

*Jinan Yipin Corporation, Ltd. and  
Shandong Heze International Trade and Developing Company v. United States*  
Consol. Court No. 04-00240  
Slip Op. 07-168 (CIT November 15, 2007)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

**A. Summary**

The Department of Commerce (“the Department”) has prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (“CIT” or the “Court”) in *Jinan Yipin Corporation, Ltd. and Shandong Heze International Trade and Developing Company v. United States*, 526 F. Supp. 2d 1347 (CIT November 15, 2007) (“*Jinan Yipin*”). The Court’s opinion and remand order have been issued with regard to *Fresh Garlic From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews*, 69 FR 33626 (June 16, 2004) (“*Final Results*”), and accompanying Issues and Decision Memorandum (“Issues and Decision Memorandum”).

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

## **B. Analysis**

### **1. Treatment of Sales Between Jinan Yipin and Houston Seafood Negotiated After March 29, 2002**

From September 29 through October 2, 2003, the Department conducted a constructed export price verification of American Yipin, a United States affiliate of the respondent, Jinan Yipin, in the administrative review of the antidumping duty order on fresh garlic from the People's Republic of China ("PRC") for the period November 1, 2001, through October 31, 2002. During this verification, the Department learned for the first time that Edward Lee had been a co-owner of Houston Seafood, a company through which Jinan Yipin made sales of subject merchandise. The Department also learned at verification that Edward Lee's brother, Henry Lee, was employed as a sales manager for American Yipin during the period of review ("POR"). *See Final Results at Comment 19.* Based on the new information discovered at verification, the Department found that there was a potential affiliation pursuant to section 771(33)(A) of the Tariff Act of 1930, as amended ("the Act"), between American Yipin and Houston Seafood. After verification, the Department issued a questionnaire to determine the timing of any affiliation between American Yipin and Houston Seafood and to what extent it existed during the POR.

The Department determined in *Fresh Garlic from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and New Shipper Reviews*, 68 FR 68868, 68871 (December 10, 2003) ("*Preliminary Results*"), that Edward Lee, Henry Lee, Houston Seafood, Jinan Yipin, American Yipin, and the reported ultimate customer were all possibly affiliated during at least part of the POR. The Department also found that Jinan Yipin had not acted to the best of its ability in responding to the Department's request for information regarding affiliation during the administrative review. Therefore, the Department treated all sales

of Jinan Yipin's merchandise to Houston Seafood through American Yipin as sales between affiliated companies that had been reported as unaffiliated transactions. This was unchanged in the *Final Results*. Thus, the Department applied a facts otherwise available rate with an adverse inference of 367.67 percent to sales made from American Yipin to Houston Seafood during the POR. *Preliminary Results* at 68871, unchanged in the *Final Results*.

The Court determined in its opinion that record evidence demonstrates that American Yipin was not affiliated with Houston Seafood after March 29, 2002, the date when Edward Lee divested his shares of Houston Seafood. *Jinan Yipin*, 526 F. Supp. 2d at 1361. Therefore, the Court instructed the Department to treat all sales made between American Yipin and Houston Seafood after March 29, 2002, as unaffiliated transactions. As directed by the Court, we have treated all such sales as unaffiliated transactions and relied on Jinan Yipin's reported information to calculate the transaction-specific margins for those sales. Therefore, we have revised Jinan Yipin's weighted-average margin from the *Final Results* to incorporate this change in the redetermination pursuant to court order.

## **2. Beginning Date of Employment of Henry Lee with American Yipin**

In the *Final Results* the Department applied an adverse facts available rate to all POR sales made between American Yipin and Houston Seafood. Although record evidence showed that Henry Lee was the sales manager for American Yipin during some part of the POR (*i.e.*, November 1, 2001, through October 31, 2002), it did not definitively demonstrate that he was the sales manager between November 1, 2001, and October 31, 2002. While record evidence showed Henry Lee received a salary payment in July 2002, record evidence also showed that American Yipin did not pay its employees on a regular basis and thus it was unclear for what period of time

the July 2002 payment constituted remuneration. *See* Jinan Yipin Verification Report dated November 24, 2003, at Exhibit 6A.

In its opinion, the Court stated that the Department “was justified in its reluctance to find, based on the July 31, 2002 payroll record, that Henry Lee began his employment with American Yipin no sooner than July 2002.” *Jinan Yipin*, 526 F. Supp. 2d at 1362. However, the Court emphasized that the issue of when Henry Lee’s employment with American Yipin began is critical to determining whether the Department acted according to law in finding that the sales between American Yipin and Houston Seafood during the period November 1, 2001, through March 29, 2002, were affiliated transactions. *See id.* Therefore, the Court allowed the Department on remand to reopen the record for the purpose of obtaining evidence to determine the start date of Henry Lee’s employment with American Yipin. *See id.*

The Department opened the record to determine Henry Lee’s start date with American Yipin in a supplemental questionnaire. *See* Department’s December 31, 2007, supplemental remand questionnaire to Jinan Yipin. On January 14, 2008, American Yipin submitted its response to our questionnaire, wherein it provided documentation and affidavits which demonstrate that Henry Lee did not begin his employment with American Yipin until July 1, 2002. *See* Jinan Yipin’s Remand Supplemental dated January 14, 2008. This date falls after the date on which Edward Lee sold his shares of Houston Seafood, *i.e.*, March 29, 2002. Therefore, we find that American Yipin and Houston Seafood were not affiliated during any portion of the POR.

Based on the new record evidence submitted by Jinan Yipin, we find that it is appropriate to treat all sales made between American Yipin and Houston Seafood during the POR as unaffiliated transactions. Therefore, in recalculating Jinan Yipin’s weighted-average margin for the POR, we have used all POR sales information reported by Jinan Yipin, rather than applying

facts otherwise available with an adverse inference as we did in the *Final Results* to transactions between Jinan Yipin and Houston Seafood. We have revised Jinan Yipin's weighted-average margin from the *Final Results* to incorporate this change in the redetermination pursuant to court order.

**3. Reconsideration of the Facts Otherwise Available Rate with an Adverse Inference**

For the *Final Results*, the Department applied an adverse facts available rate of 367.67 percent to all of American Yipin's sales of Jinan Yipin's merchandise to Houston Seafood during the POR because it was the highest calculated rate in any segment of the proceeding. *See Preliminary Results* at 68871, unchanged in the *Final Results*. In its opinion, the Court instructed the Department to reconsider the rate it applied to Jinan Yipin's sales and demonstrate that the use of this rate is appropriate and not punitive, if record evidence showed an affiliation between American Yipin and Houston Seafood for a portion of the POR. *See Jinan Yipin*, 526 F. Supp. 2d at 1362.

As the Department is no longer applying an adverse facts available rate to these transactions (*see* Issues 1 and 2, above), this issue is no longer relevant to the proceeding.

**4. Reconsideration of the Calculation of Jinan Yipin's Indirect Selling Expenses**

During the verification of American Yipin in the current proceeding, the Department found that certain employees of American Yipin were shared between American Yipin and Bayou Dock, a company located near American Yipin that does not sell the subject merchandise. *See Jinan Yipin Verification Report* dated November 24, 2003 at 2 and 4. The Department also found at verification that while Bayou Dock consistently paid salaries to these shared employees between September and November 2002, American Yipin did not record any salary expenses for services rendered by these employees during this period relating to the sale of subject merchandise in the

indirect selling expenses it reported to the Department. *See id.* at Exhibit 6A. Therefore, as adverse facts available, the Department made an upward adjustment in Jinan Yipin's reported indirect selling expenses factor because the Department found that Jinan Yipin did not act to the best of its ability in reporting the required indirect selling expenses information. *See Preliminary Results* at 68872, unchanged in the *Final Results*. The Department adjusted Jinan Yipin's reported indirect selling expenses by adding to Jinan Yipin's reported indirect selling expenses the annual salary and benefit expenses incurred by Bayou Dock to account for the three months of unreported salary expenses for the shared employees.

In its opinion, the Court stated that “[s]ubstantial record evidence does support . . . a finding, or at least a reasonable inference, that not all salary expenses of American Yipin's selling activities were included in Jinan Yipin's reported data.” *Jinan Yipin*, 526 F. Supp. 2d at 1365. However, the Court stated that on remand the Department must reconsider its determination to add Bayou Dock's annual salary and benefit expense amounts to Jinan Yipin's reported indirect selling expense and demonstrate why adding all twelve months of Bayou Dock's salary and benefit expenses to Jinan Yipin's reported indirect selling expenses is a reasonable adjustment for finding three months of missing salary expenses at American Yipin. *See id.* at 1366.

Based on the Court's instruction, we have reviewed the record evidence and recalculated Jinan Yipin's indirect selling expenses. The data available on the record of this review are Bayou Dock's annual expenses, including the expenses for salaries and benefits. *See* Bayou Dock's Income Statement in Exhibit 1 of Jinan Yipin's 3<sup>rd</sup> Supplemental Response, dated November 12, 2003. The Department is not including expenses pertaining to shared office space, office equipment, or overhead expenses. In order to calculate an expense amount for salaries and benefits limited to the three-month period identified above, we have allocated the annual expenses

for salaries and benefits over the year by dividing by 12 to arrive at an estimated monthly expense. Next, we multiplied the estimated monthly expense by three to derive a reasonable estimation of Bayou Dock's salary and benefit expenses for a three-month period. We have added this estimated amount to Jinan Yipin's reported indirect selling expenses to account for the unreported salary expenses for the shared employees.

This estimated portion of Bayou Dock's salary and benefit expenses continues to represent adverse facts available because it includes the full salaries of the shared employees which were incurred while performing work for both American Yipin and Bayou Dock. Because Jinan Yipin did not act to the best of its ability to include in its indirect selling expenses all salaries incurred by American Yipin during its startup period, as an adverse inference, we are applying the equivalent of three full months of all employees' salaries to American Yipin's indirect selling expenses. We have revised Jinan Yipin's weighted-average margin from the *Final Results* to incorporate this change in the redetermination pursuant to court order.

## **5. Valuation of Garlic Seed**

In the *Final Results*, the Department valued the garlic seed used by the respondents with the Agrifound Parvati and the Yamuna Safed-3 varieties from the National Horticultural Research and Development Foundation ("NHRDF") data because the bulb diameter and number of cloves per bulb match the seed used by the respondents in these key characteristics. *See* Market Research Report at 14; *see also* Jinan Yipin Verification Report dated March 10, 2004, at 6 and Shandong Heze International Trade and Developing Company's ("Shandong Heze") Verification Report dated January 5, 2004, at 12. The Department declined to use Indian import data to value garlic seed because they were not as product specific as the pricing information for the two varieties within the NHRDF data. The Court in its opinion has directed the Department to

reconsider and redetermine its valuation of garlic seed as a factor of production and to base its analysis of this issue on findings of fact that are supported by substantial record evidence. *See Jinan Yipin*, 526 F. Supp. 2d at 1372. The Court specifically stated that due to the Department's failure to analyze the record data showing that the majority of the Indian imports of garlic are of Chinese origin, the Department's selection of the NHRDF data as being more product specific than the Indian import data does not rest on findings supported by substantial record evidence or adequate reasoning. *See id.* Additionally, the Court stated that the discrepancy between the prices in the Market Research Report (15-20 rupees per kilogram) and the NHRDF prices (50 rupees per kilogram) is further evidence that the NHRDF value is unreasonable. *See id.* Therefore, based on the Court's direction, we have reconsidered our valuation of garlic seed for this administrative review.

There are three values for garlic on the record of this review: 1) Indian Import Statistics data from the *Monthly Statistics of the Foreign Trade of India* ("MSFTI") as reported by the World Trade Atlas ("WTA") for Harmonized Tariff Schedule ("HTS") category 0703.20.00 "Garlic Fresh or Chilled"; 2) prices for Indian varieties of garlic as set forth in several "News Letters" of NHRDF; and 3) values included in a Market Research Report on Fresh Whole Garlic in India. *See Jinan Yipin's* June 25, 2003, surrogate value submission at Exhibit 3 and Petitioner's June 30, 2003, surrogate value submission at Exhibit 2 and Exhibit 7, respectively. In reconsidering the surrogate values on the record for garlic seed, section 773(c)(1) of the Act instructs the Department to use "the best available information" from the appropriate market-economy country. The Department has a well-established practice for determining the reliability and appropriateness of surrogate values under consideration. With respect to surrogate value selection, "it is the Department's stated practice to use investigation or review period-wide price averages, prices

specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data.” See Non-Market Economy (“NME”) Surrogate Selection Policy Bulletin <<http://ia.ita.doc.gov/policy/index.html>>, at page 4 of the website version.

Of the three sources of surrogate value information for garlic seed on the record, both the NHRDF and the MSFTI data are period-wide price averages, prices that are net of taxes and import duties, contemporaneous, and publicly available. The Market Research Report submitted by Petitioners at Exhibit 7 of their June 30, 2003, response is not publicly available and, while containing summaries of import, export, and domestic pricing data from India, does not contain the source data for these summaries. As a consequence, the Department is unable to determine how the data were accumulated. Because the Market Research Report is not publicly available and the source of the summary data was not provided on the record, these values do not meet the Department’s criteria to be selected as a surrogate value for garlic seed. See, e.g., *Chlorinated Isocyanurates from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 FR 159 (January 2, 2008) (“*Chlorinated Isos*”), and accompanying Issues and Decision Memorandum at Comment 9 (where the Department declined to use data submitted by the respondent because they did not include the source documents).

The remaining criterion for selecting between the NHRDF and the Indian import data is product specificity. As the Court states and the Market Research Report shows, 94 percent of the Indian import data is comprised of Chinese imports.<sup>1</sup> See Attachment 1. However, the

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<sup>1</sup> The Court cites the Market Research Report’s statement that 95 percent of the Indian Import Statistics is comprised of Chinese garlic; that figure, however includes garlic from Hong Kong. See *Jinan Yipin*, 526 F. Supp. 2d at 1371; see also Market Research Report at 26-27.

Department has a practice of excluding imports from non-market economy (“NME”) countries, including the PRC, from our surrogate value calculations. *See, e.g., Natural Bristle Paint Brushed and Brush Heads from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 65 FR 45753 (July 25, 2000), and accompanying Issues and Decision Memorandum at Issue 1A, Comment 1. Imports from NME countries are excluded for the same reason that we do not rely on an NME producer’s costs to calculate normal value in an antidumping duty calculation. Specifically, the presence of government control on various aspects of NMEs renders production costs, prices, and price comparisons unreliable and invalid. Therefore, although the Indian import data originally included garlic seed that is, perhaps, identical to the Chinese garlic seed being valued, the Chinese garlic values within the Indian import data are necessarily eliminated from the value under consideration.

There is no information on the record which speaks to the quality, size, or number of cloves in garlic from the remaining countries in the MSFTI data, *i.e.*, Canada, Hong Kong, Malaysia, Myanmar, Pakistan, Switzerland, and Taiwan. The Market Research Report states that “Imports from Hong Kong SAR [are] (*believed* to be essentially garlic of Chinese origin),” but does not provide documentation to support this statement. *See* Market Research Report at 27 (emphasis added). Additionally, the report states that it is “*speculated* by the trade that a significant portion of the imports from Malaysia may *possibly* be of garlic of Chinese origin.” *See id.* (emphasis added). The Market Research Report states that this speculation is based on the timing of the growth in imports from these countries being in line with the growth in imports from the PRC. *See id.* Additionally, the Market Research Report states that Hong Kong and Malaysia do not have a traditional garlic exporting industry that exports garlic to India. *See id.* However, because there is no evidence on the record that affirmatively demonstrates that imports included in

the Indian import data from Malaysia and Hong Kong are from the PRC, the Department does not consider the speculative statements in the Market Research Report to be reliable. Therefore, little is known about the garlic that comprises the remaining six percent of usable Indian import data. In contrast, there is detailed information on the record that demonstrates that the NHRDF data are for garlic of similar quality, size, and with the same number of cloves as the garlic seed used by the respondents.

As mentioned above, the Court stated that the discrepancy between the prices in the Market Research Report (15-20 rupees per kilogram) and the NHRDF prices (50 rupees per kilogram) is evidence that the NHRDF value is unreasonable. *See Jinan Yipin*, 526 F. Supp. 2d at 1372. In this remand, we have reviewed the garlic prices in the Market Research Report.<sup>2</sup> There are three types of pricing data in the Market Research Report: import prices, export prices, and domestic garlic prices segmented by grades. Similar to our discussion of the Indian import data above, most of the imports included in the import data in the Market Research Report are from the PRC, and for that reason, the import data in the report are not usable.

With respect to the Indian export data, we have found that India is a country with generally available export subsidies and it is the Department's longstanding practice to eliminate exports from India from consideration in our surrogate value calculations. *See, e.g., Chlorinated Isos* at Comment 1, and *Folding Metal Tables and Chairs from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 38852, 38858 (July 10, 2006) ("*Tables and Chairs*") (unchanged in *Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 FR 71509

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<sup>2</sup> The Court did not cite to a particular set of data, so we have evaluated all of the values included in the Market Research Report.

(December 11, 2006)). Additionally, it is not reasonable to assume that garlic export prices provide a reasonable indicator of the prices incurred by garlic farmers within India because these prices are not for garlic being used domestically within India.

Indian domestic garlic prices are included at page 12 of the Market Research Report. These prices are segmented by grade levels, *i.e.*, Grade A (bulb diameter greater than 40 mm), Grade B (bulb diameter between 30 and 40 mm), and Grade C (bulb diameter less than 30 mm).<sup>3</sup> 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. *See* Attachment 2 for an analysis of these domestic data. For instance, the wholesale average unit value of Grade A garlic is 32 rupees per kilogram, Grade B garlic is 26 rupees per kilogram, and Grade C garlic is 21 rupees per kilogram. *See* Attachment 2.

As mentioned above, the values in the Market Research Report are not appropriate for surrogate value selection because the data are not publicly available and the source data for the values in the report are not included on the record for evaluation. However, even if the domestic garlic values in the Market Research Report were appropriate surrogate values for the respondents' garlic seed, they are not as product specific as the NHRDF data. The closest value in the Market Research Report for the type of garlic used by the respondents is the domestic Grade A garlic with a bulb diameter greater than 40 mm. However, the Market Research Report states that "most Chinese (imported) garlic is large bulbed typically bulb diameter of 50-65mm." *See* Market Research Report at 12, n. 4. The Market Research Report's most product-specific data for

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<sup>3</sup> Prices are in rupees per quintal. (1 Quintal = 100 kilograms). Therefore, to determine a per-kilogram price, we divided the monthly values by 100.

valuing garlic seed are inclusive of garlic that is 10 mm smaller in diameter than the Chinese garlic. All of the other grade categories identified in the Market Research Report vary by 10 mm. Therefore, a difference of 10 mm is significant enough to create a difference in the categorization and pricing of the garlic as identified in the Market Research Report.

Having addressed the apparently contradictory evidence from the Market Research Report cited by the Court (*see Jinan Yipin*, 526 F. Supp. 2d at 1371-72), the Department believes its reliance on NHRDF data is supported by substantial evidence. Specifically, 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 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. Thus, the Department continues to believe that the pricing information of the NHRDF selected varieties represents an appropriate surrogate value for the type of high-quality garlic produced in the PRC. Therefore, because the NHRDF data appear to most closely resemble the physical characteristics of the garlic seed used by the respondents, are publicly available information and are contemporaneous with the POR, we continue to find that they are the best available information on the record of this review with which to value garlic seed for the PRC producers.

## **6. Valuation of Water**

During the administrative review, the respondents claimed that it is inappropriate for the Department to value the water they used to produce the subject merchandise because water expenses were included in the surrogate company's financial statements and, furthermore, they did not pay for the water they used, but instead paid only for the energy used to pump the water from a freely available water source. *See Final Results* at Comment 2. In the *Final Results*, the

Department valued the water used by the respondents with a surrogate value for water in its calculation of the respondents' normal value because the surrogate company's financial statements did not indicate a line item for water and the Department felt that it was more appropriate to value water rather than an energy input to acquire the water. *See id.* The Court stated in its opinion that the Department did not demonstrate why valuing water with municipal water rates as a direct input, rather than valuing the required energy consumption, or determining that water was a part of selling, general, and administrative expenses, was the most appropriate method to value water based on information on the record. *See Jinan Yipin*, 526 F. Supp. 2d at 1375. Accordingly, the Court ordered the Department to reconsider and redetermine its value for water and explain why the method selected results in the most accurate antidumping margin. *See id.* at 1376. Therefore, based on the Court's direction, we have reconsidered our valuation of water for this administrative review.

The Court additionally questions the Department's inconsistent treatment of water in calculating the normal value for Jinan Yipin in its new shipper review and the subsequent administrative reviews. *See id.* at 1373. Specifically, the Department treated the water used by Jinan Yipin in the new shipper review as overhead, while in the subsequent administrative review, the Department determined that it was more appropriate to value water as a direct material. *See id.* The Department acknowledges the difference between its treatment of Jinan Yipin's water in the new shipper review and the administrative review subject to this remand. The new shipper review for Jinan Yipin was the first review of the antidumping duty order on garlic in which the Department calculated a company-specific antidumping duty margin. At that time, the Department was not fully aware of the impact of Jinan Yipin's water usage on the cost of production attributable to growing the final product. Since the new shipper review of Jinan

Yipin, however, the Department has consistently found that the quantity of water used in the production of garlic and the fact that the water is absorbed into the final product warrants valuing water as a direct material with a surrogate value, rather than treating water as overhead. *See Fresh Garlic from the People's Republic of China; Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review in Part*, 68 FR 4758 (January 30, 2003); *see also Fresh Garlic From the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Reviews*, 69 FR 24123 (May 3, 2004), unchanged in the final results, *Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty New Shipper Review*, 69 FR 58392 (September 30, 2004), and accompanying Issues and Decision Memorandum at Comment 1, *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 3.

The Department continues to treat water as a material input in the production of garlic, in accordance with section 773(c)(3) of the Act. Where water is used only for standard workplace chores such as cleaning the floors or machinery, for plumbing purposes, for drinking water for employees, *etc.*, water is properly considered by the Department as factory overhead incurred by most factories. *See Notice of Final Determination of Sales at Less Than Fair Value: Bicycles from the People's Republic of China*, 61 FR 19026 (April 30, 1996), and accompanying Issues and Decision Memorandum at Comment 16. However, when water is used for more than incidental workplace activities, and is a significant input into the product itself, the Department will usually treat water as a raw material and find that the amount of water used in production is too large to be accounted for in the company's factory overhead. *See, e.g., Freshwater Crawfish Tailmeat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative*

*Review*, 66 FR 20634 (April 24, 2001) (“*Crawfish*”), and accompanying Issues and Decision Memorandum at Comment 7 (affirmed by *Pacific Giant, Inc. v. United States*, 223 F. Supp. 2d 1336, 1346 (CIT 2002) (“*Pacific Giant*”) (upholding as reasonable the Department’s decision to value water as a separate factor of production where the Department found that water use was more than incidental, and could not determine whether the cost of water was included in factory overhead)); *see also Glycine from the People’s Republic of China: Final Results of New Shipper Administrative Review*, 66 FR 8383 (January 31, 2001).

In the current case, large quantities of water are used to irrigate the field in order to grow garlic and this water is incorporated into the final product. Moreover, the Department will typically value water separately when water is a direct input into the production or growth of the product as it is in the garlic industry because factory overhead does not typically capture direct inputs. *See Fuyao Glass Industry Group Co. v. United States*, Slip Op. 05-6, 2005 Ct. Intl. Trade LEXIS 29 (CIT Jan. 25, 2005) (“*Fuyao*”).

Furthermore, when an input is physically incorporated into the actual product, it is an essential element of production not typically valued in factory overhead. *See Fuyao*, 2005 Ct. Intl. Trade LEXIS 29 at \*40-41 (“Commerce must consider whether the material is physically incorporated into the final product, since materials that are not physically incorporated into a final product are considered to be ‘indirect’ materials that are valued as part of factory overhead.”). Therefore, frequently the Department will look to whether water is physically incorporated into the product in determining whether to value it separately. Additionally, the Department will consider whether the inputs are reusable and whether their cost was captured in overhead expenses. *See Final Determination of Sales at Less Than Fair Value and Critical Circumstances: Certain Malleable Pipe Fittings From the People’s Republic of China*, 68 FR 61395 (October 28,

2003), and accompanying Issues and Decision Memorandum at Comment 11. In this case, the water is not reusable, nor is there a line item for water in the surrogate financial statements used to calculate the surrogate financial ratios. Therefore, treatment of water as a direct input is warranted.

In selecting a surrogate value for water, we attempt to approximate the price that would be paid for the input in a market-economy country. Jinan Yipin's claim that the Chinese government did not charge it for water does not mean that the Department need not assign a separate value for water. In *Pacific Giant*, the Court held that the Department correctly determined to value water separately where water was used for more than incidental purposes and the Department could not know whether the respondents included water cost in their factory overhead. *See Pacific Giant*, 223 F. Supp. 2d at 1346. The Court also recognized that section 771(c)(3) of the Act "plainly focuses upon the quantity of inputs for factors of production rather than the costs associated with them." *Id.* at 1346. Thus, the fact that Jinan Yipin incurred no cost for the water does not negate the requirement that the Department value water as an input. In approximating the cost for water in a market-economy country, there is no evidence on the record that demonstrates that garlic growers in market-economy countries incur no cost for water, nor that they incur only the cost of the energy to pump their water from a local water source. Additionally, while the Department will value the upstream inputs to value self-produced materials, in this case, water is not being self-produced.<sup>4</sup> The energy used to retrieve the water from a water source is simply a pumping

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<sup>4</sup> *See Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China*, 72 FR 60632 (October 25, 2007), and accompanying Issues and Decision Memorandum at Comment 7; *see also Polyvinyl Alcohol From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 FR 27991 (May 15, 2006), and accompanying Issues and Decision Memorandum at Comment 12 through 14.

cost. The cost of water, while including a pumping cost, also necessarily includes the cost for the water being used. In *Pacific Giant*, the CIT upheld the Department's position to focus on the quantity of inputs used by the PRC producers in valuing their factors of production, rather than on the costs associated with these factors in the PRC. See *Pacific Giant*, 223 F. Supp. 2d at 1346. Therefore, we find that it is appropriate to disregard the amount of energy that Jinan Yipin reported to pump the water from a water source and, instead, value the quantity of water used in the production of subject merchandise.

In reviewing the financial statements used to calculate the surrogate financial ratios, we have found that water is not included as an expense on Parry Agro's financial statements. Schedule 10 on page 28 of Parry Agro's financial statements lists the expenses included in its financial statements. See Jinan Yipin's June 25, 2003, surrogate value submission at Exhibit 20. The raw materials category includes only green leaf tea. See *id.* at Exhibit 30, p. 32, (c)(I) Details of Purchases, Raw Materials, Stores, Spare Parts and Components Consumed. The stores and spare parts consumed include two categories, indigenous and imported. See *id.* at Exhibit 30, p. 32, section (c)(ii). Because the water most likely to be used in the production of tea is not readily classifiable as indigenous or imported, it is reasonable to determine that water is not included in this expense category either. The rest of the categories included in Schedule 10 are not categories that would include a water expense. See *id.* at Exhibit 30, p.28. There is no record evidence that would demonstrate that the cultivation of tea in India requires irrigation; however, it is clear that the surrogate financial statements used to calculate the financial ratios do not include an expense for water. Therefore, double counting does not occur by valuing water as a direct material.

In reviewing the record for possible values for water, we found that municipal water rates are the only value for water on the record of this review. We find that valuing water with the

municipal water rates is the best approximation of the water expense in calculating Jinan Yipin's normal value because it is the only way to account for the water expense used in the production of the subject merchandise. If we were to only value the energy that Jinan Yipin used to pump the water from a water source, we would not be capturing the expense as experienced by a garlic grower in a market-economy country. Therefore, we find it appropriate to value water with the municipal water rates, and not account for Jinan Yipin's energy costs to pump water, as the best method to value water.

## **7. Valuation of Packing Cartons**

In the *Final Results*, the Department valued the cartons used by Jinan Yipin to pack the subject merchandise sold in the United States with prices from Indian Import Statistics. The Court found in its remand that “[t]he Indian import data presented in the *World Trade Atlas*, although contemporaneous with the period of review, do not bear a reasonable relationship to the boxes used by Jinan Yipin to pack its garlic.” *Jinan Yipin*, 526 F. Supp. 2d at 1377. The Court in its opinion has directed the Department to reconsider and redetermine its valuation of cartons as a factor of production. *See id.* at 1379. Specifically, the Court stated that the Department did not demonstrate that the surrogate value it used to value cartons in this segment of the proceeding was the “best available information” as required by section 773(c)(1) of the Act. *See Jinan Yipin*, 526 F. Supp. 2d at 1379. The Court further noted that the Indian import data used by the Department to value cartons are more than three times higher than the price quotes on the record. *See id.* In accordance with the Court's order, we have reconsidered the values for cartons on the record of this review.

There are two values for cartons on the record of this segment of the proceeding:

1) Indian Import Statistics data from the MSFTI as reported by the WTA for HTS category 4819.10.01 “Boxes of Corrugated Paper & Paper Board” and 2) four price quotes. In response to the Court’s inquiries as to why the Department excluded imports of cartons from certain countries in calculating the surrogate value for cartons from the MSFTI data (*see Jinan Yipin*, 526 F. Supp. 2d at 1377-78), as explained above for calculating the surrogate value for garlic seed, the Department has a longstanding practice of eliminating imports from NME countries and countries known to have widely available export subsidies, *i.e.*, Indonesia, South Korea, Thailand, and India. *See, e.g., Chlorinated Isos* at Comment 1, and *Tables and Chairs* at 38858. Therefore, in the calculation of the surrogate value for cartons, we have eliminated imports from the PRC and “Unspecified” because there is no indication that imports from NME countries are not included. We have also eliminated imports from Indonesia, South Korea, and Thailand because they are countries known to have widely available export subsidies. Finland has been removed due to a problem with its data which show a small value of imports with no import quantity making the calculation of its country-specific average unit value impossible.

In reconsidering the surrogate values on the record for cartons, section 773(c)(1) of the Act instructs the Department to use the “best available information” from the appropriate market-economy country. The Department has a well-established practice for determining the reliability and appropriateness of surrogate values under consideration. With respect to surrogate value selection, “it is the Department’s stated practice to use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data.” NME Surrogate Selection Policy Bulletin, available at <http://ia.ita.doc.gov/policy/index.html>, at page 4 of the website version. Section 351.408(c)(1) of

the Department's regulations additionally states, "[t]he Secretary normally will use publicly available information to value factors. Further, the Department has reiterated its practice and preference for publicly available information." See *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), and accompanying Issues and Decision Memorandum at Comment 9; *Final Determination of Sales at Less Than Fair Value: Tetrahydrofurfuryl Alcohol from the People's Republic of China*, 69 FR 34130 (June 18, 2004), and accompanying Issues and Decision Memorandum at Comment 6; *Honey from the People's Republic of China: Final Results of First Antidumping Duty Administrative Review*, 69 FR 25060 (May 5, 2004), and accompanying Issues and Decision Memorandum at Comment 3.

The MSFTI data are period-wide prices, net of taxes and import duties, contemporaneous, and publicly available. The four price quotes, however, do not meet several of our surrogate value selection criteria. The price quotes are not contemporaneous with, and are, in fact, dated eight months after, the POR and approximately ten days before Jinan Yipin's surrogate value submission. There is no record evidence that demonstrates that the price quotes were generated in the normal course of business by the party that offered them. 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.

Moreover, there is no record evidence to indicate where they fall in the spectrum of price quotes that might have been offered by these companies. Jinan Yipin did not submit information to the Department regarding the parties that requested the prices, or whether or not an affiliation existed between the requester and the Indian companies. Without 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 representative of prices in the Indian market during the POR. Such information is also of unknowable internal and external validity unless verification is conducted. Therefore, without further information, we cannot determine that the price quotes submitted by Jinan Yipin are publicly available and representative of prices in the Indian market during the POR.

Further, we note that the price quotes 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 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 are obtained from so isolated a time frame as to be subject to temporary market fluctuations. *See, e.g., 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*, 69 FR 42672, 42684 (July 16, 2004), unchanged in *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam*, 69 FR 71005 (December 8, 2004).

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.

Similar to the facts in this review, in *Synthetic Indigo* 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 are publicly available, contemporaneous with the POR, representative of a range of prices throughout the POR, and sufficiently specific to the product.

Jinan Yipin placed trade research data on the record in order to demonstrate that the Indian import data are not reasonably representative of Jinan Yipin's packing cartons. The Court cited this trade research data in remanding the Department's valuation decision. *See Jinan Yipin*, 526 F. Supp. 2d at 1378. However, there are problems with the reliability of the trade research data in demonstrating the unsuitability of imports included in the WTA data used by the Department. It is unclear from the research data what period is covered as the formatting of the data cuts off the last digit of the year for most of the entries.<sup>5</sup> To assume that the period is from June 2002 through May 2003 is problematic because, while the trade research data are supposed to be a subset of the WTA data, the trade research data list double the value of imports from Bahrain during the POR

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<sup>5</sup> The data were submitted in paper form only, so there is no way to reformat the data to ascertain the last digit.

than the total value included in the Indian import data for that same period. Also, almost 60 percent of the value of imports (in the trade research data) within the POR, from June through October, must be disregarded on the basis of being from an NME country or from a country with widely available export subsidies. Overall, the total value of all usable data from the trade research data accounts for less than two percent of the total usable import value in the Indian import data. Thus, it is not significant enough to provide a true representation of the Indian import data.

The Court states that the value from the Indian Import Statistics is three times the value of the price quotes on the record. *See Jinan Yipin*, 526 F. Supp. 2d at 1378. This comparison may seem reasonable on its face, but there are several reasons why comparing the price quotes to the value from the Indian Import Statistics is unreliable. First, the price quotes do not provide a reliable benchmark for comparing the Indian import data on the record. As stated above, no information was provided on the record of this review to help us to substantiate and evaluate the relevance of the price quotes. Second, it cannot be shown from the trade research data that the few specialty boxes included in the HTS category are more or less expensive than the rest of the boxes in the category. The trade research data provide information on entries with various units including numbers, pieces, and sets. Without information that would allow us to convert these line items within the trade research data to the same unit basis, it is impossible to tell what effect the entries are having on the final weighted-average unit value calculated from the MSFTI data. Therefore, record evidence does not provide us with reasonable evidence that the MSFTI value is overstated based on the average-unit values of the few “specialty” boxes included in the HTS category.

In its opinion, the Court expressed concern with the variation in carton values from various countries, stating that “it would be illogical to assume that the country of origin, rather than substantial variations in the types of boxes imported, produced the wide variation in listed values.” *Jinan Yipin*, 526 F. Supp. 2d at 1377. However, the Department respectfully disagrees. Price differences can arise from a multitude of circumstances, such as quality and current market conditions, including supply and demand. As stated above, it is impossible to tell from the trade research data what effect the dissimilar boxes in the HTS category are having on the final weighted-average value, especially in light of the fact that the value of the total usable line items in the trade research data represent less than two percent of the total usable value within the Indian Import Statistics.

Furthermore, the specific values from the United Kingdom, Austria, the Philippines, and Spain cited by the Court represent 2.10 percent, 0.05 percent, 0.01 percent, and 0.49 percent of the weighted-average surrogate value, respectively. The lowest value cited by the Court in this listing is from the PRC, the imports from which are excluded from the weighted-average calculation, as mentioned above, because the value is from an NME country and, therefore, considered unreliable by the Department. In calculating surrogate values using Indian Import Statistics, the Department calculates a weighted-average value that attributes more weight to values with higher quantities than values with smaller quantities. Therefore, all of the countries identified by the Court represent less than three percent of the total weighted-average value for cartons as calculated by the Department.

The CIT has upheld the Department’s use of a basket category over more specific pricing data when the pricing data represent a small portion of the total sales of that product in India and when the pricing data specific to the input had little or no supporting documentation. *See*

*Polyethylene Retail Carrier Bag Committee v. United States*, Slip Op. 2005-157 at 44-45, 2005 Ct. Intl. Trade LEXIS 175, \*68-69 (CIT Dec. 13, 2005), *aff'd* 232 Fed. Appx. 965, 2007 U.S. App. LEXIS 10647 (Fed. Cir. 2007) (affirming Department's use of basket category import data over sales from one company constituting only 30 percent of total sales of product in India). Similarly, in this case, the price quotes submitted by Jinan Yipin do not include supporting documentation and there is no information on the quantity of actual sales made in India at these prices during the POR. 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.

### **C. Conclusion**

Pursuant to the Court's opinion, we have reconsidered and recalculated Jinan Yipin's weighted-average antidumping duty margin from the *Final Results*. In order to recalculate Jinan Yipin's margin, we treated all sales from Jinan Yipin to Houston Seafood as unaffiliated sales and relied on the reported sales information to calculate transaction-specific margins for those sales. Additionally, we included the revised indirect selling expense ratio in the recalculation of Jinan Yipin's margin. In reconsidering the surrogate values we applied to garlic seed, water, and cartons, we found that the most appropriate surrogate values for these inputs were the values used in the *Final Results*. Therefore, we did not make any changes to the surrogate values applied to Jinan Yipin's reported factors of production for garlic seed, water and cartons, nor Shandong Heze's reported factors of production for garlic seed and water. Based on these changes, Jinan Yipin's margin from the *Final Results* has changed. Jinan Yipin's revised antidumping duty margin is 9.70 percent. Because the values for garlic seed and water did not change in the

redetermination pursuant to court remand, Shandong Heze's final margin remains the same as the margin published in the *Final Results*.

#### **D. Comments on Draft Results of Redetermination**

On February 5, 2008, we issued our draft results of redetermination pursuant to court order. On February 13, 2008, we received comments on the draft remand results from Jinan Yipin ("Jinan Yipin Comments"). We did not receive comments from any other party. Jinan Yipin's submission contained new factual information that was not requested by the Department. On February 25, 2008, the Department requested under our regulations at 19 CFR 351.302(d)(1)(i) that Jinan Yipin remove the new factual information and resubmit its comments on February 27, 2008. Jinan Yipin resubmitted its comments on February 27, 2008, and the Department has addressed these comments below.

##### Garlic Seed Value

Jinan Yipin argues that the Department ignored the Court's findings even though the Court stated that "the Department's analysis cannot convince a reasonable mind, based on the record evidence before Commerce, that a producer in India of garlic of a variety comparable to that produced by Jinan Yipin or Shandong reasonably would be expected to incur a cost of 50 rupees per kilogram for the garlic seed that it routinely uses to produce its crop," and reached the same "unsustainable" conclusion. Jinan Yipin Comments at 5 (quoting *Jinan Yipin*, 526 F. Supp. 2d at 1372). Jinan Yipin asserts that the Court already stated that:

The finding regarding product specificity is unsustainable on this record; specifically, given the record evidence, the court cannot affirm the Department's finding that "[t]he alternative information, Indian import data, is considerably less product-specific because [Commerce] cannot ascertain the quality or nature (*i.e.*, bulbs, loose cloves, etc.) of the garlic products entered under the applicable [Harmonized Tariff Schedule] category.

Jinan Yipin Comments at 5 (quoting *Jinan Yipin*, 526 F. Supp. 2d at 1370). Therefore, Jinan Yipin contends that the Department should reconsider its decision in the Draft Redetermination and use the garlic value derived from either the Indian import statistics or the Market Research Report on Fresh Whole Garlic in India.

Department's Position:

Although Jinan Yipin argues that the Department should reconsider its garlic seed value determination in this Redetermination, it does not point out any specific inadequacies with the Department's garlic seed analysis. While the Court could not sustain the Department's garlic seed analysis in the *Final Results* because the Department did not adequately review the record data on garlic seed values and explain our reasoning for the garlic seed value selection, the Department has reconsidered and redetermined this value based on a more complete analysis of the record on garlic seed. In doing so, the Department has provided cites to record evidence and analysis that support the conclusions found in our redetermination.

Specifically, although Chinese garlic imports comprise the majority of the Indian import data on garlic seed, the Department has a longstanding practice of removing data from NME countries, including data from the PRC, from its surrogate value calculations, as stated above. Therefore, with this consideration in mind, the remaining usable Indian import data are significantly vaguer with regard to product specificity than record evidence illustrates the complete set of Indian import data to be. Additionally, while we considered the selection of values for garlic seed included in the Market Research Report, we found these values to be unusable. First, the Indian import data in the Market Research Report does not identify the country of export. Therefore, given the Department's practice of removing imports from NME countries, and countries with widely available export subsidies, there is no way of identifying

which, if any, of the imports are usable. Second, Indian export values in the Market Research Report are not usable because India is among the countries with widely available export subsidies. Finally, we found the Indian domestic values in the Market Research Report to be unusable due to the lack of source data for those values. Furthermore, the domestic values in the Market Research report are less product specific than the NHRDF data.

Although the Court identified a discrepancy in the NHRDF value and certain prices in the Market Research Report, in the Department's reconsideration of the garlic seed value, it finds that the import and export pricing information contained in the Market Research Report could not be relied upon to evaluate the appropriate value for garlic seed in this review. Moreover, the Department notes that the domestic prices for garlic in India increase by widening differentials for size categories that increase by 10 mm. Therefore, the Department determines that it is appropriate that the more size-specific and quality-specific values for larger, higher quality garlic would be valued at a higher price than smaller, lower quality garlic.

While the Court directed the Department to reconsider and redetermine its selection of a garlic seed value in this review, it did not ask the Department to determine this value without regard to our longstanding practices and reasonable market considerations. The Court, in fact, ordered the Department to redetermine the surrogate value for garlic seed ensuring that the redetermination is based on sufficient findings of fact and that the findings of fact are supported by substantial record evidence and reasoning to support our redetermination. *See Jinan Yipin*, 526 F. Supp. 2d at 1372. The Court based the conclusions in its opinion on its finding that the Department failed to analyze the record data on Indian imports of Chinese garlic. *See id.* We have now analyzed the record information on Indian imports of Chinese garlic and reconsidered this information in light of the Court's order and the Department's practices, and continue to find

based on this reconsideration that the NHRDF garlic seed value is the most appropriate source for valuing the respondents' garlic seed.

In this case, the Department believes that it has addressed the Court's concern regarding the Indian imports of Chinese garlic and why these imports of Chinese garlic are not actually included in the usable data in the HTS category under consideration as a potential value for garlic seed.<sup>6</sup> The Department also believes that it has addressed the Court's concern with the price differential found between the NHRDF data and the values in the Market Research Report. Therefore, the Department finds that the NHRDF data is the best available information from the appropriate market-economy country with which to value the respondents' garlic seed in this proceeding.

#### Water

Jinan Yipin argues that the Department did not follow the Court's instructions in its Draft Redetermination because it continues to rely on unsupported presumptions. Jinan Yipin maintains that findings that the Parry Agro financial statements do not include water because the store and spare parts expenses are broken out into indigenous and imported categories are unsupportable. Jinan Yipin alleges that water expenses could be classified under the "indigenous" category in stores and spare parts expense even though it is not specifically listed in the surrogate financial statements. Citing *Fuyao*, Jinan Yipin argues that the Court addressed whether the Department's conclusion that an expense not specifically listed was also not included in the financial statements was supportable. Jinan Yipin also states that in *Fuyao*, the Court found

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<sup>6</sup> See *Guangdong Chemicals Import & Export Corp. v. United States*, 460 F. Supp. 2d 1365, 1373 (CIT 2006) ("*Guangdong Chemicals*"). In *Guangdong Chemicals*, the Department relied upon the same data source originally used in the final results, while eliminating an aberrational average unit value from the calculation, thereby addressing the deficiencies identified by the court. The court affirmed the remand results. See *id.* In this case, the Department has also determined to use the original data source, but has determined that no adjustments are necessary.

that stores and spare parts “could arguably include water” and, therefore, the Department’s conclusion that water was not included in the stores and spare parts category was unreasonable and contrary to law. Jinan Yipin Comments at 4 (quoting *Fuyao*, Slip Op. 03-169 at 12).

Jinan Yipin argues that the Department’s statement that record evidence does not demonstrate that tea requires irrigation water is contrary to logic and yet the Department did not reopen the record in order to obtain information to obtain the necessary information. However, Jinan Yipin contends that even if the Department determines that Parry Agro does not use water for the cultivation of tea leaves, the valuation of water is contrary to Court precedent which establishes that the goal of the surrogate value methodology is “to construct the product’s normal value as it would have been if the NME country were a market-economy country.” See Jinan Yipin Comments at 4 (quoting *Rhodia, Inc. v. United States*, 25 CIT 1278, 1286 (2001)). Consistent with this principle then, Commerce should not value this input because if Jinan Yipin were operating in a market-economy country, it would not incur an expense for water. In conclusion, Jinan Yipin contends that the Department’s decision to value water is unsupported by substantial evidence, results in improper double counting, and is contrary to Court precedent.

Department’s Position:

Citing *Fuyao*, Jinan Yipin claims that the Department’s finding in the Remand Redetermination does not adequately demonstrate that the stores and spare parts category lacks an expense for water and, therefore, the Department’s conclusion that water was not included in the stores and spares category was unreasonable and contrary to law. There are two relevant categories when analyzing whether or not Parry Agro’s financial statements contain an expense for water. These categories are raw materials and stores and spare parts consumed. It is the Department’s understanding of Indian accounting principles that “stores and spare parts” only

contain indirect materials and not direct materials that physically enter into the composition of the finished product. *See Notice of Final Determinations at Sales at Less Than Fair Value: Brake Drums and Brake Rotors from the People's Republic of China*, 62 FR 9160, 9169 (February 28, 1997) (“According to the [Indian] Compendium of Statements and Standards, in order for a material to be considered as part of factory overhead, it must ‘assist the manufacturing process, but . . . not enter physically into the composition of the finished product.’”) Any irrigation water, if used, is in this case incorporated into the finished product, tea. Therefore, unlike the water used in *Fuyao* which was an indirect material because it was not incorporated into the final product, the water, if any, used to grow tea is incorporated into the final product. Consequently, the water used to grow tea, and garlic for that matter, is more properly classified as a raw material.

Further, in the detail of the raw materials’ expense category included at page 32 of Parry Agro’s financial statements, Parry Agro reports a value for “Green Leaf”. *See Jinan Yipin’s June 30, 2003, surrogate value submission at 118.* Within the category for “Green Leaf”, there is a line item for “Harvested in Own Gardens” and a line item for “Purchases” with a value of the raw materials for each line item. *See id.* The value for the line item for “Harvested in Own Gardens” demonstrates that Parry Agro did not use any raw materials, including any irrigation water that would be incorporated into the tea it produces. *See id.* Additionally, the value for the line item “Purchases” necessarily includes any irrigation cost that is incurred during the production of the tea that Parry Agro purchased and, therefore, any irrigation water used in the production of the self-produced or purchased tea is already excluded from the numerator of the Department’s surrogate financial ratio calculations.

Jinan Yipin argues that the Department has not adequately explained in its Draft Redetermination why its decision to value water as an additional raw material does not result in

improper double counting. By including the value for raw materials in the denominator and not the numerator of the financial ratio calculations, the Department has not double counted any water that may be incorporated into the tea and, therefore, included in the raw materials category. Additionally, valuing water separately is the most accurate method for determining the appropriate normal value for garlic because garlic requires a large amount of irrigation water that is incorporated into the garlic. The water used in the production of garlic has a value whether or not the respondents paid for this input. In fact, in other cases where the respondent has received inputs without a cost, the Department has still sought a surrogate value for the input. *See, e.g., Crawfish* at Comment 7 (where the Department valued water separately despite respondents' claim that they do not incur a cost for well water). In this case, the respondents only paid for the energy cost of pumping the water from a freely available water source and not for the water itself. However, that does not mean that the water they are using does not have a value. Therefore, we find it appropriate to value water as a raw material input rather than the energy used to retrieve the water or as an overhead expense.

### Cartons

Jinan Yipin argues that the Department's Draft Redetermination ignores the Court's instructions and simply repeats the same reasoning found to be unconvincing by the Court. Jinan Yipin contends that while the Court "stated that the price quotes 'are vastly superior to the Indian import data in an important respect: they are specific to the factor being valued,'" the Department did not address the shortcoming of the import data it selected to value cartons, *i.e.*, that "[t]he Indian import data presented in the *World Trade Atlas*, although contemporaneous with the period of review, do not bear a reasonable relationship to the boxes used by Jinan Yipin to pack its garlic." Jinan Yipin Comments at 6 (quoting *Jinan Yipin*, 526 F. Supp. 2d at 1377). Furthermore, Jinan

Yipin maintains that the Court specifically considered the arguments the Department included in its Draft Redetermination and found that the HTS data, although broad-based, contemporaneous, and publicly available, could not overcome the lack of specificity when compared with the more specific price quotes for cartons. Consequently, Jinan Yipin argues that Commerce must find that the price quotes constitute the best available information on the record given the Court's strong rejection of the arguments upon which the Department continues to rely.

Department's Position:

Jinan Yipin correctly states that the Department's consideration of the carton value in the Draft Redetermination relies on some of the same findings as the Department's consideration of this value in the *Final Results*. The Department has longstanding practices that enable us to predictably select reliable and appropriate surrogate values. These practices include relying upon broad-based, publicly available, product-specific, and contemporaneous values. While the *WTA* data are broad-based, publicly available, and contemporaneous with the POR, the Court indicates that the price quotes are superior to the *WTA* data with regard to product-specificity, an important criteria without record evidence of significant price fluctuations. *See Jinan Yipin*, 526 F. Supp. 2d at 1379. The Court also concluded that the *WTA* data for the selected HTS category for cartons do not bear a reasonable relationship to the boxes used by Jinan Yipin to pack its garlic because of the varying average unit values included within the Indian import data and the trade research data on the record of the review.

In its redetermination, the Department acknowledges that the Indian import data from the HTS category for cartons show varying average unit values when segregated by country. However, the Department has examined the underlying data and found that they do not demonstrate that the products within the *WTA* data vary significantly. As stated above, there are

a multitude of reasons for varying average unit values. In fact, many of the surrogate value calculations on the record of this review have such average unit value variations. Additionally, the product specificity of the price quotes does not overcome the problems with this data source. The price quotes are not publicly available and are dated approximately ten days prior to Jinan Yipin's surrogate value submission (*i.e.*, they do not reflect prices during the POR). The fact that the price quotes are dated so close to Jinan Yipin's surrogate value submission leads the Department to believe that these price quotes may have been requested solely for the purpose of obtaining a surrogate value for this review and may not represent an actual price for a completed order of these boxes between unaffiliated parties. To avoid this potential, the Department has a practice of selecting publicly available data as surrogate values. Furthermore, the value of the price quotes is lower than any average unit value for cartons in the WTA data, including all of the countries for which the WTA data lists imports but for which the trade research data lists none.

The trade research data on the record of this review do not represent a significant portion of the imports included in the WTA data. Furthermore, the trade research data do not demonstrate the impact of the pricing of the dissimilar imports in the WTA data. Moreover, there are significant problems with the reliability of the trade research data with regard to the imports from Bahrain, as stated above. Given that the Department has a strong preference for publicly available data over more product-specific data to value surrogate values and the CIT has affirmed this preference as previously cited above, we continue to find that the WTA data are the best available information with which to value Jinan Yipin's cartons in this proceeding.

#### Ministerial Error in the Calculation of the Surrogate Financial Ratios

Jinan Yipin argues that the Department should correct a ministerial error contained in its surrogate financial ratio calculation. Jinan Yipin claims that the Department inadvertently

excluded “Power and Fuel” from the materials, labor and energy (“MLE”) denominator in its surrogate financial ratios calculation. Jinan Yipin contends that the Department should recalculate the margin results using the corrected financial ratios.

Department’s Position:

The Department first released the financial ratio calculation with the preliminary results of review. Jinan Yipin had the opportunity to identify this alleged ministerial error in its case brief to the Department. However, it did not do so. The Department released the same financial ratio calculation for the second time with the final results of review. Section 351.224(c)(2) of the Department’s regulations allows parties to submit comments regarding errors in the released calculations within five days of the release of that information. Again, Jinan Yipin chose not to comment on this alleged ministerial error. In its comments on the Draft Redetermination, almost four years after the release of the calculations in the *Final Results*, Jinan Yipin included a request that the Department correct this alleged ministerial error unrelated to the issues being remanded to the Department.

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

The Department has neither examined the merits of this ministerial error allegation, nor made any changes resulting from this allegation in the final remand results. In addition, the Department does not have the administrative resources to continually re-examine the record of the review to test the authenticity and legitimacy of new ministerial error allegations that are untimely filed, not the basis of any of the parties' challenges before the Court, and not subject to a remand determination. The CIT has recently affirmed Commerce's decision not to evaluate and address untimely ministerial error allegations. *See Dorbest Ltd. et al. v. United States*, Slip Op. 08-24 (Feb. 27, 2008) at 60-61. Therefore, we are not addressing this ministerial error allegation in our final remand redetermination.

## **FINAL RESULTS OF REDETERMINATION**

After reviewing and addressing the comments we received on the Draft Redetermination pursuant to the Court's order, we continue to find that the most appropriate surrogate values for garlic, water, and cartons are the values used in the *Final Results*. Additionally, the Department finds that it is inappropriate to address a ministerial error allegation first made significantly past the deadline for such allegations. Therefore, we did not make any changes from the Draft Redetermination. Jinan Yipin's antidumping duty margin continues to be 9.70 percent. Shandong Heze's antidumping duty margin did not change from the *Final Results* and continues to be 43.30 percent.

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David M. Spooner  
Assistant Secretary  
for Import Administration

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Date

# **Attachment 1**

World Trade Atlas  
India - Imports  
07032000 GARLIC FRESH OR CHILLED  
Billions of Indian Rupee

| Country          | -            | Nov 01-Oct 02       | KG Nov 01-Oct 02      | AUV<br>(Rs/Kg)   | % of Total<br>Qty |
|------------------|--------------|---------------------|-----------------------|------------------|-------------------|
| -- World --      | -            | <b>0.747087</b>     | <b>41,291,896</b>     | <b>18.09</b>     |                   |
| Canada           | -            | 0.000781            | 56,000                | 13.95            | 0.14%             |
| <del>China</del> | <del>-</del> | <del>0.707474</del> | <del>38,849,396</del> | <del>18.24</del> | <b>94.08%</b>     |
| Hong Kong        | -            | 0.011868            | 688,000               | 17.25            | 1.67%             |
| Malaysia         | -            | 0.016484            | 788,000               | 20.92            | 1.91%             |
| Myanmar          | -            | 0.005496            | 612,000               | 8.98             | 1.48%             |
| Pakistan         | -            | 0.000182            | 13,500                | 13.48            | 0.03%             |
| Switzerland      | -            | 0.001579            | 117,000               | 13.50            | 0.28%             |
| Taiwan           | -            | 0.003223            | 168,000               | 19.18            | 0.41%             |
|                  |              | 0.039613            | 2,442,500.00          | <b>16.22</b>     | <b>5.92%</b>      |

Source of data: Jinan Yipin's June 30, 2003,  
Surrogate Value Submission, Exhibit 3.  
Taken from Indian Import Statistics  
(DGCI&S, Ministry of Commerce)

## **Attachment 2**

**Wholesale Prices for Garlic by Grade at Azadpur APMC near Delhi**

| <b>Time Period</b>             | <b>Nov-01</b> | <b>Dec-01</b> | <b>Jan-02</b> | <b>Feb-02</b> | <b>Mar-02</b> | <b>Apr-02</b> | <b>May-02</b> | <b>Jun-02</b> | <b>Jul-02</b> | <b>Aug-02</b> | <b>Sep-02</b> | <b>Oct-02</b> | <b>Average</b> |
|--------------------------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|----------------|
| Grade A garlic Rs per Quintal  | 5094          | 5750          | 4063          | 3469          | 1955          | 1650          | 2013          | 1400          | 2185          | 2875          | 3973          | 3894          |                |
| Grade A garlic Rs per Kilogram | 50.94         | 57.5          | 40.63         | 34.69         | 19.55         | 16.5          | 20.13         | 14            | 21.85         | 28.75         | 39.73         | 38.94         | <b>31.93</b>   |
| Grade B garlic Rs per Quintal  | 4406          | 4938          | 3281          | 2922          | 1705          | 1400          | 1556          | 1088          | 1650          | 2231          | 3150          | 3000          |                |
| Grade B garlic Rs per Kilogram | 44.06         | 49.38         | 32.81         | 29.22         | 17.05         | 14            | 15.56         | 10.88         | 16.5          | 22.31         | 31.5          | 30            | <b>26.11</b>   |
| Grade C garlic Rs per Quintal  | 3625          | 4281          | 2594          | 2563          | 1625          | 1198          | 1063          | 811           | 1105          | 1638          | 2375          | 2219          |                |
| Grade C garlic Rs per Kilogram | 36.25         | 42.81         | 25.94         | 25.63         | 16.25         | 11.98         | 10.63         | 8.11          | 11.05         | 16.38         | 23.75         | 22.19         | <b>20.91</b>   |

Source: Petitioner's June 30, 2003, Surrogate Value Submission at Exhibit 7, Market Research Report at 22.