

MEMORANDUM TO: Joseph A. Spetrini  
Acting Assistant Secretary  
for Import Administration

FROM: Barbara E. Tillman  
Acting Deputy Assistant Secretary  
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Administrative Review  
of the Antidumping Duty Order on Fresh Garlic from the People's  
Republic of China

Summary

We have analyzed the March 2005 submissions, case and rebuttal briefs, and May 2005 submissions of interested parties in the 2002-2003 administrative review of the antidumping duty order on fresh garlic from the People's Republic of China ("PRC"). The period of review ("POR") is November 1, 2002, through October 31, 2003. As a result of our analysis, we have made changes in the margin calculation for nine respondents. We recommend that you approve the positions that we have developed in the "Discussion of the Issues" section of this memorandum. Below is the list of the issues for which we received comments and rebuttal comments by parties in this review:

1. Intermediate Input Methodology
2. Valuation of Garlic Seed
3. Valuation of Water
4. Valuation of Leased Land
5. Surrogate Financial Ratios
6. Valuation of Garlic Sprouts
7. Valuation of Cartons
8. Valuation of Plastic Jars and Lids
9. Valuation of Attachment Clips
10. Valuation of Cold Storage
11. Valuation of Ocean Freight
12. Calculation of Surrogate Wage Rate
13. Correct Calculation of CEP Profit
14. Use of Most Up-To-Date Information

15. Clerical and Programming Errors
16. Educational Meetings and Other Non-Used Information on the Record
17. Partial Adverse Facts Available

## **Background**

On December 7, 2004, the Department published the preliminary results of the administrative review of the antidumping duty order on fresh garlic from the PRC. See Fresh Garlic from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Rescission in Part, 69 FR 70638 (December 7, 2004) (“Preliminary Results”). We invited parties to comment on our Preliminary Results. We received comments from nine respondent(s): Jinxiang Dongyun Freezing Storage Co., Ltd. (“Dongyun”), Fook Huat Tong Kee Pte., Ltd. (“FHTK”), Huaiyang Hongda Dehydrated Vegetable Company (“Hongda”), Jinan Yipin Corporation, Ltd. (“Jinan Yipin”), Linshu Dading Private Agricultural Products Co., Ltd. (“Linshu Dading”), Sunny Import and Export Co., Ltd. (“Sunny”), Taiyan Ziyang Food Co., Ltd. (“Ziyang”), Jining Trans-High Trading Co., Ltd. (“Trans-High”), and Zhengzhou Harmoni Spice Co., Ltd. (“Harmoni”), and rebuttal comments from the petitioners.<sup>1</sup>

In the Preliminary Results, the Department determined that a comparison of the respondents' reported factors of production (“FOPs”) to third-party, objective benchmarks for these FOPs indicated that five companies<sup>2</sup> had one or more usage rates which fell outside the benchmarks for herbicide, pesticide and/or seed usage, while the remaining four companies<sup>3</sup> provided data that fell within the benchmarks. The Department's benchmarks were based on two articles describing garlic-growing in the PRC that were prepared by supposed experts in the field of PRC garlic growth.<sup>4</sup> Furthermore, the Department expressed its concern about divergent water usage, a factor that these two articles did not address. Accordingly, the Department explained that based on the information currently on the record, including information it obtained through independent research into standard garlic-growing procedures in the PRC, the divergent usage rates provided

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<sup>1</sup>The petitioners are the Fresh Garlic Producers Association (“FGPA”) and its individual members. The individual members of the FPGa are Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc.

<sup>2</sup> Referred to hereafter as the “non-benchmark companies” (i.e., Dongyun, FHTK, Hongda, Trans-High and Ziyang)

<sup>3</sup> Referred to hereafter as the “benchmark companies” (i.e., Harmoni, Jinan Yipin, Linshu Dading and Sunny).

<sup>4</sup> These articles are entitled, “Garlic Production Technology Regulations” and “Environmentally Safe Garlic Production Technology Regulations.” See Memorandum from Steve Williams to File, entitled “Research on Chinese Garlic Production and Costs,” dated November 29, 2004 (“Research Memo”). Both items appear at Attachments 1 and 2.

by certain respondents did not appear to be realistic or adequately substantiated by the facts on the record with respect to herbicide, pesticide or seed usage. Additionally, the Department observed major discrepancies among the FOPs reported by different respondents and determined that, “if FOPs reported to the Department appear highly improbable and lack credibility, we have an obligation to address the resultant inadequacy in our calculations.” See Preliminary Results at 70642.

In an attempt to address the concerns the Department had at the Preliminary Results, the Department employed the use of an intermediate product methodology for the non-benchmark companies, for the reasons outlined in detail in the Memorandum from Edward Yang to Barbara E. Tillman Re: Modification of Factors-of-Production Methodology, dated November 29, 2004. Subsequent to the Preliminary Results, the Department offered interested parties several opportunities to submit new factual information and argument on the use of this intermediate product methodology (hereinafter referred to as the “bulb methodology”), including an opportunity to provide new benchmark information.

Specifically, in the Preliminary Results, the Department extended the deadline for submission of third-party factual information to the record, specifically to allow parties to address issues regarding the use of benchmarks for FOPs used in garlic production.

The Department conducted verification of Sunny and Linshu Dading in January 2005 and issued the relevant verification reports in April 2005.

On March 21, 2005, the Department took the unusual step of inviting the interested parties to submit argument regarding issues raised in the Preliminary Results, specifically regarding the bulb methodology applied in the Preliminary Results and the relative impact on yield from the FOPs used in the production of garlic. Several interested parties submitted arguments for the record on March 29, 2005, in response to this invitation. All interested parties were given the opportunity to submit case and rebuttal briefs during April 2005. Additionally, during the public hearing held on May 11, 2005, the Hearing Examiner posed specific questions regarding the bulb methodology and asked the parties to address them. Finally, during May 2005, the Department placed memoranda on the record of this review regarding various meetings that were conducted with officials in the PRC, and meetings with respondent counsel, an importer, and a consultant to respondents, as well as additional information to clarify an earlier memorandum already on the record of this review. Accordingly, the Department opened up a third commenting period in May 2005 regarding these memoranda and information.<sup>5</sup>

## **Discussion of the Issues**

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<sup>5</sup> See Memorandum to All Interested Parties entitled, “Opportunity for interested parties to comment on specific record documents,” dated May 12, 2005, for a complete listing of the memoranda on which interested parties were invited to submit comments.

## **Intermediate Input Methodology<sup>6</sup>**

**Comment 1:** The petitioners argue that the Department should apply the bulb methodology to all respondents in this review. The petitioners assert that the use of this methodology will lead to a more accurate result than valuing the respondents' upstream FOPs, because the respondents' reported upstream FOP data are sufficiently disparate in a variety of ways such that the basic reliability of the data is in question, notwithstanding the verification of some of that data. Further, the petitioners argue that many of the respondents' reported FOPs bear no consistent or rational relationship to their reported garlic yields. Finally, the petitioners state that while some of the more significant anomalies in the reported FOP data are common to most of the respondents, there is no single litmus test or benchmark of reliability that applies across the board.

The petitioners argue that although there is no single formula which prescribes how much of each FOP is needed to produce a given yield of garlic, the large variances in the respondents' FOP data demonstrate that their data are not reliable. For example, the petitioners rely on the expertise of a domestic industry source, which estimates the consumption of garlic seed required to yield one pound of harvested fresh garlic. See the petitioners' January 6, 2005, Submission of Factors of Production Usage Information ("Petitioners' Surrogate Value Submission") at Attachment I. Using this estimated consumption figure as a guide, the petitioners argue that only Dongyun and Harmoni reported seed FOPs that fall within the range of this estimate, whereas the seed FOPs reported by the remaining respondents (which include both benchmark and non-benchmark companies) are lower than the estimated consumption. The petitioners further argue with respect to garlic seed consumption that although certain respondents report production of different varieties of garlic, they did not report separate FOPs for these different varieties.

With respect to several of the FOPs reported by the respondents that are inputs into producing the raw garlic bulb (e.g., seed, fertilizer, herbicide, and water), the petitioners argue that despite the close physical proximity of some of the benchmark companies' farms, their reported FOPs, and claims as to how much rain fell during the POR, vary significantly while their reported yields do not differ significantly. To illustrate these arguments, the petitioners compare various FOPs, and the respective yields, reported by Jinan Yipin, Linshu Dading, Harmoni, and Sunny. Such illustrations, assert the petitioners, demonstrate that the FOPs reported by the benchmark companies are unreasonable, which contradicts the Department's determination that the FOPs for these respondents are reliable.

With respect to labor, the petitioners argue that although the respondents claim to grow, harvest, and process the subject merchandise using similar – if not identical – harvesting and processing techniques, and despite the close proximity of the respondents, the reported labor FOPs are not comparable, and vary dramatically, across all the respondents. The petitioners then compare the

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<sup>6</sup> Harmoni, Jinan Yipin, Linshu Dading and Sunny did not comment on the Department's use of the bulb methodology in the Preliminary Results, or the relative impact on yield from the FOPs used in the production of garlic.

reported labor FOPs and respective yields of certain respondents, the reported labor FOPs of certain non-benchmark companies, and the labor FOPs reported by the four benchmark companies, in order to illustrate this argument.

The petitioners assert that the study by the U.S. Department of Agriculture entitled, Garlic: An Economic Assessment of the Feasibility of Providing Multiple Peril Crop Insurance (May 20, 1996) (“USDA Study”), included in Attachment I to the Memorandum from Ryan Douglas to the File entitled, “Clarification of the Memorandum from Steve Williams to the File Re: Research on Chinese Production and Costs (November 29, 2004) in the 9<sup>th</sup> Administrative Review of the Antidumping Duty Order of Garlic from the People’s Republic of China,” dated May 10, 2005 (“Clarification Memo”), concludes that the general environmental conditions for garlic production in California are the same as those where the respondents produce, characterized by “sunny, relatively dry climates with cold, but not severe winter temperatures.” Thus, argue the petitioners, the variances in the respondents’ factor usage rates cannot be explained. The petitioners also state that, based on information in the USDA Study, “It is wrong to assume that all precipitation during the growing season is beneficial to the crop and reduces the need for irrigation by the exact amount of the precipitation.” See the petitioners’ May 16, 2005, submission in response to the Department’s May 12, 2005 memorandum at 4. The petitioners further note that, based on the USDA Study, the Department should disregard the information respondents have put on the record about non-commercial garlic production.

The petitioners state that according to the USDA Study, garlic has high nutrient requirements and, thus, requires more fertilizer. They also note that the USDA Study finds that garlic plants “need protection against weed competition.” The petitioners further state that, according to the study, respondents have three means to prevent weeds: plastic sheeting, manual removal, and herbicides. The petitioners contend that plastic sheeting alone is insufficient and respondents must employ an additional method. The petitioners further note that the USDA Study supports that “in general, insects are not considered to be a serious peril...because growers have the means to control them with present management practices.” The petitioners state that, according to the study, “present management practices” are limited to the application of chemical pesticides.

Dongyun and Hongda argue that the Department incorrectly concluded from the two PRC articles on garlic production, relied upon in the Preliminary Results, that the use of pesticide is necessary in the garlic growing process. Dongyun and Hongda further argue that they did not report the use of insecticides in their questionnaire responses because neither respondent actually used them in its garlic production. Dongyun and Hongda contend that these two articles should be characterized as general guidelines, rather than specific steps required, for PRC garlic production. Dongyun and Hongda assert that the material in these articles is unofficial and general in nature, and does not account for the specific conditions that exist for different garlic farms (e.g., field fertility, amount of rainfall, pest levels). Regarding the Department’s interpretation of these articles with respect to herbicides and insecticides, Dongyun and Hongda claim that a more reasonable interpretation of these reports is that they offer advice for weed and pest control, where necessary. They further cite affidavits submitted on the record from local

government and company officials who affirm that pesticide was not used by these firms, and that the county in which the respondents are located has a cold, dry climate which results in little insect infestation. Accordingly, Dongyun and Hongda contend that the Department was incorrect to calculate their normal values using the bulb methodology in the Preliminary Results based on the conclusion that they should have reported usage of pesticide and herbicide.

Dongyun and Hongda state that it would never be appropriate for the Department to obtain industry information on the FOPs and yield ranges from an independent source and then use this information as a way to benchmark the FOP data provided by respondents. Moreover, they assert that respondents could never comply with the dumping laws if they were also required to make sure their FOP data conform to an average benchmark. Instead, they suggest that the best approach is for the Department to verify the accuracy of a respondent's reported FOPs.

Trans-High contends that the Department adopted the bulb methodology for the Preliminary Results without informing the respondents, seeking any comments on the appropriateness of this approach, or seeking comments on the two Chinese-language articles that the Department used as the basis for its decision which, according to Trans-High, are unsubstantiated and incompletely translated. Citing Cut-to-Length Plate from the PRC,<sup>7</sup> in which the Department refuted a U.S. industry claim that respondents' reported labor FOP data must be compared to information in Paine Webber's World Steel Dynamics, Trans-High asserts that the Department has no basis on which to allow an unverified internet discussion about garlic farming to override the legitimacy of its reported FOP data, which can be verified.

FHTK and Ziyang argue that record evidence contained in Exhibits 4, 5, and 24 of their respective January 7, 2005, and January 6, 2005, submissions on additional third party information on reported FOPs ("Third Party Submissions") disproves the Department's treatment of the two articles relied upon in the Preliminary Results as firm guidelines or requirements that necessarily apply to garlic production in the Shandong province. Furthermore, FHTK and Ziyang submit that the assessments of these articles by Dr. Ronald E. Voss, a University of California-Davis garlic production expert, also prove that the information contained in these articles are not relevant standards with which to judge the "credibility" of FHTK and Ziyang's reported FOP data. Thus, FHTK and Ziyang assert that the Department should not continue to rely on these two articles to judge the credibility of their upstream FOP data because new evidence they submitted subsequent to the Preliminary Results discredits them. Furthermore, FHTK and Ziyang state that in using benchmarks, the Department must assume that all things are equal. However, according to FHTK and Ziyang, the information on the record demonstrates that in reality, standards, or governing regulations, with respect to growing garlic vary and provide a lot of flexibility. As such, these respondents assert that the Department cannot reject FOP data from respondents whose data does not fall within such benchmarks.

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<sup>7</sup> See Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China, 62 FR 61964, 61978-79 (November 20, 1997).

Ziyang argues that its seed consumption is reasonable according to the benchmarks relied upon by the Department in the Preliminary Results. According to Ziyang, the Department based its determination that this FOP was unreliable on a miscalculation of its FOP data. Ziyang submits that a correct analysis shows that Ziyang's seed consumption rate falls within the Department's benchmark, is reliable, and should be relied on by the Department in the final results of review. Additionally, both FHTK and Ziyang argue that their non-use of pesticides and herbicides is credible and reasonable, citing the statement on the record by Dr. Voss that growing garlic without herbicides or pesticides is credible.

FHTK and Ziyang also assert that the record evidence about garlic production in the PRC, the United States, and in other countries establishes that commercial garlic farming is a dynamic process that cannot be reduced to formulas. According to FHTK and Ziyang, the respondents' reported data is consistent with the California studies included in their Third Party Submissions in that they reflect the wide variances inherent in garlic production. Moreover, according to FHTK and Ziyang, the fact that the respondents in this review farm in different locations and on different commercial scales, grow different garlic varieties, and focus on different markets, provides additional explanation for variations in the data. FHTK and Ziyang believe that the Department's statistical analysis of the differences among the respondents' production and yield data relative to one another is too simplistic and ignores how different conditions (e.g., production methods, scale of farming, and local soil and weather conditions) could account for such differences. Furthermore, FHTK and Ziyang argue that cross-comparisons of all respondents' reported consumption of seed, fertilizer, herbicides, pesticides, water, and PE film versus yield reveal no meaningful patterns in the data. Therefore, according to FHTK and Ziyang, the Department does not have a valid factual basis to reject certain respondents' FOP data based on variations among the respondents' data.

Moreover, Dongyun, FHTK, Hongda, and Ziyang disagree with the Department's characterization of the information included in Attachment 4 of the Research Memo as "irrelevant, unhelpful, or documented a lack of information available." Dongyun and Hongda state that this attachment supports their zero usage of pesticide, noting that the attachment makes no indication that this factor of production must be used. Ziyang and FHTK submit that the USDA Study "proves that variations in production practices and yields are normal." They state that this study further supports their claims that weather elements are important "in determining the relative success or failure of a crop" and that "controlling weeds can be accomplished by a combination of mechanical cultivation, field selection, rotation, and when needed, application of chemical herbicide."

In response to FHTK and Ziyang's argument that FOPs will vary according to certain environmental factors, the petitioners state that no respondent has established that its production methods, production scale, or geographic location differs in any significant degree from those of any other respondent. Further, the petitioners assert that no respondent has established that the soil in its fields is superior to the others' soil for purposes of growing garlic, or that it has any geographic advantage that enables it to use substantially less seed, irrigation water, labor and

other crucial inputs to produce one metric ton of fresh garlic. Accordingly, the petitioners restate their position that the Department should use the bulb methodology for all nine respondents, or, in the alternative, at least the five non-benchmark respondents.

In response to FHTK and Ziyang's contention that comparing data across respondents reveals no meaningful patterns, the petitioners conducted a "Pearson Correlation Analysis" of the respondents' data, and contend that they found a negative correlation between all the respondents' major raw material, labor, and energy inputs and their yields. Specifically, according to the petitioners, this analysis shows that for each of the eight major inputs, higher usage rates resulted in lower yields. The petitioners argue that such a negative correlation – increased usage of an FOP that lowers the overall yield – may not necessarily be significant when considering one or two inputs. However, because the use of additional amounts of each major input for all respondents results in decreased yields, the petitioners assert that either the respondents must be very inefficient producers of garlic (which they claim is not supported by the record in this case), or the respondents' reported data is materially flawed and thus is not appropriate for use in calculating normal value in this review.

The petitioners disagree with the respondents' claim that reported yields do not vary dramatically among respondents and that all yields are within an acceptable allowance of the average. The petitioners claim the simple average of reported yields reveals differences that are quite significant. The petitioners, therefore, state that a comparison to a simple average is not a meaningful statistical analysis in this case. Further, the petitioners disagree with the respondents' claim that increased input does not necessarily bring about a greater yield, and argue that most of the respondents are experienced garlic growers that would not intentionally experience negative impact to their yields due to the over-use of certain inputs.

The petitioners contend that such strong objection from the respondents with respect to the use of benchmarks in this case should cause the Department concern and that, contrary to respondents' arguments, there are times where using standards is appropriate. In this particular case, though, the petitioners believe, as they have argued throughout this review, that the respondents' FOP data are so divergent that it is not necessary for the Department to rely on standards. Rather, the Department should use the bulb methodology with respect to all respondents in this review as a means to accurately calculate the costs for the raw garlic bulb.

Contrary to several respondents' emphasis on their upstream FOP data being verifiable, the petitioners argue that the traditional verification techniques cannot be used to verify the FOPs for growing fresh garlic. The petitioners point out, given the timing of the Department's verification, that the Department is unable to verify the following steps involved in the harvesting process: plowing and tilling soil, fertilizing, planting cloves, irrigating, plastic film covering, tending of plant, sprout harvesting, trimming of roots and stems, transfer to cold storage, and finally processing and packing. Moreover, the petitioners note that the list of what the

Department did observe at its recent verifications is substantially smaller than the items it did not observe.<sup>8</sup>

Finally, several parties raised arguments, in addition to those summarized above, during the course of this review pertaining to the Preliminary Results. Based on the Department's decisions in these final results, these issues no longer apply. Therefore, the Department is not addressing the following issues raised by the parties:

- Whether the criteria articulated in Certain Frozen Fillets from the Socialist Republic of Vietnam<sup>9</sup> and other proceedings involving agricultural products support the use of the bulb methodology in this proceeding;
- Whether using the bulb methodology, compared to alternative calculation methodologies, actually leads to a more accurate result;
- Whether the Preliminary Results are consistent with the Department's past practice in prior garlic reviews and other cases that did not rely on similar allegations of impossible or unreasonable FOPs;
- Whether using the bulb methodology is akin to the application of total adverse facts available ("AFA");
- Whether it is appropriate to value raw garlic, as the intermediate product, using a surrogate value that allegedly represents a finished product; and
- Whether the Department may depart from an established methodology that has not been contested in past segments, because respondents set their U.S. sales prices in an effort to avoid dumping by relying on this calculation methodology.

While the following arguments are no longer relevant with respect to most of the parties, they remain relevant with respect to FHTK and Ziyang. They are addressed in the Department's Position to Comment 17 below, regarding the application of partial AFA.

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<sup>8</sup> See Memoranda from Steve Williams to the File entitled, "Report of Verification of Sales and Factors of Production of Linshu Dading Co., Ltd and Jinxiang Agriculture Industrial & Trading Company Ltd: 11/01/02-10/31/03 Administrative Review of Fresh Garlic from the People's Republic of China" and "Verification of Sales and Factors of Production of Sunny Import and Export Co., Ltd: Ninth Administrative Review of Fresh Garlic from the People's Republic of China," dated April 13, 2005 (collectively, the "Verification Reports").

<sup>9</sup> See Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 FR 37116 (June 23, 2003).

- Whether the Department should deem factual information reported by certain respondents in this review to be complete, reliable, and substantiated because, although unverified in this review, the Department verified their data in a previous review, and the FOPs reported in this review are either consistent with or identical to the FOPs reported in previous review segments;
- Whether the Department abused its administrative discretion to not conduct verification of certain respondents' questionnaire responses, despite requests from such respondents that the Department conduct verification; and
- Whether the Department should value the consumption of pesticides and herbicides for respondents that reported zero usage of these inputs by using, as partial AFA, the reported consumption of pesticides and herbicides of another respondent.

**Department's Position:** The Department finds that the relevance of two articles relied upon in the Preliminary Results from which we derived benchmarks with respect to the valuation of garlic seed, pesticides, and herbicides has been called into question by the information now on the record of this review.<sup>10</sup> From the vast amount of information now on the record of this administrative review, it appears that an FOP usage rate, taken in isolation, could differ when compared across the production experience of multiple garlic producers, depending on several factors, including the quantity and quality of other FOPs, and the overall yield. For example, without impacting the yield, a garlic farmer could: a) compensate for low or zero herbicide usage by increasing the consumption of garlic seed; b) use plastic film or even increase the number of laborers in the field while decreasing its consumption of herbicide; or c) carefully coordinate the timing of irrigating the fields, in conjunction with the pattern of rainfall that season (a variable that nobody has the power to control), in order to compensate for lower seed consumption. See Third Party Submissions. In all these and other scenarios, taken in isolation, a single FOP might differ among farmers, but the overall experience might result in the same yield. While the information on the record of this review segment does not allow us to objectively determine to what extent, if any, such FOPs can realistically differ among farmers, or to quantify the range of "reasonable" consumption for any particular FOP used in the production of garlic, we are not convinced that benchmarking would necessarily be inappropriate if all relevant data were available on the record.

When comparing each FOP individually to some kind of standard, it is necessary to take a holistic look at the entire growing process – that is, the collective whole of all growing and harvesting FOPs in relation to the overall yield – in order to determine whether such data make sense, and are reliable, for purposes of calculating normal value. The record of this particular administrative review does not support the usage of objective benchmarks in this segment of the

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<sup>10</sup> See supra, note 4.

proceeding. Thus, we have determined not to rely on the benchmarks used in the Preliminary Results for the final results of this review.

The Department did not rely on information contained in the USDA Study in the Preliminary Results because it focused solely on garlic production practices in California and because the Department considered it outdated. Likewise, the Department has also not relied on this information in the final results of review.

From the vast amount of new factual information placed on the record of this review, and multiple submissions of comments by the parties, many questions remain unanswered which pertain to the adequacy of the methodology applied in previous segments of this proceeding to accurately capture complete costs of growing garlic, and the ability of the Department's verification procedures to be able to appropriately establish the accuracy and completeness of the reported FOPs in the context of confirming reported FOP usage rates. Thus, we will be considering the appropriateness of alternative methodologies in subsequent administrative reviews of this antidumping duty order.

Although we have conducted several antidumping duty proceedings involving imports of products from non-market economies, garlic – by its very nature – presents the Department with some highly unique and unusual problems when compared to other products that we have investigated. For example, when the Department conducts an administrative review of steel or chemical products, the books and records of the producer of the subject merchandise are able to chronicle with a great deal of precision nearly everything that might affect the physical and chemical attributes of the final product. Thus, the Department may verify a producer's books and records with relative confidence that a given output of the product relates back to each reported input. In other words, if it takes a certain amount of inputs to produce a ton of steel or coke, then the fact that a certain tonnage of the ultimate product was produced combined with the fact that the respondent's books and records reflect the amount of necessary inputs to produce that quantity of output, means that the Department can rely on the verification of what is reported in those books and records.

With respect to agricultural products, by their nature, however, there may be less consistency from one harvest to the next, or among growers, between the FOPs which go into the ultimate production of the item and the product which results from this process. Seed may not always sprout, fertilizer may not always work, fertilizer or pesticide from neighboring fields might “run off” onto a farmer's land, and the weather may sometimes provide favorable or harsh growing conditions. Such events will have an impact on the quantity and quality of the FOPs and, ultimately, the accurate measurement and reporting of these FOPs. However, with many agricultural products that the Department has verified in the past, such as certain preserved mushrooms from the PRC, much of the growing procedures are supervised in very controlled environments that arguably might not be influenced by outside, unmeasurable factors.

This is not the case with fresh garlic. Fresh garlic is farmed outdoors in an environment that is not within the farmers' ability to directly control at all times. See Third Party Submissions. The

weather alone can affect the growth patterns and yield of crops. Farmers deal with the existence of, and/or lack of, wind, rain, sunlight, pests, weeds, and the nitrogen content and arability of the soil. Farmers also deal with the possible effect of neighboring farms and the possible benefits from herbicides and pesticides that are blown or “run off” from neighboring lands onto a respondent’s own crops. On the flipside of this benefit is the fact that rain and wind may diminish the benefit of herbicides and pesticides if the weather removes a respondent’s own herbicides and pesticides and places them on a neighboring farm or property. Notwithstanding that such circumstances may impede the farmer’s ability to accurately measure the consumption of growing-related inputs into the production of fresh garlic, farmers cannot be expected to try to capture or record in their books and records information such as the amount of fertilizer blown away by wind or the amount of seed destroyed by a heavy rainfall. With this in mind, the Department, as is its standard practice, has asked relevant questions in this review in an effort to identify the relevant effects of all of the FOPs on the subject merchandise and to understand how certain external factors might impact such FOPs.

In addition to all of this uncertainty, with the majority of respondents, there is one additional factor which the Department believes is critical. These respondents do not own the land that they farm - they lease it. Therefore, for three or four months out of the year, every year, another crop may be grown and harvested on the land that is used by the garlic producers. The entities leasing this land are often not the respondents. Thus, the effect that these “off season” crops have on the soil is not accounted for in the respondents’ books and records, and the respondents have indicated that they cannot obtain this information for the Department. Besides the effect that such crops might have on the acidity or nitrogen content of the soil, farmers using this land might use liquid or granular herbicide or pesticide that remains on the land or in the soil and benefits subsequent crops. Thus, information derived from the farming techniques of the “off season” crops might explain a poor, or positive, yield in the subsequent garlic crops, and none of this will appear in the breakdown of FOPs provided in a respondents’ books and records, thereby diminishing the respondents’ ability to measure and report accurate FOPs to the Department.

Finally, there are concerns regarding whether farmers keep the types of books and records that would allow the Department to establish the appropriateness or accuracy of the reported FOPs. This naturally leads to difficulties for the Department in being able to conduct an effective verification which the agency can rely upon with confidence. For example, during the verifications of Sunny and Linshu Dading, conducted in January 2005, we stated that we did not have the opportunity to observe the following processes: a) preparation of fields for planting; b) planting of garlic cloves; c) application of fertilizers, pesticides, herbicides; d) labor activities related to the planting, harvesting (sprout and garlic), storage, transportation, and most processing and packing; e) detailed off-season crop activities; and f) timing, amount, and frequency of field irrigation practices. See Verification Reports at section entitled, “PRODUCTION PROCESS AND TOUR OF FACILITIES.”

The Department’s standard verification schedule for administrative reviews, when applied in the context of this case, has not allowed the agency to verify the planting, growing, and harvesting activities in the PRC. Therefore, we have only been able to review the books and records of the

respondent companies with respect to these processes (i.e., conduct only paper verifications) and, thus, were not able to determine what information may reasonably be expected for potential respondents to gather and report. Furthermore, even if the Department verified these activities, all of the previously mentioned man-made and natural factors which affect the growing and harvesting of garlic raise concerns about whether respondents even have the ability to measure and report accurate data to the Department.

In addition to all of these matters, with respect to the information which respondents can provide to the agency, there are also issues pertaining to the books and records themselves for some of the respondents. Some respondents have audited accounting records, while others do not. See, e.g., Verification Reports. The lack of audited records, in and of itself, is not conclusive one way or the other, but it does remove a layer of security for the agency that a company's books and records have been reviewed by an objective third party. Further, we have evidence on the record showing that certain respondents incurred labor for planting and harvesting that is provided by the entity from whom the respondents lease the farmland, as stipulated in the lease agreements provided by the respondents in the questionnaire responses. As such, these laborers are not actual employees of the respondents. Such a relationship allows for the possibility that the labor records in the respondents' possession may not be accurate and complete, due to the fact that such respondents have to rely on the record-keeping of their lessors, a record-keeping system that we do not verify.

For all of these reasons, the Department intends in future administrative reviews to examine whether or not, and the extent to which, standard verification procedures can be applied to respondents' books and records, as they relate to the growing and harvesting FOPs of fresh garlic in the PRC. Furthermore, the Department intends to examine more closely the ability of respondents to provide accurate, complete and most importantly, verifiable FOP data in questionnaire responses to the Department, when the normal books and records of these respondents apparently do not reflect all of the information relevant to such an analysis.

Since the initiation of this review, and even more since the Preliminary Results, we have gained a greater understanding of the production of fresh garlic and the current state of records kept by the garlic producers from the information and comments placed on the record. While we are very concerned the information on the record indicates that we may not be fully or accurately capturing the complete costs of producing fresh garlic, for the reasons explained above, we believe that, on balance, there is not sufficient information for the Department to disregard the FOPs for garlic production reported by seven respondents for purposes of these final results.<sup>11</sup> In light of this finding, and the numerous unresolved issues pertaining to the production of fresh garlic, the Department intends to fully examine all of these issues in the next administrative review which is ongoing. See (Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 69 FR 77181 (December 27, 2004).

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<sup>11</sup> The Department has applied partial adverse facts available to two respondents in this review. See Comment 17.

## Valuation of Garlic Seed

**Comment 2:** The GDLSK respondents,<sup>12</sup> Ziyang, FHTK, and Trans-High contest the Department's use of the National Horticultural Research and Development Foundation ("NHRDF") data to value garlic seed in the Preliminary Results. The GDLSK respondents and Trans-High argue that the Department should value garlic seed using the domestic country-wide prices ("Agmarknet Data") for garlic submitted by Ziyang and FHTK in their January 6, 2005, surrogate value submission ("FHTK and Ziyang SV Submission") at Exhibit 2. To support their argument, they cite Notice of Final Results of Antidumping Duty New Shipper Review: Honey From the People's Republic of China, 68 FR 62053 (October 31, 2003), and accompanying Issues and Decisions Memorandum at Comment 2, and Pure Magnesium. They contend that the Department prefers to use country-wide data and tax-exclusive domestic prices to value material inputs and that this information satisfies this preference. In the alternative to the domestic data, the GDLSK respondents argue that the Department should use the Indian Import Statistics data submitted in Exhibit 3 of their surrogate value submission, dated September 7, 2004 (GDLSK SV submission 1). Citing a previous administrative review of garlic, these respondents contend that the Department rejected the prices for the high-quality Indian varieties in favor of the Indian Import Statistics based on an absence of information regarding the similarity of the respondents' garlic seed to NHRDF garlic varieties. See Fress Garlic from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review in Part, 68 FR 4758 (January 30, 2003) ("Garlic 7<sup>th</sup> Review") and accompanying Issues and Decision Memorandum at Comment 5.

Ziyang and FHTK argue that the Department's decision to limit its evaluation of seed surrogate values to the products' physical similarities with the subject merchandise is inappropriate according to the statute, the Department's past practice and the facts of this case. Moreover, Ziyang and FHTK allege that the use of the NHRDF data to value garlic seed does not reflect a country-wide market driven value. According to Ziyang and FHTK, the Agmarknet website provides comprehensive data that reflect an Indian market price for garlic clove/seed. Thus, Ziyang and FHTK assert that the Department should base the surrogate value for garlic clove/seed on data from the Agmarknet website for the final results.

Ziyang and FHTK state that in its Preliminary Results, the Department based its preference for the NHRDF data over the Indian Import Statistics only on the "physical similarities" between the NHRDF varieties and subject merchandise. Ziyang and FHTK argue that the Department weighed too heavily on garlic variety as a factor for evaluating seed surrogate values over other equally relevant factors in its decision to use the NHRDF data. Instead, Ziyang and FHTK contend that the Department should evaluate all factors equally relevant to selecting surrogate values in light of record evidence for the final results. According to Ziyang and FHTK, equally applying all factors demonstrates that Agmarknet garlic clove/seed data are superior to the NHRDF data in terms of quality, specificity, and contemporaneity of the data.

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<sup>12</sup> Respondents represented by Grunfeld, Desiderio, Lebowitz, Silverman, and Klestadt, LLP; Harmoni, Jinan Yipin, Linshu Dading, and Sunny.

Citing section 773(c)(1) of the Act, Ziyang and FHTK point out that when selecting surrogate values, the statute requires the Department to use the “best available information.” While the Department has explained that there is no ranking or hierarchy that attaches to the criteria, the determination of what data are best is made on a case-by-case basis. Moreover, Ziyang and FHTK note that the Department has a stated preference to use publicly available prices that are based on commercial quantities and that reflect numerous transactions between many buyers and sellers. To support these points, Ziyang and FHTK cite multiple cases.<sup>13</sup>

In the Preliminary Results, Ziyang and FHTK assert that the Department identified the two physical similarities among the NHRDF varieties and subject merchandise, bulb diameter and number of cloves per bulb. However, Ziyang and FHTK argue that the record evidence shows that one of the “two” NHRDF varieties selected by the Department is much smaller in diameter and has several times more cloves per bulb than the garlic grown by the respondents. Specifically, Ziyang and FHTK cite the FHTK and Ziyang SV Submission and state that Yamuna Safed G-1 variety bulbs have an average diameter of 4.0 to 4.5 centimeters and 20-25 cloves per bulb.<sup>14</sup> Thus, based on physical similarity alone, Ziyang and FHTK conclude that Yamuna Safed is not comparable to the varieties grown by the respondents.

Ziyang and FHTK point out that rejecting Yamuna Safed’s prices would thus leave only the price of an Indian hybrid variety, Agrifound Parvati, to represent the entire garlic market in India. According to Ziyang and FHTK, this would be improper because the NHRDF varieties “are yet to be popularized among the farmers and at present, their cultivation is mostly confined to the areas around the research station where they have been released.”<sup>15</sup> Ziyang and FHTK assert that valuing the entire commercial garlic market based on a single specialty hybrid would contradict the Department’s preference for country-wide data as stated in Sebacic Acid From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, 69 FR 75303 (December 16, 2004), and accompanying Issues and Decision Memorandum at Comment 1. Therefore, Ziyang and FHTK argue that even if the Department determines that Agrifound Parvati is physically similar to the varieties grown by the PRC respondents, its appropriateness

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<sup>13</sup> 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) (“Violet Pigment”) and accompanying Issues and Decision Memorandum at Comment 4; Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from the People’s Republic of China, 69 FR 34125 (June 18, 2004) (“Retail Carrier Bags”), and accompanying Issues and Decision Memorandum at Comment 9; Freshwater Crawfish Tail Meat from the People’s Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, 68 FR 19504 (April 21, 2003), citing Cut-to-Length Plate from the PRC at 61973.

<sup>14</sup> See FHTK and Ziyang SV Submission at Exhibit 2.

<sup>15</sup> See Id at Exhibit 2.

for use as a surrogate for all PRC garlic seed is undermined by its lack of presence in the Indian commercial markets. See, e.g., Violet Pigment at Comment 4.

Ziyang and FHTK assert that the Agmarknet data is the best available information to value garlic seed because it is publicly available, includes daily domestic market prices for all garlic sold in every major market in India (*i.e.*, is country-wide), and is contemporaneous with the POR. Ziyang and FHTK further contend that a comparison of the prices published in the NHRDF newsletter with actual market-driven data reveals that NHRDF prices are unrepresentative of the Indian garlic market. According to Ziyang and FHTK, while the NHRDF prices range from 40-60 Rs/kg for the five, three-month periods, the Agmarknet web site continuously tracks markets across India with streaming, up-to-the-minute price data. Because the NHRDF newsletter is an extension of the NHRDF research foundation, Ziyang and FHTK argue that its prices are set by NHRDF rather than by the market. As a result, Ziyang and FHTK question the commercial viability of NHRDF's price quotes. Ziyang and FHTK contend that NHRDF's values are not market-based as evidenced by the fact that NHRDF varieties are, on average, approximately three times higher than the average price of garlic prices in India during the POR. Therefore, Ziyang and FHTK conclude that the Department should reject the NHRDF data and use the Agmarknet data to value garlic clove/seed in the final results because the Agmarknet data are far superior to the pricing data of the rare hybrid varieties.

Finally, Harmoni and Jinan Yipin argue that the Department should value their garlic seed using their reported FOPs rather than applying a separate surrogate value for seed. Harmoni and Jinan Yipin contend that their farmers use garlic grown from their own farms for seed as demonstrated by the fact that a portion of their harvested garlic is set aside for use as seed in the following garlic season. To support this claim, Harmoni and Jinan Yipin point to the record which shows that the consumption quantity of garlic seed reported was the actual quantity of garlic seed saved from the previous harvest as opposed to seed that was purchased. Harmoni and Jinan Yipin note that both companies relayed this information in the first step of their reported production process outlines and also provided the Department with a garlic production breakdown from the previous harvest. The breakdown from the previous harvest can be matched to information which was submitted on the record in the previous administrative review. Harmoni and Jinan Yipin contend that the fact that the amount of garlic set aside by each company during the previous harvest matches the amount of garlic seed consumed during the harvest covered in the instant review makes evident that they grew their own garlic for seed. Thus, Harmoni and Jinan Yipin conclude that the Department should not apply a separate surrogate value for purchased seed for the final results because it does not reflect the manufacturing experience of these two companies. To support their argument, Harmoni and Jinan Yipin cite Rhodia, Inc v. United States, 185 F. Supp. 2d 1343, 1351 (Court of International Trade (CIT) 2001) ("Rhodia"), and state that "the purpose of the statute, [is] to construct the product's normal value as it would have been if the NME country were a market economy country."

The petitioners counter that seed must be valued even where a respondent has used retained seed garlic, as is the case with Harmoni and Jinan Yipin. The petitioners argue that the GDLSK respondents' claim is flawed for two reasons. First, the GDLSK respondents do not offer any

guidance as to how the Department can value garlic seed using the FOPs contained on the record for growing garlic. According to the petitioners, it would be impossible to derive a value for garlic seed using the FOPs on the record because the main input used in valuing garlic seed is the garlic clove itself. The petitioners, therefore, contend that the GDLSK respondents' proposal is circular and illogical. Second, the petitioners point out that the respondents derived their reported per-unit consumption rates for cloves and all other raw material inputs by allocating total consumption over total POR production of fresh garlic. As a result, the denominator includes the amount of garlic set aside and later used as seed. Consequently, the petitioners note that all reported per-unit consumption rates are decreased due to the inclusion in the denominator of fresh garlic produced but ultimately used as seed. The petitioners, therefore, reason that if the Department were to figure out how to value garlic seed using the factors that include fresh garlic, it would have to revise all other reported consumption rates to exclude the amount of garlic used for seed from the denominator of each allocation. The petitioners believe this is both unnecessary and impracticable, and the Department should, therefore, continue to value garlic seed as it did in the Preliminary Results.

The petitioners further argue that the Department should continue to value seed for all respondents using NHRDF's published values for high-yield hybrid garlic, which they believe is supported by the record and by the Department's past practice. The petitioners disagree with the respondents' claim that the Agmarknet data or the Indian Import Statistics represent the best available data to value garlic seed. According to the petitioners, the record in this and previous reviews<sup>16</sup> clearly demonstrates that the type of garlic grown and exported by the respondents is high-quality and high-yield hybrid varieties that are similar to the NHRDF products. The type of garlic grown and sold in the Indian market, however, is predominantly lower-quality and low-yield varieties with a large number of small cloves per bulb.

The petitioners further assert that Ziyang and FHTK's argument to reject one of the Indian hybrids because it has smaller cloves and a higher clove count per bulb than the garlic grown by the respondents is disingenuous, as the Agmarknet data and the official import data also reflect garlic that has smaller cloves and often a higher clove count per bulb than garlic grown in the PRC. The petitioners note that regardless of this contention, the NHRDF variety in question is of high quality and is, therefore, an appropriate surrogate for the high-quality garlic grown and exported by the respondents. Thus, the petitioners assert that the three high-yield Indian varieties selected by the Department in the Preliminary Results are the closest to the subject merchandise in terms of physical characteristics (except as noted above) and cost/FOP structure.

According to the petitioners, the GDLSK respondents' claim that they (i.e., the petitioners) have not demonstrated that the garlic seed used by the GDLSK respondents are similar to the high-

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<sup>16</sup> Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews, 69 FR 33626 (June 16, 2004) and accompanying Issues and Decision Memorandum ("Garlic 8<sup>th</sup> Review") at Comment 1.

yielding, high-priced Indian varieties is backwards. The petitioners counter that it is the respondents burden to show that their garlic is unlike the high-yielding, high-priced Indian varieties, but have not done so. On the contrary, the petitioners maintain that the GDLSK respondents have nowhere denied that their garlic qualifies as high-yield and the record clearly demonstrates that the garlic grown by all of the respondents is high-yield. As such, the petitioners argue that the published prices for the Indian high-yield varieties are clearly the best available information for use in valuing garlic clove or fresh whole garlic in accordance with section 773(c)(1) of the Act.

The petitioners also make a number of comments with respect to the information contained in the Clarification Memo at Attachment I. Specifically, the petitioners reference the USDA Study. The petitioners maintain that the USDA Study appears to be the most recent overview of the commercial production of fresh garlic in the United States. According to the petitioners, the USDA Study corroborates many of the positions they have advocated in this and in previous administrative reviews including discussions of the inputs and climate conditions necessary for the cultivation of garlic in the United States.

Furthermore, the petitioners point out that the USDA Study comments on the U.S. fresh market's preference for large garlic bulbs over smaller ones. In this respect, the petitioners note that according to the study, "the fresh market pays a premium for large-bulb garlic. A cursory assessment of wholesale prices for garlic suggests that the price per pound rises as bulb-size increases." USDA Study at p. 23.

The petitioners maintain the Indian varieties are generally smaller and are poor surrogates for the subject merchandise. The petitioners assert that this statement is also supported by the affidavits enclosed as Attachment II to the Clarification Memo. According to the petitioners, the attachment (i.e., Attachment II) includes a declaration from a U.S. domestic producer of fresh garlic expressing his attempts on behalf of his company to find fresh garlic that could be imported from India and sold in the U.S. market.<sup>17</sup> The petitioners continue that the declarant received four samples of Indian garlic that were "from a variety of growing regions throughout India and thus, represented a cross-section of fresh garlic produced in India. According to the declarant, both the whole bulbs, and the cloves of the bulbs that were sent to him as samples 'were too small to be commercially saleable in the United States.'"<sup>18</sup> As a result, note the petitioners, the domestic fresh garlic producer decided not to bring the Indian garlic into the U.S. market because the product would not be accepted here due to its small bulb and clove size.

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<sup>17</sup> The petitioners note that the declaration was originally attached to its June 11, 2002, submission in the 4<sup>th</sup> new shipper review of the order covering the November 2001 through October 2002 POR.

<sup>18</sup> See petitioners' May 16, 2005 submission regarding the opportunity to comment on specific memorandum.

The petitioners further add that Attachment II to the Clarification Memo also included a declaration describing observations from a visit to the PRC's garlic-growing regions in the Shandong province in June 2000. According to the declarant:

{a} garlic bulb's grade will depend on its size, shape and color. For the most part, larger, symmetrical white bulbs are valued more highly than relatively small, misshapen, discolored bulbs. The top grade is exported to developed countries like Japan, the United States, and Canada, and to countries of the European Community. The second grade is exported to developing countries in Asia such as Indonesia and the Philippines. The bottom grade which consists of the lowest quality garlic bulbs, is consumed in the domestic market.<sup>19</sup>

The petitioners maintain that no information has been placed on the record of the current review to discredit this information regarding the information provided by these declarations as described above. Thus, the petitioners argue that the Department should not use the price of the indigenous garlic produced in India as a surrogate value for the price of the Chinese clove seed used to produce top-grade garlic shipped to the United States. Rather, the petitioners contend that Department should continue to use the Indian garlic clove seed specially developed to produce large white bulbs and cloves suitable for the high-value export market.

**Department's Position:** In the Preliminary Results, we reviewed the numerous comments made by the petitioners and respondents and concluded that the NHRDF pricing information was the best information available on the record to value garlic seed. See Memorandum from Steve Williams to the file entitled, "Factors Valuations for the Preliminary Results of the Administrative Review," dated November 29, 2004 ("Prelim Factor Value Memo"). We selected the pricing information for the Agrifound Parvati, Yamuna Safed-3, and Agrifound White varieties (which, together, constitute "three high-yield varieties"). We averaged the garlic seed prices of these three high-yield varieties presented in five quarterly NHRDF price bulletins, which cover the entire POR, to determine the surrogate value,<sup>20</sup> and we have found no reason to revise our surrogate value for garlic seed in these final results.

We agree with Ziyang and FHTK that the Department evaluates all relevant factors when selecting surrogate values. However, the record evidence indicates that the physical characteristics of garlic (e.g., bulb and clove size) have a specific effect on the demand for the product and the value fresh garlic is given in the market, a relationship that has not been refuted by any party to this proceeding. In selecting a surrogate value, it is important that the Department acknowledge market realities that impact the selection of an appropriate surrogate value. In this

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<sup>19</sup> See Clarification Memo at Attachment II.

<sup>20</sup> Prices were averaged from the October-December 2002, January-March 2003, April-June 2003, July-September 2003, and October-December 2003 price lists.

case, in light of the record information and the proposed surrogate value sources, it would not make sense for the Department to ignore factors it knows influence this value.

In support of their claims that NHRDF's sales prices cannot be market-based prices, the respondents assert that NHRDF sold the high-yield varieties of garlic seed for prices that were significantly higher than the average sales prices for garlic in India, as demonstrated by the Indian Import Statistics and Agmarknet data. However, as noted by all parties in this review, these prices at issue are for high-yield, high-quality garlic seed. Thus, the fact that these prices are higher than average sales prices in India only demonstrates that high-yield and high-quality garlic will command a higher price in the market. A higher price in and of itself does not invalidate the suitability of the hybrid garlic for use as a surrogate value applicable to the garlic grown by the respondents. As pointed out by the petitioners, the respondents have never denied on the record of this review that their garlic qualifies as high-yield or high-quality.

In this respect, we agree with the petitioners that the record clearly shows that the respondents grow and export to the United States, high-quality and high-yield garlic, while the garlic grown and sold in the general Indian market is predominantly low-quality and low-yield varieties with a large number of small cloves per bulb. See Garlic 8<sup>th</sup> Review at Comment 1. Contrary to the respondents' claims, the country-wide Agmarknet data is not the best available information to value garlic seed because it appears to reflect prices of a product that is of a quality inferior to that used by the PRC garlic producers. We believe that the higher price commanded on the market for better quality garlic is reasonable and not distortive of market realities. Thus, the Department continues to believe that the pricing information of the NHRDF selected varieties represents the most appropriate surrogate values for the type of high-quality, high-yield garlic produced in the PRC.

Moreover, we note that the majority of descriptions of the garlic varieties of the Agmarknet data as presented in the FHTK and Ziyang SV Submission, at Exhibit 1, are listed as "Other," "Garlic," or "Average," and as such, provide little specificity with respect to the product reflected by that data. Similarly, the Indian import information is sourced from data that is considerably less product-specific and thus does not allow us to ascertain the quality or nature of the garlic products (*i.e.*, bulbs, loose cloves, etc.) entered under the applicable Indian Harmonized Tariff Schedule ("HTS") category. Therefore, we do not agree with the respondents that Agmarknet data or the Indian Import Statistics are more appropriate to value the seed/cloves used to produce the high-quality garlic grown by the respondents.

Therefore, because the NHRDF data appear to most closely resemble the physical characteristics of the garlic seed used by the respondents, is publicly available information and is contemporaneous with the POR, we continue to find that it is the best available information on the record of this review with which to value garlic seed for the PRC producers.

The Department does not dispute the GDLSK respondents' assertion that the Department rejected the NHRDF data in favor of Indian Import Statistics in a prior segment of the proceeding. However, the respondents' assertion ignores that the facts in the prior review differ

from the ones on the record of this review. In this review, the parties submitted detailed information about the NHRDF seed varieties that enabled us to conduct an analysis of the product and pricing information. Review of the record reveals that the reports provide information with respect to the types of garlic bulbs planted in different regions in India, the average size and diameter of various varieties of garlic bulbs, and the price that certain varieties demand in the Indian market. See the petitioners' Surrogate Value Submission, at Attachment 5.

FHTK and Ziyang claim that the Department should not rely on the Yamuna Safed (G-1) NHRDF variety as a source from which to derive the surrogate value for their garlic seed because it is not comparable to their merchandise with respect to bulb size and number of cloves per bulb. In this review the Department has derived a surrogate value for garlic seed based on data reflecting the Agrifound White, Agrifound Parvati, and Yamuna Safed-3 varieties of NHRDF garlic. Therefore, we need not address the respondents' concerns with respect to the suitability of the Yamuna Safed (G-1) variety. With respect to the respondents' related argument expressing concern with the use of Agrifound Parvati because it allegedly grows in only a limited area, we do not believe that this fact, alone, undermines the usability of this variety of garlic along with two others. While information on the record corroborates that the Agrifound Parvati variety of garlic is "suitable for growing at higher hills," which might indicate a limited growing area, the information also states that the Agrifound White has been "released" for growing in "western, southern, and central parts" of India. See FHTK and Ziyang SV Submission at Exhibit 2. Thus, in basing the surrogate value for seed on data reflecting three varieties of garlic (the Agrifound Parvati, the Agrifound White, and the Yamuna Safed-3), the Department has concluded that it has captured a value representing garlic grown in a wide area of India.

Having conducted an analysis of the information on the record, and consistent with our findings in the most recent administrative review of the order, we conclude that the NHRDF data is more compelling than the Agmarknet and Indian Import Statistics information submitted by the respondents. Thus, our selection of prices derived from these varieties of garlic is supported by substantial evidence and is otherwise in accordance with law. See Garlic 8<sup>th</sup> Review at Comment 1.

Finally, we agree with the petitioners that seed must be valued even when a respondent has used retained seed garlic from a previous harvest, as is the case with Harmoni and Jinan Yipin. Therefore, we have continued to value seed separately as an FOP for the final results. In Pacific Giant, Inc. v. United States, 223 F. Supp. 2d 1336, 1342 (CIT 2002) ("Pacific Giant"), the CIT upheld the Department's interpretation of the Act that the agency must focus on the quantity of inputs used by the PRC producers in valuing FOPs, rather than on the costs associated with these factors in PRC. The Act provided that "The factors of production utilized in producing merchandise include, but are not limited to – (A) hours of labor required, (B) *quantities* of raw materials employed, (C) *amounts* of energy and other utilities consumed, and (D) representative capital cost including depreciation." See section 773(c)(3) of the Act (emphasis added). In Pacific Giant, the CIT affirmed the Department's interpretation that water constitutes an FOP and must be given a value because of its use for more than incidental purposes. See Pacific Giant, 223 F. Supp. 2d at 1346. Consistent with this interpretation, no matter whether the respondent

purchased or retained seed from its previous harvest, the Department must value the quantity of seed used in the production of garlic because the Act requires that the Department value the FOPs based on the quantities of the inputs, not the costs associated with those inputs. Thus, we do not agree that it would be appropriate to base the surrogate value for seed on the reported FOPs of these respondents.

Therefore, we continue to rely on the NHRDF pricing information, which reflects pricing for high-quality seed, for all respondents in this review.

### **Valuation of Water**

**Comment 3:** In the Preliminary Results, the Department assigned a surrogate value for water based on the water tariff rate reported on the Municipal Corporation of Greater Mumbai's ("MCGM") website for 2000 through 2001 (i.e., <http://www.mcgm.gov.in/Stat%20&%20Fig>). The GDLSK respondents assert that the Department should not assign a surrogate value for water because they did not pay for water, but obtained it free of charge from either their own wells or a nearby river. In addition, they argue that the record in this case now contains evidence from two experts from the Ministry of Rural Development in India, the World Bank, and the International Water Management Institute, confirming that agricultural users of water, including tea producers in India,<sup>21</sup> do not pay for the water used to irrigate farms. See Hongda's Comments on the Value of Water in India, dated January 6, 2005, and Dongyun's Comments on the Value of Water in India, dated January 6, 2005 (collectively, "Water Comments"). The GDLSK respondents claim the Department rejected this argument in the previous POR citing Pacific Giant; however, they claim that the Pacific Giant ruling is at odds with the CIT's decision in Rhodia, which states that "the purpose of the statute, [is] to construct the product's normal value as it would have been if the NME country were a market economy country." Consequently, if a PRC garlic producer were in India, it would not incur a cost for agricultural water obtained from a river or its own well. Thus, the Department is applying a surrogate value for water despite the fact that the respondents would get their water for free even if they were operating in India. The GDLSK respondents claim that this is similar to applying a surrogate value to sunlight or air merely because these items are also critical to the growing process and contend that the application of a surrogate value to any of these items for which the respondents do not incur costs unlawfully distorts the margin. See Rhone Poulenc, Inc. v. United States, 899 F. Supp. 2d 1185, 1191 (CIT 1990) (reiterating the Department's obligation to calculate dumping margins as accurately as possible).

However, if the Department continues to apply a surrogate value for water, the GDLSK respondents argue that it should reject the MCGM price used in the Preliminary Results and calculate water values using "Sustaining India's Irrigation Infrastructure" by the Indian Council of Agricultural Research ("ICAR") and submitted by the GDLSK Respondents. The GDLSK

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<sup>21</sup>As explained in Comment 5, in past reviews and in the instant review the Department has used the public financial statements of tea producers in India to derive the financial ratios used in the normal value calculations.

respondents argue that the ICAR report is more representative than the municipal water usage rates contained in the MCGM price, because the ICAR data are contemporaneous with the MCGM price, are publicly available, and cover rates in three provinces as opposed to just the city of Mumbai.

Finally, if the Department insists on valuing water and refuses to use data contained in the ICAR report, the GDLSK respondents ask that the Department use an average of the values listed in the MCGM data. The GDLSK respondents claim that the Department's use of the 35.00 Rs./1,000 liters, the highest of the range of 1.00-35.00, is unreasonable and contrary to the Department's established policy of using an average whenever a surrogate value source reports a range of prices. See Mushrooms 5<sup>th</sup> NSR. See also Sinopec Sichuan Vinylon Works v. United States, Slip Op. 05-45 at 17 (CIT 2005) ("Sinopec"). Therefore, the GDLSK respondents argue that the Department should correct its error and use the average of 1.00-35.00 Rs./1,000 liters (or 18 Rs) if it continues to use this surrogate value source.

Similarly, Dongyun and Hongda argue that, because they do not pay for the water that they obtain from wells located on their own land, there is no basis for the Department to assign a value to water in the margin calculation for the final results. They support their argument by citing several articles and comments obtained from the Ministry of Rural Development in India stating that farmers in India do not pay for the use of water obtained from wells on their own farms. See Water Comments.

In addition, Dongyun and Hongda argue that if, despite the evidence on the record, the Department finds that well water does have an associated value, then this value should be made a part of overhead, and not treated as a separate material input. They argue that such treatment is warranted because the surrogate value for water used in the Preliminary Results was based on municipal water rates, which encompass added expenses (i.e., costs of delivery, water treatment, etc.) that do not apply to water that is used for irrigation on a farm. Dongyun and Hongda argue that water used from wells self-replenishes from rainfall, with the only expense being attributed to minimal maintenance of the well, which they feel is captured by the overhead ratio taken from the Indian financial statements. Thus, they conclude that separately valuing water would result in "double-counting" its cost.

Trans-High argues that the Department should value water using the updated surrogate values for water provided in Exhibits 3-5 of the FHTK and Ziyang SV submission.

Ziyang and FHTK, citing Sinopec, argue that in the final results the Department should use a surrogate value for water that is representative of the price of the water in India, and not just the highest published value or ceiling price. Ziyang and FHTK suggest that the Department should use "some sort of a simple average of the values for water on the record." Moreover, they

contend that the record evidence<sup>22</sup> establishes alternative surrogate sources for water which show that the range of prices reported by the Department in the Preliminary Results is extreme, and not representative of water values in India. Ziyang and FHTK argue that section 773(c)(1) of the Act mandates that the Department use the “best information available regarding the values of such factors in a market economy country...”<sup>23</sup> These two respondents argue that the agricultural water rates in India are insignificant, thus any value taken from an industrial or residential consumer source necessarily overstates the value for water used in the production of fresh garlic and is, therefore, not the best information available.

The petitioners dispute the respondents’ arguments that water should not be valued separately because (1) it is a consumable and is more appropriately treated as an overhead expense, and (2) they get it at virtually no cost. Referring to the Issues and Decision Memorandum from the most recently completed administrative and new shipper review of this order, the petitioners argue that respondents raised, and the Department citing Pacific Giant, rejected, this identical argument in those segments of the proceeding. See Garlic 8<sup>th</sup> Review at Comment 2. According to the petitioners, the CIT explicitly rejected the argument that “free” water should not be assigned a value in Pacific Giant. Specifically, the CIT determined that the Department had properly assigned a value to well water obtained by the respondent at no cost, instead of basing the value on the cost of the electricity used to pump the well water. The petitioners argue that the same situation exists here. Furthermore, the petitioners claim the CIT found that water must be treated as a separate FOP whenever it is used for “more than incidental purposes” in the production of merchandise, pursuant to its reading of section 773(c)(3) of the Act.

The petitioners also contend that the Department should continue to value water using the water tariff rate for greater Mumbai as the prices reported by the ICAR contain major flaws. First, according to the petitioners, the report referenced and submitted on the record by the respondents made it clear that the water rates for irrigation are highly subsidized by the Indian Government: “Providing water supplies at subsidized rates for irrigation remained the state’s policy to enable secure food supplies.” Second, according to the petitioners, the proffered rates are reported in Rs./hectare, which assumes a uniform rate of irrigation per hectare or per mu, which is not the case in this review. The petitioners point to the fact that the respondents have argued repeatedly that each uses a different amount of water in response to its particular situation and to assume a uniform consumption of water per hectare would be inappropriate.

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<sup>22</sup> See “Water Tariffs and Subsidies in South Asia – A Scorecard from India,” and publicly available industrial water tariff data from Gujarat Industrial Development Corporation (April 2004-2005), Kerala Water Authority (April 1, 1999), and Maharashtra Industrial Development Corporation (January 6, 2003) (“Scorecard Article”).

<sup>23</sup> See also Yantai Oriental Juice Co. v. United States, Slip. Op. 02-56 (CIT 2002) (citing Shakeproof Assembly Components v. United States, 268 F.3d 1376, 1382 (Fed. Cir. 2001)).

Finally, the petitioners rebut the arguments made by the respondents with regard to averaging the Mumbai water rates. The petitioners argue that, since the Mumbai website indicates that the Municipality charged rates ranging from Rs.1.00 to Rs.35.00/kL “depending on the use,” it, therefore, contains no schedule of the specific rates charged, and thus it is not thus appropriate to average the rates. The petitioners note that this rate has also been used in other recent reviews: Notice of Preliminary Determination of Sales at Less than Fair Value: Tetrahydrofurfuryl Alcohol from the People’s Republic of China, 69 FR 3887 (January 27, 2004), Glycine from the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review, 66 FR 17649 (April 7, 2005), and Mushrooms 5<sup>th</sup> NSR.

**Department’s Position:** We agree that the respondents have provided substantial evidence to show that some Indian farmers are not charged for water that is pumped from their own wells. However, we have continued to value water separately as an FOP for the final results and have determined that doing so does not result in double-counting. In Pacific Giant, the CIT upheld the Department’s position to focus on the quantity of inputs used by the PRC producers in valuing FOPs, rather than on the costs associated with these factors in the PRC. Citing the Act, the CIT stated: “The factor of production utilized in producing merchandise include, but are not limited to – (A) hours of labor required, (B) *quantities* of raw materials employed, (C) *amounts* of energy and other utilities consumed, and (D) representative capital cost including depreciation.” See section 773(c)(3) of the Act. The CIT went on to affirm the Department’s interpretation that water constitutes an FOP and must be given a value because of its use for more than incidental purposes. See Pacific Giant, 223 F. Supp. 2d at 1346. The Act specifies clearly that, for the purpose of constructing normal value in a non-market economy case, the Department values the FOPs based on the quantities of the inputs, not the costs associated with those inputs. Moreover, water is a direct FOP of garlic because irrigation of the crops requires large quantities of water, and this is clearly different from water used by a company for incidental purposes. Thus, regardless of whether the respondent purchased or collected water, the Department must value the quantity of water used in the production of garlic.

Contrary to the assertion by Dongyun and Hongda that the Department is double-counting the cost of water, the Department finds no evidence in the selected surrogate financial statements to suggest that the Indian surrogate tea companies incur a cost for water. Nor is there any evidence on the record that irrigation water is essential to the production of tea in India.

Regarding the use of a non-agrarian versus agrarian water tariff rate, the Department agrees with the petitioners that the non-agrarian rate is a more appropriate rate for valuing water in this case. The report referenced by the GDLSK respondents at Exhibit 4 of their Second Surrogate Value Submission (January 6, 2005) (“GDLSK Second SV Submission”) indicates that agrarian water rates for irrigation are highly subsidized by the Indian Government. The NME provisions in the Act provide for the Department to use market-economy surrogate values. The Department has determined that using a rate known to be subsidized is not consistent with the purpose of these provisions of the Act. We also agree with the petitioners that the water tariff rates in the GDLSK

submission assume a uniform rate of irrigation per mu, which is not the case in this review, and that a rate expressed in Rs/liter or Rs/MT is more appropriate.

For the reasons mentioned above, the Department is continuing its long-standing practice of applying a non-agrarian rate. See e.g., Mushrooms 5<sup>th</sup> NSR at 10975, and Garlic 8<sup>th</sup> Review at Comment 2.

In selecting an appropriate non-agrarian rate based on the information provided by respondents and the petitioners, the Department agrees that actual reported contemporaneous water rates in the Scorecard Article and the information presented regarding the Indian states of Gujarat, and Kerala in the same exhibit, show that the range in water rates are not so great as reported by the Department in the Preliminary Results. However, the Department has determined that the data of the Scorecard Article and the Gujarat and Kerala articles are inappropriate for use as surrogate values.

First, the Department believes that the tariff rates in the Scorecard Article are inappropriate to use in this review because, although the publication date of the article is 2002, the time period of the data used to calculate the average non-agrarian water tariffs reported therein is not specified. Second, the Gujarat article reflects water rates from April 2004-2005, which is a time period outside of the POR, and is, therefore, not contemporaneous. The Department prefers to use contemporaneous values when possible in selecting surrogate values. See Import Administration Policy Bulletin, No. 04.1, "Non-Market Economy Surrogate Country Selection Process," dated March 1, 2004 ("NME Surrogate Country Policy Bulletin"). Finally, the Kerala article is from 1999, which is even older than the Mumbai data – and like the Mumbai data is limited to one small area in India.

The Department believes that the data provided by respondents FHTK and Ziyang in the FHTK and Ziyang SV Submission Exhibit 6 is the most appropriate surrogate value to use in these final results. These publicly available data show water rates from various areas within the Maharashtra state and are contemporaneous with the POR. We believe that these data are a more appropriate source than the data source we used in the Preliminary Results, because they are from a publicly available source, are contemporaneous with the POR,<sup>24</sup> and incorporate a greater number of data points within a large area of India, the primary surrogate country. For these reasons, we have selected the Maharashtra data provided by FHTK and Ziyang to determine the surrogate value for water for all respondents. We have averaged together the values of water used for industrial use both inside and outside the industrial areas of the Maharashtra state.

### **Valuation of Leased Land**

**Comment 4:** The GDLSK respondents argue that the Department should not value leased land separately, claiming that it constitutes unlawful double-counting. In support of their argument, the GDLSK respondents cite Certain Preserved Mushrooms From the People's Republic of

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<sup>24</sup> The Maharashtra data is from January 2003, while the Mumbai data is from 2000-2001.

China: Final Results of Sixth Antidumping Duty New Shipper Review and Final Results and Partial Rescission of the Fourth Antidumping Duty Administrative Review, 69 FR 54635 (September 9, 2004) (“Mushrooms 4th AR”), and accompanying Issues and Decision Memorandum at Comment 3, and Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China, 69 FR 70997 (December 8, 2004) (“Shrimp from the PRC”), and accompanying Issues and Decision Memorandum at Comment 9. In these cases, the GDLSK respondents point out that the Department concluded that it was not appropriate to separately value the cost of land lease, because this expense was included in the financial data of the Indian surrogate producers used to derive the surrogate financial ratios.

According to the GDLSK respondents, in this case, the financial statement used by the Department to calculate the surrogate financial ratios in the Preliminary Results (i.e., the 2002-2003 Parry Agro Ltd. annual report) includes an amount for “Lease Rent.” Thus, the GDLSK respondents argue that there is no basis to conclude that the line item “Lease Rent” does not include all types of lease expenses, including leased land. Assigning a surrogate value for land, therefore, would result in double-counting as this cost is already included in the annual report of Parry Agro, they argue.

The GDLSK respondents further contend that the additional surrogate companies whose data they have submitted for use in these final results<sup>25</sup> own the farm land where the tea is cultivated. According to the GDLSK respondents, while these companies do not have lease expenses, they certainly incur depreciation costs for the land which are captured in the factory overhead ratio used in the calculation of the respondents’ normal value. Therefore, the GDLSK respondents conclude that whether the surrogate companies lease or own the land, the Department should not value the leased land separately because it would result in double counting of these costs.

Dongyun and Hongda argue that the Department’s decision to value a land-lease factor was contrary to law, as these expenses are included in the selling, general and administrative (“SG&A”) ratios derived from the surrogate country financial statements. According to Dongyun and Hongda, the payment by the PRC garlic respondents for the leasing of land is comparable to the “rent” line item that appears in the financial statements of Parry Agro and others on the record. Therefore, Dongyun and Hongda assert that there is no basis for the Department not to consider that land rent/lease expense is already accounted for in the SG&A costs of the surrogate financial companies.

The petitioners counter that valuing land separately does not amount to double-counting, as argued by the respondents. According to the petitioners, the GDLSK respondents’ reference to Shrimp from the PRC to support their contention that Parry Agro’s “Lease Rent” line item expense includes land payment is misplaced. The petitioners assert that the GDLSK respondents’ conclusion ignores the fact that the Parry Agro financial statement makes it clear

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<sup>25</sup> See GDLSK Second SV Submission at Exhibit 6.

that the lease payments noted here are for four factories used to produce tea, not for land used to grow tea.<sup>26</sup>

The petitioners further assert that Parry Agro owns the land on which it grows its tea. Thus, the petitioners contend that there are no leasing or rental costs included in overhead expenses for land. Therefore, the petitioners reason the surrogate financial ratios (*i.e.*, overhead, SG&A, and profit) derived from Parry Agro's data exclude the costs of leasing land. The petitioners contend that Parry Agro's schedule of fixed assets does not include any depreciation for land. Rather, they argue land costs were revalued as of June 1992, and any increase in book value on such revaluation was credited to the revaluation reserve.

The petitioners further argue that, contrary to the GDLSK respondents' claim, none of the other financial statements referenced (*e.g.*, Moran Tea Company (India) Ltd. ("Moran"), Joonktolle Tea and Industries ("Joonktollee"), and Preethi Tea Industry Private Ltd. ("Preethi")) contain any values for depreciation of land; instead, they all report zero under depreciation for land. Thus, the petitioners assert that none of the companies proffered as surrogates have included land costs in their financial data and, consequently, valuing land lease separately does not result in double counting of these costs.

**Department's Position:** Consistent with our Preliminary Results and with prior reviews of this proceeding<sup>27</sup>, we have continued to value leased land separately and have determined that doing so does not result in double-counting. Based on our review of the selected financial statements<sup>28</sup> used to calculate the surrogate financial ratios for the final results, we cannot conclude that the cost for leasing land has been included in the financial data of the Indian surrogate producers, for the reasons discussed below.

We reviewed each of the line items listed in each of the Indian surrogate producers' financial statements used to calculate the surrogate financial ratios for the final results. Contrary to the GDLSK respondents' claims, while each financial statement contained a line item for land in its schedule for fixed assets, none reported an expense for depreciation. Instead, each reported "zero" under depreciation for land. Therefore, we agree with the petitioners that our calculation of factory overhead does not capture such costs because they are not included in the financial statements.

Furthermore, the GDLSK respondents' reliance on Mushrooms 4th AR and Shrimp from the PRC in the instant review is misplaced. As noted by the GDLSK respondents, in Shrimp from the PRC, the Department stated:

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<sup>26</sup> See 2002 -2003 Parry Agro Annual Report at p. 39.

<sup>27</sup> See, *e.g.*, Fresh Garlic from the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Review, 69 FR 40607, 40611 (July 6, 2004).

<sup>28</sup> See Comment 5 for further information regarding the selected surrogate companies.

Our review of the Indian surrogate companies' financial reports indicate Devi reported details of aquaculture expenses incurred during the POI...Of the various line items that are reported, "lease rent" and "rent" are specifically detailed in the expense report. Although these line items might include a variety of lease expenses, the Department finds no basis on the record to conclude that all types of lease expense (i.e., machinery, land, etc.) would not be included in one or both of these line items. See Mushrooms 4th AR at Comment 3.

The GDLSK respondents argue that, similar to the situation in Shrimp from the PRC and Mushrooms 4<sup>th</sup> AR, Parry Agro's financial statement includes an amount for "Lease Rent." However, as pointed out by the petitioners, notes included in the financial statement further detailing this expense reveal that this amount reflects the lease expenses of four factories used to produce tea, not expenses for land used to grow tea.<sup>29</sup>

In the same respect, we examined each of the selected Indian surrogate producer's statements to see if such expenses could be included in other line items. However, unlike the situation in Shrimp from the PRC and Mushrooms 4th AR, there were no other separate line items for "lease expenses" or similar type expenses identified. Moreover, we disagree with Dongyun and Hongda that we can conclude that the payment by the PRC garlic respondents for the leasing of land is comparable to the "rent" line item that appears in the financial statement of Parry Agro and other surrogate companies whose data are on the record. In those financial statements, there are no indications that "rent" includes such land lease payments. Therefore, given the information contained in the financial statements, it would be inappropriate to assume that the cost for leasing land has been included in the costs reported by the Indian surrogate producers. Therefore, absent information to the contrary, we find that the cost of land is not reflected in the financial ratios derived from the selected financial statements used in these final results, and that the inclusion of a separate value for the cost of leasing land does not result in double-counting.

### **Surrogate Financial Ratios**

**Comment 5:** The GDLSK respondents argue that the Department should use financial statements from multiple tea companies on the record covering the entire POR to calculate the surrogate ratios for the final results. Specifically, the GDLSK respondents contend that the Department should use the 2002-2003 Parry Agro financial statement, the 2002-2003 and the 2003-2004 financial statements of Moran, Limtex (India) Ltd. ("Limtex"), Joonktollee, and Preethi ("collectively, the GDLSK tea submissions"). Citing 19 CFR 351.408(c)(4), the GDLSK respondents contend that the Department uses financial data from producers of identical or comparable merchandise when selecting surrogate companies. The GDLSK respondents point out that the Department has found tea companies to be the "most representative of the financial experience of the respondent companies" because tea is a product that is not highly processed or preserved prior to its sale. See Preliminary Results, 69 FR at 70643. Therefore, for the final

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<sup>29</sup> See the 2003-2004 Parry Agro Ltd. Annual Report at p. 39.

results, the GDLSK respondents argue that the Department should use the above-noted integrated tea companies' financial statements.

The GDLSK respondents assert that, to obtain the most representative surrogate ratios of the subject industry, the Department's practice is to calculate the surrogate ratios based on the financial experience of multiple producers of comparable merchandise rather than a single producer. To support this argument, the GDLSK respondents cite to Rhodia Inc v. United States States, 240 F. Supp. 2d 1247, 1253-1254 (CIT 2002), 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 ("Wooden Bedroom Furniture") at Comment 3, Certain Frozen Fillets from the Socialist Republic of Vietnam, and accompanying Issues and Decision Memorandum at Comment 14, and Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of 2000- 2001 Administrative Review, Partial Rescission of Review, and Determination to Revoke Order, in Part, 67 FR 68990 (November 14, 2002), and accompanying Issues and Decision Memorandum at Comment 5.

Further, the GDLSK respondents point to several decisions where the Department has noted that using multiple financial statements minimizes the potentially distorted circumstances of a single producer. See, e.g., Final Results of New Shipper Review: Certain Preserved Mushrooms From the People's Republic of China, 66 FR 45006 (August 27, 2001), and accompanying Issues and Decision Memorandum at Comment 1, Brake Rotors From the People's Republic of China: Preliminary Results of Third New Shipper Review and Preliminary Results and Partial Rescission of Second Antidumping Duty Administrative Review, 64 FR 73007 (December 29, 1999). In addition, the GDLSK respondents contend that using multiple producers to value surrogate ratios comports with the Department's preference to use country-wide data whenever possible.

The GDLSK respondents further point out that, in the Preliminary Results, the Department valued factory overhead and SG&A using the Parry Agro financial statement from 2003-2004<sup>30</sup> (covering the fiscal period from April 1, 2003, through March 31, 2004). According to the GDLSK respondents, this financial statement covers only seven months of the POR, leaving five months unaccounted for during the same period. Therefore, the GDLSK respondents argue that the Department should average the financial statements for both years (i.e., 2002-2003 and 2003-2004 fiscal year financial statements) of the GDLSK tea submissions in order to capture the most complete financial experience of the surrogate industry during the POR. Citing 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 20954 (April 16, 2004), and Certain Preserved Mushrooms From the People's Republic of China: Preliminary Results of Sixth New Shipper Review and Preliminary Results and Partial

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<sup>30</sup> Because Parry Agro did not realize a profit during its 2003 or 2004 fiscal years, we used the profit ratio from its 2002 fiscal year financial statements.

Rescission of Fourth Antidumping Duty Administrative Review, 69 FR 10410 (March 1, 2004), the GDLSK respondents maintain that the Department has averaged company financial statements covering different years to calculate the financial ratios when it considers the financial statements reliable. In the instant review, the GDLSK respondents assert that the record contains various reliable and contemporaneous financial statements. Moreover, the GDLSK respondents argue that the application of ratios derived from both years' financial statements<sup>31</sup> (i.e., 2002-2003 and 2003-2004), would provide a more accurate representation of the Indian tea industry's experience throughout the entire POR.

The petitioners counter that the Department should not use the tea company financial statements submitted by respondents to calculate the surrogate ratio for the final results. According to the petitioners, Joonktollee is not only a tea producer, but a coffee producer as well. The petitioners assert that, unlike any of the respondents in this review, Joonktollee purchases over thirty percent of its total tea consumed and, thus, is not an appropriate surrogate for companies that all claim to grow one hundred percent of their fresh product. The petitioners contend that the problem is similar with Limtex and Preethi in that they purchase ninety percent and one hundred percent, respectively, of their total tea leaf consumption. The petitioners further argue that Preethi is not only a tea producer, but is also in the hospitality business. In addition, the petitioners assert that Preethi, unlike respondents, is not an exporter. With respect to Moran, the petitioners note that this company also purchases about twenty percent of its tea leaf consumption. The petitioners further add that Moran exports less than twenty percent of its product, and thus is also unlike any of the respondents in this review, who are all major exporters of their product to the United States. The petitioners, therefore, argue that there is no common level of integration between tea companies that purchase a portion of their product and respondents that grow all of the product.

The petitioners further assert that the GDLSK respondents' argument that the Department should use data from all tea companies on the record would involve including the financial statement from Dhunseri Tea. The petitioners highlight several reasons why the Department should exclude Dhunseri Tea from its calculation of surrogate financial ratios in this review. First, the petitioners contend that Dhunseri Tea produces packet teas, markets them under various brand names, and holds the highest market share in the premium segment for packet tea in Rajasthan (India). Second, according to the petitioners, Dhunseri Tea is heavily involved in non-agricultural products. As an example, the petitioners note that one of the company's stated strategic objectives is to achieve a global scale of operation in PET resin. The petitioners also note that the associate companies of Dhunseri Tea include: Jaipur Polyspin Ltd., a manufacturer of synthetic blended ring spun yarn; and South Asian Petrochemicals Ltd., a manufacturer of bottle grade PET resins. Thus, the petitioners believe that Dhunseri Tea cannot be considered as a surrogate company for purposes determining financial ratios for respondents in this review.

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<sup>31</sup> With respect to tea companies on the record, there are no 2002-2003 financial statements for Dhunseri Tea & Industries Limited ("Dhunseri Tea") and Parry Agro. There are only 2003-2004 financial statements for these companies.

As an alternative, the petitioners proffer the financial statements of Sangameshwar Coffee Estates (“Sangameshwar”) and Ossoor Estates Limited (“Ossoor”) for the calculation of surrogate financial ratios, claiming that both are growers and processors of coffee, and do not purchase any intermediate product or trade in any other non-agricultural products. Instead, the petitioners note that these companies grow their own coffee plants and process the coffee on their own estates. The petitioners contend that, should the Department decide to include the tea producers that also produce coffee (e.g., Joonktollee) as suggested by the GDLSK respondents, then the Department should also include the experience of the fully-integrated coffee producers it has submitted on the record (i.e., Sangameshwar and Ossoor), particularly because they do not suffer from the defects described with respect to the tea companies above (e.g., they do not purchase unprocessed coffee beans).

**Department’s Position:** In calculating surrogate values for overhead, SG&A and profit, the Department’s policy is to use data from market-economy surrogate companies based on the specificity, contemporaneity, and quality of the data. See, e.g., Brake Rotors from the People’s Republic of China: Preliminary Results, Preliminary Partial Rescission and Postponement of Final Results of the Fourth Antidumping Duty Administrative Review, 67 FR 557 (January 4, 2002). Consistent with the Preliminary Results, we continue to find that the tea industry is comparable and representative of the financial experience of the PRC respondent companies “because it produced and processed a product that was not highly processed or preserved prior to its sale.”

In reviewing the 11 companies for which the 16 financial statements were submitted on the record of this review, we examined whether it would be appropriate to use them as surrogate companies for the purposes of deriving factory overhead, SG&A, and profit based on the criteria listed above. Based on this analysis, we find that the 2003-2004 financial statements of Parry Agro and Dhunseri Tea, and the 2002-2003 and the 2003-2004 financial statements of Moran (collectively, “the selected tea companies”) are the most appropriate for use in these final results for all companies for which we have calculated margins.

We selected multiple financial statements because, as pointed out by the GDLSK respondents, it is the Department’s preference to use multiple financial statements, when they are not distortive or otherwise unreliable, in order to eliminate potential distortions that may arise from using those of a single producer. We also agree with the GDLSK respondents that using the average of multiple financial statements from different years, when available and contemporaneous, captures the most complete financial experience of the surrogate industry (i.e., the Indian tea industry).

We have not used the 2001-2002 financial statement of Parry Agro, the 2002-2003 financial statements of Preethi, Limtex, Joonktollee or the 2003-2004 financial statements of Ossoor, Sangameshwar, Preethi, Limtex, Joonktollee, Tata Tea (“Tata”), or Mahabaleshwar Honey Producers Co-Operative Society Ltd. (“MHPC”) for reasons discussed further below. We also declined to use the 2002-2003 financial statement of Daksh Foods Private Limited (“Daksh”), a

manufacturer of dehydrated vegetables, and we did not receive any comments suggesting that it should be used in the final results.

We declined to use the 2001-2002 financial statement of Parry Agro because it was not contemporaneous with the POR, whereas we have on the record other appropriate financial statements that are contemporaneous. We also did not use the financial statements of MHPC,<sup>32</sup> Preethi, Lintex, and Daksh because, unlike the production experience of all of the respondents in this review,<sup>33</sup> we found that each of these companies is a processor of an intermediate product (*i.e.*, they are non-integrated companies) rather than both a grower and processor. We observed that Preethi and Lintex purchased the majority of their tea (*i.e.*, green leaf tea) for further processing and grew little or none of their own tea. Preethi appears to have purchased one hundred percent of its green tea requirements for further processing during both the 2002-2003 and 2003-2004 fiscal years. Lintex also purchased approximately ninety percent of its green tea requirements for both years. Additionally, Daksh appears to have purchased all of its raw materials, and its financial statement does not contain enough information from which to ascertain whether the company is comparable to the PRC respondents. Unlike most of the PRC respondents in this review, these companies do not grow their own product (*i.e.*, they are not fully integrated-producers). Thus, the financial statements of non-integrated companies may not accurately reflect the costs associated with more fully-integrated producers that grow their own product and then further process it.

With respect to the selected tea companies used for these final results, we found that each of these companies, to some extent, purchased a portion of its raw material requirements (*i.e.*, green leaf tea) in addition to the raw materials that were self-cultivated. However, we do not believe that the amount of raw materials purchased by each of the selected tea companies was significant enough to distort the costs incurred by these producers, which we believe to be representative of fully-integrated producers.

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<sup>32</sup> In the Preliminary Results, we already stated that MHPC is a non-integrated honey processor in India, as initially determined in Honey from the People's Republic of China: Notice of Final Results and Final Rescission, In Part, of Antidumping Duty New Shipper Review, 69 FR 64029 (November 3, 2004) ("Honey 3<sup>rd</sup> NSR").

<sup>33</sup> In the Preliminary Results, we applied the financial ratios derived from MHPC, a non-integrated honey producer in India to Linshu Dading's calculation of normal value. For the final results, we have treated Linshu Dading as an integrated producer. We therefore have determined that it is more appropriate to apply the financial ratios derived from the integrated surrogate producers for the final results. For further information, see "Analysis for the Final Results of the Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: Linshu Dading Private Agricultural Co., Ltd.," dated June 6, 2005.

We disagree with the petitioners that we should reject some of the selected tea companies based on the premise that some (e.g., Moran) export only a small percentage of their product. We do not believe in this case that low export levels provide a basis for rejecting these tea companies for use as surrogate companies. Our calculations take into account many expenses incurred from export sales that might appear as expenses in the financial statements of the Indian surrogate companies. As stated in the Preliminary Results, in calculating a net U.S. price, we deduct those selling expenses associated with economic activities occurring in the United States, including credit expenses, commissions, inventory carrying costs, and indirect selling expenses in accordance with section 772(d)(1) of the Act. We exclude such line item expenses (i.e., brokerage and handling) from the surrogate financial statements because we have already accounted for them in the U.S. sales portion of our calculations. As a result, we do not believe that whether or not the surrogate company exports precludes them from comparison to the PRC respondents. Furthermore, as noted above, we are using the average of multiple companies' financial statements from different years to eliminate potential distortions that may occur within the industry. Therefore, we have no basis to exclude these companies based on the level of exports, as argued by the petitioners.

The petitioners have also argued against the use of Dhunseri Tea in the calculation of surrogate financial ratios alleging that it produces, and holds a high market share for, packet teas, and is heavily involved in non-agricultural products. Dhunseri Tea's 2003-2004 year-end production quantities reveal that packet tea production represented only twenty-nine percent of total production, while non-packet tea production represented over seventy-one percent of total production. Moreover, we cannot conclude from the financial statements that the company's non-agriculture activities (e.g., achieving a global scale of involvement in PET resin), are reflected in its expenses. Instead, such activities appear to be part of its investment activity, which is not reflected in its expenses. Thus, overall, we do not believe that Dhunseri Tea's production of packet tea is sufficiently significant to lead to the conclusion that the financial statement is distortive as a proxy for the production and processing of garlic, and we have included it for the final results.

We have, however, declined to use the financial statements of Tata for the following reasons. Unlike the selected tea companies, in addition to cultivating and manufacturing black tea, Tata is also very heavily engaged in the production of instant tea, packet tea and other value-added forms of bulk tea. While its financials do not specifically break out its sales in terms of bulk, packet or other value-added forms of tea, there are other indications that most of its costs and/or sales reflect the production of packet and other value-added forms of tea. The financial statement notes that eighty-six percent of its consolidated turnover is a result of its branded tea products.<sup>34</sup> Moreover, Tata's energy expenses for 2003-2004, for example, disproportionately reflect its production of packet tea. The electricity consumed in the production of packet tea is over four times the electricity usage for bulk tea. Similarly, the consumption of furnace oil is nearly

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<sup>34</sup> See the 2003-2004 Annual Report for Tata Tea, in Attachment 4 of the petitioners' November 5, 2004, submission.

seventeen times higher.<sup>35</sup> Furthermore, consistent with Garlic 8<sup>th</sup> Review at Comment 7, we note that it is our practice to use financial data when available, from a company with a comparable production process rather than data based on production and processing of a product that is more highly processed or preserved prior to sale.

Finally, based on the information on the record of this review, we find that the coffee companies' (i.e., Sangameshwar and Ossoor) financial statements are not the best available information for use in these final results. When evaluating the production processes, the Department has taken into account the complexity and duration of the processes and the types of equipment used in production. See, e.g., Glycine from the People's Republic of China: Final Results of New Shipper Administrative Review, 66 FR 8386 (January 31, 2001), and accompanying Issues and Decision Memorandum at Comment 7. Our review of the information submitted by the parties, illustrating the production process of coffee in general and in India, specifically,<sup>36</sup> revealed that the coffee industry is not as comparable with the operations of the respondent garlic companies as the tea industry. The information leads us to conclude that coffee production is more complex than tea or garlic production. Coffee production involves varying processes (e.g., wet or dry methods), and we are unable to identify which method was used by the two coffee companies whose data were submitted on the record (i.e., Ossoor and Sangameshwar). From harvesting to sorting, coffee processing may involve numerous types of machinery and tank equipment; however, in the dry method of processing, for example, little machinery is required. In the wet method of processing, on the other hand, the use of specific equipment and substantial quantities of water are required.<sup>37</sup> Moreover, the dry method is typically used for some types of coffee (i.e., Arabicas) and for almost all Robustas in general. Further, the coffee produced by the wet method is usually regarded as being better quality and commands higher prices.<sup>38</sup> Examination of the submitted coffee companies' financial statements reveals that each company produces both Robusta and Arabica coffee. However, neither explains which production processes are employed to produce their respective coffee products. Thus, as noted above, we find that based on the information available on the record, the coffee industry in India does not represent as accurate a surrogate for garlic production as does the tea industry. For these reasons, we also declined to use the 2003-2004 financial statement of Joonktollee, whose financial statements indicate that it is involved in the production of coffee in addition to tea.

Having selected the surrogate companies, we calculated the surrogate ratios using the simple average of each company's ratios. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Bicycles from the People's Republic of China, 61 FR 19026, 19039 (April 30, 1996). Because it is the Department's practice to exclude from the profit calculation information from companies that reported losses, we did not include the negative profit reflected in the 2003-2004

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<sup>35</sup> See id.

<sup>36</sup> See Petitioners' Surrogate Value Submission

<sup>37</sup> See id.

<sup>38</sup> See id.

financial statement of Parry Agro. See, e.g., Redetermination Pursuant to Court Remand Rhodia Inc. v. United States and Jilin Pharmaceutical Co., Ltd.; Shandong Xinhua Pharmaceutical Factory Ltd., Court No. 00-08-00407 (March 29, 2002).

In calculating the surrogate ratios, we have reclassified “lease rent” expenses for Parry Argo as overhead rather than SG&A because, as pointed out by the GDLSK respondents, the financial statement for that company notes that “the company has taken on operating lease four factories for production of Tea. The lease rent paid thereon which is based on tea manufactured is shown under lease rent. The total of future of minimum lease payments under this lease is not quantifiable since it depends on the Tea manufactured in these factories.”<sup>39</sup> Therefore, because these expenses reflect the rent for factories, this expense is more accurately categorized as overhead rather than SG&A.

### **Valuation of Garlic Sprouts**

**Comment 6:** The GDLSK respondents contend that the Department’s preliminary decision to value garlic sprouts using Indian prices for green onions is contrary to the findings of the CIT. Citing Shangdong Huarong General Corp. v. United States, 25 CIT 834, 849 (2001) and Hylsa, S.A. v. United States, 22 CIT 44, 48 (1998) (“Hylsa”), the GDLSK respondents contend that there is a presumption that the Department “...failed to act in a regular manner consistent with its established practice.” Further, these respondents object to the Department’s determination not to use Indian HTS category 0703 in the Preliminary Results, based on the Department’s conclusion that by using this Indian HTS category to value sprouts we could be “...selecting a value for a by-product based on the value of the principal product.” See Prelim Factor Value Memo at 14. Citing Garlic 7<sup>th</sup> Review at Comment 10, the GDLSK respondents argue that the Department itself found that “...garlic sprouts and fresh garlic are joint products...” and in that review used price data on Indian HTS 0703 to value garlic sprouts, regardless of the fact that all imports under that category were of garlic. Citing the Department’s statement, in the Prelim Factor Value Memo at 3, that we could not identify the varieties of garlic in the 8-digit category of Indian Import Statistics, the GDLSK respondents argue it is plausible that their suggested 4-digit category contains sprouts as well as garlic bulbs. Furthermore, the GDLSK respondents claim that the use of Indian HTS 0703 data would be in accordance with sound accounting principals. The GDLSK respondents reference the Department’s recognition of the National Association of Accountants’ definition of a byproduct as a secondary product recovered in the course of manufacturing a primary product whose total sales value is less than that of the primary product. See id. at 22. The GDLSK respondents note that the value of imports under Indian HTS 0703 are roughly 10 Rs./kg, which is significantly lower than the value the Department is using as the price of garlic in this review and conclude that the Department should use this Indian HTS category for onion, shallots, garlic, leeks, and other alliaceous vegetables to value garlic sprouts for these final results. The petitioners did not comment on this issue.

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<sup>39</sup> See Factors Valuations for the Final Results of the Administrative Review (June 6, 2005) at Exhibit E, p. 39 of the 2003-2004 Parry Agro Annual Report.

**Department's Position:** The Department disagrees with the respondents. The Department acknowledges that it did use World Trade Atlas ("WTA") data for imports under Indian HTS heading 0703 to value garlic sprouts in the Garlic 7<sup>th</sup> Review cited by the respondents. However, the Department has obtained information on the wholesale prices of Indian green onions published by the Azadpur Agricultural Produce Marketing Committee ("Azadpur APMC") that it has deemed to be a more appropriate source for deriving the surrogate value for garlic sprouts, and used this information in reviews subsequent to the review cited by the respondents. See Factors Valuations for the Preliminary Results of Review for Jinxiang Shanyang Freezing Storage Co. Ltd for New Shipper Review (11/1/02-10/31/03), and Factors Valuations for the Preliminary Results of the New Shipper Reviews (11/1/02-4/30/03) (April 26, 2004) ("Eighth Preliminary FOP Valuations"). In that review, and in this one, the Department found that all of the imports entered under the Indian HTS heading 0703 during the POR were imports of fresh garlic. Thus, the Department determined that to use this Indian HTS heading would result in valuing the by-product based on the value of the principal product, fresh garlic. The Department further determined that green onions were a comparable product to the by-product garlic sprouts, and that these two products shared similar characteristics and end-uses. Accordingly, in that review, the Department decided to use the average of the wholesale prices of Indian green onions from Azadpur APMC to value garlic sprouts instead of the value of imports entered under the Indian HTS heading 0703.

For the current review, we continue to find that valuing garlic sprouts based on the average wholesale prices of Indian green onions is preferable to using the data from Indian HTS heading 0703. As discussed in the eighth administrative review, green onions are a product that corresponds closely to garlic sprouts in characteristics and uses. See Eighth Preliminary FOP Valuations. No one has contested the Department's determination that these products have similar physical characteristics and usages. Because the description of products covered under the Indian HTS heading 0703 does not specifically include garlic sprouts, we do not believe the Indian HTS data are the appropriate values to use in this case. On the other hand, because we have pricing data for green onions<sup>40</sup> on the record, a product that corresponds closely to garlic sprouts in characteristics and uses, we have determined that these data constitute the best information on the record with which to value garlic sprouts. Accordingly, we will continue to value garlic sprouts at \$0.0825/kg.

### **Valuation of Cartons**

**Comment 7:** The GDLSK respondents argue that the Department's reliance on Indian HTS 4919.1001 to value cartons is misplaced given that this Indian HTS category includes specialty boxes which the respondents allegedly would never use for packaging. See GDLSK Rebuttal to Petitioners' Surrogate Value Submission (September 17, 2004) at p. 4 and Exhibit 3. Citing Sulfanilic Acid from the People's Republic of China, Final Results of Antidumping Duty

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<sup>40</sup> See Ninth Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: Petitioners' Submission of Surrogate Values for the Factors of Production (September 7, 2004) at Exhibit 12.

Administrative Review, 61 FR 53711, 53716 (October 15, 1996), the GDLSK respondents argue that, where record evidence demonstrates that Indian HTS category prices are distorted, the Department will not use them as surrogate values. They note that this practice has been upheld by the Courts in multiple determinations where the Department used Indian HTS values rather than lower domestic prices. Specifically, the GDLSK respondents cite a pig iron case where the CIT remanded a decision to the Department because the Department used the Indian Import Statistics instead of the domestic prices, stating that the Department had not determined whether the Import Statistics were aberrational relative to the other record evidence of the items' market value. See Shanghai Foreign Trade Enterprises v. United States, 318 F. Supp. 2d 1339, 1350 (CIT 2004) (“Shanghai Foreign”). The GDLSK respondents cite additional cases where the CIT, on appeal, rejected the use of import data instead of domestic price data where domestic prices were much lower. See Yantai Oriental Juice Co. v. United States, Slip Op. 05-32 (CIT 2002); Pure Magnesium at 3087; and Hebei Metals and Mineral Import and Export Corporation et. al. v. United States, Slip. Op. 05-32 at 19-20 (March 10, 2005).

The GDLSK respondents urge the Department to use the Indian domestic price quotes they placed on the record to value cartons in this review. They argue that the Department's decision to reject more specific, domestic surrogate prices to value cartons is internally inconsistent with its valuation of garlic seed in this same review. These respondents argue that the Department cannot select a domestic garlic seed surrogate value on the basis of it being “more product specific,” while at the same time rejecting another domestic price to value a different FOP in order to achieve higher margins. Citing Shandong Huarong Machine Co. v. United States, Slip Op. 05-54 (CIT 2005) and Hylsa, the GDLSK respondents argue that this would be inconsistent and contrary to established practice.

Finally, the respondents also argue that the air freight charges included in the Indian Import Statistics further distort the surrogate value. The petitioners did not comment on this issue.

**Department's Position:** We disagree with the respondents that their price quotes are a more accurate source for the surrogate values used to value cartons in the final results. The Department finds that the Indian HTS category 4919.1001 represents the best available information on the record, since its values are publicly available, are sufficiently specific to the product, are fully contemporaneous with the POR (thereby lessening the impacts of any temporary price fluctuations), and are not specific to one region within India. Moreover, the Department's verification observations during this administrative review regarding packing materials indicated that boxes within this Indian HTS category are commonly used by respondents in the PRC (e.g., 5-ply 10 by 14 cardboard).<sup>41</sup> The Department's analysis of the trade intelligence data provided by the GDLSK respondents indicated that there are many different types of boxes covered by the Indian HTS category, but that fact alone does not undermine the use of the value. For example, the GDLSK respondents cite the fact that “gift

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<sup>41</sup> See Verification Reports at section entitled, “PRODUCTION PROCESS AND TOUR OF FACILITIES.”

boxes” are included within this Indian HTS category. However, the total quantity of gift boxes was less than ten percent of the total carton imports. On the other hand, more than fifty percent of the entries reported within that database are simply categorized as boxes or cartons, with no other specifications. Thus, the fact that different boxes for different purposes have entered India under this Indian HTS category does not, in and of itself, call this value into question.

On the other hand, the four price quotes the GDLSK respondents suggest the Department use appear to have been obtained from four Indian companies in direct response to a request for such prices. We find that these price quotes do not meet the criteria of public availability that the Department has historically relied upon when choosing appropriate surrogate values in order to lessen the likelihood of possible manipulation of documents prepared specifically for use in trade remedy cases.

In the NME Surrogate Country Policy Bulletin, the Department explained that “in assessing data and data sources, it is the Department’s stated practice to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data.”

Section 351.408(c)(1) of the Department’s regulations additionally states, “the Secretary normally will use publicly available information to value factors.” Further, the Department has reiterated its practice and preference for publicly available information in recent cases.<sup>42</sup> The respondents in this review did not provide the Department with any information on how the submitted price quotes were obtained. The four price quotes that the respondents submitted to the Department appear to have been provided in response to a specific request for the prices. As with the submission of the surrogate value information related to jars and lids (see Comment 8 below), however, no detail on the parties that requested the prices, or whether or not an affiliation existed between the requester and the Indian companies, was ever placed on the record. Without access to all the information on how the data were obtained (including the sources and any adjustments that may have been made), it is impossible to confirm that the data are complete and/or accurate. Such previously non-public information is also of unknowable internal and external validity unless verification is conducted. In short, unless the Department verifies such information, it will necessarily be of uncertain reliability. The necessity of undertaking this burden is avoided through the use of independently generated public information. Therefore, without further

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<sup>42</sup> See Retail Carrier Bags at Comment 9; Notice of Final Determination of Sales at Less Than Fair Value: Tetrahydrofurfuryl Alcohol from the People’s Republic of China, 69 FR 34130 (June 18, 2004) (“Tetrahydrofurfuryl Alcohol”) and accompanying Issues and Decision Memorandum at Comment 6; Notice of Final Results of First Administrative Review: Honey from the People’s Republic of China, 69 FR 25060 (May 5, 2004) (“First Administrative Review of Honey”), and accompanying Issues and Decision Memorandum at Comment 3.

information, we cannot determine that the price quotes submitted by the respondents are publicly available and accurate.

While the Department concedes that the price quotes fall within the POR (i.e., June 2003), we note that they do not represent a broad market average of prices for cartons. Four price quotes from four different companies obtained within one week of one another could easily be subject to temporary market conditions. The Department has historically chosen to use surrogate values that reflect broad market averages and that cover a substantial time period over price data that is obtained from so isolated a time frame as to be subject to temporary market fluctuations. See Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam, 68 FR 3876, (January 27, 2004) (“Preliminary Shrimp”).

In Synthetic Indigo from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, 68 FR 53711 (September 12, 2003) (“Synthetic Indigo”), and accompanying Issues and Decision Memorandum at Comment 11, the Department found that the use of a value derived from the Indian Import Statistics for imports of polyethylene sacks and bags was preferable to the use of a value based on price quotes of Indian suppliers of plastic bags. We found in that review that, consistent with our past practice, the Indian Import Statistics constituted the best available information on the record because they were contemporaneous with the POR, representative of a range of prices during the POR, and sufficiently specific to the input being valued. The Department acknowledged that the import category was not as product-specific as the price quotes for plastic bags. We concluded in Synthetic Indigo, however, that we were not able to determine that the quotes, which were dated anywhere from seven to ten months after the end of the POR, were representative of the range of prices for the input during the POR.

In light of the reasoning in Synthetic Indigo and the factual considerations of the current review, we find that the Indian Import Statistics constitute the best available information because the data is publicly available, contemporaneous with the POR, representative of a range of prices throughout the POR, and sufficiently specific to the product. By their nature, import statistics have an element of general applicability to them. Therefore, as a surrogate value they may not necessarily reflect the exact carton experience of any one respondent. Some companies may import cartons into the PRC by air, others may not, and the Indian HTS category reflects all of these experiences. This point alone, however, does not undermine the rationale discussed above. Furthermore, the respondents have not submitted on the record of this review anything that demonstrates that their own domestic carton suppliers did not import some products into the PRC by air. Mere allegations of facts, absent any record evidence for support of such claims, cannot be a basis for undermining the use of publicly available, contemporaneous valuation data from Indian HTS categories in this case.

Given the facts on the record, we find it appropriate to follow our practice of using import statistics where we consider that they represent the best available data. Accordingly, we have

made no changes to our valuation of cartons and have used the Indian Import Statistics as the basis of this valuation.

### **Valuation of Plastic Jars and Lids**

**Comment 8:** Harmoni, Jinan Yipin, Linshu Dading, and Sunny argue that the Indian HTS categories, 3923.3000 and 3923.5000, that the Department used in the Preliminary Results are distorted and should not be used to value plastic jars and lids. The respondents argue that these HTS “basket” categories include specialty products such as hair cosmetics and centrifuge tubes that do not resemble the plastic jars and lids used by the respondents for the subject merchandise. The respondents also argue that the air freight charges included in the Indian Import Statistics further distort the surrogate values. The respondents argue that the Department has a preference for domestic prices and an established policy of rejecting aberrations on determined values.

The respondents argue that the Department should use the domestic, product-specific surrogate prices for plastic jars that they submitted after the publication of the Preliminary Results. See GDLSK Second Surrogate Value Submission at Exhibit 3. The respondents claim that these domestic surrogate prices are a more accurate reflection of the true values of the plastic jars and lids used by respondents, and should be applied in lieu of the Indian HTS categories that the Department used in the Preliminary Results. The petitioners did not comment on this issue.

**Department’s Position:** We disagree with the respondents that their price quotes are a more accurate source for the surrogate values for plastic jars and lids in the final results. Two of the four price quotes appear to be obtained from two Indian companies in direct response to a request for such prices, which mean they do not necessarily reflect an objective, market-based value, and the remaining two quotes are taken directly from a price list from a third Indian company. We find that these price quotes are not the best information on the record of this proceeding as they do not meet the criteria for public availability, accuracy, and contemporaneity that the Department considers when choosing appropriate surrogate values.

In the NME Surrogate Country Policy Bulletin, the Department explained that “in assessing data and data sources, it is the Department’s stated practice to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data.”

Section 351.408(c)(1) of the Department’s regulations additionally states, “the Secretary normally will use publicly available information to value factors.” Further, the Department has reiterated its preference for publicly available information in recent cases<sup>43</sup> and past reviews in this case.<sup>44</sup>

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<sup>43</sup> See Retail Carrier Bags at Comment 9; Tetrahydrofurfuryl Alcohol at Comment 6; First Administrative Review of Honey at Comment 3.

<sup>44</sup> See Garlic 8<sup>th</sup> Review at Comment 3.

The respondents in this review did not provide the Department with any information on how the submitted price quotes were obtained. As stated previously, two of the four price quotes that were submitted appear to be in response to a specific request for the prices. However, no detail on the identity of the party who requested the prices, or information as to whether or not an affiliation existed between the requester and the Indian companies, was ever placed on the record. Without access to all the information on the means by which the data was obtained (including the sources and any adjustments that may have been made), it is impossible to confirm that the data is complete and/or accurate. Such previously non-public information is also of unknowable internal and external validity unless verification is conducted. In short, unless the Department verifies such information, the reported quotes are, alone, unreliable indicators of market values for plastic jars and lids. The necessity of undertaking this burden is avoided through the use of independently generated public information. Therefore, without further information, we cannot determine that the price quotes submitted by the respondents are publicly available and accurate.

Furthermore, we note that all of the price quotes actually fall outside of the POR, and do not represent a broad market average of prices for plastic jars and lids. The price quotes submitted by the respondents are dated October 8, 2004, November 6, 2004, and November 22, 2004, and therefore post-date the end of the POR by more than ten months. The Department values contemporaneity highly in selecting an appropriate surrogate value because an administrative review is limited to a particular time period and, therefore, a surrogate derived from this time period is reasonably appropriate to apply to the Department's analysis. See Synthetic Indigo, and the accompanying Issues and Decision Memorandum at Comment 11.

Furthermore, even if these quotes were contemporaneous, however, they would still not represent a broad market average. Four price quotes from three different companies obtained within two months could easily be subject to temporary market conditions. The Department has historically chosen to use surrogate values that reflect broad market averages and that cover a substantial time period throughout the POR instead of price data that are obtained from so isolated a time frame as to be subject to temporary market fluctuations. See Preliminary Shrimp.

In addition, even if we were to determine that the price quotes were publicly available, contemporaneous, and represented a broad market average of prices, we would still find them to be unsuitable surrogate values because they lack all of the information that we would need to apply them in our margin calculations. Two of the four price quotes do not indicate whether lids are included in the submitted price. The remaining two price quotes, which clearly include the price of the lid, do not separate between the price of the lid and the price of the jar. Therefore, we would not have a separate price to use for either jars or lids for those respondents for which only one of these factors is valued with a surrogate value in our calculations. Our inability to apply the price quotes to the specific calculation needs of the specific FOPs further impedes our use of these submitted values.

In Synthetic Indigo, the Department found that the use of a value derived from the Indian Import Statistics for imports of polyethylene sacks and bags was preferable to a value based on price

quotes of Indian suppliers of plastic bags. We found in that review, consistent with our past practice, that the Indian Import Statistics constituted the best available information on the record because they were contemporaneous with the POR, representative of a range of prices during the POR, and sufficiently specific to the input being valued despite not being as product-specific as the price quotes for plastic bags. On the other hand, we concluded in Synthetic Indigo that we were not able to determine that the quotes, which were dated anywhere from seven to ten months after the end of the POR, were representative of the range of prices for the input during the POR.

In light of the reasoning in Synthetic Indigo and the factual considerations of the current review, we find that the Indian Import Statistics constitute the best available information because the data is contemporaneous with the POR, representative of a range of prices throughout the POR, and sufficiently specific to the product. By their nature, Import Statistics have an element of general applicability to them. Therefore, as a surrogate value they may not necessarily reflect the exact packaging experience of any one respondent. Some companies import jars and lids into the PRC by air, others do not, and the Indian HTS category reflects all of these experiences. This point alone, however, does not undermine the fact that this information is the most contemporaneous and accurate surrogate on the record. Furthermore, the respondents have not submitted any documents on the record of this review demonstrating that their own domestic plastic jar and lid suppliers did not import the products into the PRC by air. Mere allegations of facts, absent any record evidence for support of such claims, cannot be a basis for undermining the use of publicly available, contemporaneous valuation data from HTS categories in this case.

Because no additional reliable domestic price information has been added to the record, we do not find a basis to revise our use of these statistics for these final results. Given the circumstances in the current review, we find it appropriate to follow the precedent established by Synthetic Indigo. Accordingly, we have made no changes to the selected surrogate values for plastic jars and lids and have used the Indian Import Statistics as the basis of these valuations.

### **Valuation of Attachment Clips**

**Comment 9:** The GDLSK respondents argue that the Department should use Indian HTS category 7223.00 (covering “Stainless Steel Wire”) rather than the Indian Import Statistics HTS category 8305.10 that covers “Fittings for Loose Leaf Binders of Files” to derive the surrogate value for clips. They argue that the latter category is inappropriate as attachment clips, as the type of clip the respondents use could not possibly be considered fittings for loose leaf binders and more closely resemble the materials covered by Indian HTS category 7223.00. The petitioners did not comment on this issue.

**Department’s Position:** The Department has reexamined the types of attachment clips that have been reported by the GDLSK respondents in this review. See GDLSK SV Submission 1 at Exhibit 17. We note that the GDLSK respondents’ argument indicates that each of these companies uses metal attachment clips. However, our review of each of the respondents’ data reveals that only Sunny has reported the use of metal attachment clips in its questionnaire responses. Therefore, this issue is relevant only to Sunny’s normal value calculation and we

need not address it with respect to the remaining GDLSK respondents. We agree that it is appropriate to derive the surrogate value from a category that is more specific to the reported attachment clip used. Thus, we agree with Sunny that the Department should value its attachment clips using Indian HTS heading 7223.0, “Stainless Steel Wire” as this value is country-wide and contemporaneous with the POR. The surrogate value for stainless steel wire is 184.20 Rs./kg, or \$3.92/kg. Accordingly, we will apply this value for attachment clips in the margin calculations for Sunny for the final results.

### **Valuation of Cold Storage \_\_\_\_\_**

**Comment 10:** The GDLSK respondents argue that the application of a separate surrogate value for cold storage costs results in double-counting of these costs. The GDLSK respondents assert that the financial statements of the Indian tea companies used to calculate the surrogate ratios are already inclusive of the expenditures for temperature and humidity control that are comparable to the cold storage expenses incurred by the respondents in this review. Citing Garlic 8<sup>th</sup> Review at Comment 7, the GDLSK respondents state that the basis for the Department’s decision to use data from Parry Agro to calculate the surrogate financial ratios in the two most recent garlic administrative and new shipper reviews was that the financial information of Parry Agro was the most representative of the financial experiences of the fresh garlic producers.

According to the GDLSK respondents, one of the many similarities between the garlic and tea production processes is the need to keep both agricultural products in climate-controlled storage facilities prior to sale. To support this comparison, the GDLSK respondents point to their surrogate value submission which provided, among other things, information from Bry-Air, an Indian company specializing in the manufacture and sale of dehumidifiers and other climate control equipment. See the GDLSK SV Submission 1 at Exhibit 25. According to the GDLSK respondents, the information contained in the Bry-Air brochure makes clear that temperature control is a significant factor in the “withering” process stage of tea production and during storage. See id. The GDLSK respondents conclude that commercial tea producers must use sophisticated and expensive equipment to maintain a precise controlled environment in order to meet these rigid production and storage requirements. The GDLSK respondents note that the information from Bry-Air included a partial list of tea companies that use Bry-Air equipment. Among the tea companies listed are Dhunseri Tea, Moran, and Tata, three India tea companies whose financial statements were submitted on the record in this review.<sup>45</sup> The GDLSK respondents further conclude that other tea producers must incur similar costs based on the importance of temperature and humidity control as discussed by Bry-Air.

The GDLSK respondents argue that the information provided by Bry-Air demonstrates that tea producers incur costs for maintaining climate-controlled facilities similar to the cold storage costs incurred by producers of garlic and other perishable products. According to the GDLSK

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<sup>45</sup> These financial statements were submitted by several respondents for consideration by the Department to use as surrogate ratios in the calculation of overhead, SG&A expenses, and profit.

respondents, none of the Indian tea financial statements on the record, including the three companies noted in the Bry-Air brochure, contain separate line items in their financial statements for temperature and humidity control costs. Therefore, the GDLSK respondents conclude, these items must be accounted for within some other line item (i.e., rent, lease rent, warehousing or plant and machinery) within each financial statement. Thus, applying a separate surrogate value for these cold storage expenditures in addition to the costs already incorporated into the surrogate financial ratios results in an impermissible double-counting of expenses. To support their argument, the GDLSK respondents cite Fuyao Glass Industry Group Co., Ltd v. United States, Slip Op. 05-06 at 25-27 (CIT January 25, 2005) (“Fuyao Glass”), and Notice of Final Determination of Sales at Less Than Fair Value: Saccharin from the People’s Republic of China, 59 FR 58818 (November 15, 1994) (“Saccharin”).<sup>46</sup> In Saccharin, for example, the Department stated that applying a separate value for water expenses contained in factory overhead would result in an improper double-counting of costs.

The GDLSK respondents further argue that the cost of climate control facilities should not be valued separately regardless of whether the facilities are owned or leased by the PRC garlic companies. Citing Mushrooms 4th AR at Comment 3, the GDLSK respondents note that the Department concluded that the land leased by the PRC mushroom companies should not be valued separately even though the financial statements of the surrogate companies did not have a specific line item for “Land Lease.” The Department found that it was proper to assume that the cost was fully reflected in certain line items (i.e., “lease”) contained in the financial statements of the Indian surrogate producers. Therefore, the Department stated that there was no basis to conclude that all types of lease expenses (i.e., machinery, land, etc.) would not be included in these line items. See id.

In the same respect, the GDLSK respondents maintain that, regardless of whether the Indian tea companies rent or own climate-controlled facilities, it is proper to assume that these costs are included in their financial statements. The GDLSK respondents assert that there are a number of line items contained in the financial statements on the record of this review which could include the lease or rent of the temperature-and humidity-controlled facilities. The GDLSK respondents point out that five out of the seven tea companies’ financial statements on the record include an item for “Rent” which could include the lease or rent of these facilities. See the GDLSK SV Submission 1, at Exhibit 29 and Exhibit 6, and Ziyang and FHTK’s “First Surrogate Value Submission” dated September 7, 2004. Similarly, other companies have line items for “Godown Expense,” and “Warehouse Charge” which could also include such expenses. See the GDLSK SV Submission 1 at Exhibit 6. Further, the GDLSK respondents argue that the financial statements also report depreciation amounts for “building” and “machinery,” either of which could include the costs of cold storage and dehumidifying facilities if these are owned by a tea company. Thus, regardless of whether the tea or garlic companies lease or own climate-

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<sup>46</sup> The GDLSK respondents provided an incorrect citation. We noted the correct citation here.

controlled facilities, the GDLSK respondents maintain that these costs are being fully captured in the surrogate ratio calculations.

The GDLSK respondents further argue that, should the Department continue to value cold storage separately, it should use an average of the two product-specific (*i.e.*, cold storage costs for garlic in India) price quotes on the record because they constitute the most accurate and best available information regarding cold storage expenses in India. To support their argument, the GDLSK respondents cite Shanghai Foreign. See GDLSK Second SV Submission at Exhibit 1. First, the GDLSK respondents assert that the cold storage value used in the Preliminary Results is nearly ten years old (*i.e.*, dated May 19, 1994). Second, the GDLSK respondents assert that the article is from Pakistan which is not the primary surrogate country identified by the Department in its Prelim Factor Value Memo. Therefore, the GDLSK respondents argue that the two price quotes noted above are the best information to use for valuing cold storage in the final results because they are contemporaneous, consistent with the surrogate country selected, product-specific, and are corroborated by Indian cold storage prices contained in the Department of Commerce's Industry Sector Analysis dated May 30, 2001 ("ISA") regarding the air conditioning/refrigeration equipment industry in India. See GDLSK Second SV Submission at Exhibit 1.

In the alternative, the GDLSK respondents assert that the Department should use the average of the cold storage costs cited in the ISA as a surrogate value for cold storage, since these costs generally correspond with the garlic-specific price quotes discussed above.

The petitioners counter that the application of a separate cold storage value does not result in double-counting. In the petitioners' view, the GDLSK respondents offer no real evidence that the financial statements of the Indian tea companies used to calculate the surrogate ratios include expenditures for temperature-and humidity-control comparable to the cold storage costs of the garlic respondents in this review. According to the petitioners, the temperature-and humidity-control equipment cited by the GDLSK respondents are not "comparable" to the cold storage technology used by the respondents in the PRC because each utilizes different technologies and energy requirements. Furthermore, the petitioners assert that the GDLSK respondents do not demonstrate that all surrogate companies on the record use "sophisticated and expensive" temperature or humidity control equipment. In addition, the petitioners contend that the GDLSK respondents admit that none of the Indian tea financial statements on the record have a separate line item in their financial statement for temperature or humidity control costs. Therefore, the petitioners argue that the respondents are just guessing that this cost "must be accounted for in some other line item," such as rent, lease rent, warehousing, or plant and machinery expenditures. The petitioners point out that one example cited by the GDLSK respondents (*i.e.*, "Godown Expense") amounts to an expense which is less than the surrogate company's expenditures for "printing and stationary" or for "Internet Expenses." Thus, the petitioners argue that it is ludicrous to conclude that these items could include substantial expenses such as those incurred for cold storage usage. Finally, the petitioners note that the Department's valuation of cold storage in the Preliminary Results was limited to the additional energy charges incurred and

therefore, is separate from the costs incurred for items such as depreciation or maintenance of the equipment.

**Department's Position:** We have continued to value cold storage separately as an FOP for the final results and have determined that doing so does not result in double-counting. We have reviewed the information with respect to tea production and cold storage costs in India contained in the submissions submitted on the record by the GDLSK respondents (see GDLSK SV Submission 1, at Exhibit 25, and GDLSK SV Submission 2, at Exhibit 1). With respect to the submitted information on tea production, we find that while it may be true that humidity is an important aspect for maintaining quality control in tea products, there is no stated requirement indicating that temperature and humidity must be monitored using certain equipment. Moreover, while the respondents' GDLSK SV Submission 1 at Exhibit 25 contained information on several types of tea machinery which have a "unique use" or are "widely used" in the manufacture of tea, we note, however, that the list does not include any reference to temperature- or humidity-control equipment.

Furthermore, our review of each producer's financial report used to calculate the surrogate ratios for the final results does not lead us to believe that such expenses are incurred or included in the financial statements. According to the GDLSK respondents, Bry-Air lists Dhunseri, Moran, and Tata as customers on its website. However, there is no information on the record which indicates specifically the circumstances or types of tea products that would require such equipment. Moreover, there is no substantiating evidence on the record to identify whether the Indian tea companies named on the website actually, or currently, use the Bry-Air equipment, and there is no information regarding whether Parry Agro uses such equipment at all. Even if the three companies cited (i.e., Dhunseri, Moran, and Tata) are in fact users of Bry-Air dehumidifier equipment, however, there is no basis on which to conclude that the costs to run and maintain this type of equipment are in fact, comparable to the cold storage facilities used by the PRC respondents as argued by the GDLSK respondents. Therefore, even if the Indian tea companies did use Bry-Air equipment, there is no information on the record regarding the actual costs of operation incurred by this equipment and where such costs could be identified in the financial statements. Thus, we cannot conclude that the line items suggested by the GDLSK respondents include such costs simply based on the proposition that some tea companies may use, or might have used at one time, temperature- and humidity-control equipment as discussed above. As a result, the GDLSK respondents' reference to Fuyao Glass and Saccharin is misplaced, since the application of a separate value for cold storage in this case does not result in an improper double-counting of costs.

As noted by the petitioners and the GDLSK respondents, in the Preliminary Results, for most respondents, we valued cold storage at the production facility using an electricity surrogate value. A separate value for cold storage was applied to only one respondent whose subject merchandise was put in an off-site cold storage facility. See Prelim Factor Value Memo. As argued by the petitioners, the valuation of on-site cold storage in the Preliminary Results was limited to the additional energy charges and had nothing to do with the cost, depreciation or maintenance of the equipment. Thus, we agree with the petitioners that the valuation of cold storage based on

additional energy used is separate from the potential costs incurred for the equipment that would be included in items such as rent, plant and machinery expense, etc. (i.e., the line items suggested by the GDLSK respondents which might include such expenses).

Furthermore, this situation differs from the land lease issue addressed in Mushrooms 4th AR as cited by the GDLSK respondents. In that case, the financial reports of each producer used to derive the surrogate financial ratios included a specific expense item for “Lease” which could be inferred to include “Land Lease” expenses. In the instant case, there are no separate line items or other indications in the financial statements used to derive the surrogate financial ratios which include costs specific to temperature- and humidity-control as discussed above. Therefore, we find it appropriate to continue to separately value cold storage costs for the final results using a methodology consistent with our calculations in the Preliminary Results.

However, we agree with the GDLSK respondents that we should value cold storage by using the average of the prices cited in the ISA for the final results. The ISA is public information published in 2001 by the Department of Commerce and provides a detailed description of the cold storage industry in India. In selecting surrogate values, the Department selects the “best available information” and does so based on the quality, specificity, and contemporaneity of the data on the record. See, e.g., Honey 3<sup>rd</sup> NSR and accompanying Issues and Decision Memorandum at Comment 4. In addition, the Department will normally use publicly available information to value factors. See 19 CFR 351.408(c)(1). Therefore, we have determined that it is preferable to use the information contained in the ISA because it is information that is publicly available, sourced from the selected surrogate country, representative of a range of prices, more recent than the value previously used in this case, and sufficiently specific to the product.

With respect to the two cold storage price quotes submitted on the record of this review, the GDLSK respondents did not provide the Department with any information on how the submitted price quotes were obtained. Both price quotes provided appear to have been obtained from a request by “V. Sahai & Company.”<sup>47</sup> Based on independent research, we found that “V. Sahai & Company” appears to be an auditing company in India.<sup>48</sup> Without further information detailing why an auditor would request such information or if any adjustments have been made, it is impossible to confirm that the data are complete and/or accurate. Such previously non-public information is also of unknowable internal and external validity unless verification is conducted. In short, unless the Department verifies such information, it will necessarily be of uncertain reliability. The necessity of undertaking this burden is avoided through the use of independently generated public information. Therefore, although the price quotes provided by the GDLSK respondents may seem more specific to the cold storage of garlic, without further information, we

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<sup>47</sup> See GDLSK Second SV Submission at Exhibit 1.

<sup>48</sup> See, e.g.,  
<http://www.doononline.net/pages/community/publications/rosebowl/rb123100/rb2200015.htm>.

cannot determine that the price quotes submitted by the respondents are publicly available and accurate.

Thus, as best available information for the surrogate value of cold storage, we have relied upon the average of the range of prices cited in the ISA for cold storage space in India. See Final Factor Valuation Memorandum.

### **Valuation of Ocean Freight**

**Comment 11:** The GDLSK respondents argue that there are two problems with the Department's approach to calculating a surrogate value for ocean freight in the Preliminary Results. Their first argument is that this POR includes all sales made during the new shipper review and that by combining Linshu Dading's new-shipper ocean freight charges with the company's ocean freight charges during the administrative review, the Department is double-counting the ocean freight charges. The GDLSK respondents suggest that the Department should simply calculate the weighted-average of all the publicly ranged ocean freight values provided by the respondents. The GDLSK respondents also argue that, since more than one company in this review purchased ocean freight from a market-economy supplier, the Department should average the publicly-ranged data of all available market-economy ocean freight values.

The GDLSK respondents argue that 1) the Maersk Sealand ("Maersk") rates the Department put on the record are not representative because they represent a rate for a single carrier on a single day, rather than throughout the POR, 2) there is no record evidence that these quotes represent the shipping of garlic, 3) they do not reflect the actual freight route used by any of the respondents in this review, and 4) Maersk is known as one of the most expensive freight carriers in the business.

Citing Garlic 8<sup>th</sup> Review at Comment 5, the GDLSK respondents allege that the Department rejected use of the Maersk freight quotes in the previous administrative review of garlic in favor of the actual market-economy rates incurred by one respondent in that review:

Because this rate is a rate actually incurred and paid for in a market-economy currency by a respondent in a review of this antidumping duty order on fresh garlic from the PRC, we have determined that it is the most accurate rate available and selected it as the surrogate value for shipments to the west coast. We adjusted this rate to arrive at a surrogate value for shipments to the east coast.

In the instant review, the GDLSK respondents argue that the Department faces the exact same issue, and contend that the evidence is even more compelling for using the actual freight purchases of the respondents. They contend that there is no reason for the Department to use a single carrier's rate from one single date that is roughly fifty percent higher than publicly ranged market-economy freight values available on the record.

Finally, the GDLSK respondents provide freight quotes from each month during the POR that are specific to garlic from the Descartes website that they claim demonstrate that Maersk's freight quotes are much higher than Descartes, and higher than the actual freight paid by two respondents in this review.

For the above reasons, the GDLSK respondents contend that the publicly ranged numbers of the proprietary market-economy freight rates on the record, or the information from the Descartes database that they claim is specific to garlic, are more accurate surrogate value sources than the Maersk data.

The petitioners did not comment on this issue.

**Department's Position:** We disagree with the GDLSK respondents that the publicly-ranged value of market-economy prices paid for ocean freight represents the most appropriate source to value ocean freight for the remaining respondents. In the NME Surrogate Country Policy Bulletin, regarding the NME surrogate country selection process, the Department explained that "in assessing data and data sources, it is the Department's stated practice to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data."

Section 351.408(c)(1) of the Department's regulations additionally states, "the Secretary normally will use publicly available information to value factors." Further, the Department has reiterated its preference for publicly-available information in recent cases<sup>49</sup> and past reviews in this case.<sup>50</sup>

In the Preliminary Results, the Department used the actual market-economy freight rates that were paid for in a market-economy currency for the three respondents that used market-economy suppliers for ocean freight. For the remaining respondents, we used publicly ranged data for a market-economy purchase of ocean freight from the most recent new-shipper review. The data, however, are based on proprietary information and are usually ranged within plus or minus ten percent of the proprietary value that is their basis. Thus, the ranged data on the record in this case are not accurate reflections of actual expenses charged by market-economy suppliers for ocean freight because we do not have enough information to adjust the prices to account for the over-inclusive values reflected in these numbers (*i.e.*, plus or minus ten percent) which protect the proprietary information from which they are derived. Although we used this information in the prior review, upon further reflection, the Department has determined that the Maersk publicly available price quotes are a more appropriate source for valuing ocean freight in this review.

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<sup>49</sup> See Retail Carrier Bags at Comment 9; Tetrahydrofurfuryl Alcohol at Comment 6; First Administrative Review of Honey at Comment 3.

<sup>50</sup> See Garlic 8<sup>th</sup> Review at Comment 3.

On two occasions in this review, respondents have placed information on the record from the Descartes database to value ocean freight. However, the Department does not have access to the Descartes database, and cannot corroborate any information placed on the record from this source. Therefore, we are unable to investigate further about these ocean freight rates or determine whether these rates are representative of the range of rates available from the Descartes database.

Conversely, Maersk is a public source that has often been used by the Department in non-market-economy cases to value ocean freight. Most recently, the Department used this source in Automotive Replacement Glass Windshields from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, 70 FR 24373 (May 9, 2005); see also Violet Pigment. Given the fact that it has been a longstanding practice by the Department to use rate quotes from Maersk to value ocean freight, coupled with the fact that these quotes are the only publicly-available information to value ocean freight on the record of this review, the Department has determined that the Maersk data are the best available information.

However, we agree with the respondents that the Maersk quotes we placed on the record do not reflect a broad or period-wide average rate. The Department does have a policy of using values that reflect a period-wide average in selecting a surrogate value. See NME Surrogate Country Policy Bulletin. Therefore, we have revisited this public source and have pulled both east and west coast rates from each month of the POR and have used a simple average of the east coast rates to value ocean freight to the east coast and a simple average of the west coast rates to value ocean freight to the west coast. Therefore, for the final results, we will value ocean freight for each of the east and west using the revised rate quotes from Maersk. See Final Factor Valuation Memorandum at Attachment F.

### **Calculation of Surrogate Wage Rate**

**Comment 12:** The GDLSK respondents argue that the Department's calculation of its surrogate wage rate is unsupported by substantial evidence and is otherwise contrary to law. According to the GDLSK respondents, on October 6, 2004, the Department made its annual revision to the NME labor rate calculation, posted updated 2002 wage and Gross National Income ("GNI") data, and stated that the updated expected wage rate for the PRC, based on the new 2002 information, was \$0.93/hour. On November 1, 2004, the Department removed from its web site the back-up information for its original 2002 labor rate calculation. On November 15, 2004, the Department released a revised 2002 wage rate calculation, which removed the 2002 wage rate data and replaced it with the 2001 data from the previous year. However the Department continued to use a \$0.93/hour wage rate for the PRC calculation by combining 2001 wage rate data and 2001 per-capita GNI data with 2002 GNI data for the PRC. The GDLSK respondents claim that the Department had never previously mixed data from separate years and that it provided no explanation for this deviation in its methodology. Further, according to these respondents, the Department stated, in the notes accompanying its revised labor rate calculation, that it relied on wages reported in the Yearbook of Labor Statistics 2002 (Chapter 5), published by the International Labor Organization ("ILO"), which includes wage rates from 1996-2001. The GDLSK respondents argue that the Department failed to mention that 2002 wage data was

available from the Yearbook of Labor Statistics 2003 or the ILO's website. Thus, the sources the Department referenced for its hybrid 2001/2002 calculation would have enabled the Department to perform the calculation based solely on the more current 2002 data.

The GDLSK respondents urge the Department to derive the surrogate labor rate from the publicly-available, country-wide wage rate data from India. They further argue that to be consistent with the major tenets of the NME methodology, the Department should calculate a wage rate based on the wage rate data from the surrogate country rather than on data from a basket of countries. They argue that in this instance the applied surrogate wage rate is actually 600 percent higher than the primary surrogate country (India) labor rate of \$0.15 per hour. Contesting the validity of the Department's regulations that require the use of this calculated wage rate, they dispute the stated reasoning behind the Department's regression wage rate analysis. First, these respondents argue that using a basket of countries that includes non-comparable source countries and excludes more comparable low-wage countries cannot yield a "more accurate" surrogate labor rate for the PRC. They further argue that inclusion of the non-comparable countries in the regression analysis is contrary to sections 773(c)(4)(A) and 773(c)(4)(B) of the Act which, respectively, instruct that surrogate values should be derived from economically comparable countries, and countries that are significant producers of comparable merchandise. The GDLSK respondents contend that, pursuant to this statutory requirement, the Department identified six countries as being "economically comparable" to the PRC and from this list the Department chose India as the primary surrogate.

In addition, the GDLSK respondents argue that the Department's methodology violates the statute's requirement that surrogate values be taken from countries that are significant producers of comparable merchandise and allege that there is no record evidence suggesting that Germany, Switzerland or numerous other countries used to derive the \$0.93 labor rate are significant producers of garlic. Citing Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43, reh'g denied 468 U.S. 1227 (1984), the GDLSK respondents state that regulation cannot stand if it is "arbitrary, capricious, or manifestly contrary to the statute." They suggest that the Department's assertion that its regression analysis achieves greater accuracy simply because it employs more countries does not provide a valid justification for disregarding the plain language of the statute.

Furthermore, the GDLSK respondents question the Department's propensity to "make errors in its highly complicated regression analysis calculation," and they find little support for the Department's assertion that this methodology provides greater predictability. The GDLSK respondents believe that "common sense shows that using the published country-wide labor rate from the primary surrogate country would afford predictability since this information is published on a regular basis and is readily available to all parties."

The GDLSK respondents also argue that the Department's NME methodology is predicated upon the theory that economic data from the PRC are unusable because the economy is not market-driven and are therefore unreliable, but the Department's labor calculation multiplies the PRC's per-capita GNI by the results of the regression analysis. Thus, the GDLSK respondents allege

that the Department's methodology for determining a surrogate wage rate for the PRC incorporates as an integral part of its calculation the "unreliable" GNI data from the PRC that necessitated the use of the NME methodology and allege, therefore, that it is in conflict with the Department's entire surrogate value methodology.

Notwithstanding the arguments above, the GDLSK respondents argue that should the Department continue to use its regression-based wage rate analysis, it should be modified to include more current and complete data in accordance with 19 CFR 351.408(c)(3). The GDLSK respondents question the Department's use of the 2001 data despite the ready availability of the 2002 data. The GDLSK respondents claim that the Department arbitrarily decided to make a wage rate calculation using an apples-to-oranges comparison of 2001 wage rates and GNI, effectively punishing the PRC for any increase in its GNI from 2001 to 2002. Additionally, the GDLSK respondents claim that the Department excluded available data from an additional 22 countries that were available in the Yearbook of Labor Statistics or on the ILO's website without providing an explanation for these exclusions.

FHTK and Ziyang make a parallel argument to the GDLSK respondents in that they contend the Department calculated a surrogate labor rate that is inconsistent with the Department's statutory directive to value FOPs, including the wage rate, with values from comparable countries. They argue that the Department should calculate the estimated wage rate for the PRC using the publicly-available, country-wide rate for the countries the Department identified as at a level of economic development comparable to that of the PRC. In the alternative, FHTK and Ziyang argue that, where the Department continues to use the regression-based analysis, the Department should correct acknowledged errors in the wage rate calculation.

The petitioners believe the Department should continue to rely on its derived labor rate of \$0.93 per hour. They refute the respondents claim that the revised 2002 labor rate, published on November 15, 2004, is erroneous, and argue that respondents have not provided any direct support for the characterizations of the supposed superiority of the previously released labor rate data published by the Department on October 6, 2004. Further, according to petitioners, the respondents have not placed on the record the supposedly "correct" regression analysis that points out the flaws in the Department's revised November labor rate data. The petitioners argue that the data do not show any evidence of mixing data across periods, the data contain a significant number of market economies, and there are valid reasons for excluding countries from the analysis. The petitioners note that the data include wages and GDPs of dozens of market-economy countries, both large Organization for Economic Co-operation and Development member countries such as the United States, smaller third-world countries such as the Dominican Republic, and medium-size countries with more developed economies such as Chile. However, the petitioners note that the Department may elect to elucidate its filtering process in reaching its final results in this segment of the proceeding. The petitioners claim that the current wage rate of \$0.93/hour was used by the Department in Shrimp from the PRC at Comment 2, and to the extent that the Department is considering making additional changes to its wage rate calculation for all the PRC cases, that process should proceed outside the bounds of this, or any other, case.

**Department's Position:** The Department agrees with petitioners and respondents in part. As an initial matter, the Department does not agree with the respondents that the Department should use India's average wage rate as a surrogate value for PRC labor because use of such data as a surrogate for PRC labor would be contrary to the Department's regulations. Section 351.408(c)(3) of the Department's regulations directs the Department to value labor in cases involving NME countries as follows:

For labor, the Secretary will use regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries. The Secretary will calculate the wage rate to be applied in nonmarket economy proceedings each year. The calculation will be based on current data, and will be made available to the public.

However, in accordance with section 351.408(c)(3) of the Department's regulations, the Department has recalculated the regression-based expected wage rate for the PRC and has used this recalculated regression-based expected wage rate for the PRC in our calculation of the final results of review in this proceeding, as we did in Shrimp from the PRC at Comment 2 and Wooden Bedroom Furniture at Comment 23.

With respect to a new regression analysis, such an exercise would require the construction of a new dataset. *Id.* Such construction would require the Department to examine the new data closely for consistency and to revise the existing data. In light of the limited time in the current administrative review, it would be impracticable to use a new regression analysis in this case.

Therefore, for the final results of review, the Department used the 2004-revised expected wage rate of \$0.93/hour as a surrogate for PRC labor costs, which the Department derived using its regression-based methodology for the determination of wage rates for the PRC.

#### **Correct Calculation of CEP Profit**

**Comment 13:** Jinan Yipin and Harmoni argue that the Department should modify its calculation of CEP profit for the final results. These respondents argue that, in its Preliminary Results, the Department incorrectly calculated CEP profit using a ratio derived from their U.S. affiliates' gross profits and gross receipts. They claim that this methodology departs from the established practice set by the Department in Policy Bulletin 97.1, issued on September 4, 1997, which states that the CEP profit ratio should be derived from the financial data of the surrogate producers. Respondents further state that this methodology has been reconfirmed by the Department as the correct method of calculating CEP profit in recent NME cases. See Honey From the People's Republic of China; Notice of Final Results of Antidumping Duty New Shipper Reviews, 70 FR 9271 (February 25, 2005), and accompanying Issues and Decision Memorandum ("Honey") at Comment 5. Therefore, Jinan Yipin and Harmoni request that the Department recalculate CEP profit using the profit ratio derived from the financial data of the surrogate producers.

The petitioners did not comment on this issue.

**Department's Position:** We agree with the respondents. It is the Department's practice to calculate CEP profit based on the surrogate producers' profit ratio, as explained in Policy Bulletin 97.1, which states that "(s)ince it is inappropriate to use financial report data of an NME respondent in calculating CEP profit, the calculation must be based on income and expense information provided by one or more surrogate producer(s). The CEP profit deduction in such cases must be based on the U.S. selling expense data and a profit ratio derived by utilizing the financial data of the surrogate producer(s)." See also Honey at Comment 5. We have therefore used the surrogate producers' profit ratios in our calculation of CEP profit for Jinan Yipin and Harmoni for final results of review.

### **Use of Most Up-To-Date Information**

**Comment 14:** Linshu Dading, Jinan Yipin, and Harmoni request that the Department issue its final results using the most up-to-date information on the record.

#### Harmoni

On December 28, 2005, Harmoni submitted, in response to the Department's request, new information on supplier distances for lids, glue, cardboard and PET tube and the weight for a lid. See "21-Day" Submission of Zhengzhou Harmoni Spice Co. Ltd. after Publication of the Preliminary Results, at Exhibits 1 and 2. Harmoni requests that the Department adjust the calculations from the Preliminary Results to include this updated information.

#### Jinan Yipin

Jinan Yipin requests that the Department include the data changes contained in the Department's verification report of American Yipin. See the Department of Commerce Memorandum to File Re: U.S. Sales Verification of Jinan Yipin Corporation, Ltd. in the 2002/2003 Administrative Review of Fresh Garlic from the PRC at p. 3-4 (April 8, 2005).

#### Linshu Dading

Linshu Dading submitted a revised FOP file after the Department's Preliminary Results. See Factual Information and Clarification of Linshu Dading Private Agricultural Products Co. Ltd. at Exhibit 3 (January 6, 2005).

Petitioners did not address these comments in their rebuttal brief.

**Department's Position:** The Department agrees with Harmoni, Jinan Yipin, and Linshu Dading, and has incorporated the requested changes into its calculations.

### **Clerical and Programming Errors**

**Comment 15:** A number of respondents have alleged that the Department made certain clerical and/or programming errors in its calculations for the Preliminary Results.

Plastic Jars/Lids: Jinan Yipin, Linshu Dading, and Sunny argued that the surrogate values for plastic jars and lids were incorrectly applied. These respondents allege that the Department

should calculate the values of plastic jars and plastic jar lids separately using appropriate values for each Indian HTS category listed in the Prelim Factor Valuation Memo.

Pesticide: Harmoni argues that the Department incorrectly doubled the surrogate value for pesticide in its calculation of normal value.

By-Product Offset: Jinan Yipin argued that the Department incorrectly added its by-product offset to the cost of manufacturing instead of deducting its by-product offset from the cost of manufacturing.

Petitioners did not address these comments in their rebuttal brief.

**Department Position:** The Department agrees with the respondents regarding the clerical errors on jars, lids, and pesticides and have made the necessary corrections for its final calculations. Additionally, we have also made corrections to our calculations in response to comments received from various respondents after the issuance of our Preliminary Results and before the receipt of case briefs. For further details on these corrections, and on the modifications made in response to the comments on jars, lids, and pesticides outlined above, see Analysis for the Final Results of the Administrative Review of the Antidumping Duty Order on Fresh Garlic from the PRC: Huaiyang Hongda Dehydrated Company, (June 6, 2005) (“Hongda Final Analysis Memorandum”), Analysis for the Final Results of the Administrative Review of the Antidumping Duty Order on Fresh Garlic from the PRC: Jinan Yipin Corporation, (June 6, 2005) (“Jinan Yipin Final Analysis Memorandum”), Analysis for the Final Results of the Administrative Review of the Antidumping Duty Order on Fresh Garlic from the PRC: Zhengzhou Harmoni Spice Co., Ltd., (June 6, 2005) (“Harmoni Final Analysis Memorandum”), Analysis for the Final Results of the Administrative Review of Fresh Garlic from the PRC: Linshu Dading Private Agricultural Products Co., Ltd., (June 6, 2005) (“Linshu Dading Final Analysis Memorandum”), and Analysis for the Final Results of the Administrative Review of the Antidumping Duty Order on Fresh Garlic from the PRC: Sunny Import and Export Ltd. (June 6, 2005) (“Sunny Final Analysis Memorandum”).

The Department also agrees with Jinan Yipin’s comment that its by-product offset for garlic sprouts was inappropriately added to rather than deducted from the cost of manufacturing. However, in our review of this issue, we discovered that this offset was also inappropriately applied to the cost of manufacturing. It is the Department’s practice to deduct the by-product offset from normal value in situations where the by-product is sold. See Certain Helical Spring Lock Washers from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, 70 FR 28274 (May 17, 2005), and accompanying Issues and Decision Memorandum at Comment 5. Accordingly, we have modified our calculations to deduct the value of the garlic sprout off-set from the normal value for each of the respondents in this review. See Analysis Memoranda for these final results of review for Trans-High, Ziyang, FHTK, Dongyun, Linshu Dading, Sunny Hongda, Jinan Yipin and Harmoni, all dated June 6, 2005.

### **Educational Meetings and other Non-used Information on the Record**

**Comment 16:** On May 10, 11, and 12, 2005, the Department placed on the record and released to all interested parties certain memoranda regarding various meetings that were conducted with officials in the PRC, additional information to clarify an earlier memorandum already on the record of this review, as well as a memorandum documenting an April 7, 2005, meeting with respondent counsel and one importer. Since the release of this information occurred after the deadline for the submission of case briefs, the Department granted all interested parties an opportunity to comment on the memoranda. On May 16, 2005, Dongyun, FHTK, Hongda, Ziyang, and the petitioners submitted comment regarding these memoranda.

Ziyang and FHTK object to the timing of the Department's release of these memoranda and the deadline set for parties to submit comments on the information contained therein. Ziyang and FHTK assert that they were not given a meaningful opportunity to comment, as they were given five days instead of the ten days normally allowed for such comments.

Dongyun, FHTK, Hongda, and Ziyang object to the content of the three ex-parte memoranda memorializing the Department's meetings with the PRC Chamber of Commerce for Import and Export of Foodstuffs, Native Produce & Animal By-Products ("the Chamber"), the PRC Ministry of Commerce ("MOFCOM") and several PRC professors. These respondents contend that these memoranda lack substantive information on what actually occurred during these meetings, and may have omitted information from these meetings that could potentially corroborate information placed on the record by respondents. Citing NEC v. United States, 151 F. 3d 1361, 1370 (Fed. Cir. 1998), Senate Rep. No. 96-249 at 41 and 98, and the SAA, Dongyun and Hongda argue that the respondents are entitled to an "impartial" decision-maker in these proceedings and contend that the Department has not conducted a transparent review of this proceeding, claiming it has apparently chosen not to put certain information on the record of this review.

According to Ziyang and FHTK, the memoranda are insufficient because they describe the meetings as an exchange of brief or broad overviews and general discussions. Ziyang and FHTK question the validity of the Department's characterization of these meetings in light of the Department's stated concerns in the Preliminary Results regarding the respondents' reported factor input usage rates. Ziyang and FHTK contend that either the Department has mis-characterized the meeting discussions or did not to address its own issues of concern when it had the opportunity to do so with the PRC Ministry and the PRC garlic professors. Ziyang and FHTK question the point of these meetings if the Department did not intend to seek out detailed information regarding the PRC garlic industry. Finally, with respect to this issue, Ziyang, FHTK, Dongyun and Hongda state that the Department has not placed on the record information it has obtained that could be substantial and request that the Department place on the record everything it learned about garlic production in these meetings.

With regard to Dr. Hannan's participation in this proceeding, Ziyang and FHTK state that Dr. Hannan's status as a federal employee at another federal agency does not entitle the Department to "block any of his views from being placed on the record." See Ziyang and FHTK Submission,

dated May 16, 2005, at 2. Ziyang and FHTK argue that the record does not disclose when, why, or on what legal basis Dr. Hannan was “deputized” as a Department official. *Id.* They argue that the Department regularly releases its communications with other agencies, such as the International Trade Commission (*e.g.*, statutory preliminary determinations) and U.S. Customs and Border Protection liquidation instructions.

With respect to Ziyang and FHTK’s comments regarding the memorandum discussing the April 7, 2005, meeting with Dr. Voss, the respondents appear to be requesting that the Department include information submitted for the record of the subsequent review of fresh garlic on the record of this review.

**Department Position:** The Department recognizes that it released the memoranda discussed above late in this proceeding. However, the Department believes that it fulfilled its statutory and regulatory obligations by ensuring that all parties were provided an opportunity to comment on these memoranda commensurate with the time remaining before the statutory deadline for completing the reviews.

Furthermore, the Department is satisfied that these memoranda accurately portray the discussions which occurred during these meetings. Topics other than garlic discussed at the meetings in the PRC are irrelevant to, and therefore inappropriate for inclusion in, the record of this proceeding. The memoranda did not include more specific information or data because no specific information or data were presented or obtained during the course of the meetings. The discussions were, in fact, general, educational and broad in nature. Finally, we take issue with Ziyang and FHTK’s apparent request to move information from the subsequent review to the instant review. The Department’s April 7, 2005, meetings with Ziyang and FHTK’s counsel, Dr. Voss and other parties were separated into two separate meetings by agreement of the parties before the meetings began. The Department wanted to ensure that the record of the two segments did not get blurred. To that end, the parties agreed that only information already on the record of the instant review would be discussed during the first meeting. The latter meeting was to focus on issues pertaining to information for the 2003/2004 review of garlic from the PRC. All information discussed during the meeting addressing the instant review was already on the record; therefore, there was no need for the Department to reiterate the information in detail in the memorandum.

The Department employed Dr. Hannan for work on this segment of the garlic proceeding in January 2005. The employment contracts of all Department employees are irrelevant to this proceeding and there is no obligation for the Department to place the employment contracts of its attorneys, analysts or its other employees on the record of its proceedings. Dr. Hannan is an employee of another federal agency who was on detail to the Department. As a Department employee, he contributed to the deliberative process of this review and as a federal employee, as well as an employee specifically of the Department of Commerce, his participation in meetings and internal communications are protected by the deliberative process privilege. Although the Department regularly releases official inter-agency communications, such as the determinations

identified by Ziyang and FHTK, it does not release and is not required to release information on employee conversations pertaining to the administration of a review and other information demanded by Ziyang and FHTK. Finally, Dr. Hannan never prepared a “recommendation document” as suggested by the respondents, and therefore, the Department never relied on such a document for its decision. All information upon which the Department relied for its final results is on the record, and the Department sees no obligation to address further the respondents’ attempts to have it add irrelevant and/or nonexistent information to the record.

### **Partial Adverse Facts Available (“AFA”)**

**Comment 17:** The Department has determined that the application of partial AFA is warranted with respect to the growing FOPs of two respondents, FHTK and Ziyang, for the final results of review. The Department has determined that FHTK and Ziyang did not act to the best of their ability during the conduct of the administrative review in reporting data to the Department pertaining to their FOPs. More specifically, the Department has determined that FHTK and Ziyang reported untimely, contradictory, and confusing information with respect to factors pertaining to herbicide usage, and with respect to other growing and harvesting FOPs. In addition, the Department found that FHTK and Ziyang reported garlic yields per mu that appeared to be unrealistic when reviewed in light of record information, including their own reported factor input levels (e.g., seed, water, labor), the information provided by those companies’ own expert, and the growing and harvesting experience of the other respondents in this review.

### **FHTK**

Throughout the course of this administrative review, FHTK claimed that its reported yield and FOP responses to the Department’s questionnaires were reliable and urged the Department to accept this information for use in the Department’s margin calculation for the final results. Notwithstanding this claim, however, the Department has found a number of inconsistencies within the documents FHTK has submitted on the record that have not been adequately explained or addressed by FHTK. Throughout the review, FHTK has maintained that it used no herbicide. FHTK’s questionnaire responses implied that it chose to use manual weeding as an alternative to chemical-based herbicide. FHTK’s own expert has indicated on the record that a reasonable analysis indicates that non-use of herbicide would require a substantial labor input to address weed concerns. However, FHTK’s reported labor rates were average or below average in comparison to other respondents who reported using herbicide. FHTK then argued the idea that using herbicide-impregnated film could explain low labor inputs in growing garlic. However, FHTK never indicated in its questionnaire responses that the film it uses is impregnated with herbicide. In evaluating FHTK’s growing and harvesting FOPs, we find that FHTK’s confusing and conflicting statements on the record regarding its herbicide use or non-use, coupled with its unexplained labor levels, low water, seed usage rates, and relatively large overall yield have led the Department to conclude that FHTK’s questionnaire responses do not provide reliable data on garlic inputs. Due to the proprietary nature of this issue, additional discussion may be found in the June 6, 2005, memorandum regarding “Fresh Garlic from the People's Republic of China: Application of Partial Adverse Facts Available for Fook Huat Tong Kee Pte., Ltd. in the Final Results of the Administrative Review for the Period 11/01/02 - 10/31/03” (FHTK AFA Memo).

## **Ziyang**

Throughout the course of this administrative review, Ziyang claimed that its reported yield and FOP responses to the Department's questionnaires were reliable and urged the Department to accept this information for use in the Department's margin calculation for the final results. Ziyang reported a large yield in comparison to other respondents in this review, yet it also reported no consumption of herbicide, low seed usage levels, and extremely low consumption levels of water and labor to grow garlic. In addition, Ziyang's questionnaire responses reported its use of plastic film without any disclosure that it uses a specialized film that is impregnated with herbicide. Thus, the Department was unaware that it should request or seek a surrogate value for this specialized plastic film and no party submitted suggested surrogates for this value. Ziyang's own expert has indicated on the record that a reasonable analysis indicates that non-use of herbicide would require a substantial labor input to address weed concerns. However, Ziyang's reported labor rates were very low in comparison to other respondents who reported using herbicides. In its January 2005 submission, in response to the Department's request for third-party information to support the adequacy and accuracy of Ziyang's questionnaire responses, Ziyang acknowledged for the first time on the record that it used herbicide-impregnated film. Ziyang then argued that using herbicide-impregnated film could explain low labor inputs in growing garlic. Ziyang provided this response only after the Department expressed concerns about its reported FOP data. In evaluating Ziyang's growing and harvesting FOPs, we find that Ziyang's inconsistent and untimely responses pertaining to FOP values, coupled with an unexplained reported high-yield, in comparison to its reported low seed, water and labor rates, have led the Department to conclude that Ziyang's questionnaire responses were an unreliable reflection of the actual facts with respect to its garlic inputs. Due to the proprietary nature of this issue, additional discussion may be found in the June 6, 2005, memorandum regarding "Fresh Garlic from the People's Republic of China: Application of Partial Adverse Facts Available for Taiyan Ziyang Food Co., Ltd. in the Final Results of the Administrative Review for the Period 11/01/02 - 10/31/03" ("Ziyang AFA Memo").

Section 776(a) of the Act, provides that if an interested party or any other person (A) withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(l), the administering authority shall, subject to section 782(d), use facts otherwise available in reaching the applicable determination.

Accordingly, the Department has applied partial AFA to FHTK and Ziyang's reported growing and harvesting FOPs in its calculations. See FHTK AFA Memo and Ziyang AFA Memo.

Section 782(d) of the Act provides that, if the Department determines that a response to a request for information does not comply with the request, the Department shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of the review. In this administrative review, the Department issued its standard questionnaire and, in response to the inadequate responses and information

provided by FHTK and Ziyang, issued supplemental questionnaires to the respondents. The Department then took the unusual step of providing two additional opportunities for the companies to provide independent third-party information and comment on the record in an effort to support the validity of their reported FOP information. Accordingly, and pursuant to section 782(d) of the Act, the Department provided FHTK and Ziyang with numerous opportunities to remedy or explain deficiencies on the record.

The Department has concluded that, within the meaning of section 776(a) of the Act, both FHTK and Ziyang have failed to provide necessary accurate information in response to the Departments' questionnaires. Specifically, we find that FHTK and Ziyang withheld or did not provide complete and reliable information to the Department pertaining to various FOPs in the form and manner requested by the Department. The lack of this necessary data impeded the conduct of the administrative review. We conclude that the information regarding FOPs provided by FHTK and Ziyang is not reliable or usable and that, therefore, the use of facts otherwise available is appropriate.

Section 776(b) of the Act provides that the Department may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability to comply with the Department's request for information. See also SAA at 870. As noted in Nippon Steel Corp. v. United States, 118 F. Supp. 2d 1366, 1378 (Oct. 26, 2000) (Nippon Steel), such a finding is supported by substantial evidence, in accordance with section 516(A) of the Act, if the Department "(1) articulates its reasons for concluding a party failed to act to the best of its ability; and (2) explains why the missing information is significant to the review." The Department's "reasons for concluding that a party failed to act to the best of its ability should include (1) a finding that a party could comply with the request for information; and (2) a finding of either a willful decision not to comply or insufficient attention to statutory duties." See Pacific Giant (citing Nippon Steel at 1378-1379) (emphasis added). The Department may also draw some inferences from a pattern of behavior. See Borden, Inc. v. United States, 22 C.I.T. 1153, 1154 (1998). Furthermore, to determine whether the respondent "cooperated" by "acting to the best of its ability" under section 776(b) of the Act, the Department also considers the accuracy and completeness of submitted information, and whether the respondent has hindered the calculation of accurate dumping margins. See Certain Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review, 62 FR 53808, 53819-53820 (October 16, 1997).

We conclude that, within the meaning of section 776(b) of the Act, FHTK and Ziyang failed to cooperate by not acting to the best of their abilities in complying with the Department's requests for information for certain FOPs and that the use of AFA is appropriate. FHTK and Ziyang's responses to the Department's questions concerning herbicide and polyethylene film (PE) film contained significant omissions, mischaracterizations, and overall lack of clarity. See Memoranda dated June 6, 2005, to Barbara E. Tillman entitled "Fresh Garlic from the People's Republic of China: Application of Partial Adverse Facts Available for Taian Fook Huat Tong Kee Foodstuffs Co., Ltd ("FHTK") in the Final Results of the Administrative Review for the Period 11/1/02-10/31/03" and "Fresh Garlic from the People's Republic of China: Application

of Partial Adverse Facts Available for Taiyan Ziyang Food Company Ltd. in the Final Results of the Administrative Review for the Period 11/1/02-10/31/03.”

With respect to FHTK, FHTK’s claim in its questionnaire responses that it does not use herbicide appears to be a direct contradiction to veiled statements that it uses herbicide-impregnated film. In addition, FHTK’s indications that use of such film would explain its labor usage rates are not credible in light of the fact that it failed to directly disclose use of this type of film. Finally, FHTK’s failure to clearly disclose the use of herbicide-impregnated film in any of its questionnaire responses precluded the Department from identifying appropriate surrogate values for such film. See FHTK AFA Memo.

With respect to Ziyang, Ziyang’s claim in its questionnaire responses that it does not use herbicide contradicted its untimely admission that it does use an herbicide-impregnated film. However, even its untimely admission that it used this film does not account for its extremely low reported labor usage rates. Finally, Ziyang’s failure to clearly disclose the use of herbicide-impregnated film in any of its questionnaire responses precluded the Department from identifying appropriate surrogate values for such film. See Ziyang AFA Memo.

In addition, these companies reported higher yields than any other respondents in this review. On the other hand, their reported labor, seed and water FOPs were either average or below average. They were given opportunities to explain why their situations were unique or different, but none of the information they submitted explained why their reported FOPs, which were generally low, produced yields higher than the yields of farms less than 42 kilometers away in distance.

For the Department to calculate an accurate margin in an NME proceeding, respondents must provide the Department with correct responses to its questionnaires. The Department has no confidence in the reliability of FHTK’s and Ziyang’s reported growing and harvesting FOPs. Despite numerous opportunities to provide factual information or argument to support their reported FOPs, FHTK and Ziyang did not act to the best of their respective abilities in providing information on the record upon which the Department believed it could rely. Accordingly, we find that the application of an adverse inference is warranted in the selection of facts available this case.

In applying an adverse inference, the Department must consider that a respondent may not be rewarded for failing to cooperate and providing the agency with “flawed” information. See NSM Ltd. v. United States, 170 F. Supp. 2d 1280, 1312 (CIT 2001). We believe that an adverse inference, applied to FHTK and Ziyang’s FOP data, would address satisfactorily their insufficient and/or confusing submissions and provide for a result that “would not benefit [these companies] from [their] lack of cooperation” in the review. See id. at 1312. Accordingly, we have assigned FHTK and Ziyang, as partial AFA, the highest reported usage rate from the remaining seven respondents (Dong Yun, Harmoni, Hongda, Jinan Yipin, Linshu Dading, Sunny, and Trans-High)

for each of the following fresh garlic production inputs: seed, fertilizer, plastic film, herbicide, water, and labor.<sup>51</sup> See FHTK AFA Memo and Ziyang AFA Memo.

Section 776(c) of the Act provides that, when the Department relies on facts otherwise available and relies on “secondary information,” the Department shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. In the instant review, the Department is not relying on secondary information, but rather on primary information because the Department is calculating a dumping margin on the basis of the actual harvest FOP experience of other respondents (*i.e.*, using the highest harvest FOP values among all respondents). Therefore, this provision does not apply.

We note that the record is much clearer with respect to FHTK’s and Ziyang’s reported sales data and corporate structure information. The Courts have expressed a preference for the Department to use partial adverse facts available if the Department believes the respondent has only failed to comply in one respect. The use of partial adverse facts available “further[s] the purpose of achieving a reliable and accurate margin ... [and] also preserve[s] an adverse consequence for [the respondent’s] failure to provide information. See *Kawasaki Steel Corp. v. U.S.*, 24 C.I.T. 684, 110 F. Supp. 2d 1029, 1041 (CIT, 2000). See also, *Ferro Union, Inc. v. United States*, 74 F. Supp. 2d 1289, 1297 (CIT 1999).” Thus, the Department does not see any reason not to use FHTK and Ziyang’s sales and corporate data in its analysis.

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<sup>51</sup> We did not apply an AFA value for pesticide for these respondents. Record evidence indicates that seed, water, fertilizer, plastic film, and labor are all essential inputs in the production of fresh garlic. The record is not as clear with respect to herbicide and pesticide. However, Ziyang has acknowledged its use of herbicide on the record of this proceeding while not directly reporting it and FHTK has provided contradictory information with respect to its use of herbicide. Neither respondent, however, has provided any indication of pesticide use. Therefore, in light of the lack of clarity with respect to the use of pesticide in garlic growing, we are not valuing pesticide as part of either Ziyang or FHTK’s garlic FOPs. See Comment 2 above.

**Recommendation**

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of the review and the final dumping margins for all of the reviewed firms in the Federal Register.

Agree \_\_\_\_\_

Disagree \_\_\_\_\_

\_\_\_\_\_  
Joseph A. Spetrini  
Acting Assistant Secretary  
for Import Administration

\_\_\_\_\_  
Date