

DATE: September 24, 2009

MEMORANDUM TO: Ronald Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: John Andersen
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: Fresh Garlic from the People's Republic of China: Issues and
Decision Memorandum for the Final Results of the New Shipper
Reviews and Rescission, In Part, of the New Shipper Reviews

SUMMARY

We have analyzed the case and rebuttal briefs submitted by Petitioners,¹ Chengwu County Yuanxiang Industry & Commerce Co., Ltd. (Yuanxiang), Jinxiang Hejia Co., Ltd. (Hejia), Jinxiang Tianheng Trade Co., Ltd. (Tianheng), and Weifang Chenglong Import & Export Co., Ltd (Chenglong), in the antidumping duty new shipper reviews (NSRs) of fresh garlic from the PRC. The Department of Commerce (Department) published the preliminary results for these reviews on May 4, 2009. See Fresh Garlic From the People's Republic of China: Preliminary Results of New Shipper Reviews, 74 FR 20452 (May 4, 2009) (Preliminary Results). The period of review (POR) is November 1, 2007 through April 30, 2008 for Tianheng, and November 1, 2007 through June 9, 2008 for Chenglong, Hejia, and Yuanxiang. Following the Preliminary Results and analysis of the comments received, we made changes to the margin calculations. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of issues for which we received comments and rebuttal comments by parties:

General Issues:

- Comment 1: Whether Hejia's Sale is Bona Fide**
- Comment 2: Whether Chenglong's Sale is Bona Fide**
- Comment 3: Whether Tianheng's Sale is Bona Fide**
- Comment 4: Whether Yuanxiang's Sale is Bona Fide**
- Comment 5: Surrogate Value of Single-Clove Garlic**

¹ The Fresh Garlic Producers Association: Christopher Ranch L.L.C.; The Garlic Company; Valley Garlic; and Vessey and Company, Inc. (Petitioners).

Comment 6: Calculation of Yield Loss Factor

Comment 7: Financial Ratios

Comment 8: Whether to Calculate Separate Financial Ratios for Whole Garlic and Peeled Garlic

DISCUSSION OF THE ISSUES

Comment 1: Whether Hejia's Sale is Bona Fide

In the Preliminary Results, the Department preliminarily concluded that the single sale made by Hejia during the POR was a bona fide commercial transaction. See Memorandum from Toni Page, Case Analyst, Office 6, Re: Bona Fide Nature of the Sale in the Antidumping Duty New Shipper Review of Fresh Garlic from the People's Republic of China (PRC): Jinxiang Hejia Co., Ltd (Hejia) (April 27, 2009) (Hejia Preliminary Bona Fides Memorandum).

Petitioners and Hejia have submitted extensive arguments regarding the Department's preliminary bona fides analyses of Hejia's new shipper sale. In addition, the parties have submitted arguments as to whether the Department should rescind the company's NSR in these final results. In their comments, Petitioners argue that, based on the totality of circumstances, the Department should find the single sale made by Hejia to not be a bona fide transaction for these final results. Conversely, Hejia argues that the sale at issue is bona fide.

Citing Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States,² Petitioners contend that the Department tries to ensure that the cash deposit rate it assigns an exporter will be reflective of the exporter's future sales practices. Based on this contention, Petitioners argue that since the single-clove garlic sold by Hejia is atypical of the type of garlic normally sold and purchased, the Department should consider the sale not bona fide. Petitioners note that there have not been any previous exports of single-clove garlic by any company in any previous segment of this proceeding.

Petitioners also note that Hejia has not made any purchases or sales of single-clove garlic since the POR, nor does the company have any business plan to sell single-clove garlic to the United States in the future. See Memorandum from Toni Page, Case Analyst, Office 6, Re: Verification of the Sales and Factors Response of Jinxiang Hejia Co., Ltd. (Hejia) in the Antidumping Duty New Shipper Review of Fresh Garlic from the People's Republic of China (Hejia Verification Report) (July 31, 2009) at 8 and 13. Petitioners conclude that Hejia is seeking to obtain a cash deposit rate based on its sale of single-clove garlic in order to sell the more common multi-clove garlic in the United States.

Petitioners argue that the behavior of Hejia's U.S. customer is indicative of the non-bona fide nature of the sale. Petitioners point out that Hejia's customer did not purchase any garlic from other companies either during or subsequent to the POR of this NSR. See page 5 of the Importer Specific Questions in Hejia's Section C and Importer Questionnaire Responses (September 16, 2008). Petitioners argue that this is indicative of the fact that the U.S. customer's purchase of

² Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States, 366 F. Supp. 2d 1246, 1249 (CIT 2005).

single-clove garlic was atypical. Petitioners also contend that Hejia's U.S. customer could not have made a profit from its re-sale of the garlic since the U.S. customer had to pay antidumping duties on its initial purchase. Petitioners argue that it is unlikely for a first-time purchaser to assume the risk of having to pay antidumping duties even if it were possible for the purchaser to be refunded the antidumping duties at a later date. Based on the aforementioned points, Petitioners conclude that it is not possible for Hejia's U.S. customer to make a profit from the re-sale of the single-clove garlic it purchased and thus the transaction with Hejia is not bona fide.

Petitioners further argue that Hejia's sale to the U.S. is not a bona fide transaction since the Department was not able to verify the company's FDA registration. Petitioners cite the Hejia Verification Report where the Department noted that Hejia did not have a copy of its FDA registration on file nor could the company access its FDA registration via the internet. See Hejia Verification Report at 4-5. Petitioners conclude that the fact that Hejia did not have a copy of its FDA registration in its records indicates that the company will not engage in regular commercial activity in the U.S. market in the future.

Petitioners also maintain that the price and quantity of Hejia's U.S. sale make the transaction not bona fide. Hejia conversely argues that the price and quantity of its sale are bona fide. Most of the parties' arguments regarding price are based on information which is business proprietary. Thus, the parties' comments are fully discussed in the Final Results of Antidumping Duty New Shipper Review of Fresh Garlic from the People's Republic of China: Bona Fide Analysis of Jinxiang Hejia Co., Ltd's Sale (September 24, 2009) (Hejia Final Bona Fides Memorandum).

Hejia counters that single-clove garlic is a type of fresh garlic categorized under HTSUS 0703.20.0010 and is therefore not atypical. Hejia acknowledges that the Department found single-clove garlic to be a rare boutique-type of garlic which commands a significantly higher price than the more common multi-clove garlic. See Hejia Preliminary Bona Fides Memorandum at 5. However, Hejia emphasizes that single-clove garlic is just a different type of garlic rather than a species alteration that is still categorized under the same HTSUS as the more common multi-clove fresh garlic.

Further, Hejia argues that its sale of single-clove garlic is not atypical since sales of single-clove garlic are a part of the company's normal business practice thus making the sale to the United States bona fide. Hejia cites the verification report where the company stated that its business is driven by customer demand. See Hejia Verification Report at 7. Hejia notes that the company sold single-clove garlic during and after the POR to third countries because customers in those countries wanted the company's single-clove garlic product. Hejia also notes that the company was not able to purchase any single-clove garlic in 2009 because of a drought that destroyed the single-clove crop. Hejia emphasizes that it was not able, as opposed to being unwilling, to purchase single-clove garlic to sell. Hejia further emphasizes that at verification, the company stated its desire to sell more single-clove garlic in the U.S. market. See Hejia Verification Report at 8.

According to Hejia, the bona fides analysis should focus on the activities of the seller and not on the activities of the buyer. Hejia argues that its U.S. customer is not a party to the proceeding and therefore analysis of its customer's purchasing activities is unnecessary. That said, Hejia maintains that its U.S. customer did re-sell the garlic in question for a profit and cites to the

documents, such as the resale invoices, receipt of payment, and ocean freight payment, provided by its U.S. customer. See Exhibits SA-13, SC-1, SC-2, and IS-3 of Hejia's March 30, 2009 Supplemental Questionnaire response. Hejia argues that it is not the Department's practice to include antidumping duty deposits as expenses in its analysis of whether an importer did re-sell the garlic for a profit.

Regarding the issue of its FDA registration, Hejia claims it was not necessary for the company to log back into the FDA website. Hejia argues that since so much time had passed between when the company acquired its FDA registration and when the Department requested the official to log on to the FDA website, it is understandable that the company official had forgotten the password and log in information. Hejia notes that it reported its FDA registration number to the Department in its first supplemental. See Hejia's February 1, 2009 Supplemental Response at 9 and Exhibit SA-9.

Department's Position:

Based on our investigation into the nature of Hejia's reviewed sale and verification of its questionnaire responses, we determine that Hejia has met the requirements to qualify as a new shipper during the POR. Therefore, for purposes of these final results, we are treating Hejia's new shipper sale of subject merchandise to the United States as an appropriate transaction for its review.

Specifically, we continue to find that based on the totality of circumstances the sale made by Hejia during the POR was a bona fide commercial transaction. In the Preliminary Results, we found that: (1) neither Hejia nor its customer incurred any extraordinary expenses arising from the transaction; (2) the sale was made between unaffiliated parties at arm's length; and (3) the timing of the sale did not indicate that the sale was not bona fide. No new information has been placed on the record to cause us to reconsider these findings.

Since the Preliminary Results, we have continued to investigate all aspects of Hejia's sale including: (1) price; (2) quantity; and (3) whether the sale reflected atypical business practices. Since much of our analysis regarding the evidence of the bona fides of the transaction involves business proprietary information, a full discussion regarding Hejia's sale price, sale quantity, and whether the sale was atypical is set forth in the Hejia Final Bona Fides Memorandum. The Department's positions on the non-business proprietary aspects of Petitioners' and Hejia's arguments are discussed herein.

The Department has a long-standing practice of examining average unit values (AUVs) derived from U.S. Customs and Border Protection (CBP) data as an appropriate representation of the average price and average quantity of the subject merchandise being imported. See, e.g., Fresh Garlic From the People's Republic of China: Final Results and Partial Rescission of the 13th Antidumping Duty Administrative and New Shipper Reviews, 74 FR 29174 (June 19, 2009) (13th Administrative and New Shipper Reviews). As noted by both parties, Hejia's sale of single-clove garlic is subject merchandise correctly entered under HTSUS 0703.20.0010. Moreover, information on the record of this review indicates the most common form of whole garlic exported to the United States is multi-clove garlic, which is also correctly entered under HTSUS 0703.20.0010. Although Hejia's sale of single-clove garlic entered at a significantly

higher price than the AUV for HTSUS 0703.20.0010, this comparison may not be meaningful for purposes of this bona fides analysis because HTSUS 0703.20.0010 includes substantial entries of multi-clove garlic which, both parties concede, have prices significantly lower than Hejia's price for single clove garlic. Moreover, there are no other U.S. prices of single-clove garlic on the record to compare with the sale in question. Thus, we do not have a basis for concluding that the price is aberrationally high for single-clove garlic in the United States. Furthermore, we do not have any quantity data for single clove garlic shipments on the record to compare with the sale in question. Thus, we do not have a basis for concluding that the quantity of Hejia's sale was aberrationally small for a single-clove garlic shipment to the United States. See Hejia Final Bona Fides Memorandum.

Despite the absence of information on single-clove garlic price and shipment quantity information in the United States, the record indicates that Hejia made significant single-clove sales to a third country at a price comparable to the U.S. price at issue. Moreover, Hejia has offered several credible reasons for its lack of recent sales of single-clove garlic, including customer demand, a drought, and an unwillingness of farmers to produce single-clove garlic. Thus, there is not a sufficient basis on which to find that Hejia's sale of single-clove garlic to the United States was atypical of its normal business practice. Finally, we note that information on the record also indicates that Hejia sold the single clove garlic at issue to an unaffiliated U.S. importer who resold it a profit. Finally, the Department finds that Hejia's inability at verification to log into the FDA website is not a basis, on its own, for determining that the sale in question was not bona fide. The Department is satisfied with Hejia's explanation for not being able to access its information on the FDA website. Thus, based on the totality of the circumstances, the Department continues to find Hejia's sale to be bona fide. See Hejia Final Bona Fides Memorandum.

Comment 2: Whether Chenglong's Sale is Bona Fide

Petitioners argue information discovered by the Department at Chenglong's verification indicates that the company's POR sale was not bona fide and that the company itself is not a bona fide exporter engaged in normal business operations. Petitioners contend the following facts presented in Chenglong's verification report support this claim:

1. The Department found that, for Chenglong's POR sale, negotiation documents were inconsistent and that the permitted payment terms were unusually long.³
2. Chenglong's business activities since its inception in April 2007 are limited.⁴
3. The company's owners did not attend the verification despite being requested to do so by the Department.⁵
4. Chenglong was unable to provide documentation of other sales at verification because they had been removed by a former employee.⁶
5. While reviewing the computer invoices, the Department noted that all invoice records (including the U.S. sale under review) had been modified in January 2009.⁷

³ See Chenglong Verification Report at 2.

⁴ See Chenglong Verification Report at 2, 3 and 7.

⁵ See Chenglong Verification Report at 2.

⁶ See Chenglong Verification Report at 6.

6. Chenglong's internet and international phone lines have been inoperable since April 2009, which prevented the Department from testing the validity of alleged fax negotiations related to the U.S. sale under review.⁸
7. Despite being unfamiliar with its new U.S. customer, Chenglong stated that it "never worried about the payment being late" from its customer.⁹

Petitioners argue that the totality of these circumstances should lead the Department to find that Chenglong's sale and operations are not bona fide for the final results of this review. Petitioners argue that "verification revealed numerous anomalous or suspicious practices, such as maintaining full-time staff despite extremely limited or non-existent operations, failing to require (or even desire) prompt payment, allegedly allowing departing employees to abscond with key documents, and failing to keep verifiable contemporaneous documentation such as invoices." Petitioners add that receiving a favorable margin would allow Chenglong to dump garlic products from all suppliers for the next 18 to 24 months.

Chenglong argues that the Department correctly found its U.S. sale to be a bona fide sale in the Preliminary Results. Chenglong argues that Petitioners have made erroneous statements regarding the information presented at verification. Regarding Petitioners' claim that "negotiation documents were inconsistent," Chenglong counters that the company is a newly-established entity engaging in trading lower-end products. Chenglong contends that the company's equipment is backward and its management team is inexperienced in office management, such as document organization and sending/receiving faxes. As a result, Chenglong argues, the company was not able to locate certain documentation. Chenglong argues that it is still in the process of building up its management team, and that any issues regarding the company's management flaws are not an indication that the company's U.S. sale was not bona fide.

In response to Petitioners' claims that "the permitted payment terms were unusually long," Chenglong explains that the importer had experienced slow cash flow. Chenglong explained that in the interest of establishing a long-term business relationship with the importer, it agreed to allow the importer to extend the payment deadline. Chenglong adds that it must give preferable terms to its customers as a strategy to keep clients. Chenglong states that, in the end, the transaction was completed with goods exported and payment received. Therefore, Chenglong argues, the sale was commercially reasonable.

Concerning Petitioners' argument about limited business activities, Chenglong argues that China's export business was hit severely as a result of the world financial crisis. Chenglong argues that many exporters, including themselves, were forced to limit or even stop exportation to foreign markets. Chenglong adds that it is a newly-established company and it is natural for a new company to have limited business transactions because it takes time to build up a business. Chenglong argues that neither the economic crisis nor the company's (temporary) limited

⁷ See Chenglong Verification Report at 7.

⁸ See Chenglong Verification Report at 6.

⁹ See Chenglong Verification Report at 7.

business operations have anything to do with the issue of whether the U.S. sale under review or the company itself is bona fide.

Regarding Petitioners' comments concerning the fact that documentation of other sales could not be reviewed at verification because they had been removed by a former employee, Chenglong states that in small trading companies a sales person will often take negotiation documents relating to their own sales. Chenglong states that when the sales person in charge of these other sales left the company, he took some negotiation correspondence with him. However, Chenglong adds, important sales documents such as contracts, customs clearance forms and payment documentation were kept by the company. Chenglong states these documents were verified by the Department. Chenglong adds that the failure to keep certain sales documents relating to non-subject merchandise cannot be inferred as Chenglong's sale of the subject merchandise to the U.S. market being not bona fide.

Further, Chenglong argues that Petitioners' comments about the computerized invoices appearing to have been modified in January of 2009 are incorrect. Chenglong states that, as explained in the verification report, the company updated its computer system in January 2009, and the sales invoice files were transferred to the new computer by a flash drive.¹⁰ Therefore, Chenglong explains, all the 'Date Modified' for these files had a January 2009 date. Chenglong argues that the facts stated by Petitioners should not be used to infer that the U.S. sale was not bona fide.

Additionally, regarding Petitioners' argument concerning the inoperable internet and international phone lines not allowing the Department to test the validity of fax negotiations relating to the U.S. sale, Chenglong argues that during verification the company told the Department that it was about to move to a new office soon. Therefore, Chenglong argues, the company's telephone and network were temporarily stopped during the transitional period. Chenglong argues that such a situation is actually caused by the company's normal business operation.

Chenglong argues that Petitioners' claim that the company's lack of concern regarding late payment from its new customer is indicative that the sale under review is not bona fide. Chenglong argues that the company and its customer were introduced through a mutual friend, and have in turn built a trusted business relationship. Chenglong argues that the trust given to its U.S. customer cannot be interpreted as not operating as a normal business. Chenglong did not address Petitioners' concern regarding the fact that none of the company's owners attended the verification despite the Department's request to do so.

Chenglong disagrees with Petitioners' statement that "verification revealed numerous anomalous or suspicious practices, such as maintaining full-time staff despite extremely limited or non-existent operations, failing to require (or even desire) prompt payment, allegedly allowing departing employees to abscond with key documents, and failing to keep verifiable contemporaneous documentation such as invoices."¹¹ Chenglong states that due to the economic

¹⁰ See Chenglong Verification Report at 7.

¹¹ See Petitioners' Brief at 9.

downturn, many enterprises, including Chenglong, had very limited business. Chenglong states that although the company could not afford to employ a large staff during this time, it did maintain some full-time employees to develop the business. Chenglong adds that in accordance with Chinese normal business practice and traditions, enterprises generally do not fire people during economic downturns. Chenglong concludes that there is no reason to question whether the sale to the U.S. market is a bona fide transaction based on the fact that it maintained full-time staff while business was slow.

Department's Position:

For the final results of this NSR, the Department finds Chenglong's sale to be not bona fide. A full discussion of our analysis concerning Chenglong's garlic sale is only possible by means of reference to business proprietary information. See Final Results of Antidumping Duty New Shipper Review of Fresh Garlic from the People's Republic of China: Bona Fide Analysis of Weifang Chenglong Import & Export Co., Ltd's Sale (September 24, 2009) (Chenglong Bona Fide Memo – Final Results) We determine that the sale is not bona fide because: (1) the price of Chenglong's U.S. sale is not typical of other garlic imports from China; (2) the sale is atypical of the company's own normal business practice; and (3) the company is not functioning on a normal commercial basis which indicates that the sale at issue is not bona fide. See Chenglong Bona Fide Memo – Final Results.

Regarding Petitioners' claim that the payment terms were unusually long, Chenglong states that the importer's cash flow was slow and that the company agreed to extend the payment deadline in the interest of establishing a long-term business relationship. However, Chenglong does not rebut the argument that the payment terms for the garlic sale were unusually long. The Department finds that the fact that Chenglong extended payment terms to a company that it had no previous business relationship with, combined with the fact that Chenglong had limited business activities during that time is indicative of a sale not being bona fide.

Chenglong argues that the trust given to its U.S. customer cannot be interpreted as not operating as a normal commercial business. The Department notes that Chenglong had no previous business relations with the importer and, based on the information on the record, has had no business activities since the sale under review. The Department finds the fact that Chenglong appeared to not be concerned with receiving repayment for its sale under these circumstances is indicative of a sale not being bona fide. Additionally, as discussed above, Chenglong has had limited business activities since 2007. The Department finds the fact that Chenglong was unconcerned with receiving payment despite limited business activities calls into question whether the company is operating on a normal commercial basis.

In response to Petitioners' contention that Chenglong's negotiation documents presented at verification were inconsistent, Chenglong argues that it is a newly established entity with an inexperienced management team. Additionally, regarding Petitioners' argument that Chenglong was unable to provide documentation of other sales at verification because they had been removed by a former employee, Chenglong argues that the fact that certain information could not be verified regarding sales involving non-subject merchandise is irrelevant to whether the U.S. garlic was bona fide. The Department finds that, while Chenglong's lack of experience as a

company and the removal of certain documents may explain the company's inability to locate certain documents, Petitioners' statement regarding the inability to provide these documents at verification is accurate. Additionally, the Department finds that Chenglong's inability to maintain and provide certain documentation calls into question whether the company is functioning as a normal commercial business.

Concerning Petitioners' comments regarding the lack of business activities by the company, Chenglong states that it was severely hit as a result of the world financial crisis and therefore has had limited business activities. Chenglong also argues that it is a newly established company and that it takes time for a company to generate sales. The Department agrees that the current economic situation may affect Chenglong's business activities. However, the Department notes that the company maintained a full-time staff during this time despite the limited business activities. The Department finds that this is indicative of a company not operating on a normal commercial basis.

Regarding Petitioners' concerns regarding the computerized invoices, Chenglong argues that the company updated its computer system in January 2009, and thus the all the company's files were "modified" in January 2009 when the system was updated. The Department finds that Petitioners' statement regarding Chenglong's computerized invoices accurately reflects information provided at verification. However, the Department finds that this fact does not provide any support for or against whether the sale under review is bona fide, or if the company is operating on a normal commercial basis.

In response to Petitioners' comments regarding the inoperable internet and international phone lines, Chenglong argues that the company's telephone and network were stopped as the company was about to move to a new office. According to Chenglong, the company's internet and phone services were down since April 2009. The Department finds that while a brief stoppage during a transition is understandable, the fact that Chenglong had no means to conduct business internationally for at least six weeks (May 2009 through at least June 22, 2009 (date of verification)) calls into question whether the company operates on a normal commercial basis. As we indicated in Chenglong Bona Fide Memo – Final Results, the above circumstances relating to the cessation of business activity is another factor indicating the atypical nature of the sale.

Comment 3: Whether Tianheng's Sale is Bona Fide

Tianheng argues that the Department erred in finding Tianheng's new shipper sale to be not bona fide because the Department did not confine its authority to rejecting only new shipper sales with exceptional circumstances where sales are unrepresentative and extremely distortive. Tianheng argues that the standard the Department applied in deciding its new shipper sale to be a non-bona fide transaction is not in accordance with the standard required by the court. See Hebei New Donghua Amino Acid Co., Ltd. v. United States, 374 F. Supp. 2d 1333, 1339 (CIT 2005) (New Donghua), Am. Silicon Techs. v. United States, 110 F. Supp. 2d 992, 995 (CIT 2000); and Windmill Int'l Pte., Ltd. v. United States, 193 F. Supp. 2d 1303, 1313 (CIT 2002) (Windmill). Tianheng maintains that its sale price, while at the higher end of the price spectrum, was not extremely distortive.

Tianheng also argues that in its Memorandum to John M. Andersen, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, from Barbara E. Tillman, Office Director, AD/CVD Operations, Office 6, Import Administration, Subject: Bona Fide Nature of the Sale in the Antidumping Duty New Shipper Review of Fresh Garlic from the People's Republic of China ("PRC"): Amended Intent to Preliminarily Rescind Jinxiang Tianheng Trade Co.'s New Shipper Review (July 30, 2009) (Revised Bona Fides Memorandum), the Department incorrectly characterized its position as "all garlic sales from the PRC are below normal value." See Revised Bona Fides Memorandum at page 2. Tianheng clarified its position by stating that because "fresh garlic from the PRC was the subject merchandise under an antidumping duty order during the POR . . . the Department *regarded* Chinese prices were {sic} below normal value." Further, Tianheng argues, U.S. Customs and Border Protection (CBP) continues to collect duty deposits at the rates in effect at the time of entry for all the importers of subject merchandise. As such, Tianheng suggests that if the Department uses the average unit value of PRC entries of subject merchandise, to be consistent with the Department's antidumping practice, such average unit values should be inflated by the appropriate duty rate determined by the Department.

Tianheng also clarifies its argument with regard to the use of other NSR prices for comparison purposes in a bona fides analysis. Tianheng claims that in the Revised Bona Fides Memorandum, the Department mischaracterized Tianheng's argument that the price and quantity of its NSR sales should only be examined in comparison with other NSR sales. Tianheng states that its actual argument is that the Department should consider the prices of other new shippers during the same POR as one of the reasonable references for comparison, because new shippers share a similar market position as newcomers to the U.S. market, their transactions tend to be more tentative, and therefore their quantities are relatively smaller, and new shippers face the heavy financial burden of paying cash deposits at the PRC-wide rate of 376.76 percent.

Further, Tianheng agrees with the Department that the six new shippers in the current review cannot be the only basis in a bona fides analysis. However, Tianheng argues that the totality of circumstances philosophy adopted by the Department forces consideration of a new shipper's transaction from all relevant aspects, to determine whether the sale is typical sales activity. And when compared to the other new shippers in this POR, Tianheng argues its price was below the average NSR price. In addition, Tianheng contends that while the Department compared its sale price with the prices of all sales during the POR, a better comparison would be to consider only sales that occurred within the same month as its sale. Tianheng argues that making price comparisons by month would address the large seasonal price fluctuations that occur in the PRC garlic market.

Also, Tianheng argues that it did not submit USDA's Agricultural Marketing Service (AMS) data as an intended replacement for the CBP data that the Department traditionally uses when examining bona fides. Rather, Tianheng argues that it provided the AMS data as another benchmark with which the Department could analyze the bona fides of its sale. Tianheng contends that the AMS data, according to its source in the garlic industry, is a valued resource for providing up-to-date, detailed information as to location, size, color, packaging and market prices of garlic. When comparing its sale to AMS data, Tianheng argues that its sale price was not atypical or distortive.

Finally, Tianheng argues that it is inappropriate for the Department to simply compare the price of its U.S. sale with the subsequent purchases of fresh garlic made by its importer. Tianheng contends that in order to make the comparison between these prices meaningful, the Department must consider the differences between these transactions. Specifically, Tianheng argues that the time of year the transactions occurred, the size and quality of the garlic at issue, and the transaction costs related to the sale of garlic must be accounted for to make such a comparison between these transactions meaningful.

Tianheng points out that its negotiation documents indicate that it sold “good quality merchandise” to its U.S. customer. Tianheng contends that it is possible that the subsequent garlic purchases by its importer may have been garlic of a lower quality, which would explain the price differential between the sales. Also, Tianheng argues that garlic size influences garlic price by as much as \$0.20 per kilogram, and it is not clear from the record the size of the garlic subsequently purchased by its importer. Tianheng further argues that garlic prices fluctuate throughout the year, depending on the season, and these subsequent sales occurred during a time of the year when garlic prices were lower than when Tianheng made its sale. Lastly, Tianheng argues that the terms of the subsequent garlic imports could have differed from the terms used in its sale. Tianheng states a difference in terms of sale could result in the entire cost of freight, insurance, customs duties, and taxes being shifted from one party to the other. In sum, Tianheng argues that these factors combined could explain much of the price difference that exists between its new shipper sale price and the sale price of its importer’s subsequent purchases.

Department’s Position:

The Department disagrees with Tianheng’s assessment that the Department overstepped its authority when it rejected Tianheng’s new shipper sale. The Department examined Tianheng’s sale in its Revised Bona Fides Memorandum and found sufficient reason to conclude that the circumstances of Tianheng’s sale represented an “atypical transaction that would not be repeated in future sales.” This finding is within the Department’s authority. *See, e.g., New Donghua*, 374 F. Supp. 2d 1333, 1339, citing Windmill, 193 F. Supp. 2d 1303, 1313.

The purpose in examining whether NSR sales are bona fide is to determine whether a sale price and quantity were based on normal commercial considerations, typical of the market as a whole, and present an accurate picture of a company’s typical sales activity. *See Windmill*, at 1303, 1313. During the POR, a total of six companies participated as NSR respondents. *See Fresh Garlic from the People's Republic of China: Initiation of Antidumping Duty New Shipper Reviews*, 73 FR 38979 (July 8, 2008). The volume and value of these NSR sales were included in the Department’s CBP-derived average unit value.¹² Moreover, the volume and value of these six NSR respondents’ sales were each compared to that CBP-derived average unit value. However, the record of these reviews shows that these six new shipper sales account for a minute fraction of the total sales of garlic imported to the United States from the PRC. We also note that some of these NSR sales have also been found to be not bona fide. Thus, comparison of Tianheng’s sales price to the prices of other NSR sales does not inform our analysis of whether

¹² *See* Memorandum from Jun Jack Zhao, Case Analyst Office 6, Re: New Shipper Review of Fresh Garlic from the People’s Republic of China: Customs Data (June 30, 2008).

Tianheng's sale was made based upon normal commercial considerations. To best achieve the Department's objective to determine whether a sale is made based upon normal commercial considerations and will present an accurate picture of a company's typical sales activity, the Department examines a number of factors, including the commercial behavior of the industry as a whole. The sales price and quantity of a handful of companies that made sales for the purpose of undergoing an NSR is not indicative of normal commercial practices in the industry as a whole. Further, we disagree that the Department must inflate the other exporters' prices with the appropriate duty rate. The entered values that the Department uses from the CBP database, when making comparisons for its bona fides analysis, do not include the duty rates that will be assigned to each entry. As such, it would be inappropriate for the Department to include those duty rates into the analysis, because it would prevent an "apples-to-apples" comparison. Therefore, the Department finds that comparing NSR sales to the "average" sale during the POR, and including all the companies that entered subject merchandise (including the new shipper companies), is appropriate.

Further, the Department disagrees with Tianheng's argument that its sale price should be compared to sales made during the same month as its sale. Contrary to Tianheng's claims, there is no evidence on the record that garlic prices fluctuate on a seasonal basis. Thus, while garlic prices may change from month to month, a seasonal or monthly trend has never been established. Further, the Department has an established practice of comparing sales prices with all prices from a specified POR, rather than with prices in a portion of the year (like a fiscal quarter, season, or month). See, e.g., 13th Administrative and New Shipper Reviews and accompanying Issues and Decision Memorandum, where the Department analyzed the sales of the three new shipper review companies in question in comparison to all garlic sales during the POR. Therefore, for these final results, the Department will continue to compare new shipper sales with all other sales during the POR.

The Department finds that Tianheng has not established why AMS price data is an appropriate basis for comparison with new shipper sales. As the Department has already noted, it has a well-established practice of comparing NSR sales prices to average unit values derived from CBP data, which compares PRC garlic import sales using entered value as the basis for price comparisons. See e.g., 13th Administrative and New Shipper Reviews. There is insufficient information on the record regarding the AMS price data. Tianheng has submitted only a spreadsheet containing AMS data for one day, without any explanations of the terms, the methodology used to collect and collate the data, or any details about what is and is not included in the data. See Tianheng's April 1, 2009 comments on the Department's bona fides analysis, at Exhibit 2. Without complete information, the Department is unable to evaluate the probative value of making any comparison with the AMS data. Therefore, the Department will not include a comparison of Tianheng's price to the AMS data price as part of its bona fides analysis.

We note that in past bona fides analyses, the Department has a practice of comparing the price of NSR sales to the price of other purchases made by the new shipper's customer. See, e.g., Fresh Garlic from the People's Republic of China: Final Results and Rescission, In Part, of Twelfth New Shipper Reviews, 73 FR 56550 (September 29, 2008) and accompanying Issues and Decision Memorandum, at Comment 1, where the Department considered Shandong Chenhe International Trading Co. Ltd.'s U.S. customer's other purchases of the subject merchandise in

determining whether the sale at issue was commercially reasonable. See also 13th Administrative and New Shipper Reviews, where the Department analyzed subsequent purchases of Anqiu Haoshun Trade Co. Ltd.'s importer as part of our bona fides analysis. Furthermore, in New Donghua, 374 F. Supp. 2d at 1343, the Court affirmed Commerce's reliance on the customer's post-sale activities as a factor in the bona fides analysis. In the instant case, Tianheng has advanced several possible factors that could account for the difference between the price of its garlic sale and the price of its importer's subsequent garlic purchases. Indeed, several factors put forward by Tianheng, such as quality, size, and terms of sale, might well impact the prices at which garlic is sold. However, there is no information on the record of this review that indicates that the quality, size, and terms of sale of Tianheng's sale were any different than the quality, size, and terms of sale for the importer's subsequent purchases. As such, the Department has no basis to examine whether the factors proposed by Tianheng explain the price difference that exists between its NSR sale and the price of its importer's subsequent purchases. Therefore, the Department continues to find that Tianheng's new shipper sale is atypical of Tianheng's importer's subsequent garlic purchases in both price and quantity.

Comment 4: Whether Yuanxiang's Sale is Bona Fide

Petitioners argue that based on the discrepancies identified during the Department's verification and the general conduct of Yuanxiang's operations, the Department should find Yuanxiang is not a legitimate, ongoing concern entitled to receive a company-specific duty rate in this NSR. Petitioners state that Yuanxiang's assertions fail to explain or remedy the shortcomings that are consistent with a company that does not have open and transparent business operations.

Specifically, Petitioners allege that the record of this review demonstrates that Yuanxiang has engaged in deceptive practices. Petitioners maintain that Yuanxiang failed to provide "all sales negotiation documents" as requested by the Department. Petitioners also expressed concern regarding the nature of certain aspects of the relationship between Yuanxiang and its U.S. customer. See Memorandum from Summer Avery, Case Analyst, Re: Bona Fide Nature of the Sale in the Antidumping Duty New Shipper Review of Fresh Garlic from the People's Republic of China (PRC): Chengwu County Yuanxiang Industry & Commerce Co., Ltd. (September 24, 2009) (Yuanxiang Final Bona Fides Memorandum). In addition, Petitioners contend that Yuanxiang has not fully explained the circumstances by which an affiliated party has been the lessor of Yuanxiang's carton manufacturing facility or why it failed to meet certain material terms of its lease agreement. Petitioners add that Yuanxiang did not adequately explain circumstances under which its processing facility was utilized by a third party to process garlic during 2008 and that its use of false contact information reflects Yuanxiang's "willingness to cut corners in conducting its business operations." Finally, Petitioners maintain that Yuanxiang misreported information regarding the number of fax machines and electricity meters in its facilities, as well as its use of water in its operations. Petitioners argue that such omissions or mischaracterizations reflect a pattern of behavior indicating that Yuanxiang has not been forthcoming with the Department and merit assigning Yuanxiang the PRC-wide rate on the basis of adverse facts available (AFA).

Yuanxiang argues the minor issues and discrepancies identified by Petitioners are not a sufficient basis for finding its sale to be not bona fide or applying AFA. Yuanxiang states that it timely

submitted all of its price negotiation correspondence with its U.S. customer. In response to question 2.g of the Department's Section A questionnaire, which requested "evidence of any price negotiations," Yuanxiang states it provided only its correspondence with its U.S. customer regarding price negotiations. During verification, Yuanxiang states it provided a complete set of all correspondence with its U.S. customer, which included pages not submitted in Yuanxiang's questionnaire response. Yuanxiang argues it did not withhold any correspondence containing reference to "dumping," "antidumping response," "duty payment," and "obtaining legal counsel" from the Department in its questionnaire response or during verification and that any suggestion otherwise is baseless for three reasons. First, Yuanxiang argues it had no need to conceal discussion between it and its importer regarding participation in an antidumping review because it is an "obvious issue between any parties who trade the subject merchandise" and "it is hard to believe that any company would ship the goods during the POR without the knowledge of the existent antidumping order." Next, Yuanxiang contends the discussions regarding these issues were not part of "price negotiations." Finally, Yuanxiang argues that had it been attempting to withhold part of its correspondence, "it could easily have done do (sic) before presenting it to the verifiers." See the Yuanxiang Case Brief at 6.

Yuanxiang argues that, as a new shipper, it was unfamiliar with the Department's Glossary of Terms and reporting requirements regarding "affiliation," but reported its affiliation as soon as it became aware of the requirement. Yuanxiang states that its general manager learned the precise definition of "affiliation" while preparing for verification and informed counsel of the Yuanxiang's affiliation. Yuanxiang then reported the affiliation as a minor correction and presented the related documents during verification. Yuanxiang contends the affiliation should not be considered in the final result because the affiliated company never produced or traded the subject merchandise.

Regarding whether Yuanxiang ever leased its garlic processing facility to other companies and whether it received rental income for such transactions, Yuanxiang argues that the production manager and general manager reported what information they knew at the time of verification. Yuanxiang argues the production manager's information was not obtained firsthand because "the date that the Production Manager thought that Yuanxiang leased its facility to a third party was one of the dates that Yuanxiang did not produce and the Production Manager was not on site." Rather, Yuanxiang contends the facility was used by a third party for free and the processed garlic was not for export, and argues that only the general manager had complete and accurate information regarding the use of the facility at the time. Yuanxiang further argues that a full explanation would have been provided on site if the managers had been given an opportunity and that "(a)bsence of the information is good evidence of what actually happened."

With respect to Petitioner's arguments on its use of incorrect contact information, Yuanxiang states that, as it explained during verification, it used incorrect contact information in order to register Yuanxiang on multiple third party trade websites for free.

Yuanxiang maintains that it has only one fax machine and did not receive the fax sent by the Department. Yuanxiang further states that "the verifiers told Yuanxiang that they sent a fax to Yuanxiang's fax machine from their hotel the night before." Yuanxiang states its sales manager checked the fax machine in the morning and did not see a fax from the Department but did find an advertisement from an unknown sender, which had no identification line. Yuanxiang states it

reported to the verifiers that it did not understand why it received the advertisement but not the Department's fax. Further, Yuanxiang argues that a sender's identification lines can only be set up by the sender. Thus, if a sender did not set up the identification on its fax machines, there would not be an identification line on the received fax. Yuanxiang states it did not know why the advertiser did not set up an identification line on its fax machine.

With respect to requiring advance payment on its U.S. sale, Yuanxiang states that in dealing with a new customer located on the other side of the globe, it is a reasonable and normal practice for a prudent business entity to request an advance deposit in order to reduce the risk of uncollectable payment and prevent possible future losses. Moreover, Yuanxiang notes it is common in international transportation for an ocean freight forwarder to give a discount if a shipper advances freight payment before a shipment. Yuanxiang states that, as it explained during verification, it agreed to prepay certain movement expenses on behalf of its customer even though this expense wasn't covered in the of sale it reached with its customer. Yuanxiang further argues that it presented all related documents and accounting books at verification, which demonstrate what Yuanxiang reported.

With respect to the number of electricity meters, Yuanxiang argues that during verification, the electrician explained that the first meter was a general meter that recorded total electricity consumption, the second meter was a sub-meter that recorded the consumption of the processing workshops, and the other two meters were not being used currently, but were reserved for future use. Yuanxiang states that it did not report the two "extra" meters because they were not used. Yuanxiang also contends that it did not use water for fresh garlic bulb processing. Yuanxiang states that it reported water consumed for workers to wash their hands and to clean the processing site.

Yuanxiang also argues the only discrepancies in its sales database were two clerical errors of the destination zip code and payment date. Yuanxiang states the discrepancy was a typographic error. Regarding the date of second payment discrepancy, Yuanxiang explains the bank received the funds one day before it posted to the company's bank account and the accountant reported the date on which Yuanxiang was informed the funds were received. With respect to the shipment date, Yuanxiang explains that it reported the date on which it shipped the goods from its factory in response to the Department's Section C questionnaire ("report the date of shipment from the factory or distribution warehouse to the customer"), whereas the date in the bill of lading and entry summary reflect the date on which the goods were shipped from the port of exit. Yuanxiang states it was not able to find the per unit weight on any of its sales documents, but it divided the gross weight by the net weight of the goods on the packing list to get the unit weight, which it then rounded up. Finally, Yuanxiang contends it reported the value of its sale in its sales database, and thus argues there is no discrepancy regarding the entered value.

Finally, Yuanxiang argues that the Department should change its surrogate value from "adhesive packing tape" to "non-adhesive plastic strip." Yuanxiang maintains that it misreported its packing materials because the Chinese characters for "tape" and "plastic strip" are the same terms as those used for "plastic tape," and that the erroneous reference was due to translation error.

Department's Position:

The Department agrees that there are a number of inconsistencies in the information that Yuanxiang reported. However, based on the totality of the circumstances, the Department finds that these inconsistencies are not a sufficient basis to find that Yuanxiang's sale was not bona fide. See Yuanxiang Final Bona Fides Memorandum. Moreover, although some of these inconsistencies raise concerns, they are not, in total, sufficient evidence that Yuanxiang failed to cooperate to the best of its ability in this NSR. Thus, adverse facts available are not warranted for these final results. See section 776(b) of the Act.

In particular, despite the belated disclosure of Yuanxiang's affiliation with another company, the Department finds that there is insufficient information on the record to support a finding that the affiliated company produced or sold fresh garlic. In addition, although Yuanxiang's request for an advance deposit for its sale to the United States was atypical from its normal course of business, the Department finds that such a payment term is indicative of an arm's length transaction and does not support a finding that the sale was not bona fide. Moreover, the record of this review shows that the U.S. customer fully reimbursed Yuanxiang for the movement expenses that Yuanxiang prepaid on behalf of its customer. Although, this arrangement effectively changed the negotiated sales terms, the "new" terms of sale are commonly accepted and widely used. Thus, the fact that the terms of its U.S. sales changed does not support a finding that this sale was not bona fide.

The Department also has concerns about the inability to verify Yuanxiang's reported usage of a single fax machine and Yuanxiang's use of incorrect contact information in conducting its operations, as well as the inconsistent information provided by Yuanxiang regarding the potential rental of its garlic processing facility to other companies. Moreover, the Department also has concerns regarding Yuanxiang's belated disclosure of certain sales negotiation documents with its U.S. customer. However, such minor inconsistencies do not dispositively undermine the overall bona fides of the sale to the United States. See Yuanxiang Final Bona Fides Memorandum.

Finally, based on information obtained during verification and in parties' briefs, the Department has reevaluated and recalculated certain factors reported by Yuanxiang, including water, plastic binding/strip (previously reported as "plastic tape"), and flat filament (previously reported as "staples"), for purposes of these final results. Specifically, the Department is: 1) not including water as a factor in the calculation of Yuanxiang's margin; 2) using a surrogate value for plastic strip, HTS 3920.20.20, in place of the surrogate value for adhesive tape, which was used in the Preliminary Results; 3) using a surrogate value for flat filament, HTS 7217.30.00, in place of the surrogate value for staples, which was used in the Preliminary Results; and 4) using a revised distance to calculate the inland freight of cartons used to process the subject merchandise for these final results. See Final Surrogate Values Memorandum and Yuanxiang Final Calculation Memorandum.

Comment 5: Surrogate Value of Single-Clove Garlic

Petitioners contend that, in the Preliminary Results, the Department found that the single-clove garlic sold by Hejia was significantly different from the fresh multi-clove garlic on which the Department relies to value garlic bulb inputs for other respondents in this NSR. Therefore, for the Preliminary Results, the Department derived a normal value (NV) from a 2009 free on board sales offer from an Indian supplier Sundaram Overseas Operations (SOO) (posted on a third party website) for Himalayan pearl garlic, a whole garlic product that is physically similar to the product sold by Hejia. See Memorandum from Nicholas Czajkowski, Case Analyst, Office 6 Re: New Shipper Review of Fresh Garlic from the People's Republic of China: Analysis for the Preliminary Results of Jinxiang Hejia Co., Ltd. (Hejia) (April 27, 2009) (Hejia Preliminary Calculation Memorandum). Based on the information the Department obtained regarding SOO's sale of the similar product, the Department made certain assumptions regarding the number of cloves per kilogram, the price of the single-clove garlic, as well as the costs and profit for processing this type of garlic. See Hejia Preliminary Calculation Memorandum.

Petitioners argue that if the Department continues to find Hejia's sale a bona fide transaction, then the Department should revise the number of cloves that comprise a kilogram based on information the Department found at verification. See Hejia Verification Report at 13.

Finally, Petitioners argue that if the Department continues to find Hejia's sale to be bona fide, then the Department should add the profit amount from the financial statement of surrogate producer Tata Tea Ltd. (Tata Tea) since this company had the highest profit ratio of all the surrogate companies used by the Department in the preliminary calculations. See Memorandum from Nicholas Czajkowski and Toni Page, Case Analysts, Office 6, Re: Preliminary Results of the 2007-2008 New Shipper Review of Fresh Garlic from the People's Republic of China: Surrogate Values at Exhibit 2 (Preliminary Surrogate Values Memorandum). Petitioners reason that since Hejia states that the single-clove garlic it sells is a "very profitable" crop, then the Department should use a higher profit ratio to calculate the NV of Hejia's sale. See Hejia Verification Report at 8.

Hejia contends that there is no information on the record indicating that the single-clove garlic sold by SOO is of the same size or weight as the single-clove garlic sold by Hejia and thus the Department should not use the price information of SOO for determining the surrogate value of single-clove garlic. The company notes that at verification it stated that single-clove garlic comes in many different sizes. See Hejia Verification Report at 13. Hejia contends that the SOO sale used by the Department did not specify the unit of measure and therefore is not a complete sales offer. Rather, Hejia concludes that the Department should use the sales offers from other Indian sellers of single-clove garlic it placed on the record for surrogate valuation purposes. See New Shipper Review of Fresh Garlic from the People's Republic of China, Submission of Surrogate Value for Use in Final Results (May 19, 2009) (Hejia's Surrogate Values Submission). Hejia argues in its brief and rebuttal brief that the price offers in its May 19, 2009 submission are more reliable since the offers from the different Indian sellers it found include the unit of measure and the terms of sale.

Petitioners counter in their rebuttal brief that the Department should continue to rely on the SOO quote to calculate Hejia's rate for the final results if the company is still found to be bona fide.

Petitioners note that the prices provided by Hejia in its surrogate value submission and the price paid by its U.S. customer are vastly different. Petitioners conclude that this vast differential should preclude the Department from relying on the surrogate values information provided by Hejia.

Department's Position:

For the purposes of these final results, we are calculating a surrogate value for single clove garlic using a simple average of an FOB sales offer from Sundaram Overseas Operations (SOO) and a simple average of the FOB sales offer information submitted by Hejia subsequent to the Preliminary Results. The Department finds that an average of this FOB sales information from these two sources reflects the best information available on the record in accordance with section 773(c)(1) of the Act.

When selecting possible surrogate values for use in an NME proceeding, the Department's preference is to use, where possible, a publicly available value which is: (1) an average non-export value; (2) representative of a range of prices within the POI/POR or most contemporaneous with the POI/POR; (3) product-specific; and (4) duty and tax-exclusive.¹³ Both potential surrogate values are based on sales offers for Himalayan pearl garlic from India that is physically similar to the single-clove garlic sold by Hejia.

We note that each of the potential surrogate values on the record has flaws. Specifically, each potential surrogate value is based on export sales offers from outside the POR. In addition, the SOO sales offer does not clearly specify a unit of measure whereas the data submitted by Hejia does. The sales offer from SOO was obtained by the Department from the PeruTradeNet.com website prior to the Preliminary Results. See Exhibit IV of Hejia Preliminary Calculation Memorandum. Moreover, SOO's sales offer was widely available on the internet prior to the Preliminary Results. At least two of the four sales offers submitted by Hejia after the publication of the Preliminary Results were identified as "new arrival" offers by the Alibaba third party website which also lists SOO's. See Attachment 1 of Memorandum from Nicholas Czajkowski, Case Analyst, Office 6 Re: New Shipper Review of Fresh Garlic from the People's Republic of China: Analysis for the Final Results of Jinxiang Hejia Co., Ltd. (Hejia) (September 24, 2009) (Hejia Final Calculation Memorandum). This is a clear indication that the sales offers were, when Hejia submitted them after the Preliminary Results, recently created on the Alibaba website. SOO's sales offer which was also available on the same Alibaba website is not identified as a "new arrival." See Attachment 1 of Hejia Final Calculation Memorandum.

The probative value of these "new arrival" sales offers does not outweigh that of the SOO offer which was available on April 23, 2009 and also appears to have been available on the Alibaba website prior to the Preliminary Results. We note that the Department has been unable to obtain any additional or more reliable surrogate value information. Accordingly, we find that both the SOO and the sales offer information placed on the record by Hejia are equally usable and equally

¹³ See Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 from the People's Republic of China, 69 FR 67304 (November 17, 2004), and accompanying Issues and Decision Memorandum at Comment 3.

represent the best available information on the record. Therefore, we are using a simple average of the sales offer from SOO and a simple average of the sales offer information submitted by Hejia to calculate a surrogate value for Hejia. The Department believes that, in the case of Himalayan pearl garlic, an average of sales offer information from these two sources better reflects a broader, more reliable price experience than would simply relying solely on one or the other option.

The Department will make one change to its calculation of the portion of the surrogate value based on SOO's sales offer. In the Preliminary Results, the Department assumed that SOO did not process the single clove garlic at issue. Specifically, further analysis of information on the record indicates that SOO is an ISO certified manufacturer and exporter of garlic products. See Attachment IV of the Hejia Preliminary Calculation Memorandum. SOO's role is comparable to that of Hejia which acted as the processor and exporter of its garlic. Thus, since SOO performs similar processing and selling functions as Hejia, for the purposes of these final results, we have not adjusted SOO's price by removing the profit, SG&A, and overhead expenses associated with the activities of a trading company. The Department will continue to deflate the SOO sales offer to be contemporaneous to the POR.

As noted above, we will also use an average of the sales offer information submitted by Hejia to calculate a surrogate value for single clove garlic in these final results. Absent affirmative information on the record that these companies act as anything more than trading companies and did not further process, we have adjusted the average by removing the profit, SG&A, and overhead expenses associated with the activities of an Indian trading company. As such, the resulting NV will only reflect the costs and profit associated with processing whole garlic. The Department will also deflate the average of the sales offer information submitted by Hejia to be contemporaneous to the POR.

Finally, we find that there is insufficient basis to revise the number of cloves that comprise a kilogram of single clove garlic or add an additional profit amount from the financial statement of surrogate producer Tata Tea while calculating the NV of Hejia's sale. Although the Department verified that 51 bulbs of Hejia's single-clove garlic comprise a kilogram, we continue to make the assumption that 28 bulbs comprise a kilogram of SOO's single clove garlic. Given the lack of specific units of measure in SOO's sales offer, we believe that a conservative approach with respect to bulb count remains appropriate for these final results. Moreover, we believe that the NV, calculated as described above, adequately reflects the profit associated with processing and exporting whole garlic, therefore we are not adding an additional amount for profit as requested by Petitioners.

Comment 6: Calculation of Yield Loss Factor

Petitioners argue that if a final margin is calculated for Chenglong, the Department should adjust the reported yield loss factor to reflect only production of "first" grade peeled garlic. Petitioners contend that Chenglong inappropriately included "second" and "third" grade production in its garlic yield factor calculations, thereby understating the consumption of raw garlic in the production of peeled garlic.

Chenglong argues that it reported the quantity of production in accordance with the requirements described in the Departments' questionnaires. Chenglong argues that the information was timely and accurately reported to the Department, and was verified by the Department. Chenglong argues that during the verification, "the Department examined the worksheet, which reconciled the quantity and value of the subject merchandise sales reported to the Department with the quantity and value of invoices booked in Chenglong's accounts. The Department tied the total of subject and non-subject merchandise sales to the appropriate sub-ledgers and core business income general ledger, which tied to the Company's 2008 year-end income statement."¹⁴ As such, Chenglong argues that there is no reason to change the product denominator.

Department's Position:

As discussed above in Comment 2 and the Chenglong Bona Fide Memo – Final Results, the Department has found Chenglong's sale to be not bona fide and thus is not calculating a margin for Chenglong for these final results. Therefore, the arguments regarding calculation of the yield loss factor with respect to Chenglong are moot.

Comment 7: Financial Ratios

Chenglong and Yuanxiang each argue that the Department erred in the Preliminary Results by using the financial statements of two additional Indian processors of tea and/or other agricultural products (i.e., ADF Foods Ltd. (ADF) (2007/2008) and Tata Tea Ltd. (Tata Tea) (2007/2008)) to calculate surrogate financial ratios (i.e., overhead, SG&A, and profit). Both parties urge the Department to continue to rely exclusively on the 2004/2005 financial statements of Limtex to calculate surrogate financial ratios. Both Chenglong and Yuanxiang contend that the Department has previously found that Limtex's production process to be comparable to the production process for fresh garlic. Moreover, Yuanxiang argues that the Department should use only Limtex's financial ratios since its production processing is most comparable to that of whole fresh garlic, the type of subject merchandise most of the respondents in the instant NSRs processed and/or exported during the POR

Chenglong contends that the Department should not use Tata Tea's or ADF's financial statements to calculate surrogate financial ratios in the final results of this review. Chenglong argues that in previous reviews the Department deliberately chose not to use Tata Tea's financial statements to calculate surrogate financial ratios. Specifically, Chenglong notes in that in the 9th administrative review the Department stated:

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

¹⁴ See Chenglong Verification Report at 8.

tea products. 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 seventeen times higher. Furthermore, consistent with Garlic 8th Review at Comment 7, we note that it is our practice to use financial data when available, from the company with comparable production process rather than data based on production and processing of a product that is more highly processed or preserved prior to sale.¹⁵

Additionally, Chenglong claims that the merchandise produced by Tata Tea in the 2007/2008 period is not comparable to either whole or peeled garlic and that Tata Tea's production experience is significantly different from Chenglong's. Chenglong states that Tata Tea produces not only tea but other goods, including coffee and pepper. In particular, Chenglong notes that coffee, the processing of which is more complicated than that of fresh garlic, accounts for 20.5 percent of Tata Tea's sales. Moreover, Chenglong contends that Tata Tea's tea production is more advanced than its own garlic processing, stating that Tata Tea uses more machinery and equipment than it does. Chenglong points out that while plant and machinery accounted for nearly 60 percent of Tata Tea's total fixed assets in 2008,¹⁶ its garlic processing operations are labor-intensive and require little use of machinery.

Chenglong argues that the Department should consider how Tata Tea's business experiences such as company size, business operation scale, financial structure and research and development (R&D) activities compare to its own. Chenglong also holds that Tata Tea's corporate structure, business operation and economic scale are distinctively different than that of Chenglong. Chenglong contends that Tata Tea is the world's second largest manufacturer and distributor of tea, and has subsidiaries, joint ventures, and vast financial resources.¹⁷ This contrasts with Chenglong, which maintains that it has no R&D activity in garlic production or processing.

In addition, Chenglong contends that the Department erred by using Tata Tea's consolidated financial statements which include results from the many Tata Tea subsidiaries and associate companies which do not focus on the tea business.¹⁸ Chenglong argues that, if the Department were to continue to use Tata Tea's financial statements when calculating surrogate financial data, it should use Tata Tea's unconsolidated financial statements. Using data from Tata Tea's unconsolidated financial statements, Chenglong argues, would enable the Department to calculate financial ratios which better reflect those incurred in Tata Tea's normal business operation. Finally, Chenglong contends the Department should revise its calculation of Tata Tea's finished goods inventory and make adjustments to its income to account for exceptional income and investment income.

¹⁵ See Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 70 FR 34082 (June 13, 2005) and accompanying Issues and Decision Memorandum, at Comment 5.

¹⁶ 10,611.33 Rs. in lacs (plant and machinery) divided by 18,075.78 Rs. in lacs (total fixed assets) equals 58.70 percent. See Petitioners' Nov. 26, 2008 Surrogate Value Submission, Exhibit 4, Tata Tea Limited Annual Report.

¹⁷ See Petitioners' Nov. 26, 2008 Surrogate Value Submission, Exhibit 4, Tata Tea Limited Annual Report.

¹⁸ See Petitioners' Nov. 26, 2008 Surrogate Value Submission, Exhibit 4, Tata Tea Limited Annual Report, at 85-121.

Chenglong also maintains that ADF's financial ratios are not appropriate because its production processes are not comparable to that of Chenglong, and therefore ADF's data should not be used in the final results. Chenglong explains that ADF produces mainly Individually Quick Frozen (IQF) and canned foods. Chenglong holds that IQF vegetable processing is different from that of peeled garlic. Chenglong explains that in IQF processing, a "fast quick deep freezer" is used to freeze vegetables. Rather than being frozen, Chenglong maintains that fresh garlic is separated, peeled and packed.

Chenglong states that ADF also produces pickles, pastes, chutney, canned ready-to-eat vegetables, canned vegetables in brine, and frozen foods and spices. Chenglong contends that the processing required to produce any of ADF's products is at a higher level than that required to produce peeled garlic. Chenglong stresses that these products are preserved in solutions, sterilized, chopped, or ground, as compared to peeled garlic which is separated, peeled, and packed.

Moreover, Chenglong contends that the Department make certain revisions to ADF's ratios should it continue to use ADF's financial statements for the final results. Specifically, Chenglong states that the Department should correct the profit calculation to remove the taxes included in ADF's SG&A.¹⁹ Chenglong also argues that the Department erroneously included other expenses in SG&A rather than factory overhead.²⁰

Finally, should the Department decide to use an average of multiple Indian processors' financial data, Chenglong argues that LT Overseas Ltd.'s (LT) 2007/2008 financial statements and REI Agro Ltd.'s (REI) 2007/2008 financial statements are more appropriate as the basis for providing for calculating surrogate financial ratios than Tata Tea or ADF. Chenglong states that both LT and REI's financial statements are contemporaneous with the POR of the current review and publicly available from the companies' websites. Chenglong contends that the merchandise produced by both companies is comparable²¹ and that the production experiences of rice processing and peeled garlic processing are similar. Chenglong further contends that the "processing production by the two companies can accommodate increasing ratio of importation of peeled garlic from China into the U.S. market." For these reasons, Chenglong maintains that the Department should use the financial statements of LT, REI, and Limtex to calculate surrogate financial ratios.

Petitioners argue that the Department should not rely on Limtex's financial experience in the final results. Rather, Petitioners contend that the Department's intent to use financial information from a company engaged in operations similar to whole-bulb processing can be fulfilled by using the data of Tata Tea, whose financial statements reflect operations comparable to Limtex insofar as both use similar inputs and operate at similar levels of integration. Similar to Limtex, Petitioners contend that Tata Tea is a non-integrated producer of tea whose "single

¹⁹ See Petitioners' Nov. 26, 2008 Surrogate Value Submission, Exhibit 4, ADF Foods Limited Annual Report.

²⁰ See Petitioners' Nov. 26, 2008 Surrogate Value Submission, Exhibit 4, ADF Foods Limited Annual Report.

²¹ See Chenglong' June 19, 2009 Surrogate Value Submission, Exhibits 4 and 5, LT Overseas Limited Annual Report and REI Agro Limited Annual Report.

largest inputs cost is raw tea.”²² Petitioners argue the data for Limtex and Tata Tea diverge with respect to contemporaneity, which the Department should give significant weight because costs and profits can vary significantly from year to year. Specifically, Petitioners note the Limtex data are from April 2004 to March 2005 while the POR of this proceeding began in November 2007, more than three and a half years later. The Tata Tea data, Petitioners states, which are from April 2007 to March 2008, overlap with five months of the six-month POR.

Moreover, Petitioners argue that Tata Tea’s production is not skewed toward high value-added products. In particular, Petitioners state that Tata Tea’s financial statements indicate that a potentially high value-added product, such as “instant tea,” was a small proportion of Tata Tea’s 2007/2008 production and accounted for less than 2.1 percent of its sales. Petitioners add that even if coffee production were found dissimilar to garlic production, Tata Tea’s financial statements indicate that the company’s main operations involve the production of black tea and its tea revenues represented 78 percent of its total consolidated revenues. Thus, Petitioners contend Tata Tea’s production cannot be characterized as high-value products, nor is there any evidence that its production is significantly different from Limtex’s 2004/2005 production.

Finally, with respect to the use of Tata Tea’s financial statements, Petitioners add that Chenglong did not cite any precedent to support its theory that a surrogate company’s “business experience” (size, profit, and R&D activities) should be considered a criterion in selecting financial statements for use in calculating surrogate financial ratios. Petitioners contend the surrogate should reflect actual production realities in a market-economy situation because the Department cannot rely on operations in a non-market economy. Thus, Petitioners argue, it is meaningless to compare items like the relative R&D expenditures or profit experience between market and non-market entities.

Petitioners note that the Department also used ADF’s data in the Preliminary Results because it found ADF’s production process to be comparable to that of peeled garlic. Petitioners argue that respondents’ contention that ADF’s production process for IQF vegetables differ significantly from respondents’ production of peeled garlic is baseless. Petitioners contend that both production processes require refrigeration, controlled atmosphere storage, peeling machines and retail packaging in plastic jars.

Petitioners agree that the Department should revise its calculation of ADF’s financial ratios. Specifically, Petitioners contend that the Department should: 1) revise its profit calculation; 2) include certain manufacturing, freezing and preservation expenses as overhead; and 3) classify fuel and power expenses as energy expenses. However, in accordance with Department practice, Petitioners contend that rates and taxes should continue to be included as part of SG&A expenses associated with ADF’s operations.

Regarding Chenglong’s arguments supporting the use of the 2007/2008 financial statements of LT and REI, Petitioners note that Chenglong did not cite any precedent for arguing that rice production should be considered comparable to fresh garlic production. However, if the Department finds rice production sufficiently comparable to fresh garlic production, Petitioners

²² See Petitioners’ Nov. 26, 2008 Surrogate Value Submission, Exhibit 4, Tata Tea Limited Annual Report.

argue the only appropriate application for a rice producer's financial data would be as a replacement for the "obsolete" experience of Limtex.

Department's Position:

For the purposes of these final results, we are calculating financial ratios using an average of the financial data of ADF, Tata Tea, LT, and REI. The Department believes that an average of the annual reports from these four Indian processors provides financial ratios that better reflect the broader experience of the PRC garlic industry. The Department continues to use Tata Tea's and ADF's financial data since their production processes are more comparable to that of peeled garlic, which comprises an increasing share of all PRC garlic imports. See 13th Administrative and New Shipper Reviews at Comment 3. Specifically, we continue to find that ADF's production process is comparable to that of peeled garlic since it is a processor of fruits, vegetables, and spices. See Preliminary Surrogate Values Memorandum at 7. Both production processes require refrigeration or freezing, controlled atmosphere storage, peeling machines and packaging. We note that the Department normally uses three criteria when choosing surrogate financial ratios: contemporaneity; public availability; and comparable production processes. The Department does not examine the surrogate company's "business experience" (i.e., size, profit, etc.). Rather, the Department examines the surrogate company's production experience when selecting financial statements on which to base a surrogate financial ratio. In this case, both ADF and Tata Tea have similar production processes to our respondents in that they are all non-integrated processors.

Moreover, the Department is replacing Limtex's financial data with financial data of LT and REI, non-integrated processors of rice. Our analysis of information on the record leads us to determine that rice production in India is comparable to that of less-processed whole garlic bulbs. Specifically, processing rice involves removing the husk and other debris from the rice, milling the bran off the endosperm which leaves white rice, and removing any broken kernels and other defects. Similarly, garlic processing involves removing broken skin and other debris as well as washing and peeling the garlic. Thus, we find rice processing to be comparable to that of whole garlic. We are no longer including Limitex because the financial data from LT and REI, producers of merchandise comparable to garlic, are more contemporaneous to the POR.

Finally, the Department will make certain adjustments to calculated surrogate financial ratio for these final results. See Final Surrogate Values Memorandum. The Department believes that the resulting financial ratios from the average of ADF's, Tata Tea's, LT's, and REI's financial data provide the best surrogate for the garlic industry in the PRC as a whole, based on the information on the record of this review. See Final Surrogate Values Memorandum.

Comment 8: Whether to Calculate Separate Financial Ratios for Whole Garlic and Peeled Garlic

As an alternative to its argument to use solely Limtex financial ratios (see Comment 7 above), Yuanxiang argues the Department should use two different surrogate financial ratios: (i) Limtex financial ratios for respondents that exported whole garlic bulb, and (ii) an average of the financial ratios of ADF and Tata Tea for respondents that exported peeled garlic. Based on the

difference between the two sets of ratios, Yuanxiang states the Department can calculate a percentage ratio for the respondents in case they export a different type of fresh garlic in the future. Yuanxiang adds that CBP would be able to collect cash deposits with this ratio. Yuanxiang further argues that CBP can implement such a method because, to the company's knowledge, CBP has already started collecting cash deposits at different rates for whole garlic bulb and peeled garlic at the time of entry.

Petitioners argue that Yuanxiang does not cite supporting precedent for the proposed methodology of using different financial ratios for different products, nor does it explain the basis for asserting that "CBP has started imposing different cash deposit amounts for peeled garlic and garlic bulbs at the time of entry." See Yuanxiang Case Brief at 2. To their knowledge, Petitioners counter that is not the case. In addition, Petitioners contend that most fresh garlic producers can easily switch between whole and peeled garlic production. Thus, Petitioners argue, applying product-specific rates would be inappropriate and contrary to Department precedent.

Department's Position:

Section 773(c)(1) of the Act and 19 CFR 351.408(c)(4) direct the Department to value the factory overhead, SG&A, and profit incurred by respondents in the production and sales of subject merchandise by deriving financial ratios²³ from non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country. Moreover, the Department has a long-standing practice of calculating a single set of financial ratios for all types of subject merchandise and not just for the type(s) produced and/or sold by a particular respondent. See, e.g., Third Administrative Review of Frozen Warmwater Shrimp from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 46565, 46568 (September 10, 2009), which covers "head-on or head-off, shell-on or peeled warm water shrimp." The subject merchandise at issue in this proceeding includes both whole and peeled garlic. As such, for these final results, the Department has continued to calculate a single set of financial ratios applicable to the production and sales of all subject merchandise. See Comment 7, above, see also Final Surrogate Values Memorandum. Finally, the Department has no basis to evaluate Yuanxiang's claim that CBP has started collecting different cash deposit duties for peeled and whole garlic. The Department has not instructed CBP to collect different cash deposit rates for these two types of subject merchandise. To the contrary, the Department continues to calculate a single company-specific antidumping duty margin applicable to all entries of subject merchandise in a particular period.

²³ The financial surrogate ratios are factory overhead, SG&A, and profit.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions, and adjusting the margin calculation programs accordingly. If accepted, we will publish the final results of this review and the final weighted-average dumping margins in the Federal Register.

AGREE _____ DISAGREE _____

Ronald Lorentzen
Acting Assistant Secretary
for Import Administration