the Department has determined not to disregard these data.

Golden Bird argued that the Department should disregard import data showing small quantities in this review due to precedent in other cases, specifically citing a statement from TRBs from the PRC.⁷⁴ However, the exclusion in TRBs from the PRC was not due to quantity. In an omitted part of the statement cited by Golden Bird, the Department stated that: “{we} disagree in this instance that we should exclude certain monthly Japanese export data from our calculations – specifically October 1998 and May 1999 data – based solely on the fact that it is small in quantity, as all of the data is from the same country.”⁷⁵ In that instance, the Department excluded eight months of import data from a single country for a HTS category based on unit value comparison, not solely based on the quantity. Golden Bird also cited Hand Tools from the PRC in which “the Department excluded these data {imports of steel billet into India from France} as aberrationally high in relation to other India import data for the same factor of production (FOP).”⁷⁶ The memorandum did not discuss quantity but clearly stated that the exclusion is for POR import data of a single country for a HTS category.

Per contra, in this instance, Golden Bird argued that the Department should exclude the POR import data for ten HTS categories primarily due to their small quantity. Specifically, for all ten HTS categories, the Department should exclude the POR import data of any country whose quantity is less than ten kilograms, and the POR import data of any countries whose quantity is less than 100 kilograms and their unit prices are ten times larger or smaller than the HTS’ category unit price. As Petitioners argued, Golden Bird’s request is to exclude import data based on a “bright-line test” which could exclude POR import data of up to 9 countries for a HTS category, based on the quantity. That is not what the Department did in TRBs from the PRC and Hand Tools from the PRC.

In its case brief, Golden Bird claimed that such data is “not comparable to those of Golden Bird and does not represent commercial entries.” However, Golden Bird did not provide evidence to demonstrate that those data are not commercial entries, nor explain why they are not comparable to its own data. There is no evidence on the record, nor does Golden Bird provide any explanation as to why these import data are not comparable to those of its production experience or do not represent commercial entries. In addition, the FOP values placed on the record by Golden Bird show that it did not consume every one of the ten HTS products during the POR, which indicates that Golden Bird has no basis to state that those HTS products are not

⁷⁴ See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People’s Republic of China: Final Results of 1998-1999 Administrative Review, Partial Rescission of Review, and Determination Not To Revoke Order in Part, 66 FR 1953 (January 10, 2001), and accompanying Issues and Decisions Memorandum at Comment 6 (TRBs from the PRC).

⁷⁵ Id.

⁷⁶ See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People’s Republic of China: Final Results of Antidumping Duty administrative Review of the Order on Bars and Wedges, 68 FR 53347 (September 10, 2003), and accompanying Issues and Decisions Memorandum at Comment 4.

comparable to those of its production experience. As such, Golden Bird asserted that small quantity is sufficient to warrant the exclusion.

Furthermore, we examined the per unit values of import data with small quantities. While we found that the unit prices vary from country to country, there was no consistent pattern of departure from the normal range.⁷⁷ Additionally, there is no evidence on the record, nor does Golden Bird provide any explanation as to why import data with small quantities should be considered aberrational. Finally, the CIT has held that numerical differences alone do not necessarily indicate that the price data are distorted or misrepresentative.⁷⁸

Because Golden Bird has not provided any explanation why these import data are not comparable to those of its production experience, and it is not able to cite to any facts demonstrating that these import data do not represent commercial entries or to provide any explanation as to why import data with small quantities should be considered aberrational, the Department has determined not to disregard this import data.

Comment 9: Financial Statements

Golden Bird's Arguments

- The Department should continue to use the Kernel Holding S.A. of Ukraine (Kernel)) financial statements and/or use the AgriPure Holding Public Company Limited (AgriPure) financial statements to calculate the financial ratios.

Petitioners' Rebuttal

- Neither Kernel's nor AgriPure's financial statements are the best information available.
- Kernel's operations are far removed from the operating experience of a Ukrainian company; additionally it has extensive vertical integration and highly capital-intensive transformation processes.
- AgriPure's production process is not similar to those of those respondents. Additionally, the only reason to use financial statements from a second surrogate country is if there are no financial statements available from the primary surrogate country.
- Kraft Foods Ukraine's (Kraft) financial statements are the most appropriate information available. Specifically, record evidence indicates that Kraft is a processor and trader and not a multi-national corporation. Additionally, the Department has relied on financial statements in other cases that lack an auditor's report.⁷⁹

⁷⁷ For example, in Exhibit 4c of the Preliminary Surrogate Value Memorandum, Bulgaria's quantity is 5 kgs. with a \$1 per unit value, Syria's quantity is 8 kgs. with a \$3 per-unit value, while the weighted-average unit value of all countries, excluding NME and countries with widely available export subsidies, is \$2.

⁷⁸ See *Trust Chem Co. Ltd. v United States*, 791 F. Supp. 2d 1257 (CIT 2011) (affirming the Department's determination that "higher prices alone do not necessarily indicate that the price data are distorted or misrepresentative, and thus are not sufficient to exclude a particular surrogate value").

⁷⁹ See Petitioners' July 17, 2012, SC/SV Comments at Exhibit S-18 (which includes the Memorandum to the File "Administrative Review of the Antidumping Duty Order on Small Diameter Graphite Electrodes from the People's Republic of China: Selection of Surrogate Values," dated February 28, 2011, placed on the record at Small Diameter Graphite Electrodes From the People's Republic of China: Preliminary Results of the First Administrative Review of the Antidumping Duty Order; Partial Rescission of Administrative Review; and Intent To Rescind Administrative Review, in Part, 76 FR 12325 (March 7, 2011) (Electrodes from China)).

Department's Position

Prior to the Preliminary Results, three financial statements were placed on the record of this review to calculate surrogate financial ratios, two from Ukrainian companies (Kraft and Kernel) and one from a Thai company (Patum Rice Mill and Granary Public Company Limited (Patum)).

In calculating surrogate financial ratios for Patum, the Department calculated a negative profit ratio. Because the Department has an established practice of not relying on unprofitable financial statements,⁸⁰ we did not consider Patum in the Preliminary Results. In reviewing Kraft's financial statements, we found that it did not include an auditor's report or any notes (thus not allowing the Department to properly allocate expenses). Accordingly, we preliminarily calculated surrogate financial ratios based on Kernel's financial statements. While the Department preliminarily found that Kernel's statements represented the best information on record, the Department noted "serious concerns about all three financial statements" and invited interested parties to submit additional financial statements for consideration for the final results.

Following the Preliminary Results, Golden Bird placed financial statements for AgriPure, a producer and exporter of canned sweet corn and fresh vegetables, on the record of this review. After analyzing Kraft's, Kernel's and AgriPure's financial statements⁸¹ and the comments submitted by parties, the Department has determined that AgriPure's financial statements provide the best information on the record of this proceeding for calculating surrogate financial ratios because Kraft's statement is still incomplete and we have determined that Kernel does not produce comparable merchandise.

In selecting FOPs for valuation, section 773(c)(1) of the Act instructs the Department to select "the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate. . . ." The Department's criteria for choosing companies to calculate surrogate financial ratios involve considering the public availability, the contemporaneity, and the quality of the financial statements, as well as their comparability to the respondent's experience.⁸² The Department has applied this practice in previous reviews of garlic.⁸³ As an initial matter, the Department finds that AgriPure's statements are publicly available, contemporaneous (covering ten months of the POR), complete, and fully-translated.

However, in comparing the production experience (*i.e.*, merchandise produced and production process) of Kraft, Kernel and AgriPure to the experience of the respondents, the Department has

⁸⁰ See, e.g., Glycine From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 74 FR 41121 (August 14, 2009), and accompanying Issues and Decision Memorandum at Comment 1; see also Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review, 72 FR 52052 (September 12, 2007), and accompanying Issues and Decision Memorandum at Comment 2; see also Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People's Republic of China, 69 FR 67313 (November 17, 2004), and accompanying Issues and Decision Memorandum at Comment 3.

⁸¹ Consistent with the Preliminary Results, due to its negative profit, we continue to find Patum's statements to be unusable for these final results.

⁸² See, e.g., Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Final Results and Partial Rescission of First Antidumping Duty Administrative Review, 77 FR 21734 (April 11, 2012), and accompanying Issues and Decision Memorandum at Comment 2; see also Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates From the People's Republic of China, 70 FR 24502 (May 10, 2005) (Chlorinated Isos), and accompanying Issues and Decision Memorandum at Comment 3.

⁸³ See, e.g., Garlic 16.

determined that AgriPure is the most similar. First, we find that AgriPure's primary merchandise, canned sweet corn and fresh vegetables,⁸⁴ is very similar to the merchandise produced Golden Bird and Xinboda (*i.e.*, whole and peeled garlic), whereas Kraft⁸⁵ and Kernel⁸⁶ do not produce merchandise comparable to whole or peeled garlic, but instead make cocoa, sugar confectionery and bottled oils.

We find that the information available for these final results indicates that AgriPure's production process is the most comparable to that of respondents. Neither Kraft nor Kernel's financial statements provide any description regarding their production processes, nor have any parties placed supplemental information on the record to explain the production processes of these companies. Regarding AgriPure, information on the record indicates that the processing of canned sweet corn is comparable to that of peeled garlic. Specifically, the removal of the husk and separation of the corn kernels from the cob is similar to the breaking and peeling found in peeled garlic production. Additionally, one popular method for removing kernels from the corn cobs is the use of machines with rotary cutters that sever the corn kernels.⁸⁷ This process is comparable to the peeling machines the Department observed for peeled garlic production at verification.⁸⁸ As such, the Department concludes that the production process of sweet corn is comparable to that of peeled garlic. Finally, while there is no information on the production process for AgriPure's fresh vegetable sales, the production process for this merchandise is likely more comparable to the production of whole garlic, another vegetable, than the production of any of the merchandise produced by Kraft and Kernel.

In addition to the significant differences in production experience, the Department continues to have concerns that Kraft's statements do not include an auditor's report or any notes. Noting Electrodes from China, Petitioners argue that the Department has relied on financial statements in other cases that lack of auditor's report. The Department evaluates the information on the record on a case-by-case basis. In this review, we have found that AgriPure's financial statements provide the best available information as their production experience most closely reflects that of respondents. Additionally, we note that AgriPure's statements include an auditor's report. While it is always the Department's preference to use financial statements that include an auditor's report and notes, their absence would not necessarily preclude the Department from using these statements. However, as explained above, for purposes of this administrative review, the Department finds AgriPure's statements provide the best information available.

Noting that AgriPure's financial statements are from the second surrogate country (*i.e.*, Thailand), Petitioners have argued that the Department should not use AgriPure unless there are no financial statements from the primary surrogate country. While the Department's preference is to rely upon the primary surrogate country for all surrogate values, whenever possible, the Department resorts to using a secondary surrogate country if data, including financial statements,⁸⁹ from the primary surrogate country are unavailable or unreliable.⁹⁰ With respect to

⁸⁴ See Golden Bird's February 12, 2013, SC/SV Comments at Exhibit 15.

⁸⁵ See Petitioners' July 17, 2012, SC/SV Comments at Exhibit S-18.

⁸⁶ See Xinboda's August 10, 2012, SC/SV Rebuttal Comments at Exhibit 9.

⁸⁷ See Golden Bird's February 12, 2012, SV Submission at Exhibit 16 (at 3.2).

⁸⁸ See, *e.g.*, Verification Report at 13.

⁸⁹ See High Pressure Steel Cylinders From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 77 FR 26739 (May 7, 2012), accompanying Issues and Decision Memorandum at Comment 2.A.

surrogate financial statements, the Department's criteria for choosing surrogate companies are the availability of contemporaneous financial statements, comparability to the respondent's experience, and publicly available information.⁹¹ Moreover, for valuing overhead, SG&A, and profit, the Department uses non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country.⁹² For the reasons discussed above, we find that AgriPure's financial statements provide the best available information to calculate surrogate financial ratios in these final results. Therefore, the Department's calculation of financial ratios using statements from the second surrogate country is appropriate.

Company-Specific Issues

Comment 10: Hejia's No Shipment Certification

Petitioners' Arguments

- The Department should reject Hejia's no shipment certification as Hejia failed to properly serve their no shipment certification on Petitioners, as directed in the Initiation Notice.⁹³

Hejia's Rebuttal

- Hejia properly served its no shipment certification to the service list as the time of submission; only one company was on the list thus, Hejia did not have to serve Petitioners.
- On April 30, 2013 Hejia re-submitted the no shipment certification, and served every party on the service list.
- Hejia was not added to the public service list of this review and therefore not served with the review documents; if this submission is rejected, the Department would have to reject all other submissions on the record on the basis that they were not properly served to Hejia.
- Hejia was never notified of any deficiency or defect in its no shipment certification, a process it is entitled to under 19 U.S.C. §1677m(d).
- The Department's Initiation Notice incorrectly cites to 19 CFR 351.303(f)(3)(ii).

Department's Position

After careful analysis and review of the arguments and record evidence, the Department has determined not to reject Hejia's no shipment certification.

⁹⁰ See, e.g., Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of the 2007-2008 Administrative Review of the Antidumping Duty Order, 75 FR 844 (January 6, 2010), and accompanying Issues and Decision Memorandum at Comment 3; see also Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 70 FR 12651 (March 15, 2005), and accompanying Issues and Decision Memorandum at Comment 3; see also Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review, 77 FR 15039 (March 14, 2012), and accompanying Issues and Decision Memorandum at Comment 2A; see also Steel Wire Garment Hangers from the People's Republic of China: Preliminary Results and Preliminary Rescission, in Part, of the Second Antidumping Duty Administrative Review, 76 FR 66903, 66905 (October 28, 2011), unchanged in final Steel Wire Garment Hangers from the People's Republic of China: Final Results and Final Partial Rescission of Second Antidumping Duty Administrative Review, 77 FR 12553 (March 1, 2012).

⁹¹ Chlorinated Isocyanurates at Comment 3.

⁹² See 19 CFR 351.408(c)(4); see also Section 773(c)(4) of the Act.

⁹³ See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 76 FR 82268 (December 30, 2011) (Initiation Notice).

On January 17, 2012, Hejia submitted a no shipment certification stating that the company had no sales, shipments, or entries of subject merchandise in the POR. Hejia served this submission on all interested parties on the Department's public service list, which at the time contained only one party and not Petitioners. While Petitioners contend that the Initiation Notice clearly directs parties filing no shipment certifications to serve Petitioners, we acknowledge that the notice's requirement of service to Petitioners is not clear. The Department regulation cited in the Initiation Notice as support for this requirement, 19 CFR 351.303(f)(3)(ii), relates to requests for review, not certifications of no shipments, and thus may have caused confusion.

While Petitioners were not on the public service list when Hejia issued its no shipment certification, they were not prejudiced by the lack of service. Specifically, Petitioners received IA ACCESS notification four months prior to the Preliminary Results being published, when on July 13, 2012, we placed no shipment inquiries transmitted to the CBP for five companies, including Hejia, on the record. While Petitioners were not on the public service list when Hejia filed its no shipment certification, Petitioners have had access to Hejia's filing on IA ACCESS since Petitioners joined the public service list on January 17, 2012. Additionally, Petitioners commented on the CBP entry data which did not contain entries by Hejia.⁹⁴

We find that Petitioners had time prior to the case briefs to raise their concerns regarding this issue, which would have afforded the Department and Hejia an opportunity to address and remedy this situation. Moreover, while Petitioners challenge the Department's acceptance of Hejia's no shipment certification, we note that Petitioners have raised no issues about the substance of Hejia's submission. Accordingly, the Department finds no basis upon which to reject Hejia's no shipment certification and we have continued to consider it for the purposes of these final results.

Comment 11: Hongqiao Eligibility for a Separate Rate

Petitioners' Arguments

- Hongqiao lost its separate rate eligibility in the partial final results for the 16th administrative review and failed to submit a separate rate application after losing this eligibility; Hongqiao should be treated as part of the PRC-wide entity in the final results.

Hongqiao's Rebuttal

- At the time Hongqiao filed its separate rate certification, the company was entitled to a separate rate. The Department did not notify Hongqiao of any deficiency with its submission and determined the company was eligible for a separate rate in the Preliminary Results.
- Petitioners provide no new facts that would affect Hongqiao's status as independent of Chinese government control.
- Petitioners are obligated to raise in a timely manner any questions regarding Hongqiao's separate rate status; by waiting, Petitioners sacrificed their right to raise the issue.
- If Hongqiao is assigned the PRC-wide rate during the POR, the Department must change the rate so it is not arbitrary, capricious, and contrary to law.

⁹⁴ See Letter to the Department from Petitioners "17th Administrative Review of the Antidumping Order on Fresh Garlic from the People's Republic of China – Petitioners' Comments on U.S. Customs and Border Protection Entry Data," dated January 27, 2012.

Department's Position

The Department continues to find that Hongqiao is eligible for a separate rate in the final results. On February 1, 2012, the company submitted a separate rate certification for this administrative review.⁹⁵ At this time, the Department had completed Garlic 15 in which Hongqiao was assigned a separate rate, but had not yet published Garlic 16 – Partial Final.⁹⁶ In this Garlic 17 review, Hongqiao submitted a certification by the deadline of February 28, 2012 for filing separate rate applications and certifications. Accordingly, at the time of its filing, Hongqiao was eligible for a separate rate status.

On February 27, 2012, after Hongqiao had submitted its separate rate certification, and one day before the deadline to do so in this review, the Department published Garlic 16 – Partial Final. In those final results, the Department assigned Hongqiao the PRC-wide entity rate due to its failure to participate as a mandatory respondent. Following those final results, the Department did not ask Hongqiao to submit a separate rate *application* for this current review, and as such, assigned them a separate rate in the Preliminary Results.

Finally, other than procedural concerns regarding the timing of submission, Petitioners have not provided any evidence that would cause the Department to find that Hongqiao is no longer eligible for separate rate status. Thus, we are continuing to assign Hongqiao a separate rate for these final results.

Comment 12: Huachao's No Shipment Letter

Huachao's Arguments

- The Department improperly rejected Huachao's no shipment letter.
- Data on the record supports that Huachao had no shipments during the POR so the company should not be subject to this review.
- The Department's rejection of Huachao's no shipment letter but acceptance of improperly filed no shipments letters from three other companies in this review violates basic fairness, and the Administrative Procedures Act at 5 U.S.C. §702, 706.

Petitioners' Rebuttal

- The Department's consideration of timely filed, but previously overlooked, no shipment certifications does not provide a basis for accepting Huachao's no shipment certification.
- The Department responded to all of Huachao's additional case brief arguments in the letter rejecting the submission.

Department's Position

The Department has reviewed the arguments presented and continues to find that it was appropriate to reject as untimely Huachao's no shipment claim filed 11 months after the deadline

⁹⁵ NME exporters of subject merchandise may apply for a separate rate by completing an application for separate rate status. This initial separate rate application allows firms to demonstrate an absence of governmental control over their export activities. The Department allows companies who have already separate rate status to submit a certification that their status has not changed and they continue to meet the criteria to qualify for a separate rate.

⁹⁶ See Fresh Garlic From the People's Republic of China: Partial Final Results and Partial Final Rescission of the 2009–2010 Administrative Review, 77 FR 11486 (February 27, 2012) (Garlic 16 – Partial Final).

for such submission. As such, the Department continues to consider Huachao as part of the PRC-wide entity for the purposes of these final results.

Petitioners properly served their request for review on Huachao in November 2011.⁹⁷ Subsequently, in December 2011 the Department published its Initiation Notice, clearly stating that any producer/exporter named therein, which included Huachao, had 60 days to notify the Department if it had no exports, sales, or entries during the POR. In December 2012, a year after initiating the review, the Department published its Preliminary Results, and included Huachao in the PRC-wide entity because we had not received a separate rate certification or no shipment certification. In January 2013, Huachao submitted a no-shipment letter claiming it was almost a year late because Huachao's counsel was not served a copy of the review request. As discussed in the letter the Department sent to Huachao, evidence on the record established that Huachao had been properly served with notification that the company had been requested for review, thus there was no reasonable explanation for its untimely submission.⁹⁸

There is no merit to Huachao's claim that the Department should accept its no shipment claim almost a year after the deadline, because the Department accepted three other improperly filed no shipment certifications after the Preliminary Results. These three companies⁹⁹ timely filed their certification on November 30, 2011. Because when uploading the documents into our IAACCESS system, the parties selected the POR November 1, 2010, to October 30, 2011, they did not appear on the official record for the POR (November 1, 2010, to October 31, 2011) used by the Department for its Preliminary Results. The submissions were within the Department's document management system but simply were not assigned to the instant proceeding; they were held on the general record for the garlic order.

As such, the three companies had timely filed no shipment certifications and because the Department was notified about the issue immediately following the Preliminary Results, we were able to address the issue in time for these final results.¹⁰⁰ To that end, Huachao contends that, because the Department had time to review these three no shipment certifications, we should have also had time to consider Huachao's submission as well. While we recognize that there were approximately four months between Huachao's submission and the issuance of these final results, this does not negate the fact that Huachao's submission was filed 10 months beyond the established deadline date. Moreover, as the Department determined that Huachao was properly notified of its inclusion in this review, there was no justifiable reason for the tardy filing or the Department's acceptance thereof.

With respect to Huachao's arguments that the CBP entry data on the record supports its statements that it had no shipments during the POR, the Department disagrees. While the CBP entry data may not list Huachao as an importer, the Department's practice is to confirm that a

⁹⁷ See Letter to the Department from Petitioners "17th Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China – Petitioners' Requests for Administrative Reviews," dated November 30, 2011.

⁹⁸ See Letter to Huachao "Antidumping Duty Administrative Review of Fresh Garlic from People's Republic of China: Rejection of January 31, 2013 No Shipment Letter and Removal from the Record," dated April 4, 2013.

⁹⁹ Jining Yongjia Trade Co., Ltd.; Qingdao Tiantaixing Foods Co., Ltd.; and Yantai Jinyan Trading Co., Ltd.

¹⁰⁰ See Memorandum to the File regarding "Antidumping Duty Administrative Review of Fresh Garlic from the People's Republic of China: Companies with No Shipments," dated April 18, 2013.

company did not have any entries of subject merchandise during the POR.¹⁰¹ While we consider the CBP data to be accurate and reliable for purposes of ranking and selecting respondents for individual examination early in the review, because of the possibility that some suspended Type 3 entries could be omitted from the original listing, we require the company certification and issue a separate inquiry to CBP to ensure that no such entries were missed that should be subject to the review. We note that for the eight companies which we have determined had no shipments during the POR, we submitted inquiries to CBP, and had Huachao timely filed a no shipment certification, the Department would have submitted an inquiry to CBP as well. The fact remains that Huachao filed an untimely submission and, the Department, after evaluating Huachao's explanation for the late submission, determined that it must be rejected. After considering the arguments presented by Huachao and Petitioners in the briefs, the Department continues to determine that it will not rescind Huachao's review on the basis of no shipments and will instead consider it part of the PRC-wide entity.

Comment 13: Cangshan's Factor Reporting

Petitioners' Arguments

- Since Cangshan failed to include cold-storage shrinkage loss in reporting its factors of production, its garlic input volumes are understated. As such, the Department should increase Cangshan's input bulb consumption by 13.5 percent if it applies partial adverse facts available or 6.75 percent if it applies partial facts available.
- The Department should double Cangshan's reported electricity usage due to its inability to establish that electricity was metered separately during the POR for processing and administration.

Golden Bird's Rebuttal

- The shrinkage losses for garlic stored in cold storage were minimal; the Department should make a minor adjustment for Cangshan's shrinkage, based on company records.
- Cangshan reported in its questionnaire response that it used two electric meters at its old facility; it made all electricity records available to the Department so it is unclear what the Department was unable to verify.

Department's Position

The Department agrees with Petitioners. Cangshan's cold-storage shrinkage loss should be factored into its garlic production and we have done so for the purposes of these final results. At verification, the company explained that raw garlic kept in its on-site cold storage facilities prior to production experienced moisture loss, but also noted that this loss was not included in the FOP ratios provided to the Department.¹⁰² While it was not included in the factor usage ratio, we note that it was provided to the Department during the course of the review and therefore was not new information when discussed during verification.¹⁰³ Cangshan explained to Department officials that it makes an adjustment in its accounting records for cold storage weight loss generally once a year; during the POR, this adjustment was made in June 2011.¹⁰⁴ The raw garlic purchased by

¹⁰¹ See Memorandum to the File "Antidumping Duty Administrative Review of Fresh Garlic from the People's Republic of China: Companies with No Shipments," dated April 18, 2013.

¹⁰² See Verification Report at 20.

¹⁰³ See Golden Bird's September 5, 2012, Supplemental Questionnaire Response at 19.

¹⁰⁴ See Verification Report at 20.

Cangshan and stored on site was purchased for the purpose of producing subject merchandise during the POR and therefore, we find that the cold storage yield loss should be included in the calculation of the raw garlic factor usage rate. However, we do not agree with Petitioners that we should apply facts available with or without an adverse inference in adjusting Cangshan's raw garlic yield loss rates; the fact remains that the information was timely filed but was omitted from the calculation. Because the Department has the necessary information on the record regarding the cold storage weight loss, we have re-calculated the FOP ratio for raw garlic inputs for both peeled and whole garlic to include the cold storage weight loss as well as any other factors of production which are calculated using the raw garlic inputs. Due to the proprietary nature of the raw garlic usage, the Department has included a more detailed explanation of the calculations, along with the revised numbers, in the Golden Bird's Final Calculation Memorandum.¹⁰⁵

With respect to Petitioners' arguments that we must make adjustments to Cangshan's electricity usage rate on the basis that the Department could not verify the presence of two electricity meters during the POR, we disagree. Cangshan correctly reported all information in its questionnaire responses and, at verification, the Department found no discrepancies with the reported electricity information. The Department closely reviewed Cangshan's electricity expenses with respect to two electricity meters and how they were logged into the company's accounting records. While we were unable to physically note the presence of two electricity meters due to the fact that Cangshan has relocated since the end of the POR, nothing in Cangshan's records or statements raised any concern with Department officials. As such, we have made no changes to the calculations with respect to electricity.

Comment 14: By-Product vs Co-Product

Golden Bird's Arguments

- Cangshan's locally-sold peeled garlic is a co-product, not a by-product, as it is produced at the same time and by the same workers as the exported garlic, differing only in size.
- The scope of the order includes all grades of peeled garlic, so the locally-sold garlic falls within the scope.

Petitioners' Rebuttal

- In the Preliminary Results, the Department properly treated the domestically-sold peeled garlic as a by-product.
- Due to the inferior quality and handling process, the low-grade peeled garlic cannot be sold as export-grade peeled garlic. Instead, this low-grade garlic is processed into products (e.g., minced garlic) where the physical appearance of the input is irrelevant

Department's Position

The Department continues to determine that the low-grade peeled garlic produced by Cangshan is a by-product of subject merchandise. The Department has based this decision on what we have historically considered to be a by-product as well as evidence on the record of this proceeding.

¹⁰⁵ See Memorandum to the File "Fresh Garlic from the People's Republic of China: Calculation Memorandum for the Final Results of Antidumping Duty Administrative Review – Hebei Golden Bird Trading Co., Ltd.," dated June 10, 2013 (Golden Bird's Final Calculation Memorandum).

The National Association of Accountants (NAA) defines a joint product as two or more products so related that one cannot be produced without producing the other(s), each having relatively substantial value and produced simultaneously by the same process up to a “split-off” point. The NAA defines a by-product as a secondary product recovered in the course of manufacturing a primary product, whose total sales value is relatively minor in comparison with the sales value of the primary product. Similarly, the products in a jointly-produced group often vary in importance. Products of greater importance are called major products and products of minor importance are called by-products. When two or more major products appear in the same group, they are called co-products. The term “joint product” includes major product, co-product, and by-product because all are produced jointly.¹⁰⁶

The Department generally looks at several factors in order to determine whether joint products are to be considered co-products or by-products following the “split-off” point. Among these factors are the following: (1) how the company records and allocates costs in the ordinary course of business, in accordance with its home country GAAP; (2) the significance of each product relative to the other joint products; (3) whether the product is an unavoidable consequence of producing another product; (4) whether management intentionally controls production of the product; and (5) whether the product requires significant further processing after the “split-off” point.¹⁰⁷ We emphasize that no single factor is dispositive in our determination. Rather, we consider each factor in light of all of the facts and circumstances surrounding each case.

Regarding the first factor, how the company records and allocates costs, Cangshan does not allocate its production costs between low- and export-grade peeled garlic, thus indicating the two products are not considered co-products by Cangshan itself. While the company does allocate its packaging costs, this is only because of the further processing of the export-grade garlic, discussed below, another factor indicating the higher relative value of the export-grade garlic compared to the low-grade garlic. Specifically, after the low-grade peeled garlic was sorted out and sold separately as is, the export-grade garlic was packaged in plastic prior to shipment.

A review of the second factor, the significance of each product relative to the other joint products, demonstrates that export-grade peeled garlic is more important than low-grade locally sold garlic. Cangshan only produced peeled garlic when an order of export grade was placed. Low-grade peeled garlic is recovered in the course of manufacturing export-grade peeled garlic. As is clearly demonstrated by evidence on the record, low-grade garlic is identifiable as those garlic cloves which are too large, too small or too damaged to be sold as export-grade peeled

¹⁰⁶ See Management Accountants’ Handbook, Fourth Edition; Keller, Bulloch and Shultis at 11.6.

¹⁰⁷ See Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Orange Juice from Brazil, 71 FR 2183 (January 13, 2006) and accompanying Issues and Decision Memorandum at Comment 7; see also Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium From Israel, 66 FR 43949 (September 27, 2001) and accompanying Issues and Decision Memorandum at Comment 3; see also Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review in Part, 68 FR 4758 (January 30, 2003) and accompanying Issues and Decision Memorandum at Comment 6; see also Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from South Africa, 67 FR 35485 (May 20, 2002) and accompanying Issues and Decision Memorandum at Comment 4.

garlic.¹⁰⁸ Golden Bird reported that the “quality of low-grade peeled garlic is far poorer than {export-grade} peeled garlic. Accordingly, the price of low-grade peeled garlic is lower.”¹⁰⁹ Thus, this second factor indicates low-grade garlic is a by-product.

The third factor in determining whether joint products should be considered co-products or by-products is whether the product is an unavoidable consequence of producing another product. We find that the low-grade garlic produced by Cangshan is an unavoidable consequence of producing export grade garlic. It is essentially garlic “scrap” that Cangshan did not choose to produce. Thus, this third factor also leads us to conclude that low-grade garlic is a by-product.

Similarly, we find that the fourth factor, whether management intentionally controls the production of the product in question, leads us to conclude that low-grade garlic is a by-product. As explained above, Cangshan sells garlic as low-grade garlic when it is too large, too small or damaged; it is of “lower” quality and sells for a “lower” price. Thus, it is not intentionally produced by Cangshan but, instead, is the rejected output from the export-grade production process. Cangshan would clearly prefer to produce more of the higher priced export-grade garlic than the lower priced low-grade garlic. Cangshan never entered into the production of garlic during the POR solely for the purpose of providing low-grade garlic domestically; the only time low-grade garlic was produced was when Golden Bird ordered export-grade garlic. The Department considers the production of low-grade garlic to be the unintentional result of producing export-grade garlic.

With respect to the fifth factor, whether the joint products require significant further processing after the “split-off point,” neither the low-grade or export-grade appear to undergo much further processing following the split-off point (the point at which the garlic is sorted into high-grade and low-grade because of irregular size or damaged condition). As mentioned above, however, the high-grade garlic was protected with plastic packaging for shipping purposes after the split-off point.¹¹⁰ The low grade garlic remains unprotected, which exposes the peeled cloves to rapid oxidation and shrinkage, while the export-grade garlic is sealed to prevent the same fate. According to the information provided to the Department during verification, exposed to the air, peeled garlic will begin to spoil after approximately 30 minutes.¹¹¹ This disparity of treatment further supports the Department’s position that low-grade garlic is a less valuable by-product and not a co-product with equal or even similar value.

Based on the factors explained above, the Department finds low-grade garlic to be a minor product while export-grade garlic is a major or principal product. In light of the NAA definition, relied upon by the Department in previous cases, we consider low-grade garlic to be a by-product rather than a co-product.

¹⁰⁸ See Golden Bird’s September 4, 2012 Supplemental Questionnaire Response at 10, 18 and 20; see also Verification Report at 12.

¹⁰⁹ *Id.* at 21.

¹¹⁰ See Golden Bird’s September 4, 2012, Supplemental Questionnaire Response at Exhibit 26.

¹¹¹ *Id.* at 14.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final rescission in the Federal Register.

AGREE ✓ DISAGREE _____

Paul Piquado
Paul Piquado
Assistant Secretary
for Import Administration

60 JUNE 217
Date