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Administrative Review
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June 10, 2016

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Issues and Decision Memorandum for the Final Results of
Antidumping Duty Administrative Review: Fresh Garlic from the
People's Republic of China; 2013-2014

SUMMARY

The Department of Commerce (the Department) analyzed the case briefs and rebuttal brief submitted by interested parties in the 20th administrative review of the antidumping duty order on fresh garlic from the People's Republic of China (PRC). As a result of this analysis, we have made changes to the preliminary results. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

BACKGROUND

On December 7, 2015, the Department published the preliminary results of this administrative review.¹ The only mandatory respondent which fully cooperated in this review is Shenzhen Xinboda Industrial Co., Ltd. (Xinboda). We applied adverse facts available (AFA) to the other two mandatory respondents: Hebei Golden Bird Trading Co., Ltd. and Qingdao Tiantaixing Foods Co., Ltd. (QTF), because neither cooperated to the best of its ability to comply with the Department's requests for information. Further, we preliminarily found that 10 companies made no shipments during the period of review (POR) and that 12 companies qualified for separate rate status.

Following the *Preliminary Results*, we issued a third supplemental questionnaire to Xinboda.² On December 30, 2015, Xinboda responded to our third supplemental questionnaire.³

¹ See *Fresh Garlic From the People's Republic of China: Preliminary Results, Preliminary Intent To Rescind, and Partial Rescission of the 20th Antidumping Duty Administrative Review; 2013-2014*, 80 FR 75972 (December 7, 2015) (*Preliminary Results*) and accompanying Issues and Decision Memorandum (PDM).

² See Letter from the Department to Xinboda, dated December 23, 2015.

Also, following the *Preliminary Results*, on December 28, 2015 and January 6, 2016, QTF and Xinboda each filed a request for a hearing. On January 6, 2016, the Fresh Garlic Producers Association and its individual members (hereinafter, Petitioners)⁴ requested to participate in a hearing. QTF, Xinboda, and Petitioners filed case briefs on January 11, 2016. Xinboda and Petitioners filed their respective rebuttal briefs on February 2, 2016. On March 1, 2016, we issued a memorandum outlining the hearing schedule.⁵ The hearing was held on March 3, 2016.⁶

On January 27, 2016, we issued a memorandum tolling the administrative deadlines as a result of the government closure during snowstorm “Jonas.”⁷ On February 5, 2016, QTF also untimely filed new information⁸ which we rejected.⁹ On April 4, 2016, we issued a memorandum extending these *Final Results* from April 11, 2016 until May 11, 2016.¹⁰ On May 4, 2016 we issued a second memorandum extending the deadline to June 10, 2016.

SCOPE OF THE ORDER

The products covered by the order are all grades of garlic, whole or separated into constituent cloves, whether or not peeled, fresh, chilled, frozen, water or other neutral substance, but not prepared or preserved by the addition of other ingredients or heat processing. The differences between grades are based on color, size, sheathing, and level of decay. The scope of the order does not include the following: (a) Garlic that has been mechanically harvested and that is primarily, but not exclusively, destined for non-fresh use; or (b) garlic that has been specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed. The subject merchandise is used principally as a food product and for seasoning. The subject garlic is currently classifiable under subheadings: 0703.20.0000, 0703.20.0005, 0703.20.0010, 0703.20.0015, 0703.20.0020, 0703.20.0090, 0710.80.7060, 0710.80.9750, 0711.90.6000, 0711.90.6500, 2005.90.9500, 2005.90.9700, 2005.99.9700, and of the Harmonized Tariff Schedule of the United States (HTSUS).¹¹

³ See Letter from Xinboda to the Secretary of Commerce, “Fresh Garlic from the People’s Republic of China – Third Supplemental Questionnaire Response – Shenzhen Xinboda,” dated December 30, 2015.

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

⁵ See Memorandum, entitled “Fresh Garlic from the People’s Republic of China: Hearing Schedule for the 20th Administrative Review,” dated March 1, 2016.

⁶ The transcript was filed on March 10, 2016.

⁷ See Memorandum, entitled Tolling of Administrative Deadlines as a Result of the Government Closure during Snowstorm “Jonas,” dated January 27, 2016.

⁸ A copy of a summons and complaint received by QTF and filed in the U.S. District Court for the Central District of California (Civil Action 2:16-cv-00614): *Harmoni International Spice, Inc. and Zhengzhou Harmoni Spice Co., Ltd. v. Bai et al.* On February 16, 2016, Zhengzhou Harmoni Spice Co., Ltd. filed an entry of appearance. See Letter from Zhengzhou Harmoni Spice Co., Ltd., and Harmoni International Spice, Inc. to the Department, “Notice of Appearance: Fresh Garlic from the People’s Republic of China,” dated February 16, 2016.

⁹ See Letter from the Department to QTF, dated February 11, 2016.

¹⁰ See Memorandum from Jacqueline Arrowsmith through Edward Yang to Christian Marsh, entitled “Fresh Garlic from the People’s Republic of China: Extension of Deadline for the Final Results of the Antidumping Duty Review,” dated April 4, 2016.

¹¹ See *Antidumping Duty Order: Fresh Garlic From the People’s Republic of China*, 59 FR 59209 (November 16, 1994).

Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive. In order to be excluded from the order, garlic entered under the HTSUS subheadings listed above that is (1) mechanically harvested and primarily, but not exclusively, destined for non-fresh use or (2) specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed must be accompanied by declarations to U.S. Customs and Border Protection (CBP) to that effect.

Final Determination of No Shipments

In the *Preliminary Results*, we noted that each company listed in Appendix III of the *Federal Register* notice timely filed a “no shipment” certification stating that it had no entries of subject merchandise during the POR.¹² The Department subsequently asked CBP to conduct a query on potential shipments made by these companies during the POR; CBP provided no evidence that contradicted their claims of no shipments the POR. Based on the certifications by these companies and our analysis of CBP information, we preliminarily determined that the companies listed in Appendix III did not have any reviewable transactions during the POR. There is no information on the record to warrant reconsideration of our preliminary findings. As such, for these *Final Results*, the Department finds that the 10 companies listed in Appendix III had no shipments during the POR.

DISCUSSION OF THE ISSUES

This memorandum discusses the following comments that the parties raised during this administrative review. Below is the list of comments.

- Comment 1: Whether the Department’s Selection of Romania as the Surrogate Country was Appropriate
- Comment 2: The Department’s Rejection of Mexico as a Surrogate Country Violated the Department’s New Factual Information Regulations and Was Not in Accordance with Law
- Comment 3: Whether QTF Cooperated to the Best of Its Ability in this Review
- Comment 4: Accounting for Storage and Transportation Factors for Input Garlic Bulbs Consumed by Excelink
- Comment 5: The Department Should Adjust the Weight Denominator for Brokerage and Handling and Trucking and Remove the Letter of Credit Expense
- Comment 6: Modifying Preliminary Analysis to Account for Water Consumed in Producing Fresh Peeled-Clove Garlic

¹² See Fresh Garlic from the People’s Republic of China: Final Results and Final Rescission of the 20th Antidumping Duty Administrative Review; 2013-2014 at Appendix III.

Comment 1: Whether the Department’s Selection of Romania as the Surrogate Country was Appropriate

Surrogate Country Selection Three-Prong Analysis

When the Department is investigating imports from a non-market economy (NME) country, section 773(c)(1) of the Tariff Act of 1930, as amended (the Act), directs us to base normal value (NV), in most circumstances, on the NME producer’s factors of production (FOPs), valued in a surrogate market economy (ME) country, or countries, considered appropriate by the Department. In accordance with section 773(c)(4) of the Act, in valuing FOPs, the Department shall utilize, to the extent possible, the prices or costs of the FOPs in one or more ME countries that (a) are at a level of economic development comparable to that of the NME country and (b) are significant producers of comparable merchandise. Moreover, it is the Department’s practice to select an appropriate surrogate country (SC) based on the availability and reliability of data on the record.¹³

For the *Preliminary Results*, we selected Romania as the SC from an Office of Policy list (OP List) that also included Bulgaria, Ecuador, South Africa, Thailand and Ukraine.¹⁴ We found Romania to be at a comparable level of economic development and a significant producer of comparable merchandise.¹⁵ We also found that there was publicly available Romanian data for all FOPs on the record of this review.¹⁶ Furthermore, we determined that Romanian data was superior to Thai data in a number of respects, and therefore constituted the best available information.¹⁷

Xinboda and QTF have argued that the Department erred in its selection of Romania as the primary SC in this review. Xinboda and QTF took issue with multiple aspects of the Department’s analysis under section 773(c)(4) of the Act.

A. Whether the Department Conducted its Economic Comparability Analysis Correctly

Xinboda’s Arguments:

- The Department’s decision to sequentially examine economic comparability prior to “significant production” was mistaken for the following reasons:

¹³ See Memorandum from the Department, “2013-2014 Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People’s Republic of China: Request for Surrogate Country and Surrogate Value Comments and Information,” (April 20, 2015). Enclosure, Memorandum from Carole Showers, Director, Office of Policy, Enforcement and Compliance, “Request for a List of Surrogate Countries for an Administrative Review of the Antidumping Duty Order on Fresh Garlic (“Garlic”) from the People’s Republic of China (“China”),” (April 10, 2015). The Department determined that Bulgaria, Ecuador, Romania, South Africa, Thailand, and Ukraine are countries which, based on their per capita gross national incomes (GNI), are at the same level of economic development as the PRC and therefore economically comparable.

¹⁴ See *Preliminary Results* and accompanying Preliminary Decision Memorandum (20th AR PDM) at 17.

¹⁵ *Id.*, at 24.

¹⁶ *Id.*

¹⁷ *Id.*

- Section 773(c)(4) of the Act “does not contemplate that economic comparability is more critical than significant production or that either criteria is more critical than the mandate to use the ‘best information available.’”
- The quality and availability of data is as critical as the economic comparability and the comparable production criteria.
- The Court of International Trade (CIT)’s decision that “Commerce’s own policy suggests that none of the three SC eligibility criteria – economic comparability, significant production of comparable merchandise, and quality data – is preeminent.”¹⁸
- The CIT has held that where a party demonstrates that no country on the OP List “provides the scope of quality ‘data’ that it requires in order to make a primary SC selection.... then {the Department} must consider the quality of the data on the country not on the list that a party proposes.”¹⁹
- The Department cannot refuse to consider the merits of India as a primary SC merely because it is not as economically comparable as the countries on the OP List.²⁰
- The Department should issue a post preliminary decision as to whether Mexico is an economically comparable SC as it has done in several other recent cases with GNI concerns.

Petitioners’ Arguments:

- *Amanda Foods* and *Ad Hoc Shrimp* explicitly acknowledge the Department’s sequential analysis²¹ of the criteria relevant to selecting the SC. Moreover, these cases are distinguishable from the instant review because each involves judicial review of the Department’s evaluation of different potential surrogate countries, which were included on the OP’s list of potential surrogate countries.
- As stated by the Department in Policy Bulletin 04.1, the surrogate countries on the OP List are not ranked and should be considered equivalent in terms of economic comparability.²²
- The OP List on the record does not identify India or Mexico as being at the same level of economic development as the PRC, and India’s 2013 per capita gross national income (GNI) is less than a quarter of China’s.²³

¹⁸ See *Ad Hoc Shrimp Trade Action Comm. v. United States*, 882 F. Supp. 2d 1366, 1374 (CIT 2012) (*Ad Hoc Shrimp*) (stating, “Because none of Commerce’s three surrogate country eligibility criteria is preeminent, it follows that relative strength and weaknesses among potential surrogates must be weighed by evaluating the extent to which the potential surrogates satisfy each of these criteria....”); see also *Amanda Foods (Vietnam) Ltd. v. United States*, 647 F. Supp. 2d 1368 (CIT 2009) (*Amanda Foods*).

¹⁹ *Clearon Corp. v. United States*, 2015 WL 4978995 at *4-5 (CIT August 20, 2015).

²⁰ *Id.*

²¹ As discussed in Policy Bulletin 04.1, the Department’s sequential analysis is based on Section 773(c)(4) of the Act, which states that “[t]he administering authority shall utilize to the extent possible ...prices...in one or more market economy countries that are (1) at a level of economic development comparable to that of the nonmarket economy country and (2) a significant producer of comparable merchandise.” In addition to the economic comparability and significant producer of comparable merchandise criteria, as stated in Policy Bulletin 04.1, “the data quality is a critical consideration affecting surrogate country selection.”

²² See Petitioners’ Rebuttal Brief at 39-40.

²³ *Id.*, at 21.

- It is the Department’s well-established administrative practice of selecting a country that does not appear on the OP List as the SC *only* where no country on the OP List could reasonably be selected as the SC – for example, none of the countries on the list are significant producers of identical or comparable merchandise or there are issues regarding the availability of surrogate value (SV) information from the countries on the list.²⁴ Information on the record shows that Romania is an economically comparable to the PRC and is significant producer of comparable merchandise.

Department’s Position: As discussed below, we continue to find that Romania is the most appropriate SC because it is at the same level of economic development as the PRC, is a significant producer of comparable merchandise, and its data quality is the best available on the record.

We note that *Amanda Foods* and *Ad Hoc Shrimp* do not question our long standing practice in selecting surrogate countries by first identifying those countries at the same level of economic development as the PRC in terms of per capita GNI from data available in the World Development Report provided by the World Bank.²⁵ Rather, those cases support the sequential nature of the Department’s SC analysis because each of the different potential surrogate countries in those cases was included on the OP list of economically comparable countries.²⁶ As noted in our *Preliminary Results*, the OP List for this review identified Bulgaria, Ecuador, Romania, Thailand, South Africa and Ukraine as countries at the same level of economic development as the PRC. There is no information on the record which would lead us to reverse our decision that these countries were economically comparable to the PRC in terms of per capita GNI. In these *Final Results*, we still find that they are equally comparable in terms of economic development, because we adhere to our practice of not differentiating between countries found to be at the same level of economic development in the OP List.²⁷

Similarly, Xinboda’s reliance on *Clearon* to argue against the Department’s choice of Romania is misplaced. In *Clearon*, the court ruled that the Department must consider the quality of data from a country not on the OP list of economically comparable countries if the respondent demonstrates that none of the countries on the OP List provide quality SV data. The record of this review shows that the Department selected Romania as the primary SC not *solely* because it was economically comparable, but rather because it is also a significant producer of comparable merchandise and there is suitable data on the record.

Because the non-exhaustive list is only a starting point for the SC selection process, the Department considers other countries at the same level of economic development that interested

²⁴ *Id.*, at 29.

²⁵ See, e.g., *Pure Magnesium from the People’s Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review of the Antidumping Duty Order*, 75 FR 80791 (December 23, 2010) and accompanying Issues and Decision Memorandum at Comment 4.

²⁶ See *Amanda Foods* at 1412; see also *Ad Hoc Shrimp* at 1374.

²⁷ See Policy Bulletin 04.1, n.5 (noting that the “surrogate countries on the list are not ranked and should be considered equivalent in terms of economic comparability” and that this practice “reflects in large part the fact that the statute does not require the Department to use a surrogate country that is at a level of economic development *most* comparable to the NME country”).

parties propose, as well as other countries that are not at the same level of economic development as the NME country, but nevertheless still at a level comparable to that of the NME country. Of the countries on the OP List, interested parties only submitted data from Romania and Thailand for consideration regarding surrogate valuation purposes.

The Department notes that while there is SC and SV data on the record for India and SV data on the record for Mexico, this information does not support considering either as the surrogate country for this administrative review. In the OP List, the list of countries (Bulgaria, Ecuador, Romania, South Africa, Thailand and Ukraine) comprised a GNI band that ranged from \$9,060 - 3,960 GNI with the PRC's GNI being in the middle at \$6,560.²⁸ The Department notes that India's GNI (\$1,570)²⁹ is well below Ukraine's GNI of \$3,960 and is not within the GNI band of potential surrogate countries that are considered to be at the same level of economic development to the PRC. Moreover, there is no information on the record with respect to Mexico's GNI during 2013.

The administrative determinations Xinboda cites to support the Department selecting a SC not on the OP List actually support the Department's practice of selecting a country from the OP List unless none of the countries listed are significant producers of comparable merchandise or there are issues regarding the reliability, availability, or quality of the data. First, in *1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People's Republic of China*, we found that "none of the countries listed in the OP List are significant producers of comparable merchandise."³⁰ Second, in *Certain Frozen Fillets from Vietnam*,³¹ we selected Indonesia, a country not identified on the OP List in that segment, but proposed by petitioners, after determining that it offered better SV information for the major input. Few countries in the world produce whole, live *pangasius* fish; therefore, in *Certain Frozen Fillets from Vietnam* there was a data availability issue, not present in this garlic proceeding. Finally, in *Pure Magnesium from the People's Republic of China*,³² cited by Xinboda, we selected the Philippines, which was a country identified on the OP List, because we determined that the Philippines did satisfy all of the criteria in selecting a primary SC.

As stated in our PDM, "on September 17, 2015, Xinboda untimely submitted surrogate country information and comments regarding Mexico."³³ Given that we do not have per capita GNI data for Mexico on the record of this administrative proceeding, there was no basis for the Department to issue a post preliminary decision as to whether Mexico is an economically comparable SC.

²⁸ See OP List.

²⁹ See Petitioners' May 4, 2015 OP List Rebuttal Comments at Attachment 1.

³⁰ See *1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 56341 (September 19, 2014) and accompanying Issues and Decision Memorandum.

³¹ See *Certain Frozen Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and New Shipper Review; 2011-2012*, 79 FR 19053 (March 24, 2014) and accompanying Issues and Decision Memoranda (*Fish Fillets from Vietnam*).

³² See *Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 94 (January 2, 2014) and accompanying Issues and Decision Memorandum.

³³ See PDM at 16.

At the time that it issued Policy Bulletin 04.1, the Department considered Xinboda's proposed approach of weighing the economic comparability and significant production criteria simultaneously, but dismissed it as "administratively unfeasible."³⁴ Notably, the Department's practice has recently been upheld against the very challenges Xinboda raises. In rejecting a party's claim that the Department's sequential approach to SC selection improperly excluded India as less economically comparable in its first step, the United States Court of Appeals for the Federal Circuit held: "We discern nothing in the statute that requires Commerce to consider any particular country as a surrogate country. When Congress does not mandate a procedure or methodology for applying a statutory test, 'Commerce may perform its duties in the way it believes most suitable.'"³⁵ Similarly, the CIT recently rejected a challenge to the Department's sequential consideration of surrogate selection criteria, providing that as long as the Department "identif{ies} on its list at least one economically comparable significant producer which has reliable data," a decision to exclude India as less economically comparable would be supported by substantial evidence.³⁶ Here, we find that Romania is a country on the OP List that is significant producer of comparable merchandise and has suitable SV data, and accordingly the Department has met its burden.

B. Which Countries are Significant Producers of Comparable Merchandise

Xinboda's Arguments:

- Romania did not have significant production of garlic during the POR. Based on United Nations Food and Agriculture Organization (FAO) data, Romania produced 62,156 metric tons of garlic in 2013.³⁷
- In selecting Romania, the Department did not follow its own policy articulated in the Policy Bulletin 04.1 nor did it follow the guidance of the CIT,³⁸ which requires that the Department make a comparative analysis of Romanian production in the context of world trade.³⁹ "Worldwide production of fresh garlic in 2012 was almost 25 million metric tons compared to Romania's production of 58,368 metric tons. In other words, Romania's production was ...0.239% of world production."⁴⁰ This makes it clear that Romania is not a significant producer under the Department's normal and reasonable definition embodied in Policy Bulletin 04.1.⁴¹
- If the Department continues to find that Romania is a significant producer of garlic then the Department must also find that Thailand is a significant producer of identical merchandise.⁴²

³⁴ See Policy Bulletin 04.1, n.1.

³⁵ See *Jiaying Brother Fastener Co. v. United States*, No. 2015-1611, Slip Op. at 15 (April 21, 2016).

³⁶ See *Fresh Garlic Producers Ass'n v. United States*, 121 F. Supp. 3d 1313, 1339-40 (CIT 2015) (*Fresh Garlic Producers*).

³⁷ See Xinboda Case Brief at 12.

³⁸ See *Fresh Garlic Producers*.

³⁹ See Xinboda Case Brief at 14.

⁴⁰ *Id.*, at 12-13.

⁴¹ *Id.*, at 13.

⁴² *Id.*, at 34.

- Contrary to the Department’s finding in the *Preliminary Results*, there is no information on the record that suggests that Romanian garlic bulbs are similar in size to the input garlic bulbs consumed by the respondent in China.⁴³
- Nothing on the record supports the Department’s finding that Thailand grows smaller garlic {which is less similar to Chinese garlic} than fresh garlic grown in Romania.
- India is a significant producer of comparable merchandise; “India is the only country that is truly comparable to China with respect to significant production. China is the largest producer of garlic followed by India; The Department has relied on Indian garlic bulb prices in numerous past segments because, in part, Indian price data covers large-sized garlic bulbs similar to those grown in China.”⁴⁴
- Mexico is also a significant producer of large bulb garlic and exports the second largest volume to the United States.⁴⁵

Petitioners’ Arguments:

- The Department’s practice makes clear that the standard for significant production or comparable or identical merchandise varies from case to case. The Department does not apply the *de minimis* margin benchmark to production volumes.
- Information on the record demonstrates the following:
 - The sizes of garlic from Romania and China are similar. Some 42 percent of garlic grown in Romania is medium- and large-sized and is the same genus and species as garlic grown in China. The planting and harvest cycles of prominent varieties grown in Romania are similar to garlic growing cycles in China.⁴⁶
 - Given these similarities, it is logical to conclude that Chinese and Romanian garlic share the same basic weight/diameter relationship.⁴⁷
- The physical characteristics of garlic from Thailand are not similar to Chinese garlic. Thai price data for garlic represent significant bundles of small, green, young garlic plants (*i.e.*, bulbs and green stems) which possess a relatively large number of small-sized cloves in comparison to input garlic bulbs from China.⁴⁸
- Nearly 98 percent garlic produced in India does not possess the physical characteristics that make it comparable to the input garlic bulbs consumed by Xinboda’s sole processor.⁴⁹ Specifically, the overwhelming majority of garlic bulbs grown in India involve low quality, small diameter product that is not comparable to the large-sized input bulbs consumed by the respondents in China.⁵⁰

⁴³ *Id.*, at 11.

⁴⁴ *Id.*, at 15-23.

⁴⁵ *Id.*, at 32.

⁴⁶ See Petitioners’ Rebuttal Brief at 54-55. See also Letter from Petitioners, “20th Administrative Review of Fresh Garlic from the People’s Republic of China –Petitioners’ Rebuttal Comments on Surrogate Country Selection,” (June 11, 2015) (Petitioners’ SC Rebuttal Comments) at 9-12.

⁴⁷ *Id.*, at 55.

⁴⁸ *Id.*, at 41.

⁴⁹ *Id.*, at 42.

⁵⁰ *Id.*, at 27.

Department's Position: For these *Final Results*, we have continued to rely on the 2013 FAO production data for fresh garlic to determine that Romania and Thailand are significant producers of comparable merchandise.⁵¹

Although fresh garlic from both Romania and Thailand is identical merchandise and therefore comparable, we continue to find that the record supports a finding that Romanian garlic bulbs are more comparable -- similar in size to the input garlic bulbs consumed in the production of subject merchandise.⁵² Conversely, information on the record indicates that fresh garlic grown in Thailand is generally small in size, possesses a relatively large number of small-sized cloves, and is commonly sold as bundled garlic plants, which include the stem.⁵³ For these reasons, we continue to find that the fresh garlic produced in Romania is more physically similar than the garlic produced in Thailand to the garlic produced in China.⁵⁴

We note that the PRC's production level of fresh garlic is by far the largest in the world -- approximately 80 percent of world production and over 15 times larger than the next largest producing country. Given this disparity, it is not useful to make a judgment "consistent with the characteristics of world production of, and trade in, comparable merchandise," as suggested in Policy Bulletin 04.1. Rather, based on the unique circumstances of this case,⁵⁵ the Department has evaluated the garlic production data from Romania and Thailand to determine whether the production was sufficiently large in volume such that price data from either country could provide reliable SVs reflecting the commercial market reality of producing the subject merchandise in that country. This interpretation follows from the underlying purpose of section 773(c)(4) of the Act to identify reliable market-based prices upon which to value a NME producer's factors of production.

Here, Romania and Thailand's 2013 production amounts are so noticeably and measurably large -- 62,156 and 77,886 metric tons, respectively -- that it is reasonable to assume the quantity reflects an adequate number of garlic producers that are commercially viable, and therefore provide data reflecting market-based transactions. Indeed, Xinboda agrees that Thailand constitutes a significant producer of comparable merchandise, and has not offered any meaningful distinction between the significance of Romanian and Thai 2013 production levels.

China's production level is not relevant to judging the significance of the potential SC's production of comparable merchandise. Policy Bulletin 04.1 provides that "the extent to which a country is a significant producer should not be judged against the NME country's production level." The NME country is under review to determine whether its sales are dumped sales.

⁵¹ See 20th AR PDM at 19-21.

⁵² On page 10 of Petitioners' Rebuttal Comments, Petitioners state that "{p}ublicly available information shows that garlic bulbs grown in Romania have similar physical qualities as garlic bulbs grown in China. ... This same text {2001 publication on Vegetable Growing in Romania, Volume II} provides a table of the most prominent varieties of garlic grown in Romania, including three varieties of garlic that are planted in the late fall and harvested the following summer, much as in China. The main varieties are medium to large in size, with weight ranges of 40-60 grams, 25-35 grams, and 40-50 grams, respectively."

⁵³ See Petitioners Rebuttal at 52.

⁵⁴ See Garlic 20 PDM at 24.

⁵⁵ Policy Bulletin 04.1 acknowledges the need for flexibility and the use of discretion because the "meaning of 'significant producer' can differ significantly from case to case."

Thus, Xinboda's argument that India is the only country that competes with China, as a very distant second-largest producer, is misplaced, as that is not the test contemplated by the statute or the Department's practice.

Finally, we need not further address parties' arguments as to whether India or Mexico are significant producers of comparable merchandise because we found these countries not to be economically comparable to the PRC, as detailed above.⁵⁶

C. Which Country Presents the Best SV Data

Respondents' Arguments:

- Romanian garlic prices are distorted and not reliable due to the following reasons:
 - The EU imposes an import quota and a 9.6 percent *ad valorem* duty on all imported garlic. After a certain quota of imports of garlic from a non-EU country such as China is met, the EU imposes an additional duty of 1200 Euros per metric ton.⁵⁷
 - Import quotas are by definition a government intervention that distorts domestic prices⁵⁸ and the "Department has taken the position generally that it will not measure the extent or amount of government intervention in the market: the mere existence of government intervention disqualifies a potential SV source."⁵⁹
 - COMTRADE and FAOSTAT data show that:
 - production of garlic in Romania remained stable from 2003 through 2013;⁶⁰ garlic imports dropped substantially in 2007;⁶¹ and "the domestic price of garlic in Romania increased dramatically."⁶²
 - Smuggling of garlic into Romania and elsewhere in Europe because of high tariffs, which could potentially explain an increase in exports of garlic from Romania, makes the market price of garlic in Romania unreliable.
 - The Department's finding that there was no "material evidence" that Romanian garlic prices contain or were distorted by subsidies is incorrect.⁶³
 - QTF queries whether "the Department, an agency that works closely with USTR in producing annual reports to Congress on trade barriers and subsidies, {is} unfamiliar with {Common Agricultural Policy known as} CAP"⁶⁴ and concludes that "{t}he issue is whether CAP 'distorts' prices from those that would have prevailed in the absence of CAP."⁶⁵
 - Indian garlic price data is superior to other price data on the record because it is size-specific,⁶⁶ covers large bulb garlic,⁶⁷ and is broadly-based, contemporaneous, and duty and tax exclusive.⁶⁸

⁵⁶ See Policy Bulletin 4.01.

⁵⁷ See Xinboda Case Brief at 5.

⁵⁸ *Id.*, at 6.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See QTF Case Brief at 21.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See Xinboda Case Brief at 20.

- After India, Thailand is the most significant producer of garlic.⁶⁹
- Xinboda has provided two sources of reliable Thai pricing data, FAO and Office of Agricultural Economics within the Ministry of Agriculture and Cooperatives (OAE).⁷⁰ These sources are exclusive of taxes and duties and represent a broad market average.⁷¹

Petitioners' Arguments:

- The EU tariff and quota on fresh garlic imports were implemented in 2007 to decrease the impact of low-priced Chinese garlic, which was distorting the Romanian market.⁷²
- UN COMTRADE data shows that low-priced, presumably unfairly traded garlic from China accounted for virtually all of Romanian imports between 2003 and 2006.
- Prior to 2007, low-priced Chinese imports accounted for virtually all of Romania's fresh garlic imports. Now producers from other countries can export their garlic to Romania and obtain a "reasonable" price for their product.⁷³
- Romanian exports in 2012 and 2013 were less than 70,000 kilograms, while Romanian domestic production was approximately 60,000 metric tons (*i.e.*, 60,000,000 kilograms) in those years.⁷⁴
- Xinboda's claim of widespread garlic smuggling into Romania is based exclusively on articles that were published prior to the POR, or that reference activities which occurred prior to the POR and make only limited references to Romania.⁷⁵
- Thai sources identified by Xinboda do not provide contemporaneous monthly pricing information for the POR.⁷⁶
- There are large volumes of low-priced Chinese garlic smuggled into Thailand, which have depressed the price. The Thai government subsidizes the price of domestically-produced garlic, but even that has failed to stem the influence of Chinese garlic on Thai-grown garlic. As a result, Thai farmers are forced to sell their garlic at prices below the cost of production.⁷⁷

Department's Position: We continue to find the Romanian garlic prices to be the best available information because the Romanian garlic prices are: (1) specific; (2) based on a broad market average; (3) contemporaneous; (4) exclusive of taxes and duties; and, (5) publicly available. After evaluating economic comparability and significant production of comparable merchandise, if more than one country remains, it is our practice to select an appropriate SC based on the availability and reliability of data from those countries.⁷⁸ When selecting the "best available

⁶⁷ *Id.*, at 19.

⁶⁸ *Id.*, at 19.

⁶⁹ See QTF Case Brief at 21.

⁷⁰ *Id.*, at 35.

⁷¹ *Id.*, at 37.

⁷² See Petitioners' Rebuttal Brief at 50-53.

⁷³ *Id.*, at 53.

⁷⁴ *Id.*, at 50.

⁷⁵ *Id.*, at 50.

⁷⁶ *Id.*, at 46-49.

⁷⁷ See Petitioners' June 11, 2015 SV Submission.

⁷⁸ See Policy Bulletin 04.1.

information” for valuing FOPs for use in an NME proceeding, pursuant to section 773(c)(1) of the Act, our practice, as affirmed by the CIT, is to select values that are: (1) specific; (2) based on a broad market average; (3) contemporaneous; (4) exclusive of taxes and duties; and, (5) publicly available.⁷⁹ Prior to the *Preliminary Results*, data regarding the primary input garlic bulb was placed on the record for Romania and Thailand.⁸⁰

There is no disagreement as to the National Institute of Statistics Romania (NISR) data being specific and publicly available; we continue to find that the NISR data meets these criteria as we noted in the *Preliminary Results*.

The Romanian pricing data reported by NISR and FAO are identical. Comparing the 2012 garlic bulb prices for Romania that are published separately by the NISR and the FAO – the most recent year for which they are available – it is clear that the FAO data is based on the NISR data. We have determined that this fact supports the reliability of the NISR data for this POR.⁸¹ This fact also supports the NISR data as being representative of a broad market average. By contrast, the Thai pricing data reported by the FAO and OAE from 2006 through 2012 differ for each year. Considering just 2012,⁸² which is the most recent year for which we have FAO data, there is more than a 10 percent difference.

With respect to contemporaneity, the Romanian data provides monthly pricing information for all 12 months of the POR, whereas the Thai data does not cover the entire POR. The Thai pricing data from the FAO covers 2012. The second source of Thai pricing data – pricing information published by the OAE – provides pricing data for “assorted fresh garlic” from November 2013 through April 2014.⁸³

⁷⁹ See *Notice of Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 from the People’s Republic of China*, 69 FR 67304 (November 17, 2004), and accompanying Issues and Decision Memorandum at Comment 3; see also *Allied Pacific Food (Dalian) Co. Ltd. v. United States*, 716 F. Supp. 2d 1339, 1343 (CIT 2010).

⁸⁰ See *Garlic 20 PDM* at 15-16. See also Letter from Petitioners, “20th Administrative Review of Fresh Garlic from the People’s Republic of China – Petitioners’ Rebuttal of Respondents’ Surrogate Value Submissions,” (June 29, 2015); Letter from Xinboda, “Fresh Garlic from the People’s Republic of China: Rebuttal Surrogate Value Comments,” (June 29, 2015); Letter from Petitioners, “20th Administrative Review of Fresh Garlic from the People’s Republic of China - Petitioners’ Submission of Additional Romanian Surrogate Re: Value Information,” (November 2, 2015); Letter from Xinboda to the Department, “Fresh Garlic from the People’s Republic of China: Mexico Surrogate Values,” (September 25, 2015); Letter from Xinboda to the Department, “Fresh Garlic from the People’s Republic of China: Request to Reconsider Additional GNI and Surrogate Country Additional Data,” (September 30 2015).

⁸⁰ See Letter from Xinboda, “Fresh Garlic from the People’s Republic of China: Final Surrogate Value Submission,” (November 2, 2015).

⁸¹ “A comparison of the annual national farm gate prices in Romania published by the National Institute of Statistics (“NIS”) and the farm gate prices published by the FAO make clear that the two data series are identical. Specifically, the monthly national farm gate prices in Romania published by the NIS in 2012 match those published by the FAO 2012, when converted from metric tons to kilograms. See Exhibits ROM-4 and ROM-5 hereto.” See “20th Administrative Review of Fresh Garlic from the People’s Republic of China – Petitioners’ Rebuttal Comments on Surrogate Country Selection,” dated June 11, 2015 at 13 (Petitioners’ Rebuttal Comments on SC Selection).

⁸² See Exhibit ROM-4 of Petitioners’ Rebuttal Comments on SC Selection, which shows that the most recent FAOSTAT monthly data in June 2015 was December 2012.

⁸³ We understand that there was confusion about the dates as Xinboda explained in its Case Brief that “the Department was mistaken due to the difference in the Thai Buddhist calendar and the US calendar....{T}he fresh

With regard to whether the Thai prices of garlic are exclusive of taxes and duties and based on a broad market average, it is unclear. There are discrepancies between the FAO and OAE data, so we cannot assume that the Thai pricing data meets either of these criteria.

There is no information on the record that demonstrates that the European Union-imposed tariffs on imported garlic have distorted garlic prices in the Romanian market. Contrary to Xinboda's argument, none of the information it has placed on the record links the imposition of a tariff on the importation of garlic into Romania (as part of the EU) and increased garlic prices in Romania. While Xinboda has pointed to increases in garlic prices in Romania since 2007⁸⁴ as evidence of distortion, it has not provided any information demonstrating a relationship between the presence of tariffs and any change in Romanian prices, or quantifying such a relationship. Rather, Xinboda merely presumes that such a relationship exists, citing the existence of government intervention with respect to non-EU imports. Xinboda's position that any form of government intervention in a market disqualifies that market from consideration as a SC, irrespective of whether the interested party provides evidence of distortion, is incorrect. Xinboda has not demonstrated any causal link or distortion, as opposed to a temporal correlation between prices and the imposition of tariffs. It is equally plausible, as suggested by Petitioners, that the increased price for garlic reflected the removal of unfairly traded garlic imports that had dominated the market. However, the record lacks information, such as a finding in a trade remedy proceeding, that such imports were unfairly traded, and the Department likewise declines to adopt Petitioners' proposed explanation for the increase in Romanian garlic prices since 2007.

QTF asserts that Romanian garlic farmers receive subsidies through the EU Common Agricultural Policy, but the record is entirely devoid of information about such subsidies. Similarly absent from the record is evidence that garlic prices in Thailand or Romania during the POR were distorted by smuggling of low-priced garlic. The record information related to smuggling predates the POR, or at a minimum does not clearly apply to the POR. Moreover, Xinboda's argument that increased Romanian exports in 2009, which remained a small percentage of Romanian production, were due to smuggling is speculative.⁸⁵

For these final results, we find the Romanian garlic prices to be the best available information because they meet our five criteria as discussed above. In addition, regarding the availability of information on all the FOPs, not only the most significant FOP (the garlic bulb), we stated in the *Preliminary Results* that "there is publicly available data from Romania for all FOPs on the record of this review."⁸⁶

garlic farm gate prices from OAE are contemporaneous with the POR –covering 2013-2014 harvest of garlic occurring in January through April 2014."

⁸⁴ Xinboda submitted several charts based on COMSTAT and FAOSTAT data. See Xinboda's Case Brief at 8-9.

⁸⁵ The data indicates that Romanian garlic exports totaled approximately 705 metric tons in 2009 (*i.e.*, Xinboda's chart for this metric is in kilograms, as opposed to its other charts which all reflect data in metric tons), whereas Romanian production was over 60,000 metric tons. See Xinboda's Case Brief at 9.

⁸⁶ See PDM at 24.

D. Whether the Department's Preliminary Results Comport with Economic Reality

Xinboda's Arguments:

- The preliminary dumping margin of \$2.72/kg assigned to Xinboda does not comport with commercial reality. As the CIT held in *Baoding Mantong Fine Chemistry Co. v. United States (Baoding Mantong)*, the Department must consider whether the calculated margin “defies commercial reality.”⁸⁷
- The \$2.72/kg margin is not credible because Petitioners “continue to allow zero rate exporters out of the {administrative} reviews.”⁸⁸
- Petitioners' withdrawal of their review request of Harmoni Spice suggests that the bulb price is the same as when Harmoni was last reviewed and the garlic bulb SV was much lower.⁸⁹ The Department must reject Petitioners' surrogate bulb valuation proposal because it is completely out of line with economic reality and undermined by Petitioners' actions in this review.⁹⁰

Petitioners' Arguments:

- *Baoding Mantong* is inapplicable because in that case the CIT remanded the Department's calculation of a 453.79 percent rate for a fully cooperative respondent that was three times higher than the PRC-wide entity rate that was based on adverse facts available.⁹¹
- Xinboda's preliminary antidumping margin of \$2.72/kg margin is significantly less than the \$4.71/kg PRC-wide entity rate.⁹²
- Xinboda's dumping margin substantially depends on the price Xinboda charges for subject merchandise. The Department preliminarily calculated a margin by comparing Xinboda's sales to normal value.⁹³
- Whether Petitioners request a review of a potential respondent or not has no relevance to either Xinboda's rate or the SV of an input garlic bulb.
- The Department calculated antidumping rates for two new shippers that were greater than the rate the Department calculated for Xinboda.⁹⁴

Department's Position: Xinboda's arguments alleging an inconsistency of the Final Results with its commercial reality are misplaced. As the U.S. Court of Appeals for the Federal Circuit recently clarified in *Nan Ya Plastics*,⁹⁵ the Department is not expected to apply “commercial

⁸⁷ See Xinboda's Case Brief at 58-59.

⁸⁸ *Id.*, at 59.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See Petitioners' Rebuttal Brief at 60.

⁹² *Id.*, at 61.

⁹³ *Id.*, at 60.

⁹⁴ *Id.*, at 60. (citing to *Fresh Garlic from the People's Republic of China: Final Results of the Semiannual Antidumping New Shipper Review of Jinxiang Merry Vegetable Co., Ltd. and Cangshan Qingshui Vegetable Foods Co., Ltd.*; 2012-2013, 79 FR 62103 (*Merry Vegetable and Cangshan NSRs*) (where the rate calculated for Jinxiang Merry Vegetable Co., Ltd. was \$3.33/kg and the rate calculated for Cangshan Qingshui Vegetable Foods Co., Ltd. was \$3.06/kg)).

⁹⁵ See *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1344-45 (Fed. Cir. 2016) (*Nan Ya Plastics*).

reality” in the broadest terms. The appellate court explained that “Commerce need not examine the economic or commercial reality of the parties specifically, or of the industry more generally, in some broader sense.” Rather, the Department’s decision “reflects ‘commercial reality’ if it is consistent with the method provided in the statute, thus in accordance with law.”⁹⁶ The Department has followed the SV methodology set forth in the governing law, and thus the margins calculated in these *Final Results* do not “defy” commercial reality. Moreover, unlike in *Baoding Mantong*, Xinboda’s margin in this case is less than that calculated for the PRC-wide entity based on adverse facts available, and is lower than other rates calculated for cooperating respondents in reviews of the underlying order.⁹⁷

The Federal Circuit has upheld the Department’s “ultimate authority to select the primary surrogate country in a proceeding involving a non-market economy country.”⁹⁸ While the Department is required to consider the evidence on the record and the parties’ arguments to select the country that best matches the established statutory criteria, there is no provision in the statute that requires the Department to defer to the preferences of respondents in making its choice as long as the Department is following its statutory mandate. This mandate requires that the Department select a country that is economically comparable to the non-market economy at issue and a significant producer of subject merchandise. The Department need not disregard data merely because a respondent finds it disagreeable. This would in fact contravene Congress’ intent for how the Department administers the law to remedy unfair trade practices.

The fact that Romanian prices may be higher than those of other surrogate countries is not, in itself, a basis to disregard them. The Department need not try to mimic the business decisions of a respondent in selecting SVs – as the Federal Circuit has explained there is no provision in the statute requiring the Department to match the respondent’s exact production experience in the SC.⁹⁹ The Department’s margin for Xinboda was reasonable, and we arrived at it using Xinboda’s U.S. prices and FOPs.

Finally, whether Petitioners request a review of other Chinese exporters has no relevance to Xinboda’s calculations or to the SV of a garlic bulb. It is not surprising that the price of garlic bulb or the sales price for subject merchandise may have changed over time, and there is no basis to infer that Xinboda should receive a particular rate in this review on the basis of Petitioners’ withdrawal of a review request as to another exporter that received a zero rate in a prior review.

⁹⁶ *Id.*

⁹⁷ See *Merry Vegetable and Cangshan NSRs*.

⁹⁸ See *Jiaying Brother Fastener Co. v. United States*, No. 2015-1161 (Fed. Cir. Apr. 21, 2016) (“Commerce may perform its duties in the way it believes most suitable”) (citing *JFB RAK LLC v. United States*, 790 F.3d 1358, 1364 (Fed. Cir. 2015)).

⁹⁹ See *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999).

Comment 2: The Department’s Rejection of Mexico as a Surrogate Country Violated the Department’s New Factual Information Regulations and Was Not in Accordance with Law

Xinboda’s Arguments:

- The Department’s rejection of its September 17, 2015 submission, which contained 2014 GNI rankings from the World Bank and which showed Mexico as economically comparable to the PRC, as untimely was not in accordance with the law.¹⁰⁰ The period of review for this case is “primarily encapsulated by 2014, meaning that the most accurate margins must be based on an analysis of this 2014 GNI data rather than the 2013 data”¹⁰¹ used by the Department in the *Preliminary Results*.
- The Department “has never treated the surrogate country comment deadline as an actual deadline for information related to the surrogate country selection—*i.e.*, information about economic comparability and significant production.”¹⁰² Rather, “the Department has a general practice of allowing parties to submit GNI information in later SV submission well after the surrogate country comment period had passed.”¹⁰³
- The regulations do “not contemplate a separate deadline for surrogate country information” and the Department’s deadline in this review “amounts to an arbitrary deadline that the Court of International Trade {(CIT)} has already found unlawful.”¹⁰⁴ The Department’s definition of information under 19 CFR 351.408(c) with {sic} had always included surrogate country selection information.”¹⁰⁵ The Department cannot arbitrarily apply its definition of information that can be submitted under 19 CFR 351.301(c)(3)(ii).¹⁰⁶
- In other cases, the Department has: revised the OP Lists to reflect the importance of relying on the most contemporaneous per capita GNI data to determine economic comparability;¹⁰⁷ selected a primary SC not on the Department’s initial OP List in the *Final Results* after saying in the *Preliminary Results* it would not consider the country at all;¹⁰⁸ and used SVs from countries not appearing on the record until after the *Preliminary Results*.¹⁰⁹

¹⁰⁰ See PDM at 24.

¹⁰¹ See Xinboda’s Case Brief at 52.

¹⁰² *Id.*, at 43.

¹⁰³ *Id.*, at 44.

¹⁰⁴ See Xinboda’s Case Brief at 50.

¹⁰⁵ See Xinboda’s Case Brief at 50. See also *Folding Metal Tables and Chairs From the People’s Republic of China: Final Results of 2007-2008 Deferred Antidumping Duty Administrative Review and Final Results of 2008-2009 Antidumping Duty Administrative Review*, 76 FR 2883 (January 18, 2011) and accompanying Issues and Decision Memorandum at Comment 4 (discussing the post-preliminary results submission and argumentation for a new SC were not untimely).

¹⁰⁶ See Xinboda’s Case Brief at 45.

¹⁰⁷ *Id.*, at 48, where Xinboda cites to *Activated Carbon from the PRC*. See also *Certain Corrosion-Resistant Steel Products From the People’s Republic of China: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 81 FR 75 (January 4, 2016), where the Department revised the SC letter on July 31 to reflect the new 2014 GNI instead of the 2013 GNI list that it had put on the record on July 10.

¹⁰⁸ *Id.* (citing *Hardwood and Decorative Plywood From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 58273 (September 23, 2013) (*Plywood from China*) (changing from the Philippines to Bulgaria—a country not initially listed)).

¹⁰⁹ See *Frontseating Service Valves Preliminary Results of Antidumping Duty Administrative Review; Preliminary Determination of No Shipments; 2012-2013*, 79 FR 30081 (May 27, 2014) and accompanying PDM (selecting

- The Department had ample time to consider this important information prior to November 30, 2015 deadline for the preliminary results¹¹⁰ and eight and half months prior to the June 2016 final results. In *DuPont Teijin Films v. United States*,¹¹¹ the CIT stated, “Commerce’s interest in the finality of the OP’s list and the administrative burden of considering subsequently released GNI data does not outweigh Commerce’s statutory obligations and does not permit Commerce to completely eliminate any meaningful opportunity to submit factual information related to economic comparability.”
- In *Vinh Hoan Corp. v. United States*,¹¹² the CIT emphasized the fact that the Department does not finalize its primary SC selection by the timeframe the Department asks for its economic comparability comments.¹¹³ “As the Court specifically noted in *Vinh Hoan*, the Department must base its analysis on the best available information from countries that are economically comparable and significant producers and here the Department had information more contemporaneous GNI data – that informed this precise question in front of it and it chose to disregard it.”¹¹⁴
- Accepting its timely filed Mexican SV data in accordance with 19 CFR 351.301(c)(3)(ii) is inconsistent with the Department’s rejection of Xinboda’s untimely filing of its GNI data for Mexico.

Petitioners’ Arguments

- Xinboda has identified no record information to establish that Mexico satisfies the first criterion (economic comparability) in the Department’s methodology for selecting a SC in a proceeding involving goods from an NME country. The Department’s rejection of the 2014 GNI information untimely submitted by Xinboda is consistent with the CIT’s affirmance of the Department’s action in *Vinh Hoan*.¹¹⁵
- The “Department’s enforcement of the deadlines it established in this segment concerning the OP List and the identification of the primary surrogate country is fully consistent with the purpose underlying the Department’s revision of its regulation concerning deadlines for submitting factual information in NME proceedings.”¹¹⁶
- Xinboda did not ask for an extension of time to submit updated GNI data and did not explain the 78-day delay between the World Bank’s publication of its 2014 GNI information on July 1, 2015 and its subsequent submission of the information to the Department in late September 2015.¹¹⁷
- Xinboda’s reliance on *DuPont Teijin* is misguided as the circumstances at issue in this case are different.

Bulgaria as the primary SC even though the parties only advocated and provided surrogate information from Thailand, Indonesia, and the Philippines.).

¹¹⁰ *Id.*, at 49.

¹¹¹ See *DuPont Teijin Films v. United States*, 931 F. Supp. 2d 1297, 1306 (CIT 2013).

¹¹² See *Vinh Hoan Corp. v. United States*, 49 F. Supp. 3d 1285 (CIT 2015).

¹¹³ See Xinboda Case Brief at 50.

¹¹⁴ *Id.*, at 51-52. See also *Vinh Hoan*, 49 F. Supp. 3d at 1298.

¹¹⁵ See also *Vinh Hoan*, 49 F. Supp. 3d at 1298.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

- First, the GNI data at issue was on the record whereas in this instance, the GNI data related to Mexico is not on the record.¹¹⁸
- Second, India was identified on the OP List in the underlying administrative proceeding at issue, whereas Mexico was not identified as a potential SC on the OP List in this segment.¹¹⁹

Department's Position: Our decision to reject Xinboda's untimely filing with SC information is consistent with our factual information regulations and was in accordance with the law. As we stated in the *Preliminary Results*, we established deadlines for SC information so that we may consider the SV information from economically comparable countries in a timely fashion. Xinboda's argument that the Department "has never treated the surrogate country comment deadline as an actual deadline to information related to the surrogate country selection,"¹²⁰ is not accurate and does not show requisite understanding of what is required to analyze the SV information at the appropriate stage in an administrative proceeding. The Department intentionally set deadlines for comments on the OP List and relating to SC selection to be early in the proceeding. Although the Department also set deadlines that were earlier than thirty days prior to the preliminary results for SVs, those deadlines were nevertheless later than the deadlines relating to economic comparability. As reflected in the Department's sequential SC analysis described above, the Department considers economic comparability first and reasonably required record information on that issue earlier in the course of the review.

We are not arbitrarily applying a definition of what can be submitted under the Department's regulations, which state the following at Section 351.301(c)(3)(ii): "All submissions of factual information to value factors under Section 351.408(c) . . . are due no later than 30 days before the scheduled date of the preliminary results of review."

We stated the following in the letter we sent to Xinboda rejecting its September 17, 2015 filing as untimely:

While Xinboda filed its September 17, 2015 submission within the regulatory deadline for submitting factual information to value factors of production (19 CFR 351.301(c)(3)(ii)), the GNI data contained in the submission are not factual information to value factors of production under 19 CFR 351.408(c); rather, these data relate to the selection of surrogate countries at the same level of economic development as the PRC. The Department previously established clear deadlines for parties to comment on the selection of surrogate countries.¹²¹

Contrary to Xinboda's arguments, our acceptance of its November 2, 2015 Mexican SV data as timely filed is not inconsistent with our rejection of Xinboda's September 17, 2015 filing of 2014

¹¹⁸ *Id.*, at 36.

¹¹⁹ *Id.*, at 37.

¹²⁰ See Xinboda's Case Brief at 43.

¹²¹ See Letter from the Department of Commerce to Xinboda, dated September 25, 2015.

GNI as untimely. Pursuant to 19 CFR 351.301(c)(3)(ii), the due date for SV information was “30 days before the scheduled date of the preliminary results of review,” which was on October 31, 2015, but defaulted to November 2, 2015, because October 31, 2015 was a Saturday.

The CIT’s decision in *Vinh Hoan* supports the distinction the Department drew here between factual information to value factors of production and information relevant to economic comparability of potential surrogate countries. In *Vinh Hoan*, the CIT affirmed the Department’s rejection of OP lists containing GNI information that a respondent tried to place on the administrative record of that proceeding, explaining:

Commerce categorized the Subsequent Review GNI Lists as ‘factual information’ under 19 CFR §351.301(b)(2) as opposed to ‘publicly available information to value factors’ under 19 CFR § 351.301(c)(3)... However, it is a reasonable application of 19 CFR § 351.301(c)(3) that “publicly available information to value factors” refers to information that will be used to directly value a specific factor, rather than indirectly value a specific factor because it influences the choice of the primary SC. Thus, the court cannot say that Commerce arbitrarily or unreasonably applied its regulations.¹²²

Moreover, the CIT’s decision in *Dupont Teijin* addressed a different situation than the one presented in this case because Mexico was not identified on the OP list in this administrative review, while India was on the OP List in the underlying administrative proceeding of *Dupont Teijin*.¹²³ In *Dupont Teijin*, all parties were on notice that India may be selected (or considered for selection) as the SC, while in this case, Mexico was not identified as a potential SC until Xinboda’s September 17, 2015 submission.¹²⁴ Furthermore, consistent with *Dupont Teijin*’s holding that the Department must provide a meaningful comment period on economic comparability, the Department provided several weeks for interested parties to offer such comments and received extensive comments, including from Xinboda. Accepting Xinboda’s introduction of new GNI information months later would have nullified the comments already received based on the previous year’s GNI information, and thus required a further comment period.

Specifically, we issued the request for SC and SV comments and information on April 20, 2015.¹²⁵ In the Letter Requesting SC and SV Information, the Department set deadlines for providing comments on the list of certain countries at the same level of economic development, the selection of primary SC, and the selection of SVs. The comments on the selection of primary SC were due on June 1, 2015. Xinboda filed comments on June 1, 2015 suggesting that the Department select India or Thailand as the primary SC. Xinboda did not request an extension for its comments on the selection of the primary SC to account for new GNI information to be published by the World Bank on July 1. Even after the 2014 per capita GNI

¹²² See *Vinh Hoan*, 49 F. Supp. 3d at 1298.

¹²³ See *Dupont Teijin*, 931 F. Supp. 2d at 1299.

¹²⁴ *Id.*

¹²⁵ See Letter from the Department of Commerce to All Interested Parties, titled “2013-2014 Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People’s Republic of China: Request for Surrogate Country and Surrogate Value Information,” dated April 20, 2015 (Letter Requesting SC and SV Information).

rankings were revised by the World Bank, showing an increase in China's 2014 per capita GNI, and after the Department issued a new SC list based on this updated information in other proceedings, Xinboda did not submit in a timely manner its additional SC comments. In fact, 78 days elapsed between the availability of the World Bank's 2014 per capita GNI rankings and Xinboda's September 17, 2015 submission. Given the untimeliness of this filing, we were not able to consider Xinboda's additional SC comments and removed the filing from the record. In other administrative proceedings cited by Xinboda, *Activated Carbon from China* and *Certain Corrosion-Resistant Steel Products from China*, the circumstances were different because the Department released the OP List based on the 2013 GNI information in early July 2014, *i.e.*, after publication of the 2014 GNI information, and decided to issue a revised OP List based on the more recent information.

The Department's enforcement of deadlines for submissions concerning the OP List and the identification of the primary SC in this proceeding is entirely consistent with the regulations concerning deadlines for submitting new factual information in NME cases. Moreover, the enforcement of the deadlines for submissions concerning the OP List is fully consistent with the purpose underlining our regulations for "Time Limits for Submission of Factual Information."¹²⁶

Comment 3: Whether QTF Cooperated to the Best of Its Ability in this Review

QTF's Arguments:

- QTF has fully cooperated in this administrative review and has "not withheld any information requested by the Department... {and it has} provided an explanation for the Chinese Inspection and Quarantine (CIQ) anomalies and provided documentation in the form of shipment certificates, statements and other correspondence."¹²⁷
- The Department did not identify any additional documents or information that QTF could have provided.
- There is no record information which indicates that QTF was affiliated with any other Chinese company.¹²⁸
- An official from the U.S. Food and Drug Administration conducted an inspection and "acknowledged that QTF had been processing garlic."¹²⁹ QTF provided a summary of garlic consumption and output that "confirms QTF processed the garlic. Moreover, this summary tied to the quantities of raw garlic QTF purchased from each source with a complete listing...by name and address."¹³⁰
- There would be no reason for QTF to use other processors when it had capacity at its own facility, and could and did process the garlic when it learned that the inspection site was of concern to Customs.¹³¹

¹²⁶ See 19 CFR 351.301(c)(3).

¹²⁷ See QTF's Case Brief at 18.

¹²⁸ *Id.*, at 8.

¹²⁹ *Id.*, at 13.

¹³⁰ *Id.*, at 7.

¹³¹ *Id.*, at 12.

- The “Department’s analysis relies on a Chinese government rule. While the Department may interpret the rule, the Department is without competence to judge how the rule is applied or enforced in practice.”¹³²
- Without verification, the Department is effectively making a determination based on its interpretation of a foreign law and not based on the facts presented and certified by QTF.¹³³
- QTF received a separate rate in a prior new shipper review, and in the current review, the Department did not question QTF’s independent status as evidenced in its SRC and Section A responses on the record of this review.¹³⁴
- *Rhone Poulenc, Inc. v. United States*, and *Olympia Industrial v. United States* support its contention that “the Department’s failure to articulate the standard it applied to conclude that QTF failed to cooperate to the best of its ability and thereby was part of the PRC-wide entity, constitutes reversible error.”¹³⁵

Petitioners’ Arguments:

- The continued application of AFA is warranted because “QTF intentionally hid from this segment’s record the identities of, and QTF’s relationships with, the other Chinese producers that produced {a large portion} of its POR shipments.”¹³⁶
- QTF’s argument that it provided all the documentation requested by the Department is misplaced.¹³⁷ Pursuant to *QVD Food Co. v. United States*, “the burden of creating an adequate record lies with interested parties and not with Commerce.”¹³⁸ Thus, QTF is responsible for providing information sufficient to demonstrate that it produced all the fresh garlic that it sold during the POR
- The Department’s analysis of QTF’s theories on the origin of the CIQ deficiencies “found QTF’s explanation...lacked credibility. The agency explained that this scenario was both contrary to the Chinese regulations and that the evidence of other unique produce registration numbers appearing on CIQ certifications ‘casts doubt on which entity produced the garlic in question.’”¹³⁹
- QTF’s question as to the economic sense of using a third party to process the garlic is misdirected. Rather, the obvious explanation is that “...QTF agreed to export to the United States subject merchandise processed by other entities because the cash deposit rate of 32.78 percent *ad valorem* that it obtained in the 12th new shipper review (NSR) was significantly lower than the rate available to virtually any other Chinese exporter.”¹⁴⁰
- Contrary to QTF’s argument, the Department was not required to verify QTF in this review.¹⁴¹ Moreover, verification “is a procedure used by the Department to ‘verify the

¹³² *Id.*, at 16.

¹³³ *Id.*, at 19.

¹³⁴ *Id.*, at 14.

¹³⁵ *Id.*, at 15.

¹³⁶ See Petitioners’ Rebuttal Brief at 13.

¹³⁷ *Id.*, at 10.

¹³⁸ *Id.*, at 10.

¹³⁹ *Id.*, at 7.

¹⁴⁰ *Id.*, at 11.

¹⁴¹ *Id.*, at 17, citing to 19 CFR 351.307(b)(1)(v). The regulations only require the Department to conduct a verification if a ‘domestic interested party’ makes a request and no verification was conducted in the ‘immediately

accuracy and completeness of submitted factual information’ rather than provide a respondent with an opportunity to submit new factual information which it has previously withheld.” QTF should not be allowed the opportunity to remedy the deficient record at verification.¹⁴²

- QTF’s misrepresentations related to one of the most significant questions at issue in any NME investigation or review, namely which entity produced the subject merchandise. The Department is well within its discretion to find that it cannot rely on the veracity of QTF’s Section A and SRC responses.¹⁴³
- QTF’s situation is similar to the respondent’s in *Jiangsu Changbao*,¹⁴⁴ in which the CIT “affirmed the Department’s decision to apply the China-wide rate to an uncooperative respondent” where “the Department made specific findings which the CIT explained were relevant to {the respondent’s}’s request for a separate rate.”¹⁴⁵
- The “Department has applied the PRC-wide rate to the PRC-wide entity in every administrative review under the antidumping order on fresh garlic. QTF has identified no basis for the Department to now conclude that this margin, as applied to the PRC-wide entity, is unreasonable.”¹⁴⁶

Department’s Position: We continue to use AFA to determine QTF’s margin. QTF withheld requested information, failed to provide requested information by the established deadlines, and significantly impeded the proceeding, within the meaning of sections 776(a)(2)(A)-(C) of the Act. Therefore, the use of facts available is warranted. Further, QTF failed to cooperate by not acting to the best of its ability in complying with our requests for information. Accordingly, pursuant to section 776(b) of the Act, an adverse inference is warranted.

Based on our review of the record evidence, we continue to determine that QTF was not the sole producer of garlic it reported in its sales database and that the company did not provide complete, accurate responses to our Section A questionnaire.¹⁴⁷ We note that QTF’s relatively low cash deposit rate during the POR was calculated in an NSR and was only applicable to subject merchandise produced and exported by QTF. Therefore, the identity of the party or parties, which produced QTF’s garlic is particularly important, and QTF’s inability to substantiate its claim to have been the sole producer is particularly troubling.

In the *Preliminary Results*, we determined that QTF was not the sole producer of the garlic it reported in its sales database and that accordingly necessary information concerning the producers that supplied its garlic was not on the record of this proceeding. The vast majority of phytosanitary certificates submitted by QTF were issued by CIQ bureaus without jurisdiction over its Qingdao production facility, and in many instances, also show CIQ numbers uniquely

two preceding reviews.” Since the Department conducted verification in the 18th administrative review, and Petitioners withdrew their request for review in this proceeding, the Department was not required to verify QTF.

¹⁴² *Id.*, at 17.

¹⁴³ *Id.*, at 15.

¹⁴⁴ See *Jiangsu Changbao Steel Tube Co. v. United States*, 884 F. Supp. 2d 1295 (CIT 2012).

¹⁴⁵ See Petitioners’ Rebuttal Brief at 14.

¹⁴⁶ *Id.*, at 15

¹⁴⁷ See PDM at 13; Memorandum from Alexander Cipolla, International Trade Analyst, to the File, “Application of Adverse Facts Available (AFA) to Qingdao Tiantaixing Foods Co., Ltd.,” at 3 (Dec. 4, 2015) (QTF AFA Memo).

associated with producers other than QTF. Without complete information regarding the identity of the producer(s) of subject merchandise, we could not determine that the information QTF reported for its FOPs was complete, or whether QTF had affiliated producers, involved intermediate parties in the production of subject merchandise, or sold subject merchandise supplied by unaffiliated producers.

This continues to be the case for these *Final Results*. QTF has not explained the CIQ discrepancies, but rather has offered unsubstantiated theories that the Department continues to find are not credible and inconsistent with the applicable CIQ regulations.¹⁴⁸ As we explained in the *Preliminary Results*, QTF's failure to report all of its processors, and therefore, all of its FOP information, indicated that QTF did not act to the best of its ability to comply with our requests for information.

As we stated in the *Preliminary Results*, "we examined the translation and original language version of the CIQ regulations placed on the record by Petitioners and confirmed that they clearly state that the CIQ certificates must be issued by the local CIQ bureau where a processing facility is domiciled and that the CIQ certificate... must bear the producer's registration number."¹⁴⁹ We further stated that "the vast majority of the CIQ certificates submitted by QTF were issued by CIQ bureaus elsewhere in Shandong Province and in many instances also showed CIQ numbers associated with producers other than QTF."¹⁵⁰ QTF has not provided any information to support its contention that the PRC government does not apply or enforce the CIQ regulations at issue.

QTF has also argued that it would not make economic sense for it to use a third party to process fresh garlic when it could process the garlic at its facility. Conversely, Petitioners have argued that starting in July 2014, QTF agreed to export subject merchandise processed by other entities because its cash deposit rate was significantly lower than the rate available to virtually any other Chinese exporter.

QTF's argument that it provided all the documents requested by the Department is misplaced. QTF failed to create an adequate record to explain or otherwise rebut the discrepancies obvious on the face of its CIQ certificates. The Department finds that QTF's Section A responses include misrepresentations as to the identity of the producer(s) of the bulk of its subject merchandise, and therefore that QTF has withheld information, failed to provide requested information by the established deadlines, significantly impeded the proceeding, and failed to cooperate to the best of its ability.

QTF's explanations for the CIQ anomalies are not credible, and led the Department to conclude that its response to our Section A Questionnaire contained misrepresentations. The Department identified a deficiency in QTF's representations that it was the sole processor of its garlic and

¹⁴⁸ See QTF AFA Memo.

¹⁴⁹ See Garlic 20 PDM at 12.

¹⁵⁰ *Id.*

that all processing was done at its Qingdao facility.¹⁵¹ QTF's response to the Department's Supplemental Questionnaire on these issues did not resolve the identified discrepancies.¹⁵² Rather, QTF's explanations raised further concerns about the credibility of its responses. This lack of credibility and apparent missing information regarding its processors undermine the reliability of its reported information, including information pertaining to government control over its export activities contained in its Section A response. The Department did not receive complete information regarding QTF's relationships with other entities that produced the bulk of its subject merchandise exported during the POR, which may have included information relating to whether QTF was subject to government control. Given QTF's implausible explanations, we continue to be unable to consider any information in QTF's Section A response, and specifically its information relating to government control.

The fact that QTF was granted a separate rate in its NSR is irrelevant to whether it merits a separate rate in this review. Companies are required to certify their independent status in each review, and mandatory respondents, such as QTF in this review, must submit a Section A questionnaire response that further addresses entitlement to a separate rate. When the Department finds that the response to a request for information fails to comply with the request and the submitting party fails to remedy the deficiency, the Department may disregard all of the original and subsequent responses.¹⁵³ For the same reasons that QTF's Section A questionnaire response is unusable, the Department cannot rely on its more abbreviated separate rate certification. Because we continue to determine that QTF's information concerning government control of its export activities is not useable, we find that QTF has failed to rebut the presumption of government control, and failed to demonstrate its eligibility for a separate rate. Accordingly, for these *Final Results* we continue to find that QTF is part of the PRC-wide entity.

As noted above, the cash deposit rate applicable to QTF during the POR was calculated in its NSR¹⁵⁴ and was applicable only to entries of subject merchandise produced and exported by QTF. The record of this review also shows that, after its initial NSR shipment in 2008, QTF did not export subject merchandise in any of the five annual review PORs. QTF states that it declined to ship subject merchandise to the United States during this time because "it could not produce enough garlic to turn a profit, even after being assigned a low producer-exporter cash deposit rate."¹⁵⁵ QTF also notes that the *Final Results* of the 2011-2012 administrative review were published in June 2014.¹⁵⁶ QTF points out that certain exporters – e.g., Hebei Golden Bird Trading Co., Ltd., which were selling substantial volumes of subject merchandise to the United

¹⁵¹ See Letter from the Department to QTF Re: "2013-2014 Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: Supplemental Questionnaire," dated August 27, 2015 (Supplemental Questionnaire QTF).

¹⁵² See Response to Department's Supplemental Questionnaire filed on Behalf of Qingdao Tiantaixing Foods Co., Ltd. (September 17, 2015).

¹⁵³ See section 782(d) of the Act.

¹⁵⁴ See *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).

¹⁵⁵ See *Fresh Garlic from the People's Republic of China 20th Review—QTF's Rebuttal to FPGA's Response to QTF's Supplemental Questionnaire* dated October 14, 2015.

¹⁵⁶ See *Fresh Garlic From the People's Republic of China: Final Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011-2012*, 79 FR 36721 (June 30, 2014).

States, received much higher cash deposit rates based on the 2011-2012 *Final Results*. QTF maintains that this development led to increased demand for QTF's garlic.¹⁵⁷

As discussed on page 24 and in the *Preliminary Results*, the Department's analysis of information on the record led it to conclude that QTF did not produce the vast majority of fresh garlic that it exported to the United States in the last four months of the instant POR. The record shows that in July 2014, CBP noted a huge increase in entries of subject merchandise purportedly produced and exported by QTF and entered under QTF's low cash deposit rate. Based on its examination of entry documents submitted by the importers at issue, CBP separately determined that it "could not reliably identify" QTF as the producer of the fresh garlic at issue and implemented enhanced bonding requirements.

Upon consideration, QTF's argument about the poor economic sense of using third party processors is disingenuous and misleading. The record shows that QTF immediately began shipping substantial amounts of subject merchandise to the United States in July 2014 after other Chinese exporters' cash deposit rates increased. The record also shows that QTF obtained most of the fresh garlic it exported to the United States from third-party processors and that the garlic at issue was entered into the United States using QTF's low producer-exporter specific deposit rate. Notwithstanding its arguments to the contrary, QTF clearly had its reasons for engaging in this type of business model, at least during the months immediately following the change in cash deposit rates.¹⁵⁸

We find that conducting a verification of QTF in this proceeding would be inappropriate. Specifically, because we use verification "to verify factual information upon which the Secretary relies," verification of QTF's multiple, mutually exclusive explanations of the CIQ anomalies that the Department rejected in the *Preliminary Results* was not appropriate.¹⁵⁹ Furthermore, our regulations, in 19 CFR 351.307, "Verification of Information," state:

(a) *Introduction.* Prior to making a final determination in an investigation or issuing final results of review, the Secretary may verify relevant factual information. This section clarifies when verification will occur, the contents of a verification report, and the procedures for verification.

(b) *In general.* (1) Subject to paragraph (b)(4) of this section, the Secretary will verify factual information upon which the Secretary relies in . . .

(v) The final results of an administrative review if:

¹⁵⁷ See Fresh Garlic from the People's Republic of China 20th Review—QTF's Rebuttal to FPGA's Response to QTF's Supplemental Questionnaire dated October 14, 2015.

¹⁵⁸ QTF's citation to an inspection conducted by the U.S. Food and Drug Administration on June 15-17, 2015 is inapposite because it does not show that it was a processor of the subject merchandise exported in July 2014. See QTF Case Brief at 13; Response to Department's Supplemental Questionnaire filed on Behalf of Qingdao Tiantaixing Foods Co., Ltd. at 4 (September 17, 2015).

¹⁵⁹ See 19 CFR 351.307(b).

- (A) A domestic interested party, not later than 100 days after the date of publication of the notice of initiation of review, submits a written request for verification; and
- (B) The Secretary conducted no verification under this paragraph during either of the two immediately preceding administrative reviews.

Since there was no outstanding request for verification from petitioners and we verified in the 2011-2012 (18th) administrative review of this antidumping duty order, there was no regulatory requirement for us to conduct verification in this administrative review.

Finally, we note that QTF has argued that applying the PRC-entity rate to QTF would be punitive. We disagree. As described above, the information provided in QTF's Section A response and SRC is unreliable, and we are reasonably disregarding that information pursuant to sections 776 and 782(d) of the Act. The PRC-entity is not under review.¹⁶⁰ This means that the \$4.71/kg PRC-entity rate will not change in this review. We find that QTF has not rebutted the presumption of government control over its export activities and therefore is part of the PRC-entity. This means it now receives the PRC-entity rate of \$4.71/kg.

Comment 4: Accounting for Storage and Transportation Factors for Input Garlic Bulbs Consumed by Excelink

Petitioners' Arguments:

- The Department should continue to rely on the farmgate prices for input garlic bulbs published by NISR for the Final Results. However, in order to ensure an accurate normal value the Department must modify its calculation because the Romanian farmgate price does not reflect significant storage and transportation costs incurred by Excelink and its suppliers.¹⁶¹
- The NISR data "both for this 2013/2014 POR and historically," (1) reflect the first marketing stage; (2) do not include transport or storage costs; (3) do not include subsidies on products nor VAT.
- The record in this segment demonstrates that the bulk of input garlic bulbs consumed by Excelink throughout this POR incurred substantial cold or controlled-atmosphere (CA) storage prior to being delivered to Excelink's processing facility.
- Xinboda failed to report factors associated with Excelink's on-site storage area and expenses.¹⁶²
- In addition, the Department did not account for transportation costs for the delivery of raw garlic bulbs because Xinboda claimed it was unable to report the distance from the storage facilities where input garlic was stored to Excelink's processing facility.

¹⁶⁰ See *Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 FR 65963 (November 4, 2013).

¹⁶¹ See Petitioners' Case Brief at 3.

¹⁶² *Id.*, at 12.

Xinboda's Arguments:

- The record of this review shows that Xinboda purchases garlic bulb inputs directly from local farmers throughout the POR and that {i}nsofar as the farmers themselves rent storage space, use electricity, pay wages, these costs are included in the price that Xinboda pays for its garlic bulbs.”¹⁶³
- Adding suppliers' costs to Xinboda's FOPs would run counter to the Department's stated intent in applying its intermediate input methodology by “forgoing the unfeasible task of measuring each of the garlic farmers' factors of production.”¹⁶⁴ In *Zhengzhou Harmoni Spice. Co. v. United States*, the CIT accepted the Department's rationale in instituting the intermediate input methodology; *i.e.*, foregoing the calculation of the suppliers' factors of production.”¹⁶⁵
- The record does not support Petitioners' contention that Xinboda failed to report accurate transport distances and excluded its labor and electricity for on-site cold storage.¹⁶⁶

Department's Position: Consistent with our intermediate input methodology, we have not added any additional costs for off-site storage (either CA or cold storage) incurred by Xinboda's suppliers as those costs would have been included in the price that Xinboda paid to its farmers/suppliers for the raw garlic inputs.¹⁶⁷

We note the main rationale for using the intermediate input methodology in administrative reviews of garlic was to avoid the unfeasible task of analyzing each garlic farmer's and/or supplier's factors of production.¹⁶⁸ Referencing *Drill Pipe from the People's Republic of China*¹⁶⁹ in *Xanthan Gum from The People's Republic of China*,¹⁷⁰ we stated that “attempting to value the FOPs used in a production process yielding an intermediate product would lead to an inaccurate result because a significant element of the cost would not be adequately accounted for in the overall build up when SVs are applie{d} to the FOPs.”¹⁷¹

It has not been our practice to add additional costs for storage (CA or cold storage) in administrative reviews of garlic.¹⁷² Information on the record of this review shows that fresh garlic is harvested in the PRC between May and early June. This raw garlic is semi-perishable

¹⁶³ See Xinboda Rebuttal Brief at 2.

¹⁶⁴ *Id.*, at 5-6.

¹⁶⁵ *Id.*, at 4.

¹⁶⁶ *Id.*, at 6.

¹⁶⁷ See *Fresh Garlic from the People's Republic of China: Final Results of the 2009-2010 Administrative Review*, 77 FR 34346 (June 11, 2012) and accompanying Issues and Decision Memorandum at Comment 2.

¹⁶⁸ See *Zhengzhou Harmoni Spice. Co. v. United States*, 617 F. Supp. 2d 1281 (CIT 2009).

¹⁶⁹ See *Drill Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances*, 76 FR 1966 (January 11, 2011) and the accompanying Issues and Decision Memorandum at Comment 12.

¹⁷⁰ See *Xanthan Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013) (*LTFV for Xanthan Gum*). See also *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review and Final Results of New Shipper Reviews*, 71 FR 26329 (May 4, 2006) (this administrative review covered the period from November 1, 2003 through October 31, 2004.)

¹⁷¹ *Id.*

¹⁷² See *Fresh Garlic from the People's Republic of China: Final Results of the 2009-2010 Administrative Review*, 77 FR 34346 (June 11, 2012) and accompanying Issues and Decision Memorandum at 8.

and could be dried for a period of up to three months. Thus, as noted by Petitioners, all of the semi-perishable raw garlic inputs processed by Respondents after mid-September would require either cold storage or CA storage facilities in order to remain viable for processing during the next six to nine months.

Petitioners have claimed that the NISR's garlic prices are "farm gate" prices because they do not include transport or storage costs. However, we note that although the garlic harvest in Romania is also early summer,¹⁷³ the NISR data has monthly prices. Given that Romanian garlic is also semi-perishable, any raw garlic sold in Romania from October through early June would also require either cold storage or CA storage facilities in order to remain viable. It is unclear how the NISR's garlic prices could be considered "farm gate" prices exclusive of storage.

We have, however, included delivery costs for raw garlic inputs from the farmer or storage facility to Excelink.¹⁷⁴

Finally, we also note that after the *Preliminary Results*, we issued an additional (third) supplemental questionnaire to confirm that we had all of Xinboda's transportation and on-site storage factors, including labor and electricity, on the record of this review.¹⁷⁵ There is no basis for finding that Xinboda failed to report its labor and electricity for on-site cold storage.

Comment 5: The Department Should Adjust the Weight Denominator for Brokerage and Handling and Trucking and Remove Letter of Credit Expense

Xinboda's Arguments:

- The Department's use of the hypothetical 10,000 kg payload weight from the *Doing Business Reports* to calculate a per kilogram valuation for container delivery and for brokerage and handling does not reflect the "shipping reality."¹⁷⁶ There is no evidence which suggests that the price of inland freight expenses or brokerage and handling expenses are dependent on the payload weight in a container.¹⁷⁷ Rather, the costs are the same whether the container is empty or full.

¹⁷³ On page 10 of Petitioners' Rebuttal Comments, Petitioners state that "[p]ublicly available information shows that garlic bulbs grown in Romania have similar physical qualities as garlic bulbs grown in China. ... This same text {2001 publication on Vegetable Growing in Romania, Volume II} provides a table of the most prominent varieties of garlic grown in Romania, including three varieties of garlic that are planted in the late fall and harvested the following summer, much as in China. The main varieties are medium to large in size, with weight ranges of 40-60 grams, 25-35 grams, and 40-50 grams, respectively."

¹⁷⁴ See "Administrative Review of Fresh Garlic from the People's Republic of China: Calculation Memorandum for the Final Results of Shenzhen Xinboda Industrial Co., Ltd. Memorandum to the File," (dated concurrently with the instant memorandum) at 2.

¹⁷⁵ See Letter from the Department to Xinboda, "2013-2014 Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: Third Supplemental Questionnaire," dated December 23, 2015. See also Letter to the Department of Commerce from Xinboda, "RE: Fresh Garlic from the People's Republic of China – Third Supplemental Questionnaire Response – Shenzhen Xinboda," dated December 30, 2015.

¹⁷⁶ See Xinboda Case Brief at 53.

¹⁷⁷ *Id.*, at 54.

- Evidence from Maersk Lines demonstrates that its costs are set per container and that “they are not dependent in any way on the kilograms or cubic meters in the container –as shown by the same price for a 10,000 kilogram as for a 28,200 kilogram container.”¹⁷⁸
- The Department has a practice of removing letter of credit expenses when a party has demonstrated that that the World Bank source includes this cost. In this case, the record contains the cost of a letter of credit embedded in the Thailand, Philippines, and Indonesia Doing Business 2014 & 2015 reports.¹⁷⁹

Petitioners’ Arguments:

- The World Bank’s *Doing Business* Reports consistently rely on the 10,000 kg parameter in collecting, collating, and reporting brokerage and freight costs. As such, the Department has reasonably and properly relied on this, when relying on the cost information reported by the World Bank in its *Doing Business* Reports.¹⁸⁰
- The World Bank requires a universal basis for its *Doing Business* survey; 10,000 kg is the mid-point between the smallest and greatest payload weight of merchandise that can be held in a 20-foot container, which provides the survey respondents a reasonable reporting parameter, irrespective of which commodity is being shipped. *Certain Steel Nails from the PRC* states that “{U}sing 10 MT in the per-unit calculation maintains the relationship between cost and quantity from the survey (which is important because the numerator and the denominator of the calculation are dependent upon one another), makes use of data from the same source, and is consistent with the Department’s practice.”¹⁸¹
- The Department’s preliminary calculations do not mix or convert between container sizes, and thus do not require calculations that relate costs in proportion to different weights.¹⁸²
- “Whether a material is least dense or most dense will determine how much material can fit into the volume of a 20-foot container, and that is why both a maximum weight and volume are provided by MAERSK.”¹⁸³

Department’s Position: For these *Final Results*, the Department continues to rely on information published in *Doing Business Romania*. Specifically, we have continued to use the cost for inland transportation, brokerage and handling and the container payload weight of 10,000 kg explicitly stated in the *Doing Business* methodology. The *Doing Business Romania* methodology makes clear that a payload weight of 10,000 kg is one of the assumptions in all *Doing Business* reports.¹⁸⁴ Therefore, we will continue to use this weight in our calculation of container delivery expense and brokerage and handling expense for these *Final Results*.

As we explained in the *Preliminary Results*, the Department valued brokerage and handling and truck freight using information in the World Bank’s *Doing Business 2015 Romania (Doing*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*, at 56.

¹⁸⁰ See Petitioners’ Rebuttal Brief at 56.

¹⁸¹ *Id.*, at 57.

¹⁸² *Id.*, at 58.

¹⁸³ *Id.*, at 59.

¹⁸⁴ See Petitioners’ June 17, 2015 Submission at Exhibit 6.

Business Romania) report for inland transportation and handling related to importing and exporting a standardized cargo of goods.¹⁸⁵ Thus, the Department calculated a per-kilogram brokerage and handling and inland freight using the price data to export standardized cargo of ten metric tons in a standard 20-foot container as published in *Doing Business Romania*. We note that Xinboda did not put any alternative inland freight or brokerage and handling expense information from Romania on the record. Thus, Xinboda’s argument that we should now calculate brokerage and handling and inland freight using the costs from *Doing Business Romania* and Xinboda’s average container weight would result in our creating new, hybrid SVs, which the court recently addressed. As we explained in *Certain Activated Carbon from the People’s Republic of China*, “absent such evidence {that brokerage costs are based on value (and not volume) and do not increase proportionally with the number of cubic feet} in this review, for these final results, we continue to use 10,000 kg standard container weight for calculating {brokerage and handling} expenses, which we find avoids introducing inaccuracies in calculating the {brokerage and handling SV.}”¹⁸⁶

In *Since Hardware*, the Court recently addressed an attempt by the Department to create a SV for brokerage and handling charge by blending information from *Doing Business* and the respondents’ own container weight. Here, our calculations do not mix different sizes of containers, and therefore, do not require calculations that relate costs in proportion to different sizes as was done in the underlying administrative determination in *Since Hardware*. As we stated in *Certain Nails from the People’s Republic of China*:

Using 10 MT in the per-unit calculation maintains the relationship between cost and quantity from the survey (which is important because the numerator and the denominator of the calculation are dependent on one another), makes use of data from the same source, and is consistent with the Department’s practice. Moreover, the information regarding the total payload weight of 28,200 kg represents the offering of a single vendor and thus is not a broad-market average, unlike the World Bank’s *Doing Business*. Thus, we will continue to use 10 tons as the basis for the brokerage and handling charge.¹⁸⁷

The parameter for *Doing Business Romania* as well as for our use requires as universal a basis as possible. The 10,000 kilograms basis is a mid-point between the smallest and the greatest weight held in a 20-foot container, which provides reasonable as well as consistent reporting across commodities. Given these facts, for these *Final Results*, we will continue to use a 10,000 kilogram denominator in our calculation of brokerage and handling and inland freight.

Finally, for these *Final Results*, we will not remove the letter of credit expenses as we have no evidence on the record which shows the cost of a letter of credit embedded in the Romania report.¹⁸⁸

¹⁸⁵ See *Preliminary Results* and PDM at 30.

¹⁸⁶ See *Certain Activated Carbon From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 61172 (October 9, 2015) and accompanying IDM at Comment 12.

¹⁸⁷ See *Certain Nails from the People’s Republic of China; Final Results of Third Antidumping Duty Administrative; 2010-2011*, 78 FR 16651 (March 18, 2013).

¹⁸⁸ See Xinboda’s Case Brief at 56.

Comment 6: Modifying Preliminary Analysis to Account for Water Consumed in Producing Fresh Peeled-Clove Garlic

Petitioners' Arguments:

- The Department recognized that Xinboda had not reported a factor of production for water during the POR.¹⁸⁹
- The Department relied on Xinboda's reported factor of production from the 2011-2012 administrative review to serve as the water factor for this segment.¹⁹⁰
- In its third supplemental questionnaire to Xinboda after the *Preliminary Results*, the Department requested that Xinboda provide a water factor for Excelink's production of fresh-peeled clove garlic.¹⁹¹
- Xinboda confirmed that Excelink used well water in the production of peeled garlic, not whole garlic.¹⁹²
- Xinboda reported its daily consumption of water based on information from the 15th administrative review.¹⁹³
- In preparing the *Final Results*, the Department should use Xinboda's reported FOP for water.¹⁹⁴

Xinboda's Arguments:

- Xinboda did not comment on this issue.

Department's Position: For these *Final Results*, we are using Xinboda's reported FOP from the 2011-2012 (18th) administrative review for water in our final calculations because it is more contemporaneous than the 2008-2009 (15th) administrative review.

¹⁸⁹ See Petitioners' Case Brief at 17, which cites to Prelim Calculation Memo for Xinboda at 6.

¹⁹⁰ *Id.*

¹⁹¹ See Petitioners' Case Brief at 17, which cites to the Department's Third Supplemental Questionnaire at 2.

¹⁹² *Id.*, which cites to Xinboda's Response to Third Supplemental Questionnaire at 5.

¹⁹³ *Id.*

¹⁹⁴ *Id.*, at 18.

RECOMMENDATION

We recommend adopting the above positions. If these recommendations are accepted, we will publish the *Final Results* of this administrative review in the *Federal Register*.

Agree

Disagree

Paul Piquado
Assistant Secretary
for Enforcement and Compliance

(Date)