U.S. Court of International Trade

Slip Op. 17–160

SHENZHEN XINBODA INDUSTRIAL CO. LTD., QINGDAO TIANTAIXING FOODS, CO., SHENZHEN BAINONG CO., LTD., SHENZHEN YUTING FOODSTUFF CO., LTD., JINXIANG HEJIA CO., LTD., JINXIANG FEITENG IMPORT & EXPORT CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, et al., Defendant-Intervenors.

Before:
R. Kenton Musgrave, Senior Judge
Consol. Court No. 16–00116
PUBLIC VERSION

[Remanding 20th administrative review of fresh garlic from the People's Republic of China on issue of rejected economic comparability information and sustaining final results for one mandatory respondent.]

Dated: December 5, 2017

Gregory S. Menegaz, J. Kevin Horgan, John J. Kenkel, Judith L, Holdsworth, and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, for the plaintiffs Shenzhen Xinboda Industrial Co., Ltd., Shenzhen Bainong Co., Ltd., Shenzhen Yuting Foodstuff Co., Ltd., Jinxiang Hejia Co., Ltd., and Jinxiang Feiteng Import & Export Co., Ltd.

Robert T. Hume, Hume & Associates LLC, of Taos, NM, for the plaintiff Qingdao Tiantaixing Foods Co., Ltd.

Emma E. Bond, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. On the brief were *Chad E. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of Counsel was *Emily Beline*, Attorney, Office of the Chief Counsel for Enforcement and Compliance, U.S. Department of Commerce.

Michael J. Coursey, John M. Herrmann, and *Joshua R. Morey*, Kelley Drye & Warren, of Washington, DC, for the defendant-intervenors.

OPINION

Musgrave, Senior Judge:

This opinion addresses three consolidated challenges to the final antidumping ("AD") duty administrative review[1] *Fresh Garlic from the People's Republic of China*[2], 81 Fed. Reg. 39897 (June 20, 2016)

[1] *See* Tariff Act of 1930 §751, as amended, 19 U.S.C. §1675. This is the 20th such review ("AR 20") of the AD duty order thereon. *Cf. Fresh Garlic from the People's Republic of China*, 59 Fed. Reg. 59209 (Nov. 16, 1994).

[2] Hereinafter "PRC".

("20th AR Final Results"), PDoc 442, as explained by the International Trade Administration, U.S. Department of Commerce ("Commerce"), in its issues and decision memorandum ("*IDM*") accompanying that public notice, PDoc 439. The period of review ("POR")[3] is November 1, 2013, through October 31, 2014, and the pertinent plaintiffs here are Shenzhen Xinboda Industrial Co., Ltd. ("Xinboda") and Qingdao Tiantaixing Foods, Co. ("QTF"). Together with the others,[4] they challenge Commerce's: (1) rejection of factual information from Xinboda as untimely; (2) selection of Romania as the surrogate country; (3) calculation of Xinboda's movement expenses; (4) application to QTF of facts otherwise available with an adverse inference; and (5) disregard of QTF's separate rate information as unreliable and finding that QTF was part of the PRC-wide entity. For the following reasons, Xinboda persuades that the first issue requires remand for reconsideration, obviating further discussion here of issues (2) and (3), but QTC's arguments on (4) and (5) lack persuasiveness.

I. *Overview*

Commerce initiated the 20th review of the AD order towards the end of December 2014 and initially selected Xinboda and Hebei Golden Bird Trading Co., Ltd. as mandatory respondents for the POR. PDoc 138 at 4–5. The latter did not respond to its questionnaire; therefore Commerce added or substituted QTF as a mandatory respondent. PDoc 165 at 1; PDoc 302 at 3. In its preliminary results,[5] Commerce found the magnitude of dumping for Xinboda's entries to be $2.72 per kilogram. *See* PDoc 398 at 1; PDoc 399 at 75973. For QTF, Commerce preliminarily applied adverse facts available, found QTF ineligible for a separate rate, and included QTF in the PRC-wide entity bearing the AD duty rate of $4.71 per kilogram.[6] After considering the parties' comments for the final results, Commerce affirmed that Xinboda had dumped subject merchandise by a margin of $2.75 per kilogram, applied that rate to the separate-rate-eligible respon-

[3] *See Initiation of AD and Countervailing Duty Administrative Reviews*, 79 Fed. Reg. 76956 (Dec. 23, 2014), PDoc 23.

[4] *Cf.* Plaintiff Shenzhen Xinboda Industrial Co., Ltd.'s Motion for Judgment on the Agency Record ("Xinboda Br.") *with* Memorandum of Law in Support of Co-Plaintiffs Jinxiang Hejia Co., Ltd., Jinxiang Feiteng Import & Export Co., Ltd., Shenzhen Bainong Co., Ltd., and Shenzhen Yuting Foodstuff Co., Ltd.'s Motion for Judgment upon the Agency Record at 9 ("[i]n order not to repeat the arguments being made by the other Plaintiffs in their legal memoranda, co-Plaintiffs Hejia, Feiteng, Bainong, and Yuting join in the arguments made by them and incorporate them herein").

[5] 80 Fed. Reg. 75972 (Dec. 7, 2015), PDoc 399, and accompanying decision memorandum ("*PDM*"), PDoc 398.

[6] PDoc 398 at 11–14; PDoc 400.

dents, and affirmed that QTF was ineligible for a separate rate. *See* PDoc 442 at 39898.

Xinboda and QTF filed timely challenges here to the 20th AR Final Results pursuant to 19 U.S.C. §1516a(a)(2)(A)(i)(I) and (B)(iii) and claim proper jurisdiction under 28 U.S.C. §1584(c). The standard of judicial review thereon is confined to substantial evidence on the record, *see* 19 U.S.C. §1516a(b)(1)(B)(i), meaning "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion", *i.e.*, "more than a mere scintilla". *PAM, S.p.A. v. United States*, 582 F.3d 1336, 1339 (Fed. Cir. 2009) (citation omitted). This also means that the possibility of drawing inconsistent conclusions from the record "does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citation omitted).

II. *Xinboda's Challenges*

Xinboda moves for judgment on the administrative record of Commerce's (1) rejection of its supplemental submission of information pertaining to the Mexican economy as potentially comparable to that of the PRC, (2) selection of Romania as the primary surrogate country, and (3) calculation of movement expenses. Xinboda Br. at 2–35.

A. Rejection of Surrogate Country Information

1. Background

For outstanding AD orders, Commerce annually reviews and determines the margin of dumping, *i.e.*, the difference between export price or constructed export price and "normal" value ("NV"). *See* 19 U.S.C. §1675(a)(1)(B). NV is to be determined to "a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price". 19 U.S.C. §1677b(a)(1)(A). When subject merchandise is from a non-market economy ("NME"), Commerce is required to base NV on the factors of production ("FOPs") for subject merchandise and "utilize, to the extent possible," FOPs in one or more surrogate market economy countries that are economically comparable to the level of economic development of the NME country and significant producers of comparable merchandise. 19 U.S.C. §1677b(c). *See, e.g., Jiaxing Bro. Fastener Co. v. United States*, 822 F.3d 1289, 1292 (Fed. Cir. 2016). In conjunction with such "to the extent possible" utilization, and with one exception not relevant here, FOPs are to be valued on the basis of the "best available information regarding the values of such factors". 19 U.S.C. §1677b(c)(1)(B). To-

wards that goal, Commerce tests FOP data on the record for (1) public availability, (2) product specificity, (3) broad market average, (4) tax and duty exclusivity, and (5) contemporaneity. *See IDM* at 12, citing Policy Bulletin 04.1; *see, e.g., Fresh Garlic Producers Ass'n v. United States*, 39 CIT ___, ___, 83 F. Supp. 3d 1330, 1337 (2015).

The administrative preference is to use FOPs from a single "primary" surrogate country. *See, e.g., Jiaxing Bro. Fastener*, 822 F.3d at 1302, citing 19 C.F.R. § 351.408(c)(2). The selection of thereof is a four-step process: First, Commerce requests from its Office of Policy ("OP") a list of countries at a comparable level of economic development to the NME country (the "OP List"). *See id*. at 1293; *see also NME Surrogate Country Selection Process*, Policy Bulletin 04.1 (2004). The policy bulletin explains (at page 2; italics added) that "OP *determines* economic comparability on the basis of per capita gross national income, as reported in the most current annual issue of the *World Development Report*". Second, Commerce identifies countries on that list with producers of comparable merchandise. *Jiaxing Bro. Fastener*, 822 F.3d at 1302 (citations omitted). Third, Commerce determines whether any of those countries are "significant producers" of comparable merchandise. *Id*. Fourth, if more than one country remains, Commerce will select the country with the best data for FOP valuation. *Id.; see also* 19 U.S.C. § 1677b.

For the 20th AR, Commerce provided OP's list to interested parties *via* a letter-memorandum approximately four months after initiation. PDoc 153 (Apr. 20, 2015). Commerce considers that list "non-exhaustive." *Id*. (OP List at 1). The countries that made that list were based on the available 2013 per capita gross national income ("GNI") data from the World Bank,[7] as follows: PRC ($6,560); Romania ($9,060); Bulgaria ($7,360); South Africa ($7,190); Ecuador ($5,760); Thailand ($5,340); and Ukraine ($3,960). The letter-memorandum accompanying that list also instructed:

> Because it is the Department's practice to determine economic comparability early in a proceeding, we are providing interested parties an opportunity to *comment* on the list as a starting point for surrogate country selection . . . and to *propose* for consideration other countries that are at a level of economic development comparable to the PRC. These *comments* are due by 5:00 pm Eastern Daylight Time (EDT), April 27, 2015. Rebuttal comments are due by 5:00 pm EDT, May 4, 2015.

[7] In this instance, because the 2015 *World Bank Development Report*, published in December 2014, did not contain GNI data, OP relied on the December 16, 2014 revision to 2013 GNI data published in the *World Bank Development* Indicators database. *See* PDoc 153 (OP List at 2).

Id. at 1 (bolding omitted; italics added).

At the same time, the letter-memorandum stated it was Commerce's "inten[tion] to announce the identification of its surrogate country selection in its preliminary results". *Id*. at 2. Towards that goal, and as boilerplated in numerous other NME proceedings, in addition to the above due dates the letter instructed four others: a June 1, 2015 deadline for commenting on surrogate country selection with rebuttal by June 11, 2015; and a June 17, 2015 deadline for publically available information to value the factors of production for the preliminary results with rebuttal by June 22, 2015. *Id*.

Xinboda responded with timely submitted comments on surrogate country selection and FOP information that argued for India and/or Thailand as economically comparable to the PRC. PDocs 156, 179. Xinboda did not at that time prospect Mexico as a country economically comparable to the PRC, but on September 17, 2015, it submitted "additional" comments along with 2014 GNI data from the World Bank made available in July 2015, together with information on Mexican garlic production, for the agency's use when selecting the appropriate surrogate country from the record. Xinboda contended that the information would establish Mexico as a significant producer of garlic, and called Commerce's attention to the fact that it had begun using such information in other trade proceedings, and that its revised list in such proceedings included Mexico and Thailand, which had not been considered as economically comparable countries at the time OP prepared its list earlier in this review. *See* Xinboda Br. at 22 n.4, referencing PDoc 153 at 1.

Eight days later, Commerce rejected that submission as "untimely" and removed it from the record. *See* PDoc 318, citing 19 C.F.R. §§ 351.302(d)(1)(i), 351.104(a)(2)(ii)). *Cf*. PDoc 312 (first page of rejected submission). Commerce stated that although the submission was filed before the regulatory deadline for factual information to value FOPs, the submission contained GNI data relating to economic comparability, and that the "previously established" deadline(s) for filing such information had already passed.[8] *See id*. at 1. Xinboda asked Commerce to reconsider,[9] but Commerce stood by its rejection in the preliminary results — issued two months later — for the same rea-

[8] Commerce also rejected other Xinboda submissions containing information in support of choosing Mexico as the primary surrogate country. *See, e.g.*, PDoc 319 at 1; PDoc 320 at 1; PDoc 322 at 1; PDoc 323 at 1.

[9] Xinboda Request to Reconsider (Sep. 30, 2015), PDoc 325. Xinboda here states that therein it laid out the several reasons that constitute good cause to have accepted this information, including Commerce's emphasis on economic comparability, contemporaneity, and Xinboda's inability to have submitted this information at the initial deadline. Xinboda Reply at 8–9. The defendant disputes that Xinboda argued good cause, but the record appears to support Xinboda's characterization.

sons as stated in its earlier letter to Xinboda. *PDM* at 16. *See* PDoc 325 at 1. For the final results, Commerce adhered to that decision. *IDM* at 19–21.

2. Analysis

None of the papers indicates the precise regulatory deadline with which Xinboda's submission would have been in conflict, as the regulations[10] do not explicitly address "economic comparability" related to the selection of the primary surrogate country. *See generally* 19 C.F.R §§ 351.102(b)(21) & 351.301. However, it is at least clear that the GNI data of Xinboda's supplemental submission were factual in nature, regardless of the exact provision of those regulations that would cover them, and at the very least the data would have been covered by the apparent "catch-all" of the fifth regulatory category, which covers "factual information not directly responsive to or relating to" the other four categories and bears a deadline of the earlier of 30 days prior to the scheduled date of the preliminary results of an administrative review or 14 days before verification. *See* 19 C.F.R §§351.301(c)(5). The record thus shows that the only deadline Commerce's rejection adhered to in this instance was the deadline specified in the OP List letter for submission of economic comparability information, which is simply a "modification" of an administrative "procedural rule".[11] Administration thereof is reviewed for abuse of discretion. *See Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1278 (Fed. Cir. 2012).

[10] The relevant regulatory deadlines for the submission of factual information were amended some four years ago, with an effective date of May 10, 2013. *See Definition of Factual Information and Time Limits for Submission of Factual Information*, 78 Fed. Reg. 21246 (Apr. 10, 2013). At that time, Commerce re-categorized the definitions of factual information and moved all administrative time limits for such submissions to before the preliminary determination. *See generally* 19 C.F.R §§ 351.102(b)(21) & 351.301. The stated purpose therefor was "so that [Commerce] may review and analyze factual information at the appropriate stage in the proceeding, rather than be required to review large amounts of information when it is too late to adequately conduct its analysis". 78 Fed. Reg. at 21248. The amendment set forth five categories of factual information, currently defined at 19 C.F.R. §351.102(b)(21), and deadlines for same.

[11] "It is always within the discretion of . . . an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it *when* in a given case *the ends of justice require it." American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970) (internal quotes and citation omitted; italics added). Substantial prejudice is generally required in order to obtain relief from such modification or relaxation. *American Farm Lines*, 397 U.S. at 539. *See* 5 U.S.C. §706 ("due account shall be taken of the rule of prejudicial error"); *see, e.g., PAM S.p.A. v. United States*, 463 F.3d 1345 (Fed. Cir. 2006). "Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of *inquiry* capable of permitting them to discharge their multitudinous duties." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc*., 435 U.S. 519, 543–44 (1978)) (internal quotes and citations omitted; italics added).

Xinboda broadly argues that Commerce's rejection of its supplemental economic comparability information was arbitrary, because the OP List letter deadlines have not been treated as such (*i.e.*,"hard red-line deadlines") in other proceedings. The defendant, supported by the Fresh Garlic Producers Association ("FGPA"), contends such treatment in other proceedings does not prevent Commerce from enforcing deadlines in this proceeding, and that "allowing parties constantly to supplement the record with new information as it becomes 'available' would transform the proceedings into Sisyphean endeavors, requiring Commerce to reconsider and to recalculate each aspect of its decision *ad infinitum*." Def's Resp. at 31. *See* Def-Int's Resp. at 31–38.

Paramount here is the principle that "an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem". *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). *See also, e.g., SKF USA v. United States*, 630 F.3d 1365, 1374 (Fed. Cir. 2011) (Commerce "has an 'obligation' to address important factors raised by comments from petitioners and respondents"). An arbitrary failure to consider "an important aspect of the problem" essentially gives rise to a presumption of substantial prejudice, and "agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently". *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1371 (Fed. Cir. 2011). Similarly arbitrary and capricious is when an agency "consistently follow[s] a contrary practice in similar circumstances and provide[s] no reasonable explanation for the change in practice". *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003). "[O]nce an agency agrees to allow exceptions to a rule, it must provide a rational explanation if it later refuses to allow exceptions in cases that appear similar." *Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235, 237 (D.C. Cir. 1985). Such arbitrariness is likewise presumptively prejudicial. *Cf. id*.

The matter at bar is similar to *DuPont Teijin Films v. United States*, 37 CIT ___, 931 F. Supp. 2d 1297 (2013), and *Vinh Hoan Corp. v. United States*, 39 CIT ___, 49 F. Supp. 3d 1285 (2015), which both concerned records that were compiled prior to amendment of Commerce's regulatory time limits for such submission to prior to the preliminary determination. The supplemental GNI data of those cases were submitted well after the surrogate country comment deadline, yet Commerce did not reject those data as late, and both judicial decisions essentially rejected the validity of declining to consider those data on the ground that they had been submitted "too late in the proceedings to be considered by the OP when making its list of

economically comparable countries". *DuPont Teijin*, 37 CIT at ___, 931 F. Supp. 2d at 1301. *See id.* at 1307*; see also Vinh Hoan* 39 CIT at ___, 49 F. Supp. 3d at 1296–97. In this instance, Commerce simply rejected Xinboda's supplemental economic comparability information as untimely without addressing Xinboda's commentary on why it believed its submission was appropriate for the record, thereby obviating further consideration thereof.

A wider context assists this analysis. Commerce's stated policy and practice on the selection of a surrogate country not on the OP List is only to resort to such a country when no country on the list provides the scope of quality data that the administrative review requires. *See, e.g., Clearon Corp. v. United States*, 38 CIT ___, Slip Op. 14–88 (2014) at 21. Adhering to that practice in this instance, the *PDM*'s discussion on the matter thereby avoided any further discussion of Xinboda's argument, in its request for reconsideration, that rejection of its submission solely on the ground of timeliness was inconsistent with how Commerce had treated similar such submissions previously, *see infra, videre licet*:

> Xinboda argued that [Commerce] should consider using India or Mexico as the primary surrogate country. However, . . . the Department only departs from the countries on the OP list if we find that none of the countries on the list are significant producers of identical or comparable merchandise or there are issues regarding the availability of SVs from the countries on the list. . . . [W]e have determined that at least two countries identified on the [OP] List are significant producers of identical or comparable merchandise and that Romania provides sufficient reliable sources of data from which to derive SVs. Therefore, we have not considered using India or Mexico as the primary surrogate country and have not considered the potential SV information from those two countries.

PDM at 24–25.

In other words, because Commerce ultimately identified two countries on the OP List that satisfied the statutory requirements, that circumstance precluded argument in favor of any other country not on that list -- *quod erat demonstrandum*: so long as there is at least one country on that list that satisfies the requirements of comparable merchandise, significant production and quality data, Commerce will not budge from the OP List, *i.e*, regardless of whether, at the time Commerce actually (and merely preliminarily) selects the surrogate country and announces that selection in the preliminary results, the

World Development Report Indicators data that may in fact exist and would be relevant to a particular POR may differ from those relied upon when the OP List was compiled, *i.e,* regardless of the fact that the regulatory deadlines, as amended, for the submission of "factual information"[12] do not contemplate separate deadlines for the "economic comparability" of countries encompassed by 19 U.S.C. §1677b(c)(2)(B), and, *i.e.,* regardless of the fact that Xinboda's supplemental submission was otherwise in compliance with the administrative regulations for submission of factual information but was rejected as "untimely" solely because, in this instance, Commerce decided upon strict adherence to the deadlines for economic comparability announced in its OP List letter. Thereby, Commerce rendered the OP List a "final" determination, *de facto*, on "economic comparability," and any comments on that list (or rebuttal thereof) a nullity.

On the one hand, it is not inherently unjust, at least in the abstract, to subject the processing of all administrative reviews to uniform and unexceptional adherence to deadlines for the purpose of gathering information, especially where "perfect" information (in the sense of completed and extant) is concerned, such as that pertaining to sales and costs that have already occurred during the POR under review. On the other hand, information that comes into "being" during a POR, *e.g.*, with respect to updates to country economic comparability or FOPs from publically available sources, is a harder call, due to the tension between administrative burdens and the interest in justice (*i.e.*, accuracy) that the law demands. Perhaps for that reason, Commerce has been somewhat inconsistent in requiring strict adherence to the deadlines of its OP List letter. *See infra*. At any rate, the fact that the fact-gathering stage of some administrative reviews of NME subject merchandise can straddle the timing of updates to relevant and publically available GNI data, among, *e.g.*, the *World Development Report* Indicators occurring after Commerce's OP determines a list of economically comparable countries pertinent to a particular review, has been problematic, as this and other cases show. *Cf.* Policy Bulletin 04.1 ("OP determines economic comparability on the basis of per capita gross national income, as reported in the *most current* annual issue of the *World Development Report*") (first italics added).

Commerce's OP List letter states that "it is [Commerce]'s practice to *determine* economic comparability early in a proceeding". PDoc 153 at 1.[13] But OP's determination of its list of economically comparable

[12] *See* 19 C.F.R. §§ 351.301 (time limits for submission) & 351.102(b)(21) (definition of "factual information")

[13] Italics added. *Cf. also, e.g., First Administrative Review of Sodium Hexametaphosphate From the PRC: Final Results of the AD Duty Administrative Review*, 75 Fed. Reg. 64695 (Oct. 20, 2010) and accompanying issues and decision memorandum at cmt 3 ("[Commerce]

countries is not "the" determination of economic comparability that Commerce is obliged to make. The OP List, as Commerce itself states, is only a "starting point". PDoc 153 at 1. The list itself is always stated to be non-exhaustive, therefore non-exclusive. *Cf.* 19 C.F.R. §351.408(b) ("[i]n *determining* whether *a* country is at a level of economic development comparable to the nonmarket economy under section 773(c)(2)(B) or section 773(c)(4)(A) of the Act, the Secretary will place primary emphasis on *per capita* GDP[14] as the measure of economic comparability") (first italics added). In other words, the OP's list is not determinative of the issue of economic comparability that Commerce must decide.

Further, as the court has previously observed, "[w]hen the OP issues its list 'early in a proceeding,' months before the preliminary results, issues of finality are not yet present". *DuPont Teijin*, 37 CIT at ___, 931 F. Supp. 2d at 1306. Apart from the OP List, nothing in the record indicates Commerce "determined" economic comparability "early in the proceeding" within the meaning of the statue or regulation, or otherwise communicated such a determination to the parties prior to the preliminary results; indeed, Commerce does not "make" a surrogate country selection until it is announced in the preliminary results, as explicitly stated in the OP List letter-memorandum: "[Commerce] intends to announce the identification of its surrogate country selection in its preliminary results." PDoc 153 at 2. Even after announcement of a surrogate country in the preliminary results, Commerce can, and does, change its selection in the final results, because Commerce's surrogate country decision is further based on the availability and quality of surrogate value data available in each potential surrogate country, which information is submitted up to 20 days prior to the preliminary results (*i.e.*, 30 days prior with a 10 day rebuttal deadline).

Although "the law does not require [Commerce] to choose the *most* comparable economy, but rather a comparable economy", *Tehnoimportexport v. United States*, 15 CIT 250, 256, 766 F. Supp. 1169, 1175 (1991) (italics in original), the reality here, apart from abstraction (*cf. supra*), is that Commerce has not regarded the deadlines announced in its OP List letter memorandum as "hard red-line deadlines" in a number of prior instances, as Xinboda argued to Commerce (and here reiterates), its central point being that even after the regulatory deadlines were amended, Commerce maintained "a general practice

relied on the most recent GNI per capita data *available* for this proceeding *at the time that economic comparability was determined* for this case") (italics added).

[14] Commerce's current reliance upon GNI here and in other proceedings as the better measure of economic comparability is undisputed. *See generally Tianjin Wanhua Co. v. United States*, 41 CIT ___, ___, 253 F. Supp. 3d 1318, 1321–22 (2017).

of allowing parties to submit GNI information in later surrogate value submission well after the surrogate country comment period has passed".[15] *Cf., e.g., DuPont Teijin, supra with* Court No. 12–00088, Attachment 3 to Plaintiff DuPont Teijin 56.2 Br., ECF No. 25 (Sep. 7, 2012) (letter-memorandum to parties with OP's list together with deadlines for comments and factual information submissions).

"An action . . . becomes an 'agency practice' when a uniform and established procedure exists that would lead a party, in the absence of notification of change, reasonably to expect adherence to the established practice or procedure." *Ranchers-Cattlemen Action Legal Found. v. United States*, 23 CIT 861, 884–85 (1999), referencing *Heraeus-Amersil, Inc. v. United States*, 9 CIT 412, 416, 617 F. Supp. 89, 93 (1985). To the extent that rule touches upon some sort of reliance interest, the better course would have been for an interested party to alert Commerce in the initial comments on economic comparability of an intention to submit supplemental information if and as it became available. *Cf. Extension of Time Limits*, 78 Fed. Reg. 57790 (Sep. 20, 2013) *with, e,g,*, Surrogate Value Submission (Mar. 30, 2015) in case no. A-570–912, IA ACCESS doc# 3267470–01 ("[w]e will continue to review additional information regarding surrogate values and may submit additional surrogate value or rebuttal surrogate value information on or before the deadline enumerated in [Commerce]'s regulations, *i.e.*, thirty days before the scheduled date of the preliminary determination"). And it is also notable that Commerce treated the petitioners in the same manner as Xinboda during the

[15] Xinboda Br. at 6, referencing Surrogate Value Submission (Aug. 31, 2015) in case no. A-570–912 at Attachment 6 (GNI data from *World Development Report* Indicators) IA ACCESS doc# 3301202–01; Surrogate Value Submission (July 16, 2015) in case no. A-570–900 at Exhibit 13 (GNI data from *World Development Report* Indicators) IA ACCESS doc# 3291511–02; Surrogate Value Submission (Mar. 31, 2015) in case no. A-570–904 at Exhibit 12 (GNI data from *World Development Report* Indicators) IA ACCESS doc# 3267659–03; Surrogate Value Submission (Nov. 4, 2014) in case no. A-570–900 at Exhibit 10 (GNI data from *World Development Report* Indicators) IA ACCESS doc# 3239651–02; Surrogate Value Submission (Oct. 31, 2014) in case no. A-570–932 at Exhibit 2 (GNI data from *World Development Report* Indicators) IA ACCESS doc# 3239156–01."). Xinboda also points to *Hardwood and Decorative Plywood Final Determination of Sales at Less Than Fair Value*, 78 Fed. Reg. 58273 (Sep. 23, 2013) and accompanying I&D Memo at cmt. 7 and *Folding Metal Tables and Chairs From the People's Republic of China: Final Results of 2007–2008 Deferred AD Duty Administrative Review and Final Results of 2008–2009 AD Duty Administrative Review*, 76 Fed. Reg. 2883 (Jan. 18, 2011) and accompanying I&D Memo at cmt. 4 as examples where Commerce has accepted "critically new" surrogate country data *after* the preliminary determination. *Id*. at 6–7. *Cf. Diamond Sawblades Manufacturers Coal. v. United States*, 2017 WL 3381909 at *8 (Fed. Cir. 2017) ("Commerce's willingness to consider comments related to another methodology in the case briefs filed by the parties in *Purified Carboxymethylcellulose From Finland* while refusing to do so here indicates that Commerce's decision in this case is not in accordance either with its own practices or with law").

20th AR. *See PDM* at 17 (rejecting petitioners' June 29, 2915 rebuttal comments because they contained untimely surrogate country information). To that extent, at least, Commerce's treatment of such submissions during the proceeding was consistent.

Nonetheless, the instances to which Xinboda points implicitly underscore that Commerce's "relaxation" of its *modified* deadline in the OP List letter has (or had) been in accordance with its statutory mandate, which does require reasonable *inquiry (cf. Vermont Yankee Nuclear Power, supra)* into what is the best *available* information for, *e.g.*, comparability. *See supra*. And the purpose of regulation, of course, is always in service to the purpose of its enabling legislation.[16] In this instance, of trade law administration, the statute and regulatory deadlines are intrinsically bound to the selection of that surrogate country that will,"to the extent possible", permit the "best available information" to value FOPs, a decision that is also intrinsically bound to economic comparability and surrogate selection therefrom. *See* 19 U.S.C. §1677b(c)(1)(B); *see also Vinh Hoan*, 39 CIT at ___, 49 F. Supp. 3d at 1298 ("[i]t is undoubtedly true that the selection of the primary surrogate country is central to [Commerce]'s selection of sources to value a respondent's factors of production").[17]

And yet, "best available information" is not defined by statute. Thus, it has been held to confer administrative discretion over what that constitutes. *Jiaxing Bro. Fastener*, 822 F.3d at 1293, citing 19 U.S.C. §1677b(c)(1). But at the same time, numerous decisions have also emphasized that it is the interested parties who bear the burden of building an adequate record to support their case. *E.g., QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011). That being the requirement, and contrary to the defendant's contention above, the statutory term "available" (implying not only "on" but "for" the record[18]) cannot be interpreted in a manner that would unreasonably impede a party from meeting its record-building obligation and preclude from the record relevant factual information that otherwise comports with the regulatory deadlines for the submission thereof, and would further the statute's objectives, *via, e.g.*, sudden insistence upon adherence to the "modified" regulatory deadline of the OP List letter for a specific type of factual information that, *volte face*, conflicts with the manner in which such modification has been administered in other prior proceedings -- particularly when, contrary to the

[16] *See, e.g., Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973).

[17] *Cf. PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 761 (Fed. Cir. 2012) ("[u]nder 19 C.F.R. § 351.301(b)(2), Avisma had until September 17, 2007, to submit factual information to [Commerce] to be used in the Final Results").

[18] *Cf., e.g.*, 19 C.F.R. §351.102(21)(iv) (data placed on the record *by Commerce*).

expressed intention in the OP List letter to "determine" economic comparability "early in the proceeding," the agency has not even fully considered, let alone "determined," that issue.

Commerce is obviously aware of the statutory mandates to determine FOPs that are "to the extent possible" "in"[19] a country economically comparable to the level of economic development of the NME country which has significant producers of comparable merchandise, and (again with one exception not relevant here) on the basis of the "best available information regarding the values of such factors" *et cetera*.[20] When the reality is that economic comparability has yet to be determined during the proceeding, and a party has previously complied with the original "deadline" for commenting thereon and for submitting FOP information therefor, a subsequent (attempt of) submission of relevant factual information that is otherwise within the regulatory deadline governing such factual information constitutes "available" information within the meaning and spirit of the statute. *Cf. DuPont Teijin*, 37 CIT at ___, 931 F. Supp. 2d at 1306 ("[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").

Commerce acknowledged Xinboda's September 17, 2015, submission as within the regulatory deadline for submission of information to value FOPs, *i.e.*, 30 days prior to the preliminary results in order to permit submission of rebuttal thereof and consideration, while avoiding acknowledgment of the fact that Xinboda's supplemental economic comparability information was likewise "within the regulatory deadline". *Cf.* PDoc 318 at 1 *with* 19 C.F.R. §351.301(c)(3). Despite judicial request in prior cases for greater explanation on the subject, Commerce did not avail itself of the opportunity to explain adequately why it "singled out" the attempt(s) to provide updated GNI information for "special treatment" in this instance.

Even the language in the OP List letter does not make clear that information submitted after the letter's stated deadline must be rejected and ignored; it merely implies that Commerce may not have time to consider such information prior to the preliminary results. *Cf., e.g.*, PDoc 153 at 1 (providing "opportunity *to comment* on the list

[19] *Sic. See* 19 U.S.C. §1677b(c)(1)(B) & (4).

[20] *Id*. Furthermore, although resort to determining NV on the basis of FOPs in an NME situation occurs when "the administering authority finds that available information does not permit the [NV] of the subject merchandise to be determined under subsection (a)," 19 U.S.C. §1677b(c)(1)(B), the general requirement of that subsection to determine NV "at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price under section 1677a(a) or (b) of this title" cannot be overlooked in the determination of relevant FOPs when an NME situation requires resort to subsection (c).

as a starting point for surrogate country selection . . . and *to propose* for consideration other countries that are at a level of economic development comparable to the PRC" but providing deadlines for "[t]hese *comments*" only). And yet Commerce clearly considered information submitted at the 30-day deadline as well as rebuttal information 10 days later as well as pre-preliminary results comments filed less than 30 days before the preliminary results. *See PDM*. But at the same time, the relative complexity of considering all the minutiae associated with the particular FOPs involved in the production of garlic, let alone other subject merchandise products, simply cannot compare to the relatively straightforward consideration of country-versus-country "economic comparability" based on a listing of GNI information. Hence, imposing the "hard red-line deadlines" of the OP List letter in this instance (in response to which Xinboda *did* submit timely comments and information, as aforesaid), when juxtaposed against the other instances of record when Commerce has "relaxed" those deadlines in the past (which amounts to *re*-modifying the "modified" deadlines of the OP List in any event) to "allow" submission of updated GNI information, can hardly be said to be "modify[ing] its procedural rules adopted for the orderly transaction of business before it when in a given case *the ends of justice* require it", *American Farm Lines, supra*, 397 U.S. at 539 (italics added), *i.e*, the statutory mandate of determining margins as accurately as possible, *see., e.g., Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1343 (Fed. Cir. 2016) ("clarify[ing] that 'commercial reality' and 'accurate' represent reliable guideposts for Commerce's determinations'), or to amount to a rational "pursu[it of a] method[ ] of *inquiry* capable of permitting [Commerce's analysts] to discharge their multitudinous duties", *Vermont Yankee Nuclear Power*, 435 U.S. at 543 (italics added). Once again: preliminary results are just that, preliminary -- Commerce has until the final results to make its decision. Towards that end, therefore, it is also rather oblique if not disingenuous for Commerce to claim it cannot consider surrogate country comments after the OP List letter deadline when that deadline is itself still "early in the proceeding".

The foregoing does not resolve to a coherent rational whole, nor can the court overlook the fact that Commerce's rather "terse" explanation for rejecting Xinboda's supplemental submission ignores the entiretyof *DuPont Teijin*'s numerous holdings on the administrative burdens *vis-à-vis* the AD duty statute and finality.[21] The defendant

[21] *E.g.*: "[Commerce]'s reliance on the administrative burdens of reconsidering the OP's list do not excuse it from complying with its statutory obligations to determine accurate dumping margins, including its statutory obligation to use data from an economically comparable country"; and Commerce's "position . . . conflicts with its established practice of

cites to *Essar Steel, PSC*, and *Dongtai Peak Honey* as support for its position, emphasizing that Commerce is "not required to demonstrate good cause for rejecting [a respondent's] untimely submissions"[22], however those cases are distinguishable from the facts at bar.

In *Essar Steel*, a party requested that Commerce reopen the record on appeal and admit new documents. 678 F.3d at 1276–77. The court was rightly concerned not only with the fact that the party had the burden to create an accurate record during the investigation (the party had the correct documentation it wished to submit on appeal during the investigation but chose not to submit it) and with the interests of efficiency and finality. In the case at bar, by contrast, Xinboda was requesting Commerce to consider information properly submitted under the regulation of the exact type of information Commerce was considering for the preliminary results due three months later. And unlike in *Essar Steel*, the information was not "withheld" by Xinboda, the information Xinboda sought to submit was not yet published by the World Bank at the time of OP compiled its list. Moreover, reopening a record after a decision has been made and a degree of finality attaches is entirely different from the circumstances at bar, where Commerce did not have an interest in finality or efficiency at the point where it rejected Xinboda's supplemental factual submission, because economic comparability was still an open question at that point. Thus the defendant's suggestion that Xinboda's reasoning would require "Commerce to consider reopening and supplementation and to recalculate each aspect of its decision *ad infinitum*", Def's Resp. at 31, is inaccurate. Rather than transforming the proceeding into "Sisyphean endeavors", Xinboda was apparently and simply requesting that Commerce do precisely what it was already in the process of doing, *i.e*, determining the primary surrogate country, but with, Xinboda here claims, more and more accurate information.

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permitting parties to submit factual information to 'rebut, clarify, or correct' information placed on the record by [Commerce]"; and "[w]hen the OP issues its list 'early in a proceeding,' months before the preliminary results, issues of finality are not yet present"; and "[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 here and does not permit [Commerce] to completely eliminate any meaningful opportunity to submit factual information related to economic comparability"; and "time constraints do not automatically trump Commerce's statutory obligation to determine accurate dumping margins with surrogate data from an economically comparable country"; and Commerce (here as well) "has not provided a reasoned justification for singling out the OP list as factual information placed on the record by Commerce that the parties cannot rebut, clarify, or correct." *DuPont Teijin*, 37 CIT at ___, 931 F. Supp. 2d at 1306. *See also Vinh Hoan*, 49 F. Supp. 3d at 1301 (discussing the "data covering 7 out of 12 months of the POR . . . may affect its choice of a primary surrogate country.").

[22] Def's Resp. at 34, quoting *Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1356, 1352 (Fed. Cir.2015). *See also Essar Steel Ltd. v. United States*, 678 F.3d 1268 (Fed. Cir. 2012); *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751 (Fed. Cir. 2012).

In *PSC*, a party attempted to submit an affidavit with its administrative case brief. The court held that Commerce has discretion to "set and enforce deadlines", of course, and that a court "cannot set aside application of a proper administrative procedure because it believes that properly excluded evidence would yield a more accurate result if the evidence were considered." 688 F.3d at 760–61. But it was also clear from the facts of that case that the affidavit that the plaintiff attempted to submit contained brand new information, not allowed in a case brief, which was submitted well after the preliminary results and well after the regulatory deadline to submit new information. *Id.* at 757. *PSC* is also unlike the circumstances at bar.

Dongtai Peak Honey broadly holds that accuracy concerns cannot overcome Commerce's ability to enforce its procedural deadlines for submission of questionnaire responses and for requests for extension thereof. Under the facts of that case, Commerce had earlier warned the plaintiff-respondent, in granting its eleventh-hour request for an extension of time, of the need to "plan accordingly" in future, 777 F.3d at 1347, and the respondent was, subsequently and clearly, untimely in attempting — twice — to request another extension of time to respond to a supplemental questionnaire. In denying those requests, Commerce also noted its earlier caution to the respondent about timeliness. *Id. Dongtai Peak Honey* is also unlike the circumstances at bar.

In contrast to those cases (and as mentioned previously), Xinboda did provide timely comments on economic comparability and FOP information in the first instance, and its submission of factual information was well within the regulatory deadline for submission thereof (*i.e.,* 30 days prior to the preliminary results, November 2, 2015). The deadline of June 11, 2015, in the OP List letter to submit any information related to surrogate country selection is itself not a regulatory deadline but a modification of one, and Commerce's "adherence" to the deadlines of that letter in other and in this very proceeding does not appear to have been a model of consistency. For example, while Commerce also states in its OP List letter that in order for surrogate value information to be considered in the preliminary results, it must be submitted by June 17, 2015, yet in this case (and, Xinboda argues, in every case even with the same language in the letter), Commerce considered surrogate value information submitted after this point up through and including the submission that parties submit at the very last day (30 days and 20 days prior to the preliminary results) — which is consistent with its regulation: Commerce references submissions from November 2 in its preliminary results and even relies on a financial statement submitted on Novem-

ber 2 — well after the initial OP List letter "deadline" of June 17, 2015 for submission of that information. Prelim. SV Memo at 14, PDoc 401. *See also supra*.

Granted, the OP List letter makes explicit reference to the deadlines of the regulation for the purpose of submitting FOP information (thereby undercutting its own "deadline" in the OP List letter) and does not do so with respect to economic comparability, but the bottom line here is that Commerce was not "denied" the reasonable amount of time contemplated by the purpose of the timing regulation (as amended to 19 C.F.R. §351.301) to consider the surrogate country information submitted on September 17, 2015 ahead of its preliminary results, which were due November 30, 2015, or, for that matter, for its final results due June 20, 2016. The regulation does not contemplate a separate deadline for surrogate country information. *See* Xinboda Br. at 2–7 (discussing the regulation). In view of the foregoing, the matter requires remand for reconsideration of the decision to reject Xinboda's supplemental September 17, 2015 submission as untimely.[23]

B. Xinboda's Remaining Challenges

Xinboda separately challenges Commerce's selection of Romania as the primary surrogate country from which to select the FOPs and Commerce's calculation of inland transportation and brokerage and handling expenses. *See IDM* at 4–16, 30. On the first issue Xinboda argues that the Romanian garlic market is distorted by import tariffs and that Commerce should have selected Mexico, or, in the alternative, India or Thailand. Xinboda Br. at 15–36. On the second issue Xinboda argues that Commerce erred in using a 10,000 kg denominator from the World Bank's report entitled "Doing Business 2015 Romania". *Id*. at 33. These issues are not part of the "case or controversy" at this point. *Cf*. section A, *supra, with, e.g., Tregea v. Bd. of Directors of Modesto Irrigation Dist.*, 164 U.S. 179 (1896).

III. *QTC's Challenges*

QTF's separate motion for judgment challenges Commerce's determination that QTC did not cooperate to the best of its ability and the resulting determination to apply total adverse facts available (total AFA) as well as Commerce's rejection of its separate rate information,

[23] Once again: "[i]f administrative constraints prevent Commerce from considering economic comparability after a certain point in the administrative process, that is, prior to the existing regulatory deadline for the submission of factual information, Commerce may create a reasonable deadline for the submission of GNI data pursuant to the requirements of the APA." *DuPont Teijin*, 37 CIT at ___, 931 F. Supp. 2d at 1307. The court has also considered the parties' other arguments on this issue but concludes that further discussion of them would not materially advance this decision

conclusion that it is part of the PRC-wide entity, and assignment to it of the PRC-wide rate of $4.71/kg. It contends that the dispute here relates to the extent to which Commerce may appropriately rely on PRC government regulations relating to PRC's phytosanitary inspection program to conclude a respondent fails to cooperate to the best of its ability and whether it is appropriate to conclude that respondent is part of the PRC-wide entity.

A. Background

QTF first shipped subject garlic to the United States during the November 1, 2006, through April 30, 2007 period and participated in a new shipper review that determined QTF to have been free of state control and entitled to the separate rate of 32.78 percent, significantly lower than the PRC-wide rate of 376.67 percent. *See generally Kwo Lee, Inc. v. United States*, 39 CIT ___, 70 F. Supp. 3d 1369 (2015) (*"Kwo Lee"); Fresh Garlic from the PRC*, 73 Fed. Reg. 56550 (Sep. 29, 1008) (*inter alia*, 12th new shipper reviews). The 32.78 percent rate applied only when QTF was both the exporter and the producer of the subject garlic. *Id*.

Until the POR at bar, QTF had been dormant in exporting garlic into the United States. During the POR, it began to ship large quantities of garlic into the United States, *see, e.g., Kwo Lee*, 39 CIT at ___, 70 F. Supp. 3d at 1372, purportedly due to the fact that cash deposit rates for all other companies except one had increased to a point where QTF's cash deposit rate became competitive, QTF Br. at 5. The importer of record claimed that the garlic entries were eligible for QTF's AD duty rate, but U.S. Customs and Border Protection (Customs) was unable to determine that QTF was, in fact, the producer. *Id*. Customs thus required the importer of record to post additional security equal to the PRC-wide AD duty rate. *Id*. The importer sought judicial review thereof and the higher security was preliminarily enjoined in that process, but the higher security was ultimately sustained because "Customs reasonably determined that it could not verify that QTF was the producer" of the subject garlic. *Kwo Lee*, 39 CIT at ___, ___, 70 F. Supp. 3d at 1373, 1376–77.

The garlic entries considered in *Kwo Lee* were encompassed by 20th AR's initiation on December 23, 2015. PDoc 23. *See Kwo Lee*, 39 CIT at ___, 70 F. Supp. 3d at 1372. QTD draws attention to the fact that after the *Kwo Lee* case, it voluntarily participated in this 20th AR before becoming a mandatory respondent and was "pre-warned" of the importance of the link between the PRC Inspection and Quarantine ("CIQ") phytosanitary certificates and the "producer". *See* QTF

Reply at 5, referencing *IDM* at 2. QTF's May 5, 2015 Section A questionnaire response certified that it produced all of its subject garlic in the QTF facility located in Qingdao City. PDoc 163 at A-13; *see also* CDoc 82 at Exh. A-12; PDoc 175 at D-3-D-4. QTF further stated that it had "no relationship with any other producer or exporter" of garlic from the PRC, and that it "does not coordinate with other exporters in setting prices or in determining which companies will sell to which markets." PDoc 163 at A-3, A-5, A-8. In its Section D questionnaire response, QTF also certified that it produced all the merchandise under consideration in its manufacturing facility in Qingdao City. PDoc 175 at D-3-D-4. QTF also submitted CIQ certificates as part of its garlic export documentation. CDoc 91–95 at Exh. 18. QTF also stated that all of its purchasing, processing, and selling activities took place "at the QTF facility, where the processing workshops, warehouses, sales and administrative office are located." PDoc 163 at A-13.

In response to QTF's submissions, the petitioner FGPA submitted information regarding the legal, regulatory, and administrative framework of the Chinese inspection and quarantine regime that produces the CIQ certificates. *See* PDoc 182 at Att. 1. As described by FGPA, the applicable law and regulations required exported foods to be inspected at the CIQ inspection bureau with jurisdiction over the geographic area where the manufacturer was located. *Id*., Att. 1, at 4–5, 7. Those authorities also required each manufacturer to register with the relevant PRC authority and to receive a unique CIQ code. *Id*., Att. 1 at 4–6. The CIQ certificates issued after the inspection contain the manufacturer-specific CIQ code and the location of inspection. *Id*., Att. 1 at 6–9; *see also* CDocs 91–95 at Ex. 18.

Commerce then issued a supplemental questionnaire asking QTF to explain discrepancies in its CIQ certificates. PDoc 303; CDoc 136. Among other discrepancies, Commerce asked QTF to explain why some CIQ certificates reflected companies other than QTF as the producer. CDoc 136 at 3 (listing the other producers as "[[ ]]"). Commerce also asked QTF to explain why many CIQ certificates showed inspection locations other than Qingdao City, the location where QTF certified that all of its garlic was processed. CDoc 136 at 3. The questionnaire also asked QTF to explain why its CIQ certificates showed that more than [[ ]] kilograms of garlic were inspected in [[ ]], more than [[ ]] kilograms of garlic were inspected in [[ ]], and only less than [[ ]] kilograms of garlic were inspected in Qingdao City. CDoc 136 at 3.

In its response on September 17, 2015, QTF stated that it was the processor of all garlic, but had purchased some raw garlic from one of the producers listed in Commerce's questionnaire, [[ ]]. CDoc 146 at 2–3. QTF further stated it had no business relationship with the other producer listed in Commerce's supplemental questionnaire, [[ ]], speculating that "[[ ]] may have been used by an agent to perform the [[ ]]." *Id*. at 3. With respect to the processing locations, QTF stated that the CIQ certificates from other locations, including [[ ]], "were actually processed and packed by QTF at its facility in Qingdao." *Id*. at 3; *see also* CDoc 148 Exh. 7 (providing "sample" production records). And although QTF clarified that the CIQ certificates showed less than [[ ]] kilograms of garlic produced in [[ ]], it conceded that the CIQ certificates showed that more than [[ ]] kilograms of garlic were inspected in locations other than Qingdao City. CDoc 146 at 5.

FGPA responded on October 5, 2015, reiterating that PRC law requires food exports to be inspected at the CIQ bureau in the location where the food was manufactured. PDoc 327 at 2. Because the CIQ certificates reflect the manufacturing location rather than the origin of raw inputs, FGPA explained that QTF's purchases of raw inputs from another company would not explain the discrepancies in the CIQ certificates. *Id*. at 18–19. And because many of the CIQ certificates showed manufacturing locations other than Qingdao City, FGPA argued that QTF's garlic was produced by other companies. *Id*. at 2. FGPA further argued that many of the CIQ certificates "either lack information" regarding the manufacturer code and the location of the inspection bureau, "or have a CIQ code belonging to a different entity." PDoc 327 at 13.

QTF responded on October 14, 2015 and continued to argue that it was, in fact, the producer of all garlic entries. PDoc 338 at 3 (citing CDoc 152 at Exh. 11); *see also, e.g.*, CDoc 159 at A-2-A-3.

In the preliminary results, Commerce found that "QTF was not the sole producer of the garlic it reported in its sales database and that necessary information [was] not on the record." *PDM* at 13; *see also* CDoc 167 (AFA memorandum). Without "complete information" regarding the producers of the subject merchandise, Commerce explained that it could not determine that QTF's reported factors-of-production information was accurate or complete. *PDM* at 13. Commerce preliminarily concluded "that QTF's various explanations" for the discrepancies in its CIQ certificates were "not credible" and that other entities "produced the bulk" of the garlic that QTF reported

to Commerce. *Id*. at 14. Accordingly, Commerce preliminarily relied on facts available pursuant to 19 U.S.C. §1677e(a), finding that QTF "withheld requested information, failed to provide requested information by the established deadlines and significantly impeded the proceeding." *Id*. at 13. In light of QTF's failure to provide complete information regarding its processors and factors of production, moreover, Commerce found that QTF failed to cooperate to the best of its ability and preliminarily applied total adverse facts available (AFA). *Id*. at 13; *see also* 19 U.S.C. §1677e(b).

In the final decision, Commerce determined (1) to apply adverse facts available with an adverse inference to QTF, and (2) to treat QTF as part of the PRC-wide entity subject to the PRC-wide rate of $4.71 per kilogram. IDM at 3–6, 23. QTF disputes each of these findings. QTF Br. at 11–19.

B. Application of AFA

Commerce must follow a two-step process to apply facts available with an adverse inference ("AFA"). 19 U.S.C. §1677e. First, Commerce must use facts otherwise available to fill gaps in the record either (1) if necessary information is not available on the record, or (2) if an interested party withholds information requested by Commerce, fails to provide the information by the applicable deadlines or in the form and manner requested, significantly impedes the proceeding, or provides information that cannot be verified. *Id*. §1677e(a). This has been interpreted to mean Commerce uses facts available when "it has received less than the full and complete facts needed to make a determination because a party has failed to provide requested information within the deadline for submission." *Fresh Garlic Producers Assoc. v. United States*, 39 CIT ___, ___, 121 F. Supp. 3d 1313, 1324 (2015), citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003) ("*Nippon Steel*").

Second, if an interested party fails to cooperate to the best of its ability, Commerce "may" apply an adverse inference in selecting among facts otherwise available. 19 U.S.C. §1677e(b). An interested party fails to cooperate to "the best of its ability" when it "fails to put forth its maximum effort to provide Commerce with full and complete answers to all inquiries." *Nippon Steel*, 337 F.3d at 1382. In that regard, a party is obligated to conduct a reasonable inquiry to investigate the accuracy of information that it submits to Commerce. *See PAM, S.p.A v. United States*, 582 F.3d 1336, 1339 (Fed. Cir. 2009). "The statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of [the] respon-

dent's ability, regardless of motivation or intent."[24] *Nippon Steel*, 337 F.3d at 1383.

Commerce applied "total" AFA[25] to QTF. *IDM* 3–5; *PDM* 17–20. QTF challenges that determination, arguing that it cooperated to the best of its ability. QTF Br. at 11–20. The defendant responds that Commerce determined that QTF provided inconsistent and unreliable information in its Section A submissions, including its separate rate information; that QTF's submissions contained discrepancies indicating that other PRC garlic companies produced the bulk of QTF's claimed garlic; that QTF's attempts to explain those discrepancies contained misrepresentations; that QTF failed to cooperate to the best of its ability; and that therefore Commerce applied facts otherwise available with an adverse inference, disregarded QTF's separate rate information, and treated QTF as part of the PRC-wide entity. *See, e.g., IDM* at 3–5; PDM 17–20. QTF argues to the contrary, but Commerce's determinations with respect to QTC are supported by substantial evidence and in accordance with the law. *See IDM* at 23–27. As discussed below, Commerce's application of adverse facts available is supported by substantial evidence and in accordance with the law.

QTF challenges Commerce's decision for two primary reasons, arguing that (1) "QTF did process all the garlic shipped," and (2) QTF "cooperated to the best of its ability." QTF Br. 11–13. Each of these arguments is unpersuasive. As an initial matter, the question is not, as QTF argues, whether substantial evidence supports its position, *see, e.g.*, QTF Br. at 11, 13, but whether Commerce's decision is supported by substantial evidence. *See Eurodif*, 555 U.S. at 316 n.6. QTF contends that the heart of the case is Commerce's presumption that the PRC authorities required "strict compliance" with its CIQ certification procedures and asks whether Commerce can "shift the burden on QTF to provide evidence that the [PRC] authorities were flexible and did not require strict compliance", QTF Reply at 6, but the point here is rather that it is QTF that carries the burden of showing that the record contains no substantial evidence to support

[24] Further, the purpose of AFA is "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." Statement of Administrative Action, Uruguay Round Agreements Act ("SAA"), H.R. Rep. 103–316, reprinted in 1994 U.S.C.C.A.N. 4040, 4197 (1994). Thus, Commerce may consider the extent to which a party may benefit from its own lack of cooperation when considering the application of an adverse inference. *See Nippon Steel*, 337 F.3d at 1381–83.

[25] "Total" AFA is not referenced in either the statute or the agency's regulations, but is understood to refer to a combination of Commerce's application of the "facts otherwise available" and "adverse inferences" provisions of 19 U.S.C. §1677e to all determinations with respect to a company after rejecting as untrustworthy all information submitted by that company in a trade proceeding. *See Yantai Xinke Steel Structure Co. Ltd. v. United States*, 36 CIT ___, Slip Op. 12–95 at 4 n.6 (2012).

Commerce's findings. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1348 (Fed. Cir. 2015) (citing 19 U.S.C. § 1516a(b)(1)(B)(i)). It does not make that showing here, its question essentially impugns the reasonableness of holding the PRC to its own word (law) on the subject, and substantial evidence of record supports Commerce's finding that QTF did not process all of the garlic that it claimed during the period of review. QTF submitted CIQ forms for the garlic entries it claimed to have produced during the relevant period, CDoc 91–95 at Ex. 18, but, as Commerce explained, the "vast majority" of these CIQ certificates listed inspection bureaus "without jurisdiction" over QTF's production facility in Qingdao City. *IDM* at 23. Many certificates also showed "CIQ numbers uniquely associated with producers other than QTF." *Id*. at 23–24. The record thus supports reasonably concluding that QTF was not the producer of the garlic covered by these certificates despite QTF's statements to the contrary and also supports finding that QTF's questionnaire responses contained "misrepresentations" regarding the true producer of the relevant garlic in light of QTF's representation that it had produced all subject garlic in its facility in Qingdao City. *IDM* at 23–24.

Throughout its brief, QTF discusses whether it was the "processor" of the garlic, which herein is assumed to be synonymous with the question of whether QTF "produced" the garlic entries, and QTF contends that Commerce refused to credit "irrefutable evidence" that QTF "produced" all of the garlic in its sales database. QTF Br. at 12. Although QTF's brief does not describe the contents of the purportedly "irrefutable" evidence, QTF Br. at 11–12, it presumably refers to the evidence that it submitted to Commerce in an attempt to overcome the discrepancies in the CIQ certificates. *See, e.g., IDM* at 24. Commerce found that QTF's three arguments to explain the CIQ discrepancies were "not credible" and showed that QTF's questionnaire responses "contained misrepresentations." *IDM* at 24, citing CDoc 167.

As its first proffer to Commerce, QTF argued that the location-discrepancies in the CIQ certificates occurred because of [[ ]]. CDoc 167 at 3. Commerce found that the declaration of QTF's own manager was inconsistent with that theory, instead stating that [[

]]. *Id*. Applicable PRC regulations on the record likewise required that inspections must "take place in the jurisdiction where the processor/exporter is located." *Id*. Accordingly, QTF's CIQ certificates should have been inspected at the Qingdao City bureau with juris-

diction over QTF's processing facility, and the fact that many of those certificates reflected other inspection locations is substantial evidence to support Commerce's finding that QTF was not the processor for all of its claimed garlic. *See* IDM at 24.

Second, QTF argued that it sent the garlic to be inspected in other locations because they "were better suited for those inspections." *See* CDoc 167 at 4. However, the record lacks evidence to support concluding that QTF shipped its garlic from its facility in Qingdao City to [[ ]] for inspection and then "back to Qingdao City for export." *Id*. To the contrary, QTF reported that its first shipment occurred on the same date that the CIQ certificate and other documentation were issued, *id*., which Commerce found was inconsistent with QTF's argument that it shipped garlic back and forth between its own processing facility and inspection bureaus in other locations. CDoc at 167 at 4.

Third, QTF argued that only one of the other processors listed on its CIQ certificates, [[ ]], supplied fresh garlic to QTF. CDoc 167 at 4. QTF speculated that the other entity, [[ ]], appeared on the CIQ certificates because it may have been used by an agent to perform [[ ]]. *Id*. Commerce found, however, that such a scheme would have been inconsistent with PRC regulations, which require inspections to "take place in the same jurisdiction where the processor/exporting company is located." *Id*. In any event, QTF's theory would not explain why [[ ]] were listed as the manufacturers of garlic on the CIQ certificates. Accordingly, Commerce properly concluded that "it appears that some of the garlic included in QTF's sales data base was produced by [[ ]]." *Id*. at 5.

QTF also argued that it would make no economic sense for QTF to export garlic processed by another entity. *See IDM* at 24; *see also* CDoc 179–81. As Commerce explained, however, QTF increased its exports immediately after Commerce increased the cash deposit rates for other Chinese exporters. *IDM* at 26. QTF had a comparatively low cash deposit rate at the time, and the CIQ records reveal that QTF took advantage of its own low cash deposit rates by exporting garlic "from third-party processors" at QTF's low rates. *Id*. As Commerce determined, "QTF clearly had its reasons for engaging in this type of business model." *Id*.

QTF argues that Commerce lacks competence to rely on Chinese regulations, because "[t]here is no record evidence that any [PRC] government authority found a third party was the processor rather than QTF." QTF Br. at 13. But, as Commerce explained, "QTF has not provided any information to support its contention" that the PRC

government does not enforce its own CIQ regulations. *IDM* at 24. QTF assumes the CIQ certificates are noncompliant with PRC regulations -by listing inspection locations other than Qingdao City and manufacturers other than QTF -- but QTF provided no satisfactory reason why Commerce should assume noncompliance rather than concluding, as it did, that the CIQ certificates were consistent with PRC regulations and showed that manufacturers other than QTF produced the "bulk" of QTF's claimed garlic. *See, e.g., IDM* at 23–24.

Given no satisfactory explanation for the record discrepancies in the CIQ certificates, Commerce found that QTF "misrepresent[ed]" the producers for the "bulk" of the garlic in its sales database and failed "to report all of its processors." *IDM* at 24. Without such explanation, Commerce was also unable to rely on QTF's submissions regarding (1) factors of production, (2) affiliated producers, (3) intermediate parties in the production of subject merchandise, and (4) unaffiliated producers involved in supplying garlic. *IDM* at 24. Such misrepresentations and/or omissions, above, are substantial evidence that supports Commerce's finding that QTF "withheld requested information, failed to provide requested information by the established deadlines, and significantly impeded the proceeding." PDoc 400 at 3. QTF argues that it did respond completely to Commerce's requests, QTF Br. at 12, but from Commerce's perspective "QTF failed to create an adequate record to explain or otherwise rebut the discrepancies obvious on the face of its CIQ certificates." *IDM* at 24. The court cannot substitute judgment for Commerce's finding that QTF's explanations for the discrepancies were not credible and demonstrated a failure to cooperate to the best of its ability (*see* PDoc 400 at 5). *Inland Steel Indus., Inc. v. United States*, 188 F.3d 1349, 1359 (Fed. Cir. 1999).

QTF also argues that "Commerce failed to specify" what requested information QTF failed to supply. QTF Br. at 11. As Commerce explained, however, QTF's misrepresentations regarding the producers of its garlic meant that QTF failed to submit necessary information regarding its garlic production, which, in turn, implicated other information regarding factors of production, affiliation, and independence from government control. *IDM* at 23–24; PDoc 400 at 3, 5. And QTF does not contest that Commerce provided an opportunity to remedy or to explain the deficiencies in the record. *See* 19 U.S.C. § 1677m.

Finally, QTF argues that Commerce's findings are inconsistent with the Statement of Administrative Action, which states that:

> [N]ational authorities should calculate costs on the basis of exporter's and producer's records, provided that such records

> are in accordance with generally accepted accounting principles in the exporting country and reasonably reflect the costs associated with producing and selling the merchandise.

QTF Br. at 12 n. 44, quoting SAA, H.R. Rep. No. 103–316 (1994) at 139. That section, however, describes the procedures for calculating sales below cost, a procedure that is not at issue in this case, nor does anything in the quoted material require Commerce to accept records at the respondent's insistence, especially when, as in this case, the record evidence reveals that the respondent misrepresented important information. *See IDM* at 24.

Accordingly, Commerce found that "QTF withheld requested information, failed to provide requested information by the established deadlines, and significantly impeded the proceeding," requiring application of facts otherwise available. *IDM* at 23, citing 19 U.S.C. § 1677e(a)(2)(A)-(C). And because QTF failed to cooperate to the best of its ability, Commerce applied total adverse facts available. *IDM* at 23, citing 19 U.S.C. § 1677e(b). On this record, the court cannot hold Commerce's finding and the consequence thereof unreasonable.

C. Separate Rate Eligibility

Commerce disregarded QTF's separate rate information as unreliable, found that QTF did not establish its eligibility for a separate rate, and applied the underlying presumption of government control in non-market economy countries. *IDM* at 25–27. Accordingly, in the final results Commerce included QTF in the PRC-wide entity and applied the $4.71 per kilogram PRC-wide rate. *Id*. at 27. QTF argues here that "[t]here is no evidence that QTF was ever part" of the PRC-wide entity and that Commerce failed to conduct the necessary analysis with respect to its separate rate status, and that Commerce should have accepted its separate rate certification. QTF Br. at 13–16. As discussed below, these arguments are unpersuasive.

In NME proceedings, Commerce presumes that all respondents are government-controlled unless a respondent rebuts this presumption by establishing the absence of *de jure* and *de facto* government control. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1353 (Fed. Cir. 2015). If a respondent fails to establish its independence, Commerce relies upon the presumption of government control and applies the country-wide rate. *Id*. Because the country-wide rate "presumes government control," Commerce may not apply the country-wide rate when "the respondent has established independence from government control" -- even if Commerce has applied AFA

to other information by the same respondent. *Qingdao Taifa Grp. v. United States*, 33 CIT 1090, 637 F. Supp. 2d 1231, 1098, 1240–41 (2009) (citation omitted). Several decisions have held that Commerce may not disregard separate rate information when "there is no indication that any necessary information was missing or incomplete." *See, e.g., Shandong Huarong General Group v. United States*, 27 CIT 1568, 1594 (2003) (citation omitted).

Nevertheless, Commerce may disregard a company's separate rate submission if the record supports finding that the submission consists entirely of information derived from unreliable sources. *See, e.g., Fresh Garlic Producers Ass'n v. United States*, 39 CIT ___, ___, 121 F. Supp. 3d 1313, 1328 (2015) ("Commerce's determination that a party is not entitled to a separate rate because its separate rate information is unreliable must be based on substantial evidence") (citing *Gerber Food (Yunnan) Co. v. United States*, 29 CIT 753, 772, 387 F. Supp. 2d 1270, 1287 (2005)); *Hebei Golden Bird Trading Co. v. United States*, 41 CIT ___, Slip Op. 17–86 (July 17, 2017) at 11 (information impugning separate rate submissions provides substantial evidence to support determination of ineligibility for separate rate); *Jiangsu Changbao Steel Tube Co. v. United States*, 36 CIT ___, ___, 884 F. Supp. 2d 1295, 1310 (2012) (finding specific evidence on the record to support concluding that a separate rate application presents no reliable evidence).

As outlined above, Commerce found that QTF misrepresented that it was the producer of its subject merchandise. *IDM* at 24–25. This misrepresentation appeared in QTF's Section A questionnaire responses, and revealed deficiencies in other portions of the same responses, including the separate rate information. *Id*. at 25. Commerce found that QTF failed to submit "complete information regarding QTF's relationships with other entities that produced the bulk of its subject merchandise". *Id*. Those other entities were not part of this review, did not establish separate rate status, and are thus presumed to be part of the PRC-wide entity. *See, e.g*., CDoc 15. QTF's relationship with those entities, in turn, implicated "whether QTF was subject to government control." *IDM* at 25. "Given QTF's implausible explanations" and misrepresentations, Commerce found that it was "unable to consider any information in QTF's Section A response, and specifically its information relating to government control." *Id*. Accordingly, Commerce disregarded QTF's separate rate information as unreliable and treated QTF as part of the PRC-wide entity. *Id*.

Commerce's decision to disregard QTF's separate rate information is supported by substantial evidence and complies with the law. This

case is similar to *Jiangsu*, on which the court sustained Commerce's decision to disregard the respondent's separate rate application because of deficiencies in that application. *See Jiangsu*, 884 F. Supp. 2d at 1310. Therein, Commerce found that company officials had misled during verification and that the company's computer software was unreliable. *Id*. at 1303. Because the respondent's separate rate application contained only representations by the discredited officials, Commerce denied the separate rate application. *Id*. at 1309. As the court explained, Commerce's decision was based on "specific findings" that the respondent's "submissions regarding government control were not credible." *Id*. The court further explained that Commerce's decision was not based solely on an indiscriminate adverse inference, but instead determined that the separate rate application itself was "unreliable." *Id*. at 1310.

In this case, Commerce likewise found QTF's separate rate information unreliable. *See IDM* at 25–27. Because of QTF's "misrepresentations" regarding the producers of its garlic, Commerce reasonably found that it could not trust QTF's related answers regarding its relationship with other producers or exporters. *See IDM* at 25. Those answers appeared in the separate rate portion of the Section A questionnaire response. PDoc 163 at A-2--A-11. As Commerce explained, it "did not receive complete information regarding QTF's relationships with other entities that produced the bulk of its subject merchandise . . . , which may have included information relating to whether QTF was subject to government control." *IDM* at 25.

QTF's answers regarding its relationship with other producers comprise a key part of the separate rate portion of the Section A questionnaire. PDoc 163 at A-3. That portion of the questionnaire asks for information regarding QTF's "relationship with other producers or exporters," and whether QTF "coordinate[d] with other exporters in setting prices". PDoc 163 at A-3, A-8. QTF responded, in relevant part, that it "has no relationship with any other producer or exporter of the merchandise under consideration." PDoc 163 at A-3. QTF further stated that it "does not coordinate with other exporters in setting prices." PDoc 163 at A-8. Given QTF's misrepresentation regarding the producers of its garlic, Commerce reasonably concluded that it could not rely on QTF's responses in the separate rate portion of the Section A questionnaire. *See IDM* at 25.

As in *Jiangsu*, QTF's material misrepresentations support Commerce's finding that QTF's representations in the separate rate portion of the questionnaire were unreliable. *Cf. IDM* at 25 with *Jiangsu*, 884 F. Supp. 2d at 1309–10. Indeed, Commerce possesses authority,

pursuant to section 1677m(d), to "disregard all or part of the original and subsequent responses" when a respondent fails to satisfactorily remedy a deficiency. *See* 19 U.S.C. §§ 1677e(a)(2), 1677m(d). Pursuant to such authority, Commerce properly found that "QTF's implausible explanations" left Commerce unable to consider "any information in QTF's Section A response," including "its information relating to government control." *IDM* at 25.

The Court of Appeals for the Federal Circuit, moreover, has repeatedly held that Commerce may disregard all of respondent's data when a deficient questionnaire response implicates "core" information. *See, e.g., Ad Hoc Shrimp Trade Action Committee v. United States*, 802 F.3d 1339, 1357 (Fed. Cir. 2015), citing *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011). That precedent applies in this case because Commerce found that "QTF's misrepresentations pervade the data in the record, including its Section A responses regarding its entitlement to separate rate status." CDoc 167 at 5.

QTF argues "[t]here is no evidence that QTF was ever part of the PRC-wide entity." QTF Br. at 13. But that argument inverts the underlying presumption in non-market economy reviews that the respondent is subject to government control. *See, e.g., Sigma Corp. v. United States*, 117 F.3d 1401, 1405 07 (Fed. Cir. 1997). That presumption is valid and has been upheld by the Federal Circuit. *See id.; Huaiyin For. Trade Corp. v. United States*, 322 F.3d 1369, 1372 (Fed. Cir. 2003); *see also Diamond Sawblades Manufacturers Coalition v. United States*, 866 F.3d 1304, 1311 (Fed. Cir. 2017) ("we consistently have sustained Commerce's application of a rebuttable presumption of government control to exporters and producers in NME countries, such as the PRC") (citations omitted). The burden rests on QTF to demonstrate that it is independent from government control. *See Sigma*, 117 F.3d at 1405–07. Commerce found that QTF had not made such a demonstration because the separate rate information in QTF's Section A questionnaire response is unreliable and deficient, thus the presumption of government control remained. The court cannot conclude Commerce's disregard of that information and application of the underlying presumption of government control improper on this record.

QTF further contends that "[t]he location where garlic is inspected establishes no evidence of ownership or control." QTF Br. at 13. But Commerce reasonably explained that QTF's misrepresentations implicate its relationships with other PRC garlic producers, which are

presumed to be under government control. *See, e.g., IDM* at 25–27. Indeed, neither of the companies listed on QTF's CIQ certificates participated in this review or was eligible for a separate rate, and were therefore presumed to be subject to PRC government control. *See, e.g.*, CDoc 15; CDoc 167 at 4 (listing the companies on QTF's CIQ certificates). QTF's undisclosed relationship with those companies supports treating QTF as part of the PRC-wide entity.

QTF next argues that Commerce's decision is inconsistent with other cases when the Court has held "that Commerce cannot apply the PRC-wide rate to a company that has established its independence from Chinese government control." QTF Br. at 13–14, citing, *inter alia, Shenzhen Xinboda Indus. Co. v. United States*, 40 CIT ___, 180 F. Supp. 3d 1305 (2016); *FGPA v. United States*, 40 CIT ___, ___, 180 F. Supp. 3d 1233, 1237 (2016); *Yantai Xinke Steel Structure Co. v. United States*, 36 CIT ___, Slip Op. 12–95 at 26–27 (July 18, 2012). It cites, for example, a case in which the court remanded a decision in which Commerce disregarded separate rate information solely because of "deficiencies" in the respondent's "sales data." QTF Br. at 14, citing *Xinboda*, 40 CIT at ___, 180 F. Supp. 3d at 1316.

Unlike the referenced decisions, however, Commerce made specific and particularized findings regarding QTF's misrepresentation and the resulting deficiencies in QTF's separate rate information. *See IDM* at 25–26. As discussed above, this case instead parallels the *Jiangsu* decision sustaining Commerce's application of the PRC-wide rate, because QTF's misrepresentations led to deficiencies that pervade its separate rate submissions. *See Jiangsu*, 884 F. Supp. 2d at 1309. In this case, moreover, Commerce made a finding that QTF's "separate rate responses were inaccurate or deficient," and its decision to reject QTF's separate rate information is "based on substantial evidence." *See Xinboda*, 180 F. Supp. 3d at 1316 (citation omitted).

QTF nonetheless argues that Commerce should have accepted its separate rate certification, citing "Commerce procedures" that a company must submit such a certification to show eligibility for the separate rate. QTF Br. at 15, citing *FGPA, supra*, 180 F. Supp. 3d at 1237. As the separate rate certification form states, however, merely submitting the certificate does not automatically guarantee a separate rate. PDoc 45 at 4. Rather, Commerce may conclude that a firm is not eligible for a separate rate if it fails to "furnish supporting documents as requested" by Commerce. *Id*. at 2. Further, a company selected as a mandatory respondent, like QTF, must respond to the AD "questionnaire in full in order to retain eligibility for consideration of separate rate status." *Id*. Merely submitting the separate rate certificate does not inoculate QTF against its misrepresentations and

deficiencies in the Section A questionnaire response. *See IDM* at 24–26. Commerce reasonably rejected QTF's separate rate information.

Based on the general proposition that Commerce must provide an adequate basis for its conclusions, QTF next contends that Commerce failed to "articulate the standard" it used in disregarding QTF's separate rate information. *Id*. at 22 (citing *Rhone Poulenc, Inc. v. United States*, 20 CIT 573, 574–75, 927 F. Supp. 451, 454 (1996)). But, Commerce explained that it was applying the statutory adverse facts available framework based on the deficiencies in QTF's separate rate submission. *See IDM* at 23–26; *see also PDM* at 9–14; CDoc 167 at 3–6. Commerce described that framework in detail, including the procedures for respondents to remedy a deficiency and the consequences for failing to do so. *See PDM* at 9–10, citing 19 U.S.C. § 1677m. Commerce also explained the circumstances in which it may apply facts otherwise available, and an adverse inference. *See id*. at 9–10, citing 19 U.S.C § 1677e. Applying those procedures, Commerce detailed the deficiencies in QTF's Section A questionnaire response regarding the separate rate. *See IDM* at 25; *PDM* at 14. Accordingly, Commerce properly exercised its discretion to disregard those responses. *See* 19 U.S.C. § 1677e, 1677m(d).

Finally, QTF restates its arguments that Commerce erred in applying the adverse facts available standard. QTF Br. at 15, 17–19. It argues, for example, that Commerce failed to find that "QTF's separate rate responses were inaccurate or deficient," *id*. at 17, and maintains that QTF "did not withhold any information requested by Commerce," *id*. at 18 (citing *Ad Hoc Shrimp Trade Action Committee v. United States*, 802 F.3d 1339 (Fed. Cir. 2015); 19 U.S.C. §1677e(a)(2)(A)-(D)). However, substantial evidence of record supports Commerce's determination that QTF did "withhold" or failed to provide correct information regarding the producers of its garlic, thereby rendering unreliable its responses regarding relationships with other producers, which is central to the separate rate analysis. *See, e.g., IDM* at 25; *see also id.* at 23.

And despite QTF's argument that it "did cooperate" to the best of its ability, *id*. at 15, 19, substantial evidence also supports Commerce's finding that QTF misrepresented the identity of its garlic producers. *See IDM* at 23, 25. The Federal Circuit has explained that although the "best of its ability" standard "does not require perfection and recognizes that mistakes sometimes occur," it "does not condone inattentiveness, carelessness, or inadequate record keeping." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Commerce found that QTF's misrepresentations in this case qualified

as a failure to cooperate. *See IDM* at 25. This case is akin to *Ad Hoc Shrimp*, cited in QTF's brief, when Commerce considered "evidence indicating that the exporter's statements were false." QTF Br. at 19, citing *Ad Hoc Shrimp*, 802 F.3d at 1356. Like the respondent in *Ad Hoc Shrimp*, Commerce found that QTF misrepresented important information and did not provide correct information when given the opportunity to correct the deficiencies. *See id.; see also IDM* at 23, 25. Those findings merit deference. *See, e.g., Fujian Machinery & Equip. Imp. & Exp. Corp. v. United States*, 25 CIT 1150, 1156 n.7, 178 F. Supp. 2d 1305, 1314 n.7 (2001). QTF contends Commerce did not provide "chance to rebut" pursuant to 19 U.S.C. §1677m(d), *see* QTF Reply at 7, but the fact of the matter is that during the course of the proceeding, and as a consequence of Commerce's findings on QTF's submissions for and explanations of the record, it is QTF that failed to rebut the presumption of state control.

IV. *Conclusion*

In accordance with the foregoing, Commerce's final results must be, and hereby are, remanded for reconsideration of the determination to reject Xinboda's September 17, 2015 submission of information related to economic comparability and factors of production for Mexico. The results of remand shall be due March 1, 2018. Within five business day after those results are docketed, the parties shall confer and submit a proposed schedule for filing comments on the remand results.

With respect to QTF, the 20th AR Final Results must be, and hereby are, sustained. Interested parties are requested to comment by December 15, 2017 on whether the redactions in this opinion are correct, and also whether there is any "just reason" for delaying issuance of final judgment with respect to Commerce's final results for QTF, *see* USCIT Rule 54(b).

So ordered.

Dated: December 5, 2017
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 17–165

JINKO SOLAR CO., LTD. et al., Plaintiffs and Consolidated Plaintiff, and YINGLI GREEN ENERGY AMERICAS, INC. et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SOLARWORLD AMERICAS, INC. et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 15–00080
PUBLIC VERSION

[Sustaining in part and remanding in part the U.S. Department of Commerce's remand determination in its antidumping investigation of certain crystalline silicon photovoltaic products from the People's Republic of China.]

Dated: December 13, 2017

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Neil R. Ellis, Brenda Ann Jacobs, Rajib Pal, and *Richard L.A. Weiner*, Sidley Austin, LLP, of Washington, DC, for Yingli Green Energy Americas, Inc., Yingli Green Energy Holding Co., Ltd., and Canadian Solar Inc.

Tara Kathleen Hogan, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of Counsel on the brief was *James Henry Ahrens, II*, Attorney, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Francis J. Sailer, Andrew Thomas Schutz, and *Brandon Michael Petelin*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, DC, for Hanwha Solarone (Qidong) Co., Ltd. and Hanwha Solarone Hong Kong Limited.

OPINION AND ORDER

Kelly, Judge:

Before the court for review is the U.S. Department of Commerce's ("Commerce" or "Department") remand determination in the antidumping investigation of certain crystalline silicon photovoltaic products from the People's Republic of China ("PRC" or "China"), filed pursuant to the court's order in *Jinko Solar Co., Ltd. v. United States*, 41 CIT __, __, 229 F. Supp. 3d 1333, 1361 (2017). *See* Final Results of Redetermination Pursuant to Court Remand, Aug. 2, 2017, ECF No. 105–1 ("Remand Results"); *see also Certain Crystalline Silicon Photovoltaic Products from the [PRC]*, 79 Fed. Reg. 76,970 (Dep't Commerce Dec. 23, 2014) (final determination of sales at less than fair

value) ("*Final Results*") and accompanying Issues and Decision Memorandum for the Final Determination of Sales at Less Than Fair Value, A-570–010, (Dec. 15, 2014), ECF No. 34–5 ("Final Decision Memo").

On remand, Commerce provided further explanation of its determination to collapse Renesola Jiangsu Ltd. and Renesola Zhejiang Ltd. (collectively "ReneSola group") with Jinko Solar Co., Ltd. and Jinko Solar Import & Export Co., Ltd. (collectively "Jinko group"), treating the ReneSola group and the Jinko group as a single entity for purposes of the antidumping investigation. *See* Remand Results 8–14, 18–25. Commerce also provided further explanation of its determination to use South African import data for subheading 8548.10, Harmonized Tariff Schedule ("HTS"), to value respondents' by-product offsets for scrapped solar modules when calculating normal value.[1] *See id.* at 15–18, 25–29. For the reasons that follow, the court sustains Commerce's determination to collapse the ReneSola and Jinko groups and remands for reconsideration or further explanation, consistent with this opinion, Commerce's selection of South African import data for subheading 8548.10, HTS, for valuing the by-product offset for scrapped solar modules.

BACKGROUND

The court assumes familiarity with the facts of this case as discussed in the previous opinion, *see Jinko Solar Co., Ltd.*, 41 CIT at __, 229 F. Supp. 3d at 1338–39, and here recounts the facts relevant to the court's review of the Remand Results. In this investigation, Commerce selected Changzhou Trina Solar Energy Co. Ltd. and Renesola Jiangsu Ltd. as mandatory respondents for individual examination in this investigation. *See* Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Certain Crystalline Photovoltaic Products from the [PRC] at 3, PD 698, bar code 3217803–01 (July 24, 2014);[2] Section 777A of the Tariff Act of

[1] In the prior opinion, the court noted that, while respondent Changzhou Trina Solar Energy Co. Ltd. reported the by-product offset as "module scrap," Commerce referred to the by-product as "scrap solar cells" in the final determination, and requested Commerce to explain on remand its selection of a heading for scrap modules, consistent with the reported by-product. *Jinko Solar Co., Ltd.*, 41 CIT at __ n.24, 229 F. Supp. 3d at 1353 n.24. On remand Commerce clarifies that the offset is for scrapped solar modules, rather than scrapped solar cells. *See* Remand Results 8 n.28, 15 ("Although the petitioner and the Department have previously referred to the offset as an offset for scrap solar cells, we clarify here that the offset in question is *module* scrap and should be valued as such." (emphasis in original)).

[2] On July 7, 2015, Defendant filed on the docket the indices to the public and confidential administrative records. These indices are located on the docket at ECF No. 34. All further references in this opinion to administrative record documents include the administrative record numbers assigned by Commerce in the indices.

1930, as amended, 19 U.S.C. § 1677f-1(c)(2)(B) (2012).[3] Commerce determined that mandatory respondent Renesola Jiangsu Ltd. is affiliated with Renesola Zhejiang, Jinko Solar Co. Ltd., and Jinko Solar Import & Export Co., Ltd., pursuant to 19 U.S.C. § 1677(33)(F), and that these entities should be collapsed and treated as a single entity for the antidumping investigation, pursuant to 19 C.F.R. § 351.401(f) (2014).[4] *See Final Results*, 79 Fed. Reg. at 76,971 n.2; Final Decision Memo at 60–67; Mem. Pertaining to Renesola and Jinko Solar Affiliation and Single Entity Status at 7, PD 542, bar code 3207993–01 (June 6, 2014); *see* 19 C.F.R. § 351.401(f). Commerce selected South Africa as the primary surrogate country and calculated mandatory respondents' dumping margins using South African import data to value factors of production and offsets for calculating respondents' normal value. *See* Final Decision Memo at 29–37. Pertinent here, Commerce used South African import data for subheading 8548.10, HTS ("Waste and scrap of primary cells, primary batteries and electric storage batteries; spent primary cells, spent primary and electric storage batteries"), to value respondents' by-product offsets for scrap solar modules. *See* id. at 50–51.

In the prior decision, the court sustained in part and remanded in part Commerce's determination in this investigation.[5] *Jinko Solar Co., Ltd.*, 41 CIT at __, 229 F. Supp. 3d at 1361. The court determined that Commerce's conclusion that the Jinko entities are affiliated with the ReneSola entities through common control by the Li family grouping[6] was supported by substantial evidence, *see id.*, 41 CIT at __, 229 F. Supp. 3d at 1339–43, but that the agency did not sufficiently

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

[4] Further citations to the Code of Federal Regulations are to the 2014 edition.

[5] The court sustained Commerce's determinations: 1) that Mustek's financial statements constitute the best available information to value respondents' general expenses and profit; 2) that import data for articles covered under subheading 7604, HTS, constitutes the best available information for valuing respondents' aluminum frames; 3) to accept, for purposes of adjusting its U.S. prices, the information provided by Changzhou Trina Solar Energy Co. Ltd. during verification related to quality insurance expenses covering the entire period of investigation; and 4) that respondents' antidumping duty cash deposit rate should be offset by the full amount of export subsidy calculated based on adverse facts available in the companion countervailing duty investigation. *See Jinko Solar Co., Ltd.*, 41 CIT, 229 F. Supp. 3d at 1361.

[6] Commerce explains that the Li family grouping consists of three brothers and their brother-in law:

> [T]he founder and CEO of Renesola Ltd. and Renesola Zhejiang, Mr. Li Xianshou, and Mr. Li Xiande, Mr. Li Xianhua, and Mr. Chen Kangping, who are the Chairman of the Board, Vice President, and CEO, respectively, of Jinko Solar and Jinko Solar [Import & Export], are members of the same family. Mr. Li Xianshou, Mr. Li Xiande, and Mr. Li Xianhua are brothers. Mr. Chen Kangping is a brother-in-law of Mr. Li Xianshou.

Remand Results 10.

support its decision to collapse the affiliated entities. *See id.*, 41 CIT at __, 229 F. Supp. 3d at 1343–47. The court noted that, while the enumerated provisions of Commerce's collapsing regulation require the agency to consider the extent of overlap of individual members on the boards of entities, "the evidence relied upon by Commerce only demonstrates that members of the Li family grouping sat on the boards of both entities." *Id.*, 41 CIT at __, 229 F. Supp. 3d at 1344. Nonetheless the court emphasized that, because the enumerated provisions of the regulation are non-exhaustive, Commerce is not precluded from considering the fact that members of the Li family sat on the boards of the ReneSola and Jinko groups' entities as suggestive of a potential for manipulation. *Id.*, 41 CIT at __, 229 F. Supp. 3d at 1344–45. However the court noted that, if Commerce intends to rely on the fact that members of the Li family grouping sat on boards of both groups, Commerce must "explain how this factor creates a significant potential for the manipulation of price or production." *Id.*, 41 CIT at __, 229 F. Supp. 3d at 1345. Additionally, the court determined that Commerce had not explained how the transactions between the ReneSola and Jinko groups were significant to a degree evidencing "intertwined operations" during the period of investigation ("POI"), in light of Commerce's finding that the two groups completed [[ ]] in mutual transactions in 2013 than in 2012 and that Renesola Ltd.'s reported transactions with Jinko group entities comprised a de minimis part of the ReneSola group's overall transactions. *Id.*, 41 CIT at __, 229 F. Supp. 3d at 1345–47. On the basis of these concerns, the court remanded the agency's decision to collapse the ReneSola and Jinko groups. *See id.*, 41 CIT at __, 229 F. Supp. 3d at 1345, 1347.

The court also remanded the agency's selection of South African import data for subheading 8548.10, HTS, to value the by-product offset for scrapped solar modules when calculating normal value. *See Jinko Solar Co., Ltd.*, 41 CIT at __, 229 F. Supp. 3d at 1353–55. The court determined that the selection was unsupported by substantial evidence because Commerce had not considered the fact that the language of the subheading "evidences that the products imported under that heading are specific to electrical batteries" which, according to SolarWorld, "'are produced using a significantly different manufacturing process with completely different raw material inputs than are solar cells.'" *Id.*, 41 CIT at __, 229 F. Supp. 3d at 1354–55 (*quoting* SolarWorld Br. Supp. Rule 56.2 Mot. J. Agency R. 23, Mar. 21, 2016, ECF No. 42 ("SolarWorld Br.")). The court also determined that Defendant had provided two post hoc rationalizations for Commerce's selection of subheading 8548.10, HTS, and stated that, should Commerce continue to select the subheading on remand and if either

reason in fact underlies that selection, "Commerce must make these rationalizations explicit and identify the record evidence that supports them."[7] *Id.*, 41 CIT at __, 229 F. Supp. 3d at 1355. The court remanded the issue to Commerce to reconsider or further explain its determination that subheading 8548.10, HTS, is the appropriate category with which to value respondent's scrapped solar modules by-product, in light of the arguments to the contrary and the record evidence. *Id.*

Commerce published the Remand Results on August 2, 2017. Jinko Solar argues that, on remand, Commerce has continued to insufficiently explain its finding that the Li family relationship creates the potential for price or production manipulation between the ReneSola and Jinko groups and its finding of a significant level of intertwined operations between the groups' entities. Comments on Final Results of Redetermination Pursuant to Court Remand Conf. Version 2–5, Sept. 5, 2017, ECF No. 110 ("Jinko Remand Comments"). SolarWorld supports the agency's decision to continue to collapse the ReneSola and Jinko entities, contending that the agency has supported its decision with evidence and explanation of significant potential for manipulation and intertwined operations. *See* [SolarWorld]'s Comments on [Commerce]'s Final Results of Redetermination Pursuant to Court Remand Conf. Version 4–6, Sept. 5, 2017, ECF No. 111. SolarWorld continues to challenge Commerce's use of subheading 8548.10, HTS, to value the by-product offset for scrapped solar modules. *See id.* at 6–9.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c) (2012). Commerce's antidumping determinations must be in accordance with law and supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (*quoting Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

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[7] The two rationalizations that the court deemed post hoc are: 1) that Commerce selected subheading 8548.10, HTS, because subheading 2804.69, HTS, would undervalue the costs associated with the additional raw material components that make up solar cells, and 2) that subheading 8548.10, HTS, was selected because both electrical machinery and solar modules are capable of generating electricity. *See Jinko Solar Co., Ltd.*, 41 CIT at __, 229 F. Supp. 3d at 1355 (*citing* Def.'s Mem. Opp. Pls.', Pls.-Intervenors', and Def.-Intervenors' Rule 56.2 Mots. J. Upon Agency R. 32, Sept. 23, 2016, ECF No. 59).

DISCUSSION

I. Commerce's Determination to Collapse the Affiliated Entities

The court remanded for Commerce to explain the agency's determination to collapse the affiliated ReneSola and Jinko groups, treating these companies as a single entity for the antidumping analysis. *Jinko Solar Co., Ltd.*, 41 CIT at __, __, 229 F. Supp. 3d at 1343–47, 1361. For the reasons that follow, Commerce has complied with the court's order and the agency's determination of this issue on remand is sustained.

The statute does not address how Commerce is to treat affiliated entities for purposes of the antidumping analysis. *See* 19 U.S.C. §§ 1675(a)(2)(A)(ii), 1677b(a). However, the agency's regulations provide that Commerce may treat affiliated producers as a single entity when comparing export price with normal value "where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities" and where Commerce "concludes that there is a significant potential for the manipulation of price or production." 19 C.F.R. § 351.401(f)(1). To determine the existence of a "significant potential for manipulation of price or production," Commerce may consider "[t]he level of common ownership" among the entities, "[t]he extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm," and "[w]hether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers." *Id.* § 351.401(f)(2)(i)–(iii). Commerce may also consider non-enumerated factors when determining the existence of a significant potential for manipulation. *See id.* § 351.401(f)(2) (noting that "the factors [Commerce] may consider include" those factors enumerated in 19 C.F.R. § 351.401(f)(2)(i)–(iii)).

On remand, Commerce continued to determine that the Jinko and ReneSola groups should be collapsed and treated as a single entity pursuant to 19 C.F.R. § 351.401(f), because "the level of common ownership by the Li family of the two groups," "the board memberships and management positions held by members of the Li family," and "the extent to which operations between the two groups are intertwined" suggest significant potential for manipulation between the ReneSola group and the Jinko group. *See* Remand Results 14. Commerce emphasized that one Li brother was the founder and CEO

of the entities within the ReneSola group while two other Li brothers and one brother-in-law each held prominent management and/or board positions of entities within the Jinko group. *Id.* at 9. Commerce clarified that, while no individual member of the Li family held a position on both a ReneSola entity and a Jinko entity, "the prominent role that the Li family," as a whole, played in the management of these two groups, with members of the family holding prominent positions on both groups, suggests "significant potential for the manipulation of price or production across the two company groups via the Li family," *id.*, in accordance with 19 C.F.R. § 351.401(f)(1). *Id.* at 10. Commerce reasoned that, due to the particular Li family relationship, there exists potential to "mak[e] decisions based on considerations beyond normal commercial considerations . . . ." *Id.* The agency concluded that, through these prominent positions within both groups, the Li family is enabled "to direct outcomes across the companies, and the Li family is positioned to coordinate its actions to direct the Rene[S]ola Group and the Jinko Group to act in concert or out of common interest." *Id.*

Commerce also addressed the court's concern that the agency had not previously explained how the transactions between the ReneSola and Jinko groups were significant to a degree evidencing intertwined operations, particularly in light of the change in the level of transactions during the POI. Remand Results 10–14; *see Jinko Solar Co., Ltd.*, 41 CIT at __, 229 F. Supp. 3d at 1345–47. Commerce explained that the change in the level of transactions[8] is not an indication of a particular trend in transactions between the two groups, noting that "the record shows that the level of purchases from year to year fluctuates . . . ." Remand Results 10. Commerce concluded that the evidence of transactions between the Jinko and ReneSola groups instead demonstrates "that these companies have an ongoing commercial relationship." *Id.* at 11. Commerce highlighted in particular the change[9] in raw material purchases from ReneSola entities by a Jinko entity and noted that the year-end consolidated financial statements obtained from the entities did not reflect a comprehensive picture of the financial interactions between the entities during that calendar year. *See id.* at 11–12. While objecting to the percentages put forward by Plaintiffs, Jinko Solar Co., Ltd. et al., to suggest that the level of transactions were de minimis, Commerce noted that, "[i]rre-

[8] The change was a [[ ]] in the value of purchases between the two groups from 2012 to 2013. *See* Remand Results 10.

[9] The change was an [[ ]] in raw material purchases from ReneSola entities by a Jinko entity. *See* Remand Results 11.

spective of the actual percentage of the cost of sales represented by these transactions, we do not believe that over $18 million in purchases is an insignificant level of transactions." *Id.* at 13. Commerce further explained that the accounts receivable balance put forward by Plaintiffs "represents the amount of money that 'Jinko and its subsidiaries' owed Renesola Ltd. at a single point in time (December 31, 2013)," which "does not necessarily give an indication as to the significance of Renesola Ltd.'s sales to 'Jinko and its subsidiaries' during 2013." *Id.*

Commerce sufficiently supported its determination to collapse the ReneSola and Jinko groups and treat them as a single entity in this investigation. The agency explained the enumerated and non-enumerated factors that it considered, and why each was relevant to a finding that there exists "a significant potential for the manipulation of price or production" pursuant to 19 C.F.R. § 351.401(f)(1). Commerce took into account the prominent presence of Li family members on the management and boards of Jinko and ReneSola group entities, *see* Remand Results 8–10, and found in that presence the ability to make business decisions based on considerations "beyond normal commercial considerations" and "out of common interest." *Id.* at 10. It is reasonable to determine that family members in business relationships may have a common interest and that, because family relationships are relationships beyond the scope of normal commercial relationships, business relationships between family members might be influenced by factors beyond normal commercial factors. It follows from these reasonable assumptions that family members with a business relationship may be in a position to use those business relationships towards a common interest, in a way that would create the potential for collaboration beyond the scope of a normal commercial relationship. The reasonableness of Commerce's assumption in this case is buttressed by the fact that, by virtue of their positions in the entities, Li family members are "positioned to coordinate" to "act in concert or out of common interest." *Id*.

Plaintiffs, Jinko Solar Co., Ltd. et al., argue that Commerce did not sufficiently explain its determination to collapse, contending that the agency simply relied on conclusory statements that do not evidence "the level of potential cross-operational control required to justify a collapsing determination." Comments on Final Results of Redetermination Pursuant to Court Remand 2, Sept. 1, 2017, ECF No. 109 ("Jinko Remand Comments"). Plaintiffs contend that, to support a decision to collapse, the entities' "shareholders would effectively have to conspire together to manipulate the activities of their companies [or . . .] other companies ultimately owned by their companies,"

emphasizing that "[t]here is no evidence of such activity, nor is there any evidence supporting the inference that Jinko and ReneSola, through these shareholders, would share sales information, become involved in each other's production or pricing decisions, or overlap or share facilities or employees." *Id.* at 3. However, Commerce's regulations do not require such evidence to support a determination to collapse. As discussed above, the regulations provide that Commerce may treat affiliated producers as a single entity where the agency "concludes that there is a significant potential for the manipulation of price or production," 19 C.F.R. § 351.401(f)(1), for which the agency may consider "[t]he level of common ownership" among the entities, "[t]he extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm," "[w]hether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers," and any other non-enumerated factors. *Id.* § 351.401(f)(2). The emphasis in the regulation is on the potential for, not actual, manipulation. Plaintiffs' argument that Commerce has insufficiently supported its conclusion by focusing on potential manipulation therefore fails.

Plaintiffs also argue that Commerce erred in its analysis by emphasizing that the transactions between the two groups are not insignificant, rather than demonstrating that the transactions "are so significant as to justify a determination that the companies' operations are 'intertwined.'" Jinko Remand Comments 4–5. Plaintiffs contend that "the mere fact of an 'ongoing commercial relationship' (particularly one featuring a volume [and value] of transactions as minimal as [those between the Jinko and ReneSola groups]) is a far cry from the level of 'intertwined operations' that 19 [C.F.R. §] 351.401(f)(iii) contemplates." *Id.* at 4. Contrary to Plaintiffs' argument, on remand Commerce does focus on the significance of the transactions, rather than the absence of insignificance.[10] Commerce

[10] In the Remand Results, Commerce does refer to the transactions as, essentially, not insignificant in response to the argument, addressed by the court prior to remand, that a [[ ]] in the values of transactions between the two entities from 2012 to 2013 suggests that the entities were not intertwined. *See* Remand Results 12–13. In reference to the relative drop in transactions between the two years, Commerce explains that "[i]rrespective of the actual percentage of the cost of sales represented by these transactions, we do not believe that over [[ ]] in purchases is an insignificant level of transactions." *Id.* at 13. This statement must be viewed in the context of Commerce's explanation that "the record shows that the level of purchases from year to year fluctuates, such that an increase or decrease in one year does not necessarily predict a continuing trend in the level of activity between these companies." *Id.* at 10. It is apparent from this explanation that Commerce considers the transactions between these entities in the context of their ongoing relationship, which Commerce has found to be significant. *See* id. at 14.

explains that it found that the "history of transactions" between these two groups indicates "over [[ ]] and [[ ]] in purchases by Renesola Ltd. from 'Jinko and its subsidiaries' in 2012 and 2013, respectively," which the agency found to "demonstrate that, immediately prior to the POI, and in the calendar year overlapping the POI, there was a significant level of transactions between the Rene[S]ola and Jinko Groups," from which the agency concluded "that the potential for manipulation in the future exists." Remand Results 14. For the foregoing reasons, Commerce's determination to collapse the Jinko and ReneSola groups into a single entity for purposes of the antidumping duty analysis is reasonable.

II. Surrogate Values for Scrap Solar Modules

The court also remanded Commerce's decision to use South African import data for subheading 8548.10, HTS, to value the by-product offset for scrapped solar modules when calculating normal value. *Jinko Solar Co., Ltd.*, 41 CIT at __, 229 F. Supp. 3d at 1353–55, 1361. The court determined that the selection was unsupported by substantial evidence because Commerce did not explain why the selection is reasonable in light of "the language of heading 8548, HTS, [which] evidences that the products imported under that heading are specific to electrical batteries," which are dissimilar to scrapped solar modules in both material and production processes. *Id.*, 41 CIT at __, 229 F. Supp. 3d at 1355 (citations omitted); *see also* SolarWorld Br. 23 ("Simply put, HTS heading 8548 has nothing at all to do with photovoltaic products, including scrap solar cells. Of course, batteries are produced using a significantly different manufacturing process with completely different raw material inputs than are solar cells."). For the reasons that follow, the court finds that, on remand, Commerce has still not adequately supported its selection of a surrogate value for the respondents' scrapped solar module by-product offsets, and the issue is remanded to Commerce for further explanation or reconsideration consistent with this opinion.

Commerce determines whether a company is engaged in dumping by comparing the normal value of the subject merchandise with the actual or constructed export price of the merchandise. 19 U.S.C. § 1677b(a). The normal value of the merchandise is the price of the merchandise when sold for consumption in the exporting country. *Id.* § 1677b(a)(1)(B). However, when the exporting country is, like China, a nonmarket economy country, Commerce calculates the normal value for subject merchandise by valuing inputs including the factors of production utilized in producing the merchandise and "an amount for general expenses and profit plus the cost of containers, coverings, and

other expenses." *Id.* § 1677b(c)(1). Commerce selects a surrogate value for each of these inputs from a source in a market economy country that is economically comparable to the nonmarket economy country and is a significant producer of comparable merchandise. *Id.* § 1677b(c)(4)(A)–(B); *see* 19 C.F.R. § 351.408(b). To select a surrogate value for each of these inputs, Commerce uses "the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce]."[11] 19 U.S.C. § 1677b(c)(1); *see* 19 C.F.R. § 351.408(a)–(c). With "best available information" not defined in the statute, Commerce has discretion to determine what data constitutes the best available information for valuing the inputs.[12] *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011); *Nation Ford Chemical Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999).

On remand, Commerce continued to rely upon South African import data for subheading 8548.10, HTS, as the best available information for valuing scrapped solar modules. *See* Remand Results 15–18. Commerce explained that, after further consideration, it continues to find that scrapped solar modules "are more similar to the scrap battery materials covered under HTS 8548.10 than the raw polysilicon material covered under HTS 2804.69." *Id.* at 16. Commerce explained that the products covered within subheading 8548.10, HTS "similarly include metal components and chemicals which, although not identical to the metal and chemical components in solar modules, are nonetheless metals and chemicals used in an engineered product designed to generate electricity that is no longer usable because of breakage, cutting up, wear, or other reasons[.]" *Id.* (internal quotation marks omitted). Noting that both of these subheadings are "imperfect options," *id.*, Commerce emphasized that subheading 8548.10, HTS, "more closely reflects the material composition of scrap solar modules, which include wire, metals, glass, and chemical compounds." *Id.* at 17.

Commerce's explanation on remand fails to adequately explain why its determination to value the respondents' scrapped modules using import data under subheading 8548.10, HTS, a category specific to scrapped battery cells, is supported by substantial evidence. It is

[11] Commerce has a regulatory preference to value all inputs using data from a single surrogate country. *See* 19 C.F.R. § 351.408(c)(2) ("[Commerce] normally will value all factors in a single surrogate country.").

[12] Commerce's practice in determining the "best available information" is to "use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data." *See* U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process* 2 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited Dec. 7, 2017).

apparent from Commerce's focus on the scrap nature of the by-product and of the products covered by subheading 8548.10, HTS, that the agency found the scrap nature of the by-product more significant to selecting an appropriate surrogate value than the material components of the by-product. *See, e.g.*, Remand Results 17 (explaining that Commerce selected subheading 8548.10, HTS, "because it covers scrapped and spent materials and those materials are more akin to scrap solar module materials, whereas HTS 2804.69 covers only silicon; thus, its use would not fully value the scrap module materials, and it is not a subheading at all specific to scrap materials."). However, Commerce acknowledges that products covered by subheading 8548.10, HTS, do not share any material components with respondent's by-product. *Id.* at 16 (noting that the items covered by subheading 8548.10, HTS, "include metal components and chemicals which, although not identical to the metal and chemical components in solar modules, are nonetheless metals and chemicals used in an engineered product designed to generate electricity that is no longer usable . . . ."). It is not evident that any of the components within the selected subheading would be similarly valued to the scrapped modules at issue.[13] Commerce simply does not explain why its emphasis on the scrap nature of the by-product achieves a representative surrogate value, given that the selected subheading covers products that do not share any material components with scrapped modules.

Instead, Commerce supports its selection of subheading 8548.10, HTS, as an appropriate surrogate value by reading into the term "scrap" common characteristics of scrapped products that otherwise share no material components. But the term "scrap" does not have meaning on its own in the context of respondent's by-product offset;

[13] Commerce's argument that the polysilicon heading only covers one component of the solar modules and therefore would likely undervalue the offset, *see* Remand Results 29, assumes that polysilicon is of lesser value than the other components and further suggests that the scrapped battery category would be more representative. Commerce fails to explain why its assumption is reasonable, and its position fails to account for the fact that scrapped batteries have no components in common with the scrapped solar modules. *See id.* at 16. Because scrapped batteries and scrapped solar modules do not have common materials, the scrapped battery category could undervalue or overvalue the solar modules and is therefore not necessarily more representative than the heading which covers only one component of the solar modules (polysilicon). Similarly, Commerce's argument that the weight of polysilicon in the solar module suggests that the scrapped battery category is more representative and also relies upon some unsupported assumptions. *See id.* at 28–29. Commerce suggests that, since other components of the module weigh more than the polysilicon, the polysilicon category would likely undervalue the solar modules because scrap is valued by weight. This argument assumes that scrapped solar modules are purchased for the module components other than polysilicon, because the other components comprise more of the weight of the scrap. It also assumes that scrapped battery cells are representative of the cost of the non-polysilicon components of the solar modules. Again, Commerce does not explain why its assumptions are reasonable.

the term simply serves to indicate that the article has been removed from the normal course of the respondent's solar module production, with the module components extracted and resold or reintroduced into production. Dictionary definitions for "scrap" suggest that the word is used to indicate remnants or fragments of a thing, with at least one relevant definition describing scrap as "manufactured articles or parts rejected or discarded and useful only as material for reprocessing; especially waste and discarded metal." *Scrap*, Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/scrap (last visited Dec. 7, 2017). The respondents reported "module scrap" as a by-product in their questionnaires to indicate that these scrapped modules were removed from production and should be offset when calculating normal value. *See, e.g.*, Changzhou Trina Solar Energy Co. Ltd. Questionnaire Section D at D–21, CD 394–411, bar code 3202241–01 (May 15, 2014); Renesola Questionnaire Section D at 14, CD 377, bar code 3201658–01. What is significant about these scrapped modules for purposes of valuing the offset is the components of the module; the fact that the modules were "scrapped" does not, in itself, indicate what HTS subheading would be an appropriate surrogate value for the offset. As Commerce points out, there is no overlap between the products in a battery cell and a solar module. *See* Remand Results 16. Commerce cannot simply rely on the appearance of the word "scrap" in subheading 8548.10, HTS, and in the respondents' description of the by-product as indication that this subheading provides the best available information for valuing the by-product. As the term "scrap" does not indicate particular materials or composition, it is not reasonable to value products based on that word alone where it is shown that the covered products are completely different.

Commerce emphasizes that the scrapped modules and the products covered by subheading 8548.10, HTS, are similar in that they are all products that would generate electricity (if not scrapped). *See* Remand Results 16, 27–28. However, the fact that both battery cells and solar modules could generate electricity does not overcome the fact that the components of the two types of products differ, as it is the components which lend each product value. Generating electricity does not mean that the products are similarly valued. A buyer would not purchase scrapped solar modules if the buyer wanted the components of a battery cell, regardless of the fact that both types of products could generate electricity. Commerce cannot rely on the fact that both types of products generate electricity to support its selection of a surrogate value without some explanation as to why generating electricity relates to the products' value.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's determination to collapse the ReneSola entities with the Jinko entities, treating these companies as a single entity for purposes of the antidumping duty analysis. This matter is remanded to Commerce for reconsideration or further explanation of the agency's decision to use South African import data under subheading 8548.10, HTS, to value the respondents' by-product offsets for scrapped solar cells when calculating normal value. It is

ORDERED that Commerce's determination to use South African import data under subheading 8548.10, HTS, to value respondents' offsets for scrapped solar cells when calculating normal value is remanded for further consideration consistent with this opinion. Commerce shall file its remand determination with the court within 60 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the remand determination; and it is further

ORDERED that the parties shall have 30 days thereafter to file a reply to comments on the remand determination.

Dated: December 13, 2017
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE

Slip Op. 17–166

SHENZHEN XINBODA INDUSTRIAL CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH, L.L.C., THE GARLIC COMPANY, VALLEY GARLIC, AND VESSEY AND COMPANY, INC., Defendant-Intervenors.

Court No. 11–00267

[Remanding on surrogate value for garlic and selection of financial statements; sustaining on labor wage rate and zeroing]

Dated: December 15, 2017

Gregory S. Menegaz, deKieffer & Horgan, PLLC, of Washington, D.C., argued for Plaintiff. With him on the briefs were *J. Kevin Horgan* and *Alexandra H. Salzman*.

Richard P. Schroeder, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., argued for Defendant. With him on the briefs were *Joyce R. Branda*, Acting Assistant Attorney General, Civil Division, and *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch. Of counsel on the briefs were *Justin R. Becker* and *Khalil Gharbieh*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

Michael J. Coursey, Kelley Drye & Warren LLP, of Washington D.C., argued for Defendant-Intervenors. With him on the brief was John M. Herrmann.

OPINION

RIDGWAY, Judge:

Plaintiff Shenzhen Xinboda Industrial Co., Ltd. ("Xinboda") a Chinese exporter of fresh garlic commenced this action to contest the Final Determination in the U.S. Department of Commerce's fifteenth administrative review of the antidumping duty order covering fresh garlic from the People's Republic of China. The period of review is November 1, 2008 through October 31, 2009. *See* Fresh Garlic from the People's Republic of China: Final Results and Final Rescission, in Part, of the 2008–2009 Antidumping Duty Administrative Review, 76 Fed. Reg. 37,321 (Dep't Commerce June 27, 2011) ("Final Determination"); Issues and Decision Memorandum for the Final Results of the 15th Administrative Review of Fresh Garlic from the People's Republic of China (June 20, 2011) (AR Pub. Doc. No. 176) ("Issues & Decision Memorandum"); *see generally Shenzhen Xinboda Industrial Co. v. United States*, 38 CIT ____, 976 F. Supp. 2d 1333 (2014) ("*Shenzhen Xinboda I*").[1]

In its Complaint, Xinboda challenged Commerce's decisions in its Final Determination as to the surrogate financial statements used to derive surrogate financial ratios, the surrogate value for labor (*i.e.*, the surrogate wage rate), and the surrogate value for whole raw garlic bulbs, as well as the agency's application of its "zeroing" methodology in calculating Xinboda's dumping margin. *See generally* Complaint; *see also Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1345–46.

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[1] Because this action has been remanded to Commerce, two administrative records have been filed with the court the initial administrative record (comprised of the information on which the agency's Final Determination was based) ("AR") and the supplemental administrative record compiled during the course of the remand ("SAR").

Each of the two administrative records includes confidential (*i.e.*, business proprietary) information. Therefore, two versions of each of the records a public version and a confidential version were filed with the court. The public versions of the administrative record and the supplemental administrative record consist of copies of all public documents in the record, and public versions of confidential documents with all confidential information redacted. The confidential versions consist of complete, un-redacted copies of documents on the record that include confidential information. The number of the public version of a document is different than the number of the confidential version of the same document.

All citations to the administrative record and the supplemental administrative record herein are to the public versions. Citations to public documents in the administrative record and the supplemental record are cited as "AR Pub. Doc. No. ____" and "SAR Pub. Doc. No. ____," respectively.

Ruling on Xinboda's Motion for Judgment on the Agency Record, *Shenzhen Xinboda I* remanded this matter to Commerce for further consideration of all four issues, including a voluntary remand on the surrogate value for labor. *See generally Shenzhen Xinboda I*, 38 CIT at ____, ____, 976 F. Supp. 2d at 1338, 1388. Now pending are Commerce's Remand Results, filed pursuant to Shenzhen Xinboda I. *See generally* Final Results of Redetermination Pursuant to Remand (SAR Pub. Doc. No. 7) ("Remand Results").

Xinboda is satisfied with Commerce's Remand Results as to the surrogate value for labor, as well as Commerce's exclusion of certain transportation expenses in determining the surrogate value for whole raw garlic bulbs. *See* Remand Results at 3, 29, 57 (surrogate value for labor); *id*. at 3, 8–9, 47–48 (surrogate value for whole raw garlic bulbs); Plaintiff's Comments on Remand Redetermination ("Pl.'s Brief") at 1 n.1. However, Xinboda contends that the Remand Results are flawed in all other respects. *See generally* Pl.'s Brief; Plaintiff's Reply to Response Comments on Remand Redetermination ("Pl.'s Reply Brief").[2]

In contrast, the Government and the Defendant-Intervenors the Fresh Garlic Producers Association, Christopher Ranch, L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc. (collectively, the "Domestic Producers") assert that the Remand Results are both supported by substantial evidence and in accordance with law. The Government and the Domestic Producers maintain that the Remand Results therefore should be sustained. *See generally* Defendant's Response to Comments Regarding the Remand Redetermination ("Def.'s Brief"); Defendant-Intervenors' Response to Plaintiff's Comments on Remand Redetermination ("Def.-Ints.' Brief").

Jurisdiction lies under 28 U.S.C. § 1581(c) (2006).[3] For the reasons set forth below, the Remand Results are sustained as to the surrogate value for labor and Commerce's application of zeroing in this administrative review. The surrogate value for whole raw garlic bulbs and the selection of surrogate financial statements are again remanded, for Commerce's further consideration.

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[2] In the Remand Results, Commerce made a minor adjustment to its surrogate financial ratio calculations. *See* Remand Results at 3, 23–24 & nn.64–66, 57. Xinboda has not taken a position on that adjustment. However, more generally, Xinboda continues to oppose the use of the surrogate financial statements that Commerce selected.

[3] All citations to statutes herein are to the 2006 edition of the United States Code. Similarly, all references to regulations are to the 2008 edition of the Code of Federal Regulations. The pertinent text of the statutes and regulations cited remained the same at all times relevant herein.

I. *Background*

Shenzhen Xinboda I laid out the relevant statutory scheme, including citations to the statute and other pertinent authorities. That explanation, together with other relevant background, is summarized below, in the interests of convenience and completeness.

As *Shenzhen Xinboda I* explained, dumping occurs when goods are imported into the United States and sold at a price lower than their "normal value," resulting in material injury (or the threat of material injury) to the U.S. industry. The difference between the normal value of the goods and the U.S. price is the "dumping margin." When normal value is compared to the U.S. price and dumping is found, antidumping duties equal to the dumping margin are imposed to offset the dumping. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1338 (and authorities cited there).

When the exporting country is a market economy country, normal value generally is calculated using either the price in the exporting market (*i.e.*, the price in the "home market" where the goods are produced) or the cost of production of the goods.[4] However, where as here the exporting country has a non-market economy, there is often concern that the factors of production (inputs) that are consumed in producing the goods at issue are under state control, and that home market sales therefore may not be reliable indicators of normal value. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1338 (and authorities cited there).

In such cases, Commerce identifies one or more market economy countries to serve as a "surrogate" and then "determine[s] the normal value of the subject merchandise on the basis of the value of the factors of production" (*i.e.*, the value of the inputs) in the relevant surrogate country or countries, including "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." This surrogate value analysis is designed to determine a producer's costs of production as if the producer operated in a hypothetical market economy country. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1338–39 (and authorities cited there).

Under the statute, factors of production "include, but are not limited to (A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." *See Shenzhen Xinboda I*, 38 CIT at ____ n.4, 976 F. Supp. 2d at 1338 n.4; 19 U.S.C.

[4] In addition, in certain market economy cases, Commerce may calculate normal value using the price in a third country (*i.e.*, a country other than the exporting country or the United States). *See Shenzhen Xinboda I*, 38 CIT at ____ n.3, 976 F. Supp. 2d at 1338 n.3 (and authorities cited there).

§ 1677b(c)(3). However, valuing the factors of production (inputs) consumed in producing goods does not capture (1) manufacturing/factory overhead, (2) selling, general, and administrative expenses ("SG&A"), and (3) profit. Commerce calculates those surrogate values using ratios known as "surrogate financial ratios" that the agency derives from the financial statements of one or more surrogate companies that produce identical (or at least comparable) merchandise in the relevant surrogate market economy country. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1343–44 (and authorities cited there). As discussed in greater detail below, Commerce's selection of surrogate financial statements continues to be at issue here.

In certain circumstances, where Commerce finds that the available information on the value of factors of production is not adequate for purposes of determining the normal value of the goods at issue pursuant to the agency's standard "factors of production" methodology (described above), Commerce determines the surrogate value of an "intermediate input" instead. Under Commerce's so-called "intermediate input methodology," rather than valuing the various individual "upstream" factors of production that are used to produce an intermediate input, Commerce directly values the "downstream" intermediate input itself. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1339 (and authorities cited there). As discussed in greater detail below, Commerce has used its intermediate input methodology to determine the surrogate value for whole raw garlic bulbs here. That value continues to be contested.

The underlying antidumping order in this case, which dates back to 1994, covers imports of fresh garlic from China, including whole garlic bulbs and peeled garlic cloves (the products exported by Xinboda). As noted above, this action involves the fifteenth administrative review of that antidumping order, covering the period November 1, 2008 through October 31, 2009. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1340. Commerce selected India as the primary surrogate country for purposes of this review (as in prior reviews), and used data from India to calculate the surrogate values for all factors of production, with the sole exception of labor. *See id*., CIT at ____, 976 F. Supp. 2d at 1340 (and authorities cited there).

Surrogate Value for Whole Raw Garlic Bulbs. In the course of the administrative review, Commerce compiled voluminous information concerning Xinboda and its operations, particularly the company's exports of whole garlic bulbs and peeled garlic cloves to the U.S. from China. Commerce similarly compiled detailed information on Zhenzhou Dadi Garlic Industry Co., Ltd. ("Dadi"), the affiliated processor/producer that supplied Xinboda with garlic products produced from

the whole raw garlic bulbs that Dadi purchased from local Chinese garlic farmers. Dadi processed the whole raw garlic bulbs that it purchased which had diameters of between 50 mm and 65 mm into whole garlic bulbs and peeled garlic cloves for Xinboda, using relatively simple procedures involving principally manual labor. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1340–41 (and authorities cited there).

To produce whole fresh garlic, Chinese garlic farmers deliver to Dadi whole raw garlic bulbs, sorted by size, in large mesh bags. Dadi workers sitting at tables in a simple warehouse then rub off the outer skins of the whole raw garlic bulbs (to give the garlic bulb a clean white appearance), cut or trim the roots and stems, place the bulbs into small mesh bags (typically holding three to five bulbs, depending on the customer), and affix the customer's labels to seal the bags. Bags are then packed into cartons, ready for shipping. Like its process for production of whole fresh garlic, Dadi's process for the production of peeled garlic cloves is also relatively simple and involves mostly manual labor. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1341 (and authorities cited there).

Xinboda's administrative operations are similarly modest, and its sales process is also basic and straightforward. Xinboda does not develop or market its own brands and sells only a handful of products (*i.e.*, garlic, onion shoots, and ginger) to its established customer base. Its advertising and selling expenses are minimal. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1341 (and authorities cited there).

Early in the course of the instant administrative review, Commerce concluded (as it had since the tenth review) that Chinese garlic farmers generally do not track the actual labor hours expended in growing and harvesting garlic, and, thus, do not maintain the records that Commerce would need to verify data reported for the expenses that Chinese farmers incur in growing and harvesting whole raw garlic bulbs. Commerce therefore used its intermediate input methodology to value "growing" and "harvesting" factors of production, as it had since the tenth review. As such, in lieu of separately valuing each of the various individual growing and harvesting factors of production consumed in growing and harvesting a whole raw garlic bulb (*i.e.*, the leased land, garlic seed, water, pesticides, herbicides, fertilizer, plastic film, labor, and other "inputs" or commodities), Commerce instead sought to capture those factors of production by determining the value of the "intermediate input" *i.e.*, a whole raw garlic bulb. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1341–42 (and authorities cited there).

In valuing the whole raw garlic bulb input (*i.e.*, the intermediate input), Commerce based its calculations on size-specific prices for garlic bulbs sold at the Azadpur APMC Market (located near Delhi and operated by the Azadpur Agricultural Produce Marketing Committee ("APMC")), as published in the Azadpur APMC's Market Information Bulletin. Commerce rejected the other potential sources of data on the record, including the prices favored by Xinboda *i.e.*, the prices for whole raw garlic bulbs included in the financial statements of Garlico Industries Limited ("Garlico"), an Indian purchaser, processor, and trader of garlic, onions, and other vegetables and related products based on Commerce's determination that those other sources of data do not specify the physical characteristics of the garlic bulbs that were priced. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1342–43 (citing Issues & Decision Memorandum at 12–13).[5]

To value the whole raw garlic bulbs delivered to Dadi that had a diameter of greater than 55 mm, Commerce relied on non-contemporaneous Azadpur Market prices for garlic bulbs classified as "grade S.A." (or "Super-A"), which Commerce then indexed (inflated) to be contemporaneous with the dates of the period of review. Commerce used non-contemporaneous prices to value this larger-bulbed garlic because the Azadpur Market ceased use of the "S.A."-grade classification in February 2008 (before the period of review). *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1343 (and authorities cited there, including Preliminary Surrogate Value Memorandum at 4 (AR Pub. Doc. No. 121) and Issues & Decision Memorandum at 13).

To value the whole raw garlic bulbs delivered to Dadi that were somewhat smaller (with a diameter of between 50 mm and 55 mm), Commerce averaged the non-contemporaneous but indexed Azadpur Market prices for grade "S.A." garlic (described above) together with contemporaneous Azadpur Market prices for grade "A" garlic (*i.e.*, prices for "A"-grade garlic from within the period of review). *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1343 (citing,

[5] In addition to the Azadpur Market prices and the Garlico prices, other potential sources of data on the record which Commerce considered for use in calculating a surrogate value for whole raw garlic bulbs include Indian World Trade Atlas ("WTA") import statistics, Indian export statistics, Indian domestic market data from government sources (including data from India's National Horticultural Board and data from the Indian Spices Board), and data from the Indian Agricultural Marketing Information Network ("AGMARKNET"), a database maintained by India's Ministry of Agriculture. *See Shenzhen Xinboda I*, 38 CIT at ____ n.14, 976 F. Supp. 2d at 1347 n.14.

inter alia, Final Surrogate Value Memorandum at 1 (AR Pub. Doc. No. 177)).[6]

Surrogate Value for Labor (i.e., Surrogate Wage Rate). To calculate the surrogate value for post-harvest labor costs for purposes of the Final Determination, Commerce averaged industry-specific data on wages and earnings from a group of eight countries that Commerce deemed to be both "significant producers" of comparable merchandise and "economically comparable" to China, and which had also reported data under one particular revision of an international standard. However, that group of eight countries did not include India, because although India reported contemporaneous data under the prior revision of the international standard India's reporting had not used the particular revision on which Commerce relied. Citing "concerns that the industry definitions may lack consistency between different . . . revisions" of the standard, Commerce declined to include the Indian data in its calculations in the Final Determination. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1343 (citing and quoting Issues & Decision Memorandum at 25, 27–28).

Surrogate Financial Statements/Surrogate Financial Ratios. As noted above, valuing the various direct inputs that are used to produce goods does not capture certain costs that must also be factored into prices specifically, manufacturing/factory overhead, selling, general and administrative expenses ("SG&A"), and profit. Commerce calculates surrogate values for those three items using surrogate financial ratios that it derives from the financial statements of one or more companies that produce the same or comparable merchandise in the surrogate market economy country. In its Final Determination here, Commerce derived Xinboda's surrogate financial ratios from the unconsolidated financial statements of Tata Global Beverages Limited (specifically, Tata Tea"), an Indian company that grows, processes, and sells coffee and tea products. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1343–44.

Commerce cited two reasons for selecting the financial statements of Tata Tea over the five other sets of financial statements on the record.[7] First, Commerce concluded, based on its review of the other

[6] To value garlic with a bulb diameter of between 50 and 55 mm, Commerce combined Azadpur Market prices for grades "A" and "S.A." garlic bulbs, due to the seeming overlap in the physical characteristics of the two grades *i.e.*, because, depending on traits other than bulb size, garlic bulbs with a diameter of between 40 and 55 mm could be classified as either grade "A" or grade "S.A." (at least during the period from May 2006 to February 2008, when the Azadpur APMC Market was using both of those grades). *See Shenzhen Xinboda I*, 38 CIT at ____ n.12, 976 F. Supp. 2d at 1343 n.12 (citing Preliminary Surrogate Value Memorandum at 4); *see also* Remand Results at 13 n.34.

[7] In addition to the financial statements of Tata Global/Tata Tea, other financial statements on the record include the financial statements of Indian garlic processor and trader Garlico,

companies' financial statements, that all but one of the five had received subsidies that the agency had previously determined to be countervailable. Based on its policy of disregarding a surrogate company's financial statements where the agency has "reason to believe or suspect" that the company has received actionable subsidies (*i.e.*, subsidies that Commerce has previously found to be countervailable in a formal agency countervailing duty investigation), Commerce disregarded the financial statements of four of the five companies. Commerce rejected Xinboda's claim that there is evidence on the record that gives "reason to believe or suspect" that Tata Teas "may" have received subsidies. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1344 (quoting Issues & Decision Memorandum at 20–22).

Xinboda favors use of the financial statements of the remaining company, *i.e.*, the Indian garlic processor and trader Garlico. However, Commerce concluded that Garlico's operations were not comparable to those of Xinboda, based on the agency's determination that "[Garlico's] primary production is of downstream food products," which "are described as 'dehydrated' or 'powder,'" as well as the agency's determination that Garlico "act[ed] as a trading company (rather than a food processor) on nearly one quarter of its sales." Commerce declined to rely on a combination of the financial statements of Tata Tea and Garlico, even though the agency has a stated preference for the use of multiple financial statements. The Final Determination thus relied exclusively on the financial statements of a tea company, Tata Tea, rather than Garlico (which, Xinboda emphasizes, purchased and processed garlic). *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1344, 1385; Issues & Decision Memorandum at 20–22.[8]

Application of "Zeroing" Methodology. Lastly, in its Final Determination, Commerce calculated Xinboda's dumping margin using the agency's "zeroing" methodology, which was the subject of extensive litigation. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1344 (and authorities cited there, including Issues & Decision Memorandum at 31–33). Thus, in calculating Xinboda's dumping margin, Commerce assigned negative dumping margins (*i.e.*, margins of sales of merchandise found to have been sold at non-dumped prices) a value

Limtex (India) Limited, LT Foods Ltd., ADF Foods Ltd., and REI Agro Limited. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1369 n.41 (citing Issues & Decision Memorandum at 18 & n.58).

[8] *See also* Remand Results at 55 (acknowledging that Commerce "continues to maintain a policy of favoring multiple financial statements"); Issues & Decision Memorandum at 20 (noting "[Commerce's] preference to use financial data from more than one surrogate producer to reflect the broader experience of the surrogate industry").

of zero, and only positive dumping margins (*i.e.*, margins for sales of merchandise sold at dumped prices) were aggregated. In other words, sales that were not found to have involved dumping were not used to offset sales that were found to have involved dumping. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1344.

Issuance of Final Determination and Subsequent Proceedings. Based on the methodologies, analyses, calculations, and data summarized above, Commerce assigned Xinboda a weighted-average dumping margin of $0.06 per kilogram in the Final Determination. *See* Final Determination, 76 Fed. Reg. at 37,326; *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1344–45 .

Xinboda appealed, challenging four aspects of Commerce's Final Determination. The first count of Xinboda's Complaint disputes Commerce's selection of financial statements for use in deriving the surrogate financial ratios used in calculating Xinboda's dumping margin. *See* Complaint ¶¶ 10, 15–16 (Count I). Xinboda argues that Commerce's justification for choosing the financial statements of Tata Teas is flawed and that Commerce's rejection of Garlico's financial statements which Xinboda favors is groundless. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1367–85 (discussing Xinboda's surrogate financial statements claim as set forth in greater detail in its Motion for Judgment on Agency Record).

Xinboda's Complaint next challenges Commerce's calculation of the surrogate wage rate. *See* Complaint ¶¶ 11, 17–18 (Count II). Specifically, Xinboda contended that Commerce erred in using labor data from multiple countries in the Final Determination and that Commerce should have relied on Indian data alone. Xinboda further argued that even if it was permissible for Commerce to use data from multiple countries Commerce failed to limit its "basket" of countries to those that were "significant producers" of comparable merchandise and also improperly excluded India based on the manner in which the country reported its data. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1356–67 (discussing Xinboda's surrogate wage rate claim as set forth in greater detail in its Motion for Judgment on Agency Record).

The third count of Xinboda's Complaint contests Commerce's calculation of the surrogate value for whole raw garlic bulbs. *See* Complaint ¶¶ 12, 19–20 (Count III). Xinboda contends that the Azadpur APMC Market prices (which are the basis for Commerce's calculations) do not reflect prices for the "intermediate input" whole raw garlic bulbs that Commerce is supposed to value. According to Xinboda, the Azadpur Market prices are for garlic bulbs at a more

advanced, higher level of trade *i.e.*, garlic bulbs that have been subject to additional processing and handling, above and beyond the whole raw garlic bulbs purchased by and delivered to Dadi, Xinboda's affiliated processor/producer. Xinboda also maintains that the Azadpur Market prices include significant sums paid to "middlemen" and "intermediaries." In addition, Xinboda objects to Commerce's use of non-contemporaneous Azadpur Market prices for "S.A."-grade garlic bulbs in calculating the surrogate value for whole raw garlic bulbs. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 134656 (discussing Xinboda's claim concerning the surrogate value for whole raw garlic bulbs as set forth in greater detail in its Motion for Judgment on Agency Record).

The fourth and final count of Xinboda's Complaint protests Commerce's application of the agency's "zeroing" methodology in calculating Xinboda's dumping margin. *See* Complaint, ¶¶ 13, 21–22 (Count IV); *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1385–88 (discussing Xinboda's zeroing claim as set forth in greater detail in its Motion for Judgment on Agency Record).

Ruling on Xinboda's Motion for Judgment on the Agency Record, *Shenzhen Xinboda I* remanded this matter to Commerce for further consideration of all four issues, including a voluntary remand on the surrogate value for labor (*i.e.*, the surrogate wage rate) at Commerce's request. *See generally Shenzhen Xinboda I*, 38 CIT at ____, ____, 976 F. Supp. 2d at 1338, 1388; *see also id*., 38 CIT at ____, ____, ____, 976 F. Supp. 2d at 1353, 1356, 1388 (surrogate value for whole raw garlic bulbs); *id*., 38 CIT at ____, ____, ____, ____, 976 F. Supp. 2d at 1363–64, 1365, 1367, 1388 (surrogate wage rate for labor); *id*., 38 CIT at ____, ____, ____, 976 F. Supp. 2d at 1375–76, 138485, 1388 (surrogate financial statements used to derive surrogate financial ratios); *id*., 38 CIT at ____, 976 F. Supp. 2d at 1387–88 (application of "zeroing" methodology).

On remand, Commerce revised the surrogate value for labor to be consistent with the agency's Revised Labor Methodology and based that value exclusively on labor data for India. *See* Remand Results at 3, 29, 57. In addition, although the Remand Results continue to rely on Azadpur APMC Market prices in calculating the surrogate value for whole raw garlic bulbs, Commerce adjusted its calculations to deduct freight costs for transportation of garlic from Indian farms to the Azadpur APMC Market. *See id*. at 3, 8–9, 47–48, 57.[9] Similarly, the Remand Results continue to use the financial statements of Tata

[9] Commerce acknowledged in the Remand Results that the Azadpur Market prices likely already reflect the costs of transporting raw garlic from the farms where it is grown to garlic processing facilities. Accordingly, Commerce's inclusion of such transportation costs elsewhere in its surrogate value calculations resulted in the "double-counting" of those costs.

Tea to derive surrogate financial ratios, with a minor adjustment for the costs associated with tea leaf grown by Tata Tea for its own consumption. *See id*. at 3, 23–24, 57.[10] Lastly, on remand, Commerce has elucidated the bases for its "zeroing" methodology, but continues to apply that methodology in calculating Xinboda's dumping margin for purposes of the Remand Results. *See id*. at 2, 29–44, 55–57.

As a result of Commerce's actions on remand, Xinboda's weighted-average dumping margin dropped from $0.06 per kilogram (in the Final Determination) to $0.02 per kilogram (in the Remand Results). *See* Remand Results at 1, 3.

II. *Standard of Review*

In reviewing a remand determination in an action challenging an antidumping determination by Commerce, the agency's determination must be upheld except to the extent that it is found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see also NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). Substantial evidence is "more than a mere scintilla"; rather, it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938)); *see also Dongtai Peak Honey Industry Co. v. United States*, 777 F.3d 1343, 1349 (Fed. Cir. 2015) (same).

Moreover, any evaluation of the substantiality of the evidence "must take into account whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp.*, 340 U.S. at 48788); *see also CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir.

Commerce addressed the issue in the Remand Results by excluding the costs of inland freight for the transportation of garlic from the Indian farmers to the Azadpur Market, which lowered the surrogate value for whole raw garlic bulbs. *See* Remand Results at 3, 8–9, 47–48.

[10] The Remand Results reflect an adjustment to the surrogate financial ratios that Commerce derived from the financial statements of Tata Tea, the Indian company on which Commerce relies as a surrogate in determining financial ratios for Xinboda. Specifically, to account for tea leaf grown on Tata Tea's own estate for its own consumption, Commerce excluded the costs of "self-produced and consumed" tea leaf from the numerator of the agency's surrogate financial ratio for "overhead" (and from the ratio calculations entirely), and recalculated the overhead and SG&A ratios for the Remand Results. *See* Remand Results at 3, 23–24 & nn.64–66, 57. Commerce characterizes this adjustment as "conservative" and "the most favorable adjustment from Xinboda's perspective," noting that "[b]ecause the SG&A ratio is applied to the recalculated overhead ratio, there is a cascading effect by which the SG&A ratio is lowered as well." *See id*. at 24 & n.66.

2016) (same). That said, the mere fact that it may be possible to draw two inconsistent conclusions from the record does not prevent Commerce's determination from being supported by substantial evidence. *Dongtai Peak Honey Industry Co.*, 777 F.3d at 1349 (citing *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966)).

In addition, a remand determination is reviewed for compliance with the court's remand instructions. *Yantai Xinke Steel Structure Co. v. United States*, 38 CIT ____, ____, 2014 WL 13875259 * 2 (2014) (quoting *Xinjiamei Furniture (Zhangzou) Co. v. United States*, 38 CIT ____, ____, 968 F. Supp. 2d 1255, 1259 (2014) (internal quotation marks omitted)); *Since Hardware (Guangzhou) Co. v. United States*, 39 CIT ____, ____, 49 F. Supp. 3d 1268, 1272 (2015) (same); *see also Changzhou Wujin Fine Chemical Factory Co. v. United States*, 701 F.3d 1367, 1374 (Fed. Cir. 2012) (analyzing on review whether Commerce's remand results were "within the scope of the Court of International Trade's remand order" and sustaining the Court of International Trade's conclusion on that point).

Further, while Commerce must explain the bases for its decisions, "its explanations do not have to be perfect." *NMB Singapore*, 557 F.3d at 1319–20. Commerce's rationale nevertheless must address the parties' principal arguments; and, more generally, "the path of Commerce's decision must be reasonably discernable," in order to support judicial review. *Id*. (citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see generally* 19 U.S.C. § 1677f(i)(3)(A) (requiring Commerce to "include in a final determination . . . an explanation of the basis for its determination that addresses relevant arguments, made by interested parties"); *CS Wind Vietnam Co.*, 832 F.3d at 1375–81 (highlighting, and analyzing in depth and detail, agency's "obligation to set forth a comprehensible and satisfactory justification for its [determination] . . . . as a reasonable implementation of statutory directives supported by substantial evidence"); *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350–52 (D.C. Cir. 2014) (underscoring importance of agency's obligation to "articulate an explanation for its action," stating that "a 'fundamental requirement of administrative law is that an agency set forth its reasons for decision; an agency's failure to do so constitutes arbitrary and capricious agency action") (citation omitted).[11]

[11] *See also Amerijet Int'l, Inc.*, 753 F.3d at 1350–52 (observing that requirement that an agency adequately explain its decision is a "basic principle" that is "indispensable to sound judicial review"; emphasizing that "conclusory statements will not do; an 'agency's statement must be one of *reasoning*'" (quoting *Butte County, Col. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010)) (emphasis in *Amerijet*); and remanding matter to agency where agency's determination failed to "address the main thrust" of a party's argument, such that court could not "discern if [the agency] considered the substance of [the party's] request, and, if so, what reasons it had for denying it").

Lastly, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50. An agency's determination thus cannot be sustained on the basis of a rationale supplied after the fact whether by the agency's litigation counsel, by another party, or by the court. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962).

III. *Analysis*

In commencing this action, Xinboda contested four aspects of Commerce's calculation of Xinboda's dumping margin in the agency's Final Determination *i.e.*, Commerce's selection of surrogate financial statements used to derive surrogate financial ratios, Commerce's calculation of the surrogate value for labor (*i.e.*, the surrogate wage rate), and Commerce's calculation of the surrogate value for whole raw garlic bulbs, as well as Commerce's application of its "zeroing" methodology in calculating Xinboda's dumping margin. *See generally* Complaint; *see also Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1345–46.

All four issues were remanded to Commerce in *Shenzhen Xinboda I*, including a voluntary remand on the surrogate value for labor. *See generally Shenzhen Xinboda I*, 38 CIT at ____, ____, 976 F. Supp. 2d at 1338, 1388. In the pending Remand Results, Commerce further explained its decisions in the Final Determinations and revised its calculations in several respects.

Xinboda advises that it is satisfied with the Remand Results as to the surrogate value for labor (*i.e.*, the surrogate wage rate), which Commerce has revised to be consistent with its Revised Labor Methodology and which is now based solely on data from India. *See* Remand Results at 3, 29, 57; Pl.'s Brief at 1 n.1. The Domestic Producers do not object. *See* Def.-Ints.' Brief at 2; *see also* Def.'s Brief at 3. The Remand Results on the surrogate value for labor are also generally in accord with the remand instructions in *Shenzhen Xinboda I*, 38 CIT at ____, ____, 976 F. Supp. 2d at 1356–67, 1388. Accordingly, Commerce's Remand Results on the surrogate value for labor (*i.e.*, the surrogate wage rate) are sustained. There is no need for further consideration of the issue.

Xinboda similarly approves of Commerce's decision on remand to exclude the costs of inland freight for the transportation of garlic from Indian farms to the Azadpur APMC Market, in order to eliminate from the surrogate value for whole raw garlic bulbs any "double-counting." *See* Remand Results at 3, 8–9, 47–48, 57; Pl.'s Brief at 1 n.1. Once again, the Domestic Producers do not object. *See* Def.-Ints.' Brief at 3 n.2; *see also* Def.'s Brief at 3, 13.

In all other respects, however, including other aspects of the surrogate value for whole raw garlic bulbs, Xinboda maintains that the Remand Results are not supported by substantial evidence and/or are not in accordance with law. Xinboda contends that the Remand Results therefore cannot be sustained. *See* Pl.'s Brief at 1; Pl.'s Reply Brief at 1.

Each of Xinboda's arguments challenging Commerce's determinations concerning the surrogate value for whole raw garlic bulbs, the selection of surrogate financial statements for use in calculating surrogate financial ratios, and the application of Commerce's "zeroing" methodology is addressed in turn below.

A. *Surrogate Value for Whole Raw Garlic Bulbs*

In calculating the surrogate value for whole raw garlic bulbs, the Remand Results continue to rely on prices for garlic bulbs sold at the Azadpur APMC Market. *See generally* Remand Results at 3–14, 44–48. In choosing the Azadpur Market prices over the other potential sources of data on the record of this review (including the Garlico prices that Xinboda favors), Commerce has stated that, compared to the other data sources, the Azadpur Market prices are "much more similar to the inputs being valued." In addition, Commerce emphasizes that the Azadpur Market prices are size-specific, breaking out prices based on grades of garlic bulbs, including grades Super-A ("S.A.") and "A." *See* Issues & Decision Memorandum at 12–13; Remand Results at 14.

According to the record in this administrative review, "garlic bulb sizes that range from 55 mm and above are Grade Super-A, and garlic bulb sizes that range between 40 mm and 55 mm are Grade A and Grade Super-A." Preliminary Surrogate Value Memorandum at 4. The Azadpur APMC's Market Information Bulletin published prices for grade A garlic bulbs for the period of review at issue here. However, the Bulletin ceased reporting prices for grade S.A. garlic bulbs in early February 2008 approximately nine months before the beginning of the period of review. *See* Issues & Decision Memorandum at 12–13.

The whole raw garlic bulbs that Dadi (Xinboda's processor/producer) purchased for its production of whole garlic bulbs for Xinboda ranged from 50 to 65 mm in diameter, and from 50 to 55 mm for Dadi's production of peeled garlic. To value garlic bulbs with a diameter of 55 mm or more, Commerce relied on non-contemporaneous Azadpur Market prices for S.A.-grade garlic for the period February 2007 through January 2008, which Commerce then indexed (inflated) to the dates of the period of review using a garlic-specific wholesale

price index. *See* Preliminary Surrogate Value Memorandum at 4; Issues & Decision Memorandum at 12. To value garlic bulbs with a diameter of between 50 mm and 55 mm, Commerce averaged the Azadpur Market prices for grade S.A. garlic bulbs (as described above) together with contemporaneous Azadpur Market prices for grade A bulbs (*i.e.*, prices for "A"-grade garlic from within the period of review). *See* Final Surrogate Value Memorandum at 1.

Xinboda challenges Commerce's calculation of the surrogate value for whole raw garlic bulbs on three grounds. Xinboda first argues that the Azadpur Market prices reflect garlic bulbs that are more advanced (are at a higher "level of trade") compared to the whole raw garlic bulbs that farmers deliver to Dadi, which is the "intermediate input" that Commerce assertedly seeks to value. In addition, Xinboda maintains that the Azadpur Market prices include substantial "intermediary expenses" that Dadi did not incur. Lastly, Xinboda contests Commerce's use of indexed non-contemporaneous Azadpur Market prices for S.A.-grade garlic bulbs, arguing that garlic bulbs of the size and quality previously designated as grade S.A. were subsumed into grade A garlic bulbs as of early February 2008, before the period of review. In other words, Xinboda contends that the contemporaneous Azadpur Market prices for A-grade garlic bulbs that Commerce is using already reflect prices for garlic bulbs that previously would have been classified as grade S.A. Xinboda thus concludes that Commerce's use of prices for grade S.A. garlic bulbs from outside the period of review improperly inflates Commerce's calculated surrogate value for whole raw garlic bulbs.

Xinboda argues that, in lieu of the Azadpur Market prices, Commerce should calculate the surrogate value for the whole raw garlic bulbs that farmers delivered to Dadi using averaged garlic price data from the financial statements of the Indian garlic processor and trader Garlico, which Xinboda placed on the administrative record. Xinboda contends that Garlico's experience more closely matches Xinboda's experience in the purchase of garlic.

Alternatively, if Commerce is permitted to continue to rely on Azadpur Market prices in calculating the surrogate value for whole raw garlic bulbs, Xinboda argues that Commerce must make an appropriate level of trade adjustment (to account for the fact that the garlic bulbs delivered to Dadi are less processed and handled than the garlic bulbs sold at the Azadpur Market) and must make any related adjustments to preclude "double-counting"; that Commerce must deduct 70% from the Azadpur Market prices to account for expenses attributable to intermediaries which are reflected in those prices and

which Dadi did not incur; and that Commerce must use only the contemporaneous prices for grade A garlic bulbs, excluding the prices for grade S.A.

1. The Respective Conditions of Dadi's Garlic Bulbs and Garlic Bulbs Sold at the Azadpur APMC Market & *Xinboda's Claim of "Double-Counting"*

As it did in the Final Determination, Commerce continues to (in effect) equate the condition of the whole raw garlic bulbs that farmers delivered to Dadi with the condition of the garlic bulbs sold at the Azadpur APMC Market. *See, e.g.*, Remand Results at 11–12 (stating that, on remand, Commerce "continues to find . . . [that] the Azadpur [Market] garlic prices . . . are reasonably reflective of the raw garlic inputs [that were delivered to Dadi]"); *id*. at 11 (arguing that the Azadpur Market prices and the prices that Dadi paid to farmers "are reasonably similar in nature"); *id*. (asserting that there is no evidence that "the prices paid by [Dadi] and the Azadpur [Market] net prices . . . are fundamentally different"); *see generally* Def.'s Brief at 10, 15; Def.-Ints.' Brief at 5–6.[12] But Commerce's determination is squarely at odds with the existing record.

[12] As discussed above, Commerce's calculation of the surrogate value for whole raw garlic bulbs is based on its conclusion that the condition of the garlic bulbs purchased by and delivered to Dadi and the condition of garlic bulbs sold at the Azadpur APMC Market are essentially the same. However, at several points in the Remand Results, Commerce candidly admits that it actually does not know important specifics concerning the condition of the garlic bulbs at the Azadpur Market, much less the condition of the garlic bulbs that Dadi purchased. For example, the Remand Results assert that, "in many cases, such as this one, [Commerce] does not have reliable information describing in detail the physical characteristics of the surrogate product [*i.e.*, here, the garlic bulbs sold at the Azadpur Market]. Thus, [Commerce] cannot know exactly how the actual input [*i.e.*, the garlic bulbs purchased by Dadi] and the surrogate input [*i.e.*, the garlic bulbs sold at the Azadpur Market] differ. In this case, [Commerce] finds that both the actual input and the surrogate input for raw garlic are processed beyond the 'farm gate' to some extent: . . . . As for the garlic produced by Indian farmers captured in the Azadpur data, we do not know what, if any, additional processing is undertaken." *See* Remand Results at 46; *see also id*. at 46–47 (asserting that Commerce has "no reliable information on the record indicating the exact nature of the Azadpur surrogate input").

As a threshold matter, Commerce's admission that it does not know the actual condition of the garlic bulbs purchased by Dadi or the actual condition of the garlic bulbs sold at the Azadpur APMC Market is difficult to square with the agency's conclusion that the two are fundamentally the same.

Moreover, Commerce's statement that it does not know the condition of the garlic bulbs at the Azadpur APMC Market strains credulity. It is virtually inconceivable that Commerce does not know the basic nature of the product that is the basis for the Azadpur Market prices, which Commerce has relied on as the surrogate value for Chinese garlic in numerous proceedings in addition to this one, including the twelfth, thirteenth, fourteenth, and sixteenth reviews, as well as a number of New Shipper Reviews.

Accepting Commerce's statement at face value, it is a very troubling admission, particularly as to the condition of the garlic bulbs at the Azadpur Market. It is difficult to understand how Commerce can rely on a surrogate value if it does not know what that

The Condition of Garlic Bulbs at the Azadpur APMC Market. The sole record evidence that speaks directly to the condition of the garlic bulbs sold at the Azadpur APMC Market is a declaration under oath, proffered by Xinboda, in which a researcher/consultant based in India attests to his first-hand findings and observations based on a visit that he made to the Azadpur Market. *See generally* Declaration of Xinboda Research Consultant, "Survey of Garlic Offerings Azadpur Market, New Delhi" ("Researcher Declaration") (Pub. Doc. No. 138); *see also* Pl.'s Brief at 8–11; Pl.'s Reply Brief at 4. The Researcher Declaration addresses a handful of basic but pivotal points.[13]

As to the condition of the garlic bulbs at the Azadpur APMC Market, the Researcher Declaration states, in relevant part, that "[t]he

surrogate value fundamentally represents. Moreover, it is not clear that such use can be sustained as reasonable.

[13] The Researcher Declaration was executed in Mumbai, in the Indian state of Mahrashtra. *See* Researcher Declaration. As to certain information relating to the identity of the Indian Researcher and the notary public's seal, Commerce has determined that there is "a clear and compelling need" to withhold the information from disclosure, even under an administrative protective order. That information is thus designated as "double-bracketed" and is known to Commerce, but not the Domestic Producers. *See generally* 19 C.F.R. § 351.304(a)(1)(ii)-(iii) *et seq*.; Administrative Order Protective Handbook at 10 (U.S. Dept. of Commerce, International Trade Administration, Rev. 3/10/2015); *see also infra* n.18 (explaining, *inter alia*, that, in this matter, Commerce has also granted "double-bracket" protection for similar information vis-a-vis the Domestic Producers' market research reports). With those limited exceptions, the text of the Researcher Declaration is public information and reads, in full:

1. My name is [[redacted]]. I work under the supervision of [[redacted]], of [[redacted]], which has been doing import/export trade for over 20 years. This firm's primary function is to identify raw materials for various domestic producers or foreign producers and traders.
2. I spent the day of January 31, 2011 at the Azadpur Market and interviewed the eight vendors selling garlic in the Azadpur Market that day. Based on research and my discussions with those vendors, I offer the following observations for the Department of Commerce's consideration.
3. The Azadpur Market does not publish or otherwise publicly make available a standardized grading system for the garlic sold in the market.
4. The mechanism at the market for grading the garlic is size as well as quality. However, visual inspection of the garlic offered in the market indicated that the size is what primarily distinguishes the garlic by grade in the Azadpur Market.
5. There are 3 grades of garlic in the Indian Market.
   Grade A: All Garlics above 40 mm are classified as Grade A. The sample obtained is approx. 50 mm. *See* Exhibit 1.
   Grade B: Garlics between 25–40 mm (+/- 5) are classified as Grade B. The sample obtained is approx. 40 mm. *See* Exhibit 2.
   Grade C: Garlics below 25 mm (+/- 5) would be Grade C. The sample is approx. 30 mm (but still was grade C) in the marketplace. *See* Exhibit 3.
6. There is no "Super A" Grade sold in the Azadpur Market since the first quarter of 2008. No vendor in the Azadpur Market had any recent experience selling "Super A" variety garlics. However, several vendors confirmed that garlic of sizes 55mm-65mm is sold under "Grade A" from the month of March and stays till the November-December period each season.
7. Some vendors claimed that the 55mm-65mm size range is from China and is not readily available any more in the Indian markets.

garlic sold in the Azadpur Market is ready for retail consumption and is already fully processed when it arrives there, as in: (1) taking off the outside dirty layers so the garlic has a fresh white appearance; (2) cutting any long stems; and (3) packaged in a mesh bag." Researcher Declaration ¶ 9. The Researcher Declaration further states that "[t]he garlic is ready to be consumed in the state it is sold in the Azadpur Market." *Id*.[14]

Significantly, neither Commerce nor the Domestic Producers point to any record evidence to controvert the facts set forth in the Researcher Declaration.[15] Instead, they attempt to discredit it and re-

8. The traders here do not classify the garlics according to different grades as it already comes classified by the suppliers in a mesh bag

9. The garlic sold in the Azadpur Market is ready for retail consumption and is already fully processed when it arrives there, as in: (1) taking off the outside dirty layers so the garlic has a fresh white appearance; (2) cutting any long stems; and (3) packaged in a mesh bag. The Azadpur Market simply re-sells this cargo downstream. In fact, the bags are pre-graded; the market does not even decide this. The garlic is ready to be consumed in the state it is sold in the Azadpur Market.

Confidentiality

[Text concerning request for confidential treatment]

So Sworn.

[14] The Researcher Declaration bears on two critical factual matters in controversy: (1) the condition of the garlic bulbs sold at the Azadpur APMC Market, and (2) whether garlic bulbs of a certain size (which would have previously been designated as grade "S.A." or "Super-A") were being sold as "grade A" during the period of review here. *See generally* Researcher Declaration. This second point is the subject of section III.A.3, below.

[15] This point is crucial and bears repeating: Apart from the Researcher Declaration, neither Commerce nor the Domestic Producers points to any record evidence whatsoever to establish the basic condition of the garlic bulbs at the Azadpur AMPC Market. Neither Commerce nor the Domestic Producers has placed any such evidence on the record. *See generally supra* n.12 (analyzing, *inter alia*, Commerce's statements as to its lack of knowledge of the basic condition of the garlic bulbs at the Azadpur Market).

The party advocating for the use of a particular surrogate value bears the burden of establishing what that value represents. Here, Commerce and the Domestic Producers argue for the use of the Azadpur Market prices. The Domestic Producers thus have a legal obligation to adduce affirmative evidence to adequately establish the basic nature of the garlic bulbs sold at the Azadpur Market, as an integral element of their case advocating for Commerce's use of the Azadpur Market prices. However, no affirmative evidence of the basic nature of the product has been placed on the record (other than the Researcher Declaration).

In addition to its legal obligation as the proponent of the Azadpur Market, as a matter of common sense, it is the Domestic Producers that have the incentive to rebut the statements in the Researcher Declaration concerning the condition of the garlic bulbs sold at the Azadpur Market. Yet the Domestic Producers also have failed to present any rebuttal evidence.

Presumably, if the Researcher Declaration's statements attesting to the condition of the garlic bulbs sold at the Azadpur Market are factually inaccurate, the Domestic Producers would be the first to say so. In fact, however, the Domestic Producers actually *never* dispute the *substantive accuracy* of the statements in the Declaration. Instead, the Domestic Producers content themselves with challenging (on less than solid grounds) the "reliability" of the Researcher Declaration that Xinboda has placed on the administrative record the only record evidence on point. *See generally Jinan Yipin Corp. v. United States*, 35 CIT at

ject it in its entirety. *See* Remand Results at 11 (asserting a lack of "credible evidence" to refute Commerce's conclusion that the price paid by Dadi and the Azadpur APMC Market prices are "reasonably similar"); *id*. at 46–47 (characterizing Researcher Declaration as "not reliable" and asserting that "there is no reliable information on the record indicating the exact nature of the Azadpur surrogate input or the exact steps Indian farmers might take before sending their products to [the Azadpur Market]"); *see also* Def.'s Brief at 16–17; Def.-Ints.' Brief at 15–19.[16]

____ n.71, 800 F. Supp. 2d 1226, 1287 n.71 (2011) (observing, *inter alia*, that the domestic producers there had incentive to submit evidence to rebut evidence adduced by the foreign producers, but failed to do so; and noting that it was telling that the domestic producers never actually disputed the substantive accuracy of the foreign producers' evidence) ("*Jinan Yipin II*"); *id*., 35 CIT at ____ n.101, 800 F. Supp. 2d at 1310 n.101 (same); Pl.'s Brief at 10–11 (arguing that "it was in [the Domestic Producers' interest to prove that the statements included in . . . [the] Researcher Declaration did not reflect the actual situation at the Azadpur Market. At the very least, to provide more convincing evidence, [the Domestic Producers] could have sent two researchers on two days to the Azadpur Market to interview vendors. [The Domestic Producers] did not provide this or any other rebuttal evidence.").

[16] Xinboda maintains that, to the extent that Commerce had questions or concerns about the Researcher Declaration and the information set forth in that document, Commerce should have issued a "deficiency questionnaire" to Xinboda, seeking clarification. *See generally* Pl.'s Brief at 9–10, 16–17; Plaintiff's Motion for Leave to File Record and Other Impeachment Documents Issued by the U.S. Department of Commerce, International Trade Administration at 1–3 *et seq*. ("Pl.'s Motion to File Additional Documents"). Commerce concluded that it had no such obligation. According to Commerce, it "is required to issue deficiency questionnaires only when [the agency] requested the specific information" as to which the agency has questions; and, here, according to Commerce, the agency did not request the Researcher Declaration "rather, Xinboda chose to provide it." *See* Remand Results at 45 (citing 19 U.S.C. §1677m(d) ("Deficient submissions")); *see also* Def.'s Brief at 17–18; Def.-Ints.' Brief at 15, 19–21; Defendant's Response to Xinboda's Motion to File Additional Documents at 4–5. *But see* Pl.'s Brief at 16–17 (arguing that, as a practical matter, the Researcher Declaration was an integral part of Xinboda's response to Commerce's standard ("Section D") questionnaire on factors of production for non-market economy countries); Pl.'s Motion to File Additional Documents at 1–4, 5, 7–8 (same).

Whether or not Commerce was obligated by statute to issue a deficiency questionnaire under these facts, Xinboda contrasts Commerce's position here with its treatment of market research submitted by the Domestic Producers. Xinboda points to the Domestic Producers' Market Research Report, stating that Commerce affirmatively sought clarification of certain matters in a supplemental questionnaire issued to the Domestic Producers. *See* Pl.'s Brief at 10; Pl.'s Motion to File Additional Documents at 6. *But see* Remand Results at 50 n.126 (disputing Xinboda's argument).

Xinboda now has moved to supplement the existing administrative record with several documents, seeking to demonstrate that information on the surrogate valuation of the factors of production, such as the Researcher Declaration, is submitted in response to Commerce's factors of production questionnaire, and that in other similar situations, where Commerce has had questions or concerns Commerce has sought clarification from parties, affording them an opportunity to address alleged deficiencies in their submissions. Xinboda thus contends that, as a matter of both law and agency practice, Commerce was required to alert Xinboda to any agency concerns about the Researcher Declaration and to give Xinboda an opportunity to respond to them. *See generally* Pl.'s Motion to File Additional Documents.

Opposing Xinboda's Motion, the Government cites *Mukand* and *Marvin Furniture* in support of Commerce's position that the Researcher Declaration was not submitted in response to any agency questionnaire or other "request for information," rendering 19 U.S.C. §1677m(d) inapplicable, and, further argues that Commerce's conclusion that the

Quoting *verbatim* from Commerce's Issues and Decision Memorandum in the sixteenth administrative review (*i.e.*, the review following the administrative review at issue here), the Remand Results state:

> As an initial matter, it is not clear whether Xinboda's "Indian researcher" was a market researcher or field expert; the individual reports having worked in "import/export trade for over 20 years." Moreover, the individual who provided this Researcher Declaration made a number of observations based on a single visit to the Azadpur Market on January 31, 2011 during which eight vendors were interviewed. These observations [documented in the Researcher Declaration] included discussions of the sizes of the garlic sold, the grading system for the garlic, and the market readiness of the garlic sold in Azadpur. While the researcher states that all observations are "[b]ased on research and my discussions with vendors," [Commerce] has not been presented with any research conducted by this individual, nor has any information regarding the vendors (*i.e.*, name, time selling at the market, etc.) been provided to corroborate what

Researcher Declaration is not reliable is not the equivalent of an agency conclusion that (in the words of the statute) the Declaration "d[id] not comply" with an agency request for information. *See Marvin Furniture (Shanghai) Co. v. United States*, 744 F.3d 1319, 1325 (Fed. Cir. 2014) (affirming holding that 19 U.S.C. §1677m(d)) was not applicable where interested party's defective request for a new shipper review was filed on that party's own initiative, and not in "response to a request for information" from the agency); *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1304–06 (Fed. Cir. 2014) (summarizing application of 19 U.S.C. §1677m(d) where Commerce requested information from respondent, alerted respondent to deficiencies in respondent's submissions, and gave respondent the opportunity to remedy the deficiencies, before Commerce resorted to "facts otherwise available"). In addition, the Government argues that judicial review in international trade litigation is confined to the record compiled before the agency, and Xinboda's proposed supplemental documents are not part of (and could not have been part of) the record in this administrative review; that the proposed supplemental documents do not fall within any of the established exceptions permitting expansion of the record compiled before the agency; and that, in any event, the proposed supplemental documents do not support Xinboda's claim that Commerce's actions here are inconsistent with agency practice in other cases. *See* Defendant's Response to Xinboda's Motion to File Additional Documents; *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1277–78 (Fed. Cir. 2012) (noting that courts "have carved out a small number of exceptions . . . [to] allow supplementation of an agency record").

Notwithstanding the general principle that review of an agency determination is confined to the administrative record that was compiled before the agency, it stands to reason as a matter of principle and in the interests of fundamental fairness and process, as well as the integrity of judicial proceedings that parties must have some means of documenting alleged inconsistent practices and confronting an agency with them. Here, Xinboda is not seeking to place additional documents on the record "for the truth of the matter stated," but, instead, for what are essentially "impeachment" purposes (to establish the existence of an agency practice). And it is worth noting that the Government has not objected that Xinboda waived any rights that it may have had by not proffering the proposed supplemental documents earlier in this litigation.

In any event, in light of the analysis herein concerning the Researcher Declaration and Commerce's criticisms of it, there is no need to rule on the merits of Plaintiff's Motion to File Additional Documents. The Motion is therefore denied as moot, without prejudice to refiling, should circumstances warrant.

> the Researcher Declaration actually reports. Finally, the signature date (February 2, 2011) does not match the date of the notary public's signature. While this may not be a primary concern, the discrepancy between the date the document was signed and the date the notary public signed, nonetheless, raises additional questions about the Researcher Declaration. Although the affidavit appears to have been drafted and notarized in 2011, it is unclear why it also contains a stamp date of 2010. The lack of supporting documentation and, for that matter, even information on the "researcher" as well as the discrepancy in when the document was signed, make it impossible for [Commerce] to consider the Researcher Declaration a reliable source of information upon which we may base our conclusions.

Remand Results at 5–6 (quoting Issues and Decision Memorandum for Fresh Garlic from the People's Republic of China: Final Results of the 2009–2010 Administrative Review at 20 ("Issues & Decision Memorandum for 16th Review")).

Commerce further states that "the Researcher Declaration is a two-page set of statements with no documentation provided to supports its conclusions and no details provided by the 'researcher' regarding the methods or steps he took to reach his conclusions beyond noting that he interviewed 'every' merchant of garlic on the day he visited." Remand Results at 6. Commerce continues: "The researcher provides no indication of having met with those responsible for gathering and publishing [the Azadpur APMC prices] (which is an especially relevant problem . . . related to the issue . . . concerning why the [Azadpur APMC's Market Information Bulletin] no longer publishes prices for grade Super-A raw garlic bulbs." *Id*.; *see generally* Def.'s Brief at 16–17 (arguing that Researcher Declaration was properly found to be unreliable); Def.-Ints.' Brief at 2–3, 15–19 (same). *But see* Pl.'s Brief at 8–13 (defending reliability of Researcher Declaration); Pl.'s Reply Brief at 4–6 (same).

Commerce concedes that, "in certain contexts, [the Researcher Declaration] would be sufficient for [Commerce's] purposes." Remand Results at 6. Nevertheless, Commerce ultimately rejects the Declaration as "not reliable." *Id*.[17]

[17] The Remand Results contrast the Researcher Declaration with the Domestic Producers' Market Research Report and the related October 2006 Clarification, which Commerce states it "found to be . . . reliable, detailed and well-documented source[s] of information regarding the Azadpur market." Remand Results at 5; *see also* Market Research Report on Fresh Whole Garlic in India (June 2003) ("Market Research Report") (AR Pub. Doc. No. 131); Clarifications on Garlic Study (Oct. 2006) at 6 ("Clarification of Market Research Report") (AR Pub. Doc. No. 133).

A clear-eyed, objective, and dispassionate examination of the Researcher Declaration and each of Commerce's criticisms leads to a different conclusion. As summarized below, Commerce's critique of the Declaration is wide of the mark.[18]

Whether or not Commerce's assessment of the Domestic Producers' Market Research Report and the related Clarification as "reliable, detailed and well-documented source[s] of information regarding the Azadpur market" is accurate, it is beyond cavil that the nature, length, and purposes of the Domestic Producers' reports are very different from those of the Researcher Declaration. For example, unlike the Researcher Declaration, much (if not most) of the factual information in the Market Research Report and the Clarification cannot be attributed to personal observation by the Domestic Producers' market research consultants. As such, the Market Research Report and the Clarification require references, citations to sources, and, in many instances, back-up data and documentation, in a way that the Researcher Declaration does not. The Remand Results ignore this significant distinction.

More importantly, however, whether or not the Domestic Producers' Market Research Report and the related Clarification are as Commerce states "reliable, detailed and well-documented source[s] of information" as to *some* aspects of the Azadpur APMC Market, those reports are silent on two key matters concerning that Market which are at the very heart of this dispute and which *are* addressed in the Researcher Declaration: (1) the condition of the garlic bulbs sold at the Azadpur Market, and (2) whether garlic bulbs of a certain size (which would have previously been designated as grade "S.A." or "Super-A") were being sold at the Azadpur Market as "grade A" garlic bulbs during the relevant period of review. *Compare* Researcher Declaration *with* Market Research Report *and* 2006 Clarification.

In other words, this is not a situation where Commerce is confronted with two authorities that address the same point but take positions that are diametrically opposite, thus requiring Commerce to determine which of the two authorities is accurate or correct or more reliable. Moreover, not only is it the case that the Market Research Report and the Clarification do not contradict the Researcher Declaration on the two key points above; but, in addition, the fact is that there is nothing *anywhere* in the administrative record that contradicts the Researcher Declaration's statements on those points. *See supra* n.17 (noting that neither Commerce nor the Domestic Producers placed on the record evidence concerning the basic condition of the garlic bulbs sold at the Azadpur Market, and discussing the implications of the absence of such evidence).

[18] Market studies such as the Researcher Declaration, as well as the Market Research Report and the related Clarification (both of which were commissioned by the Domestic Producers) are relatively common in international trade proceedings such as the instant administrative review. *See generally* Researcher Declaration; Market Research Report; Clarification of Market Research Report; *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1355 (noting that the Market Research Report "was commissioned and placed on the record by the Domestic Producers"); *Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1261 (discussing the Domestic Producers' Market Research Report, citing examples of other market studies submitted in other international trade proceedings, and explaining that "various types of market studies, generally commissioned by the parties, are not unusual in international trade proceedings").

Further, Commerce has in place standard procedures in order to withhold from disclosure, even under an administrative protective order, highly sensitive information (such as the identities of a party's customers or market research consultants) where Commerce finds that "there is a compelling need" to do so. *See generally* 19 C.F.R. § 351.304(a)(1)(ii)-(iii) *et seq*.; Administrative Order Protective Handbook at 10 (U.S. Dept. of Commerce, International Trade Administration, Rev. 3/10/2015); *see also supra* n.13 (explaining restrictions on disclosure of information as to the identity of the consultant who prepared the Researcher Declaration and the notary public's seal). In this review, Commerce made such a finding as to the research consultants of both parties the market research consultants that the Domestic Producers commissioned to prepare the Market Research Report and the related Clarification, and the researcher who prepared the Declaration submitted by Xinboda.

For example, the length of the Researcher Declaration whether two pages or two hundred has no bearing on the veracity of the statements made in the Declaration. Such declarations and similar reports and other documents need not be any longer than is necessary to fulfill their purpose. There is no magic number of pages. Here, the two-page Declaration is confined to a few basic factual matters at issue in this administrative review and addresses them at an adequate level of detail. Commerce's criticism of the length of the Researcher Declaration thus lacks a rational basis.

Similarly lacking in merit is Commerce's complaint that the Researcher Declaration does not indicate whether the researcher is "a market researcher or [a] field expert," as well as Commerce's broad-brush complaint that the Declaration lacks "information on the 'researcher.'" *See* Remand Results at 4. Given the straightforward nature of the facts set forth in the Declaration, the Researcher's background whether he is a "market researcher" or a "field expert" or has some other title and sub-specialty is of no moment.[19] The Researcher is not being proffered as an "expert witness" and the statements made in the Declaration do not require any special expertise.[20] Given the nature of the information provided in the document, the credence to be accorded the Researcher Declaration is the same, without regard to whether the Researcher had (or did not have) any particular background or expertise.

Commerce's observation that the Researcher Declaration is based on a "single visit" to the Azadpur APMC Market also is lacking in substance. *See* Remand Results at 4. The record is devoid of any evidence indicating that additional visits to the Market would have affected the facts set forth in the Researcher Declaration in any way, as Commerce seems to suggest.

In like manner, Commerce appears to fault the Researcher Declaration because it is based in part on interviews of eight garlic vendors. *See* Remand Results at 4. As Commerce acknowledges, however, the Declaration attests that the Researcher "interviewed 'every' merchant of garlic" present at the Azadpur APMC Market on the day of his visit not a survey of a sample of garlic vendors, but, rather,

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[19] The Domestic Producers assert that the Researcher has "no apparent experience in the sale of fresh garlic." *See* Def.-Ints. Brief at 2. As noted here, however, given the nature of the information set forth in the Researcher Declaration, no such experience is necessary. The Domestic Producers' brief does not indicate whether the consultants who prepared the Domestic Producers' Market Research Report (a fairly substantial publication) had been previously employed as garlic vendors.

[20] The Declaration does specify that the Researcher's firm has more than two decades of experience in the "import/export trade" and that the firm is primarily engaged in "identify[ing] raw materials for various domestic producers or foreign producers and traders." *See* Researcher Declaration ¶ 1.

interviews with 100% of the garlic vendors at the Market. *See id*. at 5; Researcher Declaration ¶ 2. There is no record basis for any implication that additional visits to the Market, which might (or might not) have included interviews of additional vendors,[21] would have altered the statements set forth in the Researcher Declaration.

Commerce further discounts the Researcher Declaration, asserting that it provides "no details . . . regarding the methods or steps [the Researcher] took to reach his conclusions." *See* Remand Results at 5. Commerce's point here is, again, misguided. The text of the Declaration itself discloses that the Researcher personally visited the Azadpur APMC Market, interviewed all eight of the garlic vendors at the Market, personally observed the garlic bulbs that were offered for sale, and took six photographs of those garlic bulbs (Grades A, B, and C). *See generally* Researcher Declaration & Exhs. 1–3 (photos of garlic bulbs, measured against ruler in order to establish scale) (AR Pub. Doc. Nos. 138–39). The Researcher's simple, basic "methodology," as evidenced by the Declaration, was appropriate and proportional to the purpose and nature of his inquiry and to the facts in question.

In addition, Commerce seeks to make much of the Researcher's statement that the observations documented in the Declaration are "[b]ased on research and . . . discussions with vendors." *See* Remand Results at 5 (quoting Researcher Declaration ¶ 2). Underscoring that statement, Commerce indicates that the agency has not been provided with "any research conducted by [the Researcher]" and that the agency has received "[n]o documentation . . . to support [the Declaration's] conclusions." *See* Remand Results at 4; *see also id*. (criticizing Researcher Declaration for "lack of supporting documentation"); *id*. at 5 (stating that "no documentation [is] provided to support" the Declaration's statements). However, it appears that Commerce simply reads too much into the Declaration's generalized reference to "research" (which, in context, seems to refer broadly to the Researcher's visit to the Market). There is nothing to indicate that "research"

[21] The Domestic Producers question in the abstract "how representative [the] eight vendors are relative to all entities that sell fresh garlic at the Azadpur APMC market." Def.-Ints.' Brief at 17. Although it is neither here nor there, it is not clear how many vendors were selling garlic bulbs at the Azadpur APMC Market but were not present at the Market on the day of the Researcher's visit. Moreover, in explaining Commerce's decision not to rely on the Researcher Declaration, the Remand Results do not cite concerns about the "representativeness" of the eight vendors and the information that they provided. The Domestic Producers' argument thus constitutes impermissible *post hoc* rationale. It is well-established that an agency determination cannot be sustained on the strength of a rationale supplied after the fact by counsel in the course of litigation. *See, e.g., Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962). As the Supreme Court has explained, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50. In any event, and perhaps most importantly, the information provided by the eight vendors is not the type of information where "representativeness" is typically a concern.

and "supporting documentation" exist but were not provided to the agency. Even more to the point, in light of the basic nature of the content of the Researcher Declaration and the straightforward facts set forth therein, there was no need for "research" beyond the inquiry described in the Declaration. Nor is there any need for back-up "documentation."

In particular, Commerce disparages the Researcher Declaration because it does not provide certain information *i.e.*, their names and how long they have worked at the Azadpur APMC Market for the eight garlic vendors who were interviewed. Remand Results at 5. Like the other criticisms that Commerce has leveled at the Declaration, this point initially may have a certain superficial appeal, but it does not bear up under close scrutiny. The vendors' names are of no moment in this context, and the duration of their employment is not important here, provided that the vendors have knowledge of the very basic information that they provided to the Researcher and the record is devoid of any evidence to suggest that, in fact, they lacked such knowledge.

Moreover, realistically, there can be no serious claim that, if their names and other information about the vendors were provided, Commerce or the Domestic Producers would undertake to investigate the vendors in an effort to impeach the Declaration's credibility. Speaking practically, given the nature of the very basic factual information provided in the Researcher Declaration, it would be not only inefficient but largely pointless to probe the educational backgrounds and work experience of the vendors, and to run background checks on them. Even if an investigation were to identify some anomaly as to one or more of the vendors, any showing of minimal formal education, limited work experience, and/or a criminal record (for example) would have no real effect as to the statements in the Researcher Declaration and would be collateral to the central issues at hand.

In other words, the fact remains that it is either true or false that the garlic arriving for sale at the Azadpur APMC Market has had all "long stems" cut and "the outside dirty layers" removed, "so the garlic has a fresh white appearance" (*see* Researcher Declaration ¶ 9), without regard to the individual credibility of any or all of the eight garlic vendors. To adequately and effectively refute the straightforward statements in the Researcher Declaration, evidence to that effect must be placed on the record. In the specific circumstances of this case, and in light of the wholly factual nature of the points made in the Researcher Declaration, it is of little practical consequence that

the Researcher Declaration does not specify the names and employment histories of the eight garlic vendors who were interviewed.[22]

Lastly, Commerce points to what it refers to as "date inaccuracies" in the Declaration. *See* Remand Results at 5. In particular, Commerce focuses on an asserted "discrepancy in when the [Researcher Declaration] was signed," noting that "the signature date (February 2, 2011) does not match the date of the notary public's signature." *See id*. at 4; *see also id*. at 5 n.11. In addition, Commerce states that, "[a]lthough the [Declaration] appears to have been drafted and notarized in 2011, it is unclear why it also contains a stamp date of 2010." *See id*. at 4.

Commerce does not even acknowledge much less attempt to refute Xinboda's explanation of the 2010 date that appears on the face of the Declaration ("Certified Stamp L.S.V. No. 694 20 April 2010 Proper Officer"), even though that explanation appeared in Xinboda's comments on the Draft Remand Results. Xinboda advises that the 2010 date is the date on which the Licensed Stamp Vendor ("L.S.V.") in India sold the official "non-judicial stamp paper" on which the Declaration is printed. *Compare* Xinboda Comments on Draft Remand Determination at 4 n.3 (explaining April 2010 date) (SAR Pub. Doc. No. 6) *and* Pl.'s Brief at 10 n.4 (same) *with* Remand Results at 4 (contrasting 2010 stamp date on Declaration with 2011 date of signature and notarization). And, as to the slight difference between the Declaration's signature date and the date of the notary's signature, Commerce concedes that the difference is "not . . . a primary concern" for the agency. *See* Remand Results at 4.[23]

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[22] As noted above, Commerce also critiques the Researcher Declaration on the ground that it "provides no indication [that the Researcher] met with those responsible for gathering and publishing [the Azadpur APMC prices] (which is an especially relevant problem . . . related to the issue . . . concerning *why* the publication no longer publishes prices for grade Super-A raw garlic bulbs)." *See* Remand Results at 5 (emphasis added).

In the case at bar, however, it does not matter *why* the Azadpur Market no longer sells garlic bulbs that are designated as grade "Super-A." The real point at issue is a straightforward factual question: Were garlic bulbs that were for a time (*i.e.*, beginning in May 2006) classified and sold at the Azadpur Market as grade "Super-A" (or "S.A.") subsequently classified and sold as grade "A" garlic bulbs as of early February 2008 (when publication of prices for "Super-A" or "S.A." grade garlic bulbs ceased)? Presumably vendors are as knowledgeable as anyone about the essential characteristics of the produce that they sell (as well as other matters addressed in the Researcher Declaration). Certainly there is no record evidence here to the contrary. *See infra* section III.A.3 (analyzing parties' arguments concerning Commerce's use of prices for "Super A"- (or "S.A."-) grade garlic bulbs in calculating surrogate value for Dadi's garlic bulbs).

In short, the mere fact that the Researcher Declaration could have provided additional information (for example, to address the "why" question) in no way diminishes the relevance, the significance, or the reliability of the information that is provided.

[23] There is no indication on the record here as to whether or not notarization practices in India parallel those in the U.S. for example, whether it would normally be expected that an

In sum, Commerce's criticisms of the Researcher Declaration are largely without merit, and the agency's sweeping, wholesale dismissal of the Declaration is unwarranted. Under the "substantial evidence" standard and the circumstances of this case, Commerce here is not free to disregard the only specific, relevant, concrete record evidence concerning the condition of the garlic bulbs sold at the Azadpur APMC Market *i.e.*, the evidence that "[t]he garlic sold in the Azadpur Market is ready for retail consumption and is already fully processed when it arrives there, as in: (1) taking off the outside dirty layers so the garlic has a fresh white appearance; (2) cutting any long stems; and (3) packaged in a mesh bag" and the evidence that the garlic bulbs sold at the Market are "ready to be consumed in the state [in which they are] sold." *See* Researcher Declaration ¶ 9.[24]

The Condition of Garlic Bulbs Delivered to Dadi. Much as Commerce has stated that it does not know key specifics concerning the basic condition of the garlic bulbs sold at the Azadpur APMC Market, so too Commerce states that it does not know the basic condition of the garlic bulbs that purchased by and delivered to Dadi. *See* Remand Results at 46 (stating that Commerce "does not have reliable information describing in detail the physical characteristics of the surrogate product [*i.e.*, here, the garlic bulbs sold at the Azadpur Market]. Thus, [Commerce] cannot know exactly how the actual input [*i.e.*, the garlic bulbs purchased by Dadi] and the surrogate input [*i.e.*, the garlic bulbs sold at the Azadpur Market] differ."); *see also supra* n.12. The Remand Results nevertheless essentially equate the two, assert-

affidavit would be executed in the presence of the notary public such that the signature date and the date of notarization would be the same.

Further, as a practical matter, any such differences in dates is not necessarily proof of a lack of probity or reliability. There is a solid case to be made that, if anything, minor discrepancies are evidence of the authenticity and/or reliability of a document. *See*, *e.g.*, *Jinan Yipin Corp. v. United States*, 38 CIT at ____n.39, ____n.51, 971 F. Supp. 2d at 1323 n.39, 1330 n.51 (explaining that, "[i]f one were inclined to forge or manipulate price data, presumably one would produce data that were more clearly decisive in other words, one would generate a greater number of price quotes, and those price quotes would span the full duration of the period of review") ("*Jinan Yipin III*"); *Taian Ziyang Food Co. v. United States*, 37 CIT ____, ____ n.24, ____ n.36, 918 F. Supp. 1345, 1367 n.24, 1375 n.36 (2013) (same). As such, the difference in dates here could reasonably be read as (in effect) supporting the authenticity and reliability of the Declaration. *See Jinan Yipin II*, 35 CIT at ____ n.101, 800 F. Supp. 2d at 1310 n.101 (observing that, "[v]iewed through this lens, the problems that Commerce sees in the[] price quotes are actually indicia of authenticity").

Commerce's conclusion that the differences in dates are "not . . . a primary concern" for the agency is thus a sound one. *See* Remand Results at 4.

[24] Significantly, even if Commerce's disregard of the Researcher Declaration were to be sustained, it is doubtful that the agency's use of the Azadpur APMC Market prices could be sustained as a surrogate value for the garlic bulbs delivered to Dadi in the absence of any affirmative evidence establishing what the Azadpur Market prices fundamentally represent (*i.e.*, in the absence of evidence documenting the basic condition of the garlic bulbs sold at the Azadpur Market). *See supra* n.17 (analyzing absence of record evidence on the condition of the garlic bulbs sold at the Azadpur APMC Market and its implications).

ing that both have undergone post-harvest processing. *See* Remand Results at 47 (stating that Commerce finds that both the actual input [*i.e.*, the garlic bulbs delivered to Dadi] and the surrogate input for raw garlic [*i.e.*, the garlic bulbs sold at the Azadpur APMC Market] are processed beyond the 'farm gate' to some extent").[25] In particular,

[25] The parties spill much ink debating whether or not the garlic bulbs that Dadi purchased were at the "farm gate" level of trade. *See*, *e.g.*, Remand Results at 6–8, 11 n.31, 46; Pl.'s Brief at 2–8; Def.'s Brief at 10–13, 15; Def.-Ints.' Brief at 2–15; Pl.'s Reply Brief at 2–4. However, that issue is nothing more than a semantics sideshow. The term "farm gate" is shorthand, but, as the Remand Results and the parties' briefs amply illustrate, there is no well-settled, established definition of the term.

As Commerce correctly points out, the real issue presented is whether, as the Remand Results conclude, the condition of the garlic bulbs delivered to Dadi is essentially the same as that of the garlic bulbs sold at the Azadpur APMC Market. *See* Remand Results at 46 (explaining that "what is important is finding a reasonable match between the input the producer uses and the [surrogate values] placed on the record, not the definition of the term 'farm gate'"); *see also* Def.-Ints.' Brief at 5 (noting that "at bottom it is the physical condition of the input bulbs purchased by Dadi . . . that determines the appropriate surrogate value").

It is nonetheless worth noting that Commerce's pinched definition of the term "farm gate" apparently contemplates buyers driving directly into farmers' garlic fields and loading into the buyers' trucks garlic bulbs exactly as they are plucked from the ground leaves, stems, roots, clods of dirt and all. Thus, according to Commerce:

> Were the respondents to have purchased raw garlic inputs at farmgate prices, they would have purchased raw garlic fresh at the field during the harvest. That garlic that they purchased would not [have] been cleaned, sorted by size, bagged, transported or otherwise handled. Upon taking possession of the garlic, [the] respondents would have (1) sorted the garlic (by size, quality, etc.); (2) cleaned it of all stems, root plates, etc.; (3) transported it; and (4) stored it.

Remand Results at 6 (quoting Issues & Decision Memorandum for 16th Review). This definition of "farm gate" is so narrow that it seems highly unlikely as a practical matter that Commerce could ever make a finding that garlic bulbs had been sold at the "farm gate." *See*, *e.g.*, Pl.'s Brief at 3 (observing that Commerce "appears to suggest that in order for . . . purchases to be at farm gate prices, the garlic must be pulled from the ground unidentified as to type and size and handed to a purchaser 'as is'" a practice that "would . . . not allow either party to the transaction to have any basis for agreeing on a purchase price"); *id*. at 3–4 (arguing generally that, "around the world," all newly-harvested garlic bulbs are the subject of at least some very basic processes, such as an "initial cleaning," etc., such that Commerce's definition of "farm gate" to mean "produce immediately following harvest that has not been sorted, cleaned, or transported is not a reasonable characterization" of the operations of real-life farmers); Def.'s Brief at 12–13 (conceding that, if Xinboda's description of the real-life operations of garlic farmers is accurate, "Commerce would find very few garlic farmers to be selling their product at farmgate").

Indeed, according to the Remand Results, Commerce has never made a finding that garlic bulbs were sold at the "farm gate," in any administrative review. *See* Remand Results at 11 n.31 (stating that, "[i]n prior reviews, [Commerce] applied the facts before it in each review, and determined that, during those reviews, no record evidence demonstrated that respondents purchased raw garlic inputs at farmgate prices"). That statement is in error. It is true that Commerce has never found that *Dadi* purchased garlic bulbs at farm gate prices. However, as the Government and the Domestic Producers acknowledge, Commerce in fact did find, in the tenth administrative review, that the respondents there had purchased garlic bulbs at "farm gate" prices. *See* Def.'s Brief at 12; Def.-Ints.' Brief at 13; *Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1256–57 (quoting results of first remand in litigation concerning the 10th review, where Commerce explained that, in selecting a surrogate value for the garlic bulbs consumed by the respondents at issue there, the agency sought (and selected) "a price that . . . represents the 'intermediate input' at issue *i.e.*, raw garlic bulb

Commerce emphasizes that prior to delivery to Dadi for processing the garlic bulbs that Dadi purchased had been "sorted by grade/size, cleaned, bagged, [and] stored," sometimes in cold or controlled atmosphere storage. *See* Remand Results at 6–7 (quoting Issues & Decision Memorandum for 16th Review). *See id*.[26]

as it is harvested, *at the'farm gate*'") (emphasis added)). Yet there was no record evidence in that case to indicate that the garlic bulbs there at issue were left in the field following harvest, in the exact state in which the bulbs were pulled from the ground, until they were picked up by buyers leaves, stems, roots, clods of dirt and all in the fields where the garlic was grown.

[26] At one point in the Remand Results, Commerce states that the bags of garlic bulbs arriving at Dadi's processing facilities were "either immediately opened for processing or stored in one of Dadi's refrigerated or dry storage spaces" thus referring to the possibility of storage *at Dadi's processing facilities*. *See* Remand Results at 8. As noted above, the Remand Results also state that the garlic bulbs delivered to Dadi had been "stored *by farmer suppliers* in cold storage" prior to their delivery. *Id*. at 7–8 (emphasis added). Yet, elsewhere in the Remand Results, Commerce equivocates on that point. *See id*. at 46–47 (stating that "the farmers supplying . . . Dadi[] sort, bag, and *possibly store* the raw garlic bulbs they supply to Dadi") (emphasis added).

There are several salient points to be made. First, Xinboda does not dispute that some of the garlic bulbs that farmers delivered to Dadi had been held in cold storage prior to delivery. *See*, *e.g.*, Pl.'s Brief at 7 (stating that "it is normal . . . for a farmer to store (whether by cold storage or otherwise) his produce," for sale outside of harvest season); *id*. at 6 (stating that "it would not be unusual for the farmer[s] to store their produce throughout the year so that the produce can generate stead y income and attract a premium as fresh garlic becomes scarce at the end of the cycle"). However, to the extent that the Remand Results highlight the possibility that garlic bulbs may have been held in cold storage at Dadi's processing facilities, such storage has no bearing on the matter that is in dispute *i.e.*, the condition of the garlic bulbs *at the time they were delivered to Dadi*. The Remand Results' analysis thus reflects some measure of confusion on this issue.

More generally, the Remand Results include a lengthy excerpt on the subject of cold storage (and, more generally, the handling of garlic bulbs after harvest), which Commerce cut-and-pasted *verbatim* from the Issues & Decision Memorandum for the 16th Review. *See generally* Remand Results at 6–7 (quoting Issues & Decision Memorandum for 16th Review at 20–21); *see also* Def.-Ints.' Brief at 5, 6, 7–8, 9 (discussing cold storage); Pl.'s Brief at 6, 7 (same). Although it is not entirely clear, the gravamen of the excerpt quoted in the Remand Results seems to be that Commerce views cold storage by farmers as a form of "post-harvest processing," and, as such, as evidence that the garlic bulbs delivered to Dadi are comparable to the garlic bulbs sold at the Azadpur APMC Market (in the sense that, according to Commerce, both have been subject to some post-harvest processing). *See generally*, *e.g.*, Remand Results at 6–7, 46; *see also* Def.-Ints.' Brief at 7 (characterizing "cold or controlled atmosphere storage" as "a further, substantial post-harvest handling operation"); *id*. at 3 (arguing that the garlic bulbs delivered to Dadi had been "subjected to significant post-harvest processing"; *id*. at 6 (same); *id*. at 6–7 (same); *id*. at 14–15 (same).

There are a number of problems with Commerce's emphasis on the use of cold storage. First, although the administrative record in the sixteenth administrative review may have supported the quoted findings concerning cold storage, the subject of cold storage including any implications of its use has not been a focus in the record of this review. Nor has the subject been adequately briefed in this litigation. Thus, for example, the extended discussion of cold storage at pages six to seven of the Remand Results (lifted from the Issues & Decision Memorandum in the 16th Review) is not supported by any citations to the administrative record in the instant review. *See* Remand Results at 6–7. As another example, that discussion in the Remand Results includes multiple references to "Golden Bird" and relies on "Golden Bird's statements." *Id*. Golden Bird Trading Co., Ltd. participated in the sixteenth review. But Golden Bird made no shipments during the period of review at issue here. Commerce therefore rescinded the instant review as to the company.

See Final Determination, 76 Fed. Reg. at 37,323 (rescinding 15th administrative review as to various companies, including Golden Bird). Accordingly, by definition, there is no evidence or argument from Golden Bird in the record of this review. The excerpt quoted in the Remand Results similarly incorporates numerous other statements and findings of fact, including statements that Commerce attributes to Xinboda, which have not been tied to anything in the record here. Remand Results at 6–7.

In principle, there is nothing to prohibit Commerce from "importing" into this proceeding (quoting and relying on) its findings in the sixteenth review, particularly if that is the most efficient means of communicating the agency's determination. *See* Def.'s Brief at 19 n.2 (explaining, *inter alia*, that "Commerce cited and quoted [the Issues & Decision Memorandum for the 16th Review] because it found this to be a convenient means of articulating its reasoning in [the instant review]"). However, the analysis in the Remand Results states without reservation that "the information provided by Xinboda in [the sixteenth administrative review] . . . is the same information submitted in [the fifteenth review]." *See* Remand Results at 6 n.16; *see also* Def.'s Brief at 19 n.2 (asserting that, although "Commerce cites to and quotes from" the Issues & Decision Memorandum for the 16th Review, "the explanations and findings in the . . . Remand Results were based on and in accordance with the facts and record of [the administrative review at issue here]"); *id*. at 17–18 (arguing that the Remand Results' quotation of the Issues & Decision Memorandum for the 16th review "does not draw any 'facts' from the 16th administrative review onto the record of the [administrative review at issue here]").

Even assuming *arguendo* that it is true that as Commerce states the information that Xinboda submitted (and the arguments that Xinboda made) in the sixteenth review are, in fact, identical in every meaningful respect to those of Xinboda in this fifteenth review (which seems improbable), Commerce's statement stops short of saying that all other evidence and argument in the administrative record of the sixteenth review (such as that of the Domestic Producers) is essentially identical to that in this review. In other words, significantly, Commerce does not say that that (as to this issue) the administrative records in the two reviews are essentially identical. Nor could Commerce truthfully make such a statement. At the very least, as noted above, the record in the sixteenth review included the evidence and argument of Golden Bird, which is not included in the record of this review.

Further, the mere fact that Xinboda participated in the sixteenth review does not mean that Xinboda is in any way precluded from disputing findings and conclusions from that review, or that Xinboda is foreclosed from offering more or different evidence and arguments, in this review (and, as appropriate, in this litigation). As Commerce frequently reminds parties in international trade proceedings, and as the agency reiterated here, Commerce "reviews each record and applies the facts accordingly, for 'each administrative review is a separate segment of the proceedings with its own unique facts.'" Remand Results at 11 n.31 (quotation omitted). As a matter of fundamental fairness, Xinboda here is entitled to an opportunity to present its own evidence and to respond to all arguments and to other record evidence *for purposes of this review*, without regard to the evidence, arguments, findings, conclusions, and determinations in the sixteenth review. By the same token, Commerce cannot make findings, conclusions, and determinations in this matter that are not grounded in the record of this review, even if they are supported by the record in another review involving Xinboda. Lastly, to the extent that the parties wish to argue cold storage (or any other issue) in this litigation, they must cite to specific and substantial evidence on the record at issue here.

From what can be gleaned from the Remand Results and the parties' briefs, it seems a virtual certainty that at least some of the garlic bulbs delivered to Dadi, and some of the garlic bulbs sold at the Azadpur APMC Market, had been previously held in cold storage. Ultimately, however, the issue of cold storage is a proverbial "red herring." The fundamental issue at stake is whether the condition of the garlic bulbs purchased by Dadi and the condition of the garlic bulbs sold at the Azadpur Market are essentially the same, as Commerce contends they are. As explained herein, the bottom line is that whatever may be the case as to cold storage the existing record makes it clear that the garlic bulbs sold at the Azadpur Market were "processed" to a degree significantly beyond the garlic bulbs that were delivered to Dadi.

Contrary to Commerce's implication, however, Xinboda has never denied that farmers supplying garlic bulbs to Dadi "provide[d] rudimentary services such as cleaning, removing stems and root parts, sorting, and bagging for transport," and that, in some instances, bulbs were held in cold storage prior to delivery. Pl.'s Brief at 3, 6, 7–8.[27] But, more to the point, the record evidence on the condition of the garlic bulbs delivered to Dadi belies any suggestion that their condition and the condition of the garlic bulbs sold at the Azadpur APMC Market were essentially the same.

As detailed above, the Researcher Declaration the only record evidence on point states that the garlic bulbs at the Azadpur APMC Market have already had the "long stems" and "outside dirty layers" removed, leaving the bulbs with "a fresh white appearance." Researcher Declaration ¶ 9. However, the record evidence establishes that these same processes peeling away the outside layers of the garlic bulbs, cutting their roots and long stems, and so on are processes that Dadi's workers performed at Dadi's own processing facilities. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1349. In the Verification Report, Commerce staffers noted their own firsthand, eyewitness observations to that effect: "[Dadi's] production process includes peeling off outer skins, cutting root and stem, the utilization of mesh bags when required by order, buckling the bag, and then placing it in a cardboard box." *See* Verification of the Sales and Factors Responses of Shenzhen Xinboda Industrial Co., Ltd. in

[27] As an aside, the record evidence indicates that sorting garlic bulbs by size is not as time-consuming an operation as Commerce and the Domestic Producers seem to suggest. *See generally*, *e.g.*, Verification of the Sales and Factors Responses of Shenzhen Xinboda Industrial Co., Ltd. in the Administrative Review of Fresh Garlic from the People's Republic of China at 10 (explaining that those in the garlic bulb industry "can identify garlic size by sight") ("Verification Report") (AR Pub. Doc. No. 151).

Similarly, at one point in the Remand Results, Commerce states that the garlic bulbs sold to Dadi have not only been sorted by size by Dadi's farmer suppliers, but also have been "measured." *See* Remand Results at 7–8; *see also* Verification Report at 16 (stating that "[Dadi] officials explained that suppliers provide bulbs . . . based on Dadi's requirements, so the garlic bulbs received [by Dadi] . . . have already been measured and sorted by size"). Everywhere else, however, Commerce states only that the garlic bulbs delivered to Dadi were already "sorted by size." *See*, *e.g.*, Remand Results at 6 (quoting Issues & Decision Memorandum for 16th Review, stating that "all the raw garlic inputs purchased by the respondents . . . were sorted by grade/size, cleaned, bagged, stored, and then transported"); *id*. at 7 (same, stating that "local farms had to clean, sort and bag the harvested raw garlic"); *id*. (same, stating that "the farmer selling the garlic . . . [must] have gone through the raw harvested garlic, cleaned it up, sorted it based on size and type, placed it into largemesh bags, and, finally, delivered it to . . . Dadi"); *id*. at 8 (stating that, "[p]rior to delivery, . . farmers themselves sorted and packaged the garlic based on size and type"); *id*. (stating that the garlic delivered to Dai was "presorted"); *id*. (referring to "the pre-sorted and packaged garlic purchased by Dadi"); *id*. at 46 (stating that "the farmers supplying . . . Dadi[] sort, bag, and possibly store" the garlic bulbs before they are delivered to Dadi). It is thus somewhat unclear whether or not the garlic farmers supplying Dadi literally "measured" garlic bulbs in order to size them, and if so whether that is a fairly time-consuming operation.

the Administrative Review of Fresh Garlic from the People's Republic of China at 9 ("Verification Report") (AR Pub. Doc. No. 151).

Logically, the processing that was performed at Dadi's facilities was by definition over and above any operations that may have occurred before the garlic bulbs were delivered to Dadi. Moreover, as a matter of logic, because Dadi's workers peeled off the outer skins of the garlic bulbs and cut their roots and stems, the garlic bulbs that were delivered to Dadi could not possibly have been in the same condition as those sold at the Azadpur APMC Market. At the Azadpur Market, the "long stems" of the garlic bulbs already had been cut off and the "outside dirty layers" of the bulbs already had been removed, leaving the garlic bulbs with "a fresh white appearance." *Compare* Verification Report at 9 *with* Researcher Declaration ¶ 9.

The Consequences for Commerce's Analyses. If the garlic bulbs sold at the Azadpur APMC Market were at a more advanced level of trade (*i.e.*, had been subjected to more processing) than the garlic bulbs that were delivered to Dadi (as all existing record evidence indicates), the Azadpur Market prices cannot reasonably be used as a surrogate value for the garlic bulbs that were delivered to Dadi at least not without further adjustment.

As one example, Xinboda has explained that it was required to report to Commerce the labor hours and the electricity that Dadi workers consumed in tasks such as stripping off the outside layers of the garlic bulbs and cutting the roots and stems, and that Commerce then added the value of that labor and electricity together with a proportional figure for overhead (specifically, selling, general, and administrative expenses or "SG&A") to Commerce's calculated surrogate value for whole raw garlic bulbs, *i.e.*, the Azadpur Market prices. Because Commerce separately accounted for such expenses, and because the expense of such processes is already effectively "embedded" in the Azadpur Market prices, Commerce's calculations reflect impermissible double-counting. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1349.

This matter therefore must be remanded to Commerce for a second time, to allow the agency to once again reconsider its selection of a surrogate value for the "intermediate input" in question *i.e.*, the whole raw garlic bulbs that were purchased by and delivered to Dadi taking into account the analysis herein, as well as all arguments and all record evidence. In its reconsideration, Commerce shall make any adjustments to the surrogate value that Commerce selects which may be necessary in order to avoid the double-counting of expenses and to otherwise calculate Dadi's dumping margin as accurately as possible.

See also infra sections III.A.2 & III.A.3 (analyzing, respectively, Xinboda's related claim that the Azadpur Market prices reflect expenses associated with intermediaries that are not incurred by Dadi, and Xinboda's related claim that Commerce's use of Azadpur Market prices for grade S.A. garlic bulbs skewed the agency's surrogate value).[28]

2. *Expenses Associated With "Intermediaries"*

Apart from Xinboda's challenge to Commerce's determination that the condition of the garlic bulbs delivered to Dadi and the condition of those sold at the Azadpur APMC Market are essentially the same and Xinboda's "double-counting" claim (discussed above), Xinboda also contends that the Azadpur Market prices reflect substantial "intermediary" expenses that is, fees and downstream expenses, such as sums paid to "middlemen" and "intermediaries" including "commission agents, wholesalers, and retailers" which are expenses that Dadi did not incur and which impermissibly inflate the surrogate value that Commerce has calculated for the intermediate input at issue here (*i.e.*, the garlic bulbs that were delivered to Dadi). Pl.'s Brief at 6; *see generally Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1350–53 (addressing Xinboda's claims concerning sums paid to "middle men" and "intermediaries," including "commission agents, wholesalers and retailers to cover transportation, loading, unloading,

[28] At one point, the Remand Results take an "all or nothing" approach to the Azadpur APMC Market prices, asserting that if they are the best available information for use as a surrogate value for Dadi's whole raw garlic bulbs, Commerce is entitled to rely on those prices "as is" (or, more precisely, without any adjustments other than the two adjustments that Commerce has already made). *See* Remand Results at 11 (stating that Commerce has determined that the Azadpur Market prices are the best available data, and that, "[w]ith that decision, [the agency] is not required to adjust or modify the Azadpur data" any further). However, if Commerce continues to rely on the Azadpur Market prices on remand, Commerce must make such further adjustments to those prices as may be necessary.

For its part, as noted above, Xinboda argues that in light of the problems with the Azadpur Market prices Commerce should instead base the surrogate value for whole raw garlic bulbs on the prices that are reflected in Garlico's financial statements. *See generally* Pl.'s Brief at 14–16 (advocating for use of Garlico prices). *But see* Remand Results at 13–14 (highlighting asserted deficiencies in Garlico prices and concluding that Azadpur Market prices are best available information); Def.'s Brief at 8–10, 15 (arguing that Commerce properly rejected Garlico prices); Def.-Ints.' Brief at 22–24 (same). On remand, Commerce will go back to the drawing board to reconsider its selection of a surrogate value, re-examining the record evidence and re-evaluating the strengths and weaknesses of the data sources on the record (including both the Garlico prices and the Azadpur APMC Market prices, as well as any other data that Commerce may deem appropriate).

It is at least possible that, on remand, Commerce will select the Garlico prices as the basis for the surrogate value for whole raw garlic bulbs. At a minimum, Commerce's analysis of the relative merits of the two data sources will be affected. And it is conceivable that Xinboda may be satisfied with the surrogate value that Commerce calculates on remand. There is therefore no need to further consider at this time other aspects of Xinboda's claim that Commerce should base the surrogate value on the Garlico prices, including Xinboda's argument that the Garlico prices more accurately reflect Xinboda's level of trade.

storage, overhead, profits, etc.," which, according to Xinboda, are associated with sales at markets such as the Azadpur Market).[29]

The Remand Results make the point that Commerce has already deducted 7% from the Azadpur Market prices "in order to account for commissions," including "middleman type expenses" associated with "services typically rendered by a sales agent." Remand Results at 47; *see also id*. at 6 n.16.[30] However, Xinboda claims that the actual expenses attributable to middlemen and intermediaries dwarf Commerce's 7% adjustment. According to Xinboda, the Azadpur APMC Market prices include "a 60–80% mark-up, as reported by studies conducted by the government of India." *See* Pl.'s Brief at 14–15.[31]

The Issues and Decision Memorandum that accompanied Commerce's Final Determination inexplicably stated that Xinboda failed to "place[] information on the record" to prove its claims concerning intermediary expenses. Issues & Decision Memorandum at 15. Quite to the contrary, as *Shenzhen Xinboda I* observed, "Xinboda mustered significant documentation to substantiate its claims," which Commerce's Final Determination failed to consider. *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1350–51. *Shenzhen Xinboda I* catalogued some of the record evidence on which Xinboda relies. *See Shenzhen Xinboda I*, 38 CIT at ____ , 976 F. Supp. 2d at 1351–52.[32]

Commerce now concedes, as it must, that "the articles cited by Xinboda . . . [prove] the existence of intermediary expenses added to

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[29] *See also, e.g., Jinan Yipin II*, 35 CIT at ____, 800 F. Supp. 2d at 1270–71 (stating that "the apparent involvement of intermediaries" in sales at the Azadpur APMC Market both "substantiates the Chinese Producers' concerns that the prices included in the Azadpur APMC data may include costs, fees, and commissions that hike up the prices" and also "undermines Commerce's claims that the Azadpur APMC data . . . are representative of the value of the 'intermediate input' at issue").

[30] *See also Shenzhen Xinboda I*, 38 CIT at ____ n.23, 976 F. Supp. 2d at 1353 n.23 (quoting Preliminary Surrogate Value Memorandum at 4 (AR Pub. Doc. No. 133), which notes that Commerce "subtracted a 7% fee (6% commission fee plus 1% market fee) charged on transactions at the Azadpur APMC [Market]" from the Azadpur APMC Market prices).

[31] Xinboda attached to its brief several articles to support its case, including a June 2014 news article published in the *Times of India*, reporting that the Azadpur APMC Market was being closed for the sale of fruits and vegetables because "deregulation would help get rid of the middlemen because of whom prices of food items often rose by more than 100% from the time the produce left the field till it landed up in one's home." *See* Pl.'s Brief at 14 n.7 (quoting *Times of India* (June 19, 2014)) & Exh. 4. However, as the Domestic Producers correctly note, those documents are not part of the administrative record here and therefore must be disregarded. *See* Def.-Ints.' Brief at 26.

[32] For example, *Shenzhen Xinboda I* noted Xinboda's reliance on the 2009–2010 Annual Report of the Indian Ministry of Agriculture's Department of Agriculture & Cooperation ("AgriCoop"), "which advises that the country's market system has become increasingly 'restrictive and monopolistic' over time, such that 'produce is required to be channeled through regulated markets and licensed traders' (*i.e.*, the 'intermediaries' to which Xinboda refers), resulting in 'an enormous increase in the cost of marketing.'" *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1351 (quoting Xinboda Surrogate Value Submission at Exh. 35 (AR Pub. Doc. No. 133)).

the cost of raw garlic between farmgate and the Azadpur market." Remand Results at 10.[33] The Remand Results nevertheless take the position that there is no need for further adjustments to the Azadpur Market prices to account for intermediary expenses, advancing four reasons. *See id*. at 9–11. As summarized below, Commerce yet again fails to give Xinboda's claims concerning intermediary expenses the consideration that those claims merit.

The Remand Results first state, in essence, that it is unnecessary for Commerce to make any further deductions for intermediary expenses in calculating the surrogate value for Dadi's raw garlic bulbs because, according to Commerce, Dadi's garlic bulbs incorporated the services of (and thus the costs of) intermediaries. In the words of the Remand Results: "Xinboda's argument for subtracting alleged 'inter-

Shenzhen Xinboda I also took note of other record evidence to the same general effect, including a December 29, 2010 article published in *The Economic Times*, " authored by the Director of India's National Academy of Agricultural Research Management ('NAARM') stating that the supply chains for agricultural products such as onions, tomatoes, and garlic are 'inefficient, dominated by intermediaries.'" *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1351 (citing, *inter alia*, Xinboda Surrogate Value Submission at Exh. 34 (AR Pub. Doc. No. 133)). In addition, *Shenzhen Xinboda I* observed that "[t]he Director of NAARM further explained that '[s]tudies have shown that nearly 60–80% of the price consumers pay goes to commission agents, wholesalers and retailers to cover transportation, loading, unloading, storage, overheads, profits, etc.'" *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1351 (citing, *inter alia*, Xinboda Surrogate Value Submission at Exh. 34 (AR Pub. Doc. No. 133)).

Shenzhen Xinboda I observed that Xinboda cited to another similar article from *The Economic Times*, dated December 29, 2010 and authored by a senior agricultural economist from Credit Rating and Information Services of India ("Crisil"), which "'underscores [t]he difference between the farm gate and retail prices'" of onions and other similar vegetables in India and attributes that mark-up to "'exploit[ation] by intermediaries.'" *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1351 (citing, *inter alia*, Xinboda Surrogate Value Submission at Exh. 34 (AR Pub. Doc. No. 133)).

In addition, *Shenzhen Xinboda I* noted that Xinboda argues that "the involvement of intermediaries in sales at facilities such as the Azadpur APMC Market and the existence of associated additional fees and expenses are borne out by the Domestic Producers' own Market Research Report." *See generally Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1351–52 (citing Market Research Report). *Shenzhen Xinboda I* explained that Xinboda also points to the Clarification of the Market Research Report, which "states that an individual transporting produce out of a local APMC jurisdiction to a market such as the Azadpur APMC Market must pay a market fee to the local market at the local district's exit checkpoint." *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1352 (citing, *inter alia*, Clarification of Market Research Report at 6).

Shenzhen Xinboda I further indicated that Xinboda similarly cites the Garlico price data as corroboration of Xinboda's claims. *See generally Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1352 (citing Garlico pricing data). *Shenzhen Xinboda I* explained: "According to Xinboda, '[d]educting the average 70% markup reported by [India's National Academy of Agricultural Research Management] from the Grade A prices of garlic sold on the Azadpur [APMC] market during the [period of review] amounts to a farm gate price of 7.055 Rs/kg.' . . . . Xinboda argues that this figure 'comes very close to the average prices for raw garlic that Garlico paid' during the period of review," and thus constitutes further proof that the Azadpur Market prices reflect costs above and beyond those that Dadi incurred. *Id*., 38 CIT at ____, 976 F. Supp. 2d at 1352.

[33] *But see* Remand Results at 9 (referring to "alleged 'intermediary expenses'")

mediary expenses' from the Azadpur APMC prices is based entirely on the assumption that its garlic is purchased at . . . prices[] which are free from any intermediary price mark-ups." Remand Results at 9; *see also* Def.'s Brief at 13–14. Commerce reasons that, because the garlic bulbs delivered to Dadi had already been sorted by size, bagged, and, in some instances, stored, the price that Dadi paid "may include such intermediary or 'downstream expenses.'" *Id*. (emphasis added).[34]

Even in the excerpt from the Remand Results that is quoted above, Commerce does not state definitively that the prices that Dadi paid for garlic bulbs reflected expenses associated with intermediaries. Instead, Commerce states only that the prices paid by Dadi "may" have included such expenses. *See* Remand Results at 9. More importantly, Commerce's position here is premised on the Remand Results' conclusion that the condition of the garlic bulbs delivered to Dadi and the condition of the garlic bulbs sold at the Azadpur APMC Market are basically the same. That conclusion has now been debunked, at least for the present and on the existing record. *See generally supra* section III.A.1 (at "The Condition of Garlic Bulbs at the Azadpur APMC Market" and "The Condition of Garlic Bulbs Purchased by Dadi").[35]

There is therefore no evidentiary basis for Commerce's attempt to dismiss Xinboda's claims concerning intermediary expenses by broadly equating the condition of the garlic bulbs delivered to Dadi and the condition of those sold at the Azadpur Market. The intermediary expenses that are the subject of Xinboda's claim are fees, commissions, and other costs incurred for processing and handling of the garlic bulbs sold at the Azadpur APMC Market above and beyond the very basic processing and handling to which the garlic bulbs delivered to Dadi had been subject in other words, the fees, commissions, and other expenses that are documented in the evidence that Commerce now acknowledges Xinboda has placed on the record.

The Remand Results also seek to dismiss Xinboda's claims concerning intermediary expenses by brushing aside the evidence that Xin-

[34] Apparently Commerce is here referring to any costs associated with operations such as the sorting, bagging, and storage of garlic bulbs prior to delivery to Dadi as "intermediary expenses."

[35] In addition, there is a fundamental flaw in Commerce's reasoning. In essence, even assuming that the prices that Dadi paid included "intermediary expenses" (as Commerce is defining the term) and that the Azadpur Market prices also included such "intermediary expenses," one nevertheless could not dismiss the issue of intermediary expenses as a "wash," as Commerce does in the Remand Results. *See* Remand Results at 9. Commerce's reasoning fails to consider the magnitude of the intermediary expenses. In other words, intermediary expenses could not be considered a "wash" if, for example, the prices that Dadi paid for whole raw garlic bulbs included a modest sum for intermediary expenses, while the prices for garlic bulbs sold at the Azadpur Market included very significant sums for such expenses.

boda has mustered. *See* Remand Results at 10. But this second point is no more effective than the first.

Rather than carefully reviewing and evaluating each of the numerous articles and other pieces of evidence that Xinboda cites in support of its claims, the Remand Results attempt to sweep it all away by cherry-picking several of the articles for comment, giving those articles treatment that is superficial at best, and turning a blind eye to everything else. However, Commerce is not permitted to reach its determinations by selectively citing some evidence while ignoring all the rest.

For example, the Remand Results state: "[W]hile the articles cited by Xinboda [establish] the existence of intermediary expenses added to the cost of raw garlic between farmgate and the Azadpur market, they also acknowledge other sources for such costs, such as 'changing dietary habits due to rising incomes.'" *See* Remand Results at 10; *see also* Def.'s Brief at 14. Although the Remand Results refer to "articles" and "they" (both plural), Commerce cites and quotes only one authority as support for its statement an article by a senior agricultural economist from Credit Rating and Information Services of India ("Crisil") which was published in *The Economic Times* (and is discussed in note 32 above). Further, although Commerce's meaning is not entirely clear, it seems likely that the reference in Commerce's sentence to "other sources for such costs" was intended to be "other sources for [such?] price increases."

More importantly, the Remand Results do not accurately depict the content of the Crisil article. The focus of the article is a "demand-supply" mismatch in, among other things, fruits and vegetables. The article notes increased demand as a result of factors including "changing dietary habits due to rising incomes," and indicates that production has not yet caught up. However, the article underscores the role of intermediaries, stating, for example, that "[t]he difference between the farm gate and retail prices of onion, as also of other vegetables is an indication that the situation is being *exploited by intermediaries*." (Emphasis added.) The article further states that "[e]ven a minor gap between demand and supply is being *exploited by intermediaries* to aggravate the [demand-supply mismatch] situation many-fold." (Emphasis added.) The article closes by emphasizing that the short-term solution to the demand-supply mismatch "has to be on removing supplyside bottlenecks," with the article singling out "*increased intermediation costs*" as a key problem to be addressed. (Emphasis added.)

Whatever point the Remand Results were trying to make, whether as to prices or costs, the Crisil article cannot fairly be read as equat-

ing the effects of "changing dietary habits" with those of intermediary expenses, as the Remand Results suggest. The Remand Results plainly seek to downplay the article's emphasis on the high costs attributable to intermediaries. As illustrated below, this is a pattern, not an isolated instance.[36]

The Remand Results further state that "APMC reforms have benefitted free movement of agricultural products." *See* Remand Results at 10. Although no authority is cited for this broad assertion, the Remand Results appear to be referring to another article published in *The Economic Times*, which was authored by the Director of India's National Academy of Agricultural Research Management ("NAARM") (and is also discussed in note 32 above).

According to the Remand Results, the Director of NAARM "recognized the potential positive effects of APMC Act implementation and the generally increasing efficacy of farm-to-market supply chains." Remand Results at 10. As support for that proposition, the Remand Results quote an excerpt from the Director's article: "[T]he country is witnessing a revolution of innovative institutions that are effectively linking producers with markets. Such arrangements not only improve market efficiency but also augment production of food to meet changing demands." *Id*.; *see also* Def.'s Brief at 14.

Again, the Remand Results not only lift an excerpt out of context, but also obfuscate the fundamental thrust of the article. The title of the article itself makes this obvious "Why are margins high in food items? Inefficient supply chain is a key reason." Much like the Crisil article (discussed above), this article too analyzes the reasons behind increased prices for onions, tomatoes, and garlic. As Xinboda has previously noted, the article highlights problems in agricultural supply chains in India, which the article describes as "inefficient" and "dominated by intermediaries." The article further states that "[s]tudies have shown that nearly 60%-80% of [the] price consumers pay goes to commission agents, wholesalers and retailers to cover transportation, loading, unloading, storage, overheads, profits, etc." The Remand Results conspicuously omit any mention of these points.

In referring to "a revolution of innovative institutions that are effectively linking producers with markets," the article is merely making the point that the trend is in the right direction and that this "revolution" may remedy some existing problems in the future. Even the Remand Results correctly note that, at the time the article was

[36] There is also a logical fallacy inherent in Commerce's rationale. Contrary to Commerce's implication, the presence of "other sources" (presumably other contributing factors) that may be at play would not negate the existence and effect of intermediary expenses. It would mean only that Commerce should take into account the evidence of any such "other sources" (or other factors) in determining the amount of any adjustment for intermediary expenses.

published, any "positive effects of APMC Act implementation" were still only "potential." The article thus indicates that "[e]ffective and speedy implementation of the model Agricultural Produce and Marketing Committee Act would [be]" not "will be," and certainly not "was" a step in the right direction.

Not only does this article not undermine Xinboda's case on intermediary expenses; to the contrary, the article substantiates the fact of such expenses and even goes so far as to quantify their effect on produce prices. It simply is not possible to read the article as Commerce attempts to do. The article is clear: Notwithstanding the then-not-yet-adopted APMC Act and the referenced "revolution of innovative institutions . . . effectively linking producers with markets," "nearly 60%-80% of [the] price consumers pay" was (at the time of publication) attributable to intermediary expenses. Again, the Remand Results seek to downplay the article's emphasis on the high costs attributable to intermediaries. If anything, the Remand Results' treatment of this article is even more egregious than the Remand Results' treatment of the Crisil article, discussed above.

As a third point, the Remand Results state that "Xinboda's arguments fail to establish that the sales prices at the APMC markets are distorted. In fact, a report on the APMC market system conducted and issued by the Government of India merely states that Indian farmers *may* earn less for their produce." Remand Results at 10 (emphasis in the original). However, the authority cited in the Remand Results does not stand for this proposition. The Remand Results cite Exhibit 2 to Xinboda's Surrogate Value Submission, which is captioned "DAMB, Azadpur Market Garlic Prices & Quantity, Seasonal Graphs." It consists of two pages (specifically, two graphs) and is not "a report on the APMC market system conducted and issued by the Government of India," despite what the Remand Results say. Moreover, Xinboda has not relied on Exhibit 2 to its Surrogate Value Submission as support for its intermediary expenses claim.

It appears that the Remand Results' assertion that the referenced "report on the APMC market system . . . merely states that Indian farmers *may* earn less for their produce" has been lifted by Commerce virtually *verbatim* from the agency's Issues & Decision Memorandum in the 16th Review (*i.e.*, the review following the review at issue here), although the Remand Results do not so indicate. *See* Issues & Decision Memorandum for 16th Review at 23 (asserting that "the report does not, in any way, state that the sales prices at the APMC markets, including Azadpur, are distorted. . . . [I]t only states that Indian farmers may earn less for their produce.").

As part of the third point, the Remand Results again quote the Issues & Decision Memorandum for the 16th Review (this time accurately attributing the quote): "[T]he Department, when identifying the [surrogate value] at issue, is not focused on the price the farmer receives but is instead focused on the price a processor would pay. The amount of the Azadpur sales price apportioned to Indian farmers is not material to this analysis." Remand Results at 10 (quoting Issues & Decision Memorandum for the 16th Review at 23).

Apart from the mis-citation, the Remand Results' third point is a bit of a *non sequitur* here, where (perhaps in contrast to the subsequent review) the parties' arguments have not been framed in terms of the prices that are paid to farmers. The effect of the Remand Results' third point is thus to muddle the issue of intermediary expenses that is presented here.

Still, it is worth noting that the two excerpts from the Issues & Decision Memorandum in the 16th Review seem to be Commerce's response to the 2009–2010 Annual Report of the Indian Ministry of Agriculture's Department of Agriculture & Cooperation ("AgriCoop"), which is (on this record) Exhibit 35 to Xinboda's Surrogate Value Submission not Exhibit 2 (and which is listed in note 32 above). The AgriCoop publication which the Remand Results tout as "a report on the APMC market system conducted and issued by the Government of India" states, *inter alia*, that the APMC market system in India (of which the Azadpur APMC Market is a part) has become increasingly "restrictive and monopolistic" over time, and that "produce is required to be channelled through regulated markets and licensed traders" (the intermediaries to which Xinboda refers), resulting in "an enormous increase in the cost of marketing." *See* Xinboda Surrogate Value Submission at Exh. 35, p.58; *see also* Issues & Decision Memorandum in 16th Review at 22–23 (summarizing relevant points from the AgriCoop report).

As with the Crisil article and the article by the Director of NAARM, the Remand Results fail to accurately reflect the relevant parts of the AgriCoop report. For example, the Remand Results omit any reference to the "restrictive and monopolistic" structure of the APMC market system. Nor do the Remand Results acknowledge the AgriCoop report's observations concerning the role of intermediaries and their effect on prices. *See* Remand Results at 10. Contrary to the representations in the Remand Results, the AgriCoop report cannot be read as anything other than support for Xinboda's claim that intermediary expenses are embedded in the Azadpur Market prices. The Remand Results' conclusion that "Xinboda's arguments fail to establish that the sales prices at the AMPC markets are distorted"

(*id*.) is not supported by the evidence that the Remand Results discuss.

Even assuming that the excerpts from the publications referenced in the Remand Results were not taken out of context and read in isolation without regard to the remainder of the text (as they are), the Remand Results do not address all of the evidence that Xinboda has placed on the record as proof of its claim concerning intermediary expenses. *See*, *e.g.*, Xinboda Surrogate Value Submission at Exh. 52 ("Global Market Articles") (articles referring to, *inter alia*, "the long chain of middlemen and commission agents," "intermediary exploitation," the "exploitative element in the trade," the desire to "eliminat[e] middlemen, transportation costs and delayed delivery," and "the stranglehold of markets"); *see also supra* n. 33.

Commerce's conclusions concerning intermediary expenses can be sustained only if they are based on thorough, independent, objective, and reasoned analyses of all of the evidence on which Xinboda relies. Moreover, any evaluation of the substantiality of the evidence "must take into account whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica*, 44 F.3d at 985 (quoting *Universal Camera Corp.*, 340 U.S. at 487–88). The Remand Results' fourth and final point addressed to Xinboda's claims concerning intermediary expenses is a makeweight. Falling back on one of Commerce's oft-repeated shibboleths, relying on *Longkou* (and reiterating the position that the agency took in the Final Determination),[37] the Remand Results state that Commerce is not required to "tailor its choice of [surrogate values] to a respondent's exact experiences." *See* Remand Results at 10 (citing *Longkou Haimeng Machinery Co. v. United States*, 33 CIT 603, 613, 617 F. Supp. 2d 1363, 1372–73 (2009)).

As the Remand Results note, however, the overarching principle which *Longkou* repeats is that "a surrogate value must be as representative of the production process in the [non-market economy] country as is practicable, if it is to achieve the statutory objective of assigning dumping margins as accurately as possible." *See* Remand Results at 10 (quoting *Longkou*, 33 CIT at 613, 617 F. Supp. 2d at 1372); *see also*, *e.g.*, *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1379 (Fed. Cir. 2013) (stating that "[a]n overriding purpose of Commerce's administration of antidumping laws is

[37] *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1352 (quoting Issues & Decision Memorandum at 14 and stating that the Final Determination "dismissively brush[es] off Xinboda's concerns about additional fees and expenses embedded in the Azadpur APMC prices with the general proposition that Commerce "is not required to duplicate the exact experience of an exporter when calculating surrogate values").

to calculate dumping margins as accurately as possible"); *Zhaoqing Tifo New Fibre Co. v. United States*, 37 CIT ____, ____ n.6, 60 F. Supp. 3d 1328, 1333 n.6 (2013) (collecting cases). That is precisely the point of Xinboda's claims concerning intermediary expenses. Xinboda seeks to establish what adjustments (if any) must be made to the Azadpur Market prices (or whatever other surrogate value Commerce may choose) in order to approximate Xinboda's experience *as closely as practicable*.[38]

As outlined above, the Remand Results fail to give adequate consideration to the evidence that Xinboda has proffered as proof of intermediary expenses embedded in the Azadpur Market prices which Xinboda asserts Dadi did not incur. Commerce's use of the Azadpur Market prices as a surrogate value for the intermediate input in question *i.e.*, the whole raw garlic bulbs delivered to Dadi cannot be sustained (at least not without appropriate adjustments) if those prices incorporate intermediary expenses (as Commerce now acknowledges they do) to the extent that such expenses were not incurred by Dadi.

Accordingly, this matter must be remanded for a second time on this point as well. On remand, Commerce shall rigorously review the proof of intermediary expenses that Xinboda has proffered and shall give full, fair, and balanced consideration to all relevant arguments and record evidence. Commerce shall make any necessary adjustments to the Azadpur Market prices (or whatever other surrogate

[38] The Remand Results reiterate Commerce's conclusion in the Final Determination that "the Azadpur data most broadly reflect the costs of raw garlic in India and are the best option for use in calculating [a surrogate value] meant to broadly reflect what Xinboda's costs would be if it were operating in a market economy (ME) country." Remand Results at 11. The Remand Results continue: "With that decision, [Commerce] is not required to adjust or modify the Azadpur data, or any data for that matter, to precisely replicate Xinboda's circumstances." *Id*. True enough. As discussed above, there is no requirement that Commerce "*precisely* replicate" the experience of Xinboda or any other respondent (which would, in any event, be an impossible task). It is nevertheless also true that whatever surrogate value Commerce selects Commerce must make any necessary adjustments to that value, based on the record evidence, in order to calculate Xinboda's antidumping margin "as accurately as possible." *See*, *e.g.*, *Yangzhou Bestpak Gifts & Crafts*, 716 F.3d at 1379; *see also supra* n.28 (discussing same statements from Remand Results at 11).

Similarly, Commerce elsewhere asserts that any further adjustments beyond those that the agency has already made "would be guess work." *See* Remand Results at 47. As discussed above, however, there is a significant body of evidence already on the record, much of which Commerce apparently has not closely analyzed and all of which is largely uncontroverted. *Cf.* Pl.'s Reply Brief at 2 (stating that neither Commerce nor the Domestic Producer have adduced "one iota of evidence . . . that [Xinboda/Dadi] used the services of middlemen in its purchases of raw garlic"). To the extent that Commerce is making the point that it may be challenging to calculate an adjustment for intermediary expenses, that does not relieve Commerce of its obligation to do so based on the entirety of the record. If the evidence demonstrates that intermediary expenses that Dadi does not incur are reflected in the Azadpur Market prices, Commerce must make an appropriate adjustment or select a different data source as the basis for calculating the surrogate value for the garlic bulbs delivered to Dadi.

value Commerce may choose) so as to exclude all intermediary expenses that do not reflect the experience of Xinboda (including that of Dadi) and thus to calculate Xinboda's dumping margin as accurately as possible.

3. *Use of Azadpur APMC Market Prices for Grade "S.A." Garlic*

As explained above, to value the garlic bulbs delivered to Dadi that had a diameter of 55 mm or more, Commerce used Azadpur APMC Market prices for grade "S.A." garlic bulbs for the period February 2007 through January 2008 (*i.e.*, prices from outside the period of review), which Commerce then indexed to the dates of the period of review. Similarly, to value the garlic bulbs delivered to Dadi that had a diameter of between 50 mm and 55 mm, Commerce used a combination of the non-contemporaneous but indexed Azadpur Market prices for grade "S.A." garlic bulbs (described above) and contemporaneous Azadpur Market prices for grade "A" garlic bulbs (*i.e.*, prices for grade "A" garlic bulbs from within the period of review). *See generally Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1343.[39]

There is no dispute that the Azadpur Market prices for S.A.-grade garlic bulbs that Commerce used are not contemporaneous with the period of review; and the fact that those prices are not contemporaneous (and thus were indexed to the period of review) is not challenged. There also is no dispute as to the fact that the Azadpur APMC's Market Information Bulletin has not published prices for S.A.-grade garlic bulbs since early February 2008, which is why Commerce used indexed prices for S.A.-grade garlic bulbs from outside the period of review.

[39] In concluding discussion of Xinboda's challenge to Commerce's use of prices for grade S.A. garlic bulbs in calculating the surrogate value for whole raw garlic bulbs, the Remand Results state that Commerce "continue[s] to find [that the agency] correctly averaged grades Super-A and A values for raw garlic ranging from 40 mm to 55 mm." Remand Results at 14. There are two problems with that statement. The first problem, a relatively minor point, is that Dadi did not use any 40 mm garlic bulbs in its production of garlic products for Xinboda. The garlic bulbs that Dadi used in producing garlic products for Xinboda ranged in diameter from 50 mm to 65 mm. The more significant point is that, contrary to the statement from the Remand Results quoted above, Commerce's use of prices for grade S.A. garlic bulbs is not confined to averaging those prices with prices for grade A bulbs to calculate a surrogate value for the garlic bulbs delivered to Dadi that had a diameter of 50 mm to 55 mm. To the contrary, Commerce also uses prices for S.A. grade garlic alone to value the garlic bulbs delivered to Dadi that had a diameter of 55 mm to 65 mm. *See* Final Surrogate Value Memorandum at 1.

What is in dispute is whether, as Xinboda maintains, the Azadpur Market prices for grade A garlic bulbs for the period of review *i.e.*, the contemporaneous prices include not only garlic bulbs with a diameter of between 40 mm and 55 mm, but also garlic bulbs with a diameter of 55 mm or more. In other words, what is in dispute is whether garlic bulbs that once would have been designated as grade S.A. were, as Xinboda puts it, in effect "subsumed" into grade A garlic bulbs as of February 2008, before the period of review. Thus, the issue here is whether Commerce's use of non-contemporaneous but indexed Azadpur Market prices for S.A.-grade garlic bulbs not only was unnecessary, but, in fact, significantly distorted Commerce's calculation of the surrogate value for whole raw garlic bulbs. *See generally* Pl.'s Brief at 8–14; Pl.'s Reply Brief at 4–6.

Shenzhen Xinboda I noted that the Researcher Declaration is the only record evidence that is directly on point and that the Declaration supports Xinboda's claim. Specifically, the Researcher Declaration attests that garlic bulbs with diameters of 55 mm to 65 mm in fact were being sold as grade A bulbs after the Azadpur APMC's Market Bulletin ceased publication of prices for grade S.A. garlic bulbs. *See* Researcher Declaration ¶¶ 6–7. Summarizing the state of the record evidence on this issue (which is the same now as it was then), *Shenzhen Xinboda I* stated:

> In short, the existing evidence of record supports only one conclusion that grade "S.A." garlic was subsumed into grade "A" garlic as of February 2008. As such, Commerce's use of the non-contemporaneous prices for "S.A."-grade garlic would have been both unnecessary and distortive. Specifically, if (as all record evidence indicates) the data for grade "A" garlic that were contemporaneous with the period of review included garlic with bulb diameters of up to 65 mm, there was no need for Commerce to use indexed non-contemporaneous data for grade "S.A." garlic to value larger-bulbed garlic; the value of such larger-bulbed garlic would be already accounted for in the contemporaneous data for grade "A" garlic.
>
> But, more importantly, if (as all record evidence indicates) the contemporaneous data for grade "A" garlic include garlic with bulb diameters of up to 65 mm, then it stands to reason that the Final Determination must be distorted. For example, by valuing Dadi's garlic with a bulb diameter of 50 mm to 55 mm using a combination of the indexed, non-contemporaneous data for "S.A."-grade garlic together with the contemporaneous data for "A"-grade garlic (which, it now appears, already reflected values

> for garlic with a bulb diameter of up to 65 mm), Commerce presumably skewed the surrogate value toward larger-bulb (typically higher-value) garlic.

Shenzhen Xinboda I, 38 CIT at ____, 976 F. Supp. 2d at 1355–56.[40]

The Remand Results dismiss the Researcher Declaration as "unreliable" and dispute Xinboda's claim that garlic bulbs with a diameter of up to 65 mm were being sold as grade A bulbs during the period of review. *See* Remand Results at 12–14, 44–45; *see also* Def.'s Brief at 14–20; Def.-Ints.' Brief at 15–19. In an effort to account for the absence of published prices for grade S.A. garlic bulbs for the period of review, the Remand Results again borrow from Commerce's Issues & Decision Memorandum in the 16th Review (*i.e.*, the administrative review after the review at issue here). There, Commerce adopted the Domestic Producers' theory that, at the time of the period of review, large-bulb garlic was "in high demand" and was being "directly exported [from India] instead of moving through domestic wholesale [markets]," such as the Azadpur Market. *See* Remand Results at 13 (quoting Issues & Decision Memorandum in 16th Review) (bracketing in the Remand Results); *see also* Def.'s Brief at 19.

As detailed above, Commerce's grounds for dismissing the Researcher Declaration are not well taken. Moreover, as to the Domestic Producers' explanation for the absence of Azadpur Market prices for S.A.-grade garlic during the period of review, the Remand Results candidly concede that "there is no evidence on the record of this review [or, for that matter, the record of the sixteenth review] to prove the domestic industry's theory." Remand Results at 13.[41]

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[40] Although the Researcher Declaration is the only evidence that speaks directly to whether garlic bulbs with a diameter of up to 65 mm were being sold as grade A bulbs after February 2008, Xinboda argues that there is other corroborating evidence on the record. *See* Pl.'s Brief at 11–13; Pl.'s Reply Brief at 4–6; *see generally Shenzhen Xinboda I*, 38 CIT at ____ n.26, 976 F. Supp. 2d at 1354 n.26 (noting some of the evidence cited by Xinboda). *But see* Remand Results at 12–13 (addressing Xinboda's reliance on Alibaba advertisements as corroboration); Def.'s Brief at 16–19 (responding to Xinboda's assertions concerning corroborating evidence); Def.-Ints.' Brief at 18–19 (similar); Issues & Decision Memorandum at 11, 13 (similar).

[41] As such, it is not at all clear that the use of the non-contemporaneous, indexed prices for grade S.A. garlic bulbs could be sustained even if the Researcher Declaration were to be discarded. There is no affirmative record evidence establishing the correctness of the use of such prices (*e.g.*, no evidence of the correctness of the Domestic Producers' theory). The fact of the absence of published prices for S.A.-grade garlic bulbs during the period of review alone does not suffice. *Cf. supra* n.24 (questioning whether use of Azadpur Market prices as surrogate value for whole raw garlic bulbs could be sustained, even if the Researcher Declaration were to be disregarded, absent affirmative evidence establishing what the Azadpur Market prices fundamentally represent (*i.e.*, in the absence of evidence documenting the basic condition of the garlic bulbs sold at the Azadpur Market and a demonstration of comparability to the condition of the whole raw garlic bulbs delivered to Dadi)).

Commerce's determinations must be based on actual evidence. Theory will not suffice. The Court of Appeals has underscored this principle, explaining that "[i]t is well established that speculation does not constitute 'substantial evidence.'" *Novosteel SA v. United States*, 284 F.3d 1261, 1276 (Fed. Cir. 2002). The Court of Appeals continued: "As the Supreme Court noted in *Bowen v. American Hospital Ass'n*, agency deference has not come so far that agency action is upheld whenever it is possible to conceive a basis for administrative action." *Id.*; *see also*, *e.g.*, *Yangzhou Bestpak Gifts & Crafts*, 716 F.3d at 1378 (noting that Commerce determinations cannot be based on "mere conjecture or supposition").

The sole record evidence that is on point substantiates Xinboda's claim that garlic bulbs with a diameter of 55 mm to 65 mm garlic bulbs that once would have been classified as grade S.A. were classified and sold as grade A bulbs during the period of review. Accordingly, if Commerce, on the existing record, continues on remand to rely on the Azadpur Market prices in calculating the surrogate value for whole raw garlic bulbs, Commerce shall base its calculations exclusively on the contemporaneous prices for bulbs classified as grade A.

B. *Selection of Surrogate Financial Statements*

Xinboda contends that Commerce has erred in using the financial statements of Tata Tea to derive the surrogate financial ratios that the agency used in calculating Xinboda's dumping margin. Xinboda has placed on the record certain evidence that, according to Xinboda, gives "reason to believe or suspect" that Tata Tea may have received countervailable subsidies. Based on that evidence, Xinboda maintains that Tata Tea's financial statements must be disregarded, in favor of the financial statements of Garlico.[42] Xinboda argues that the standard that Commerce has applied in evaluating Xinboda's evidence and Tata Tea's financial statements is too stringent and is not consistent with Congress' intent. *See generally* Xinboda Surrogate Value Submission at Exh. 44 (Tata Global Beverages Annual Report and Financial Statements for 2009–2010) (AR Pub. Doc. No. 133); Pl.'s Brief at 20–29; Pl.'s Reply Brief at 6–9; *see also Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1367–76.

As *Shenzhen Xinboda I* explained, Congress has instructed that, in using the factors of production methodology (the methodology used in this administrative review), Commerce is to "avoid using any prices which it has reason to believe or suspect may be dumped or subsi-

[42] Xinboda argues, in the alternative, that Commerce should use an average of the financial statements of both Tata Tea and Garlico. *See*, *e.g.*, Pl.'s Brief at 34.

dized prices." In doing so, Congress emphasized that Commerce is not expected "to conduct a formal investigation to ensure that such prices are not dumped or subsidized," but, instead, is to "base its decision [as to whether there is 'reason to believe or suspect'] on information generally available to it at that time." Omnibus Trade and Competitiveness Act of 1988, Conference Report to Accompany H.R. 3, H.R. Rep. No. 100–576 at 590–91 (1998) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623–24; *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1373–74. On its face, Congress' language includes two related but distinct expressions of attenuation "reason to believe or *suspect*" (not merely "reason to *believe*") and "*may be* dumped or subsidized prices" (not "*are* dumped or subsidized prices").

In its Final Determination, Commerce rejected Xinboda's assertions that Tata Tea's financial statements included evidence of a potential subsidies: "Although Xinboda has placed 'loan agreements' which it contends indicate that Tata Tea has received financial subsidies [Commerce] has found countervailable, . . . we did not find evidence of these loans. We note that it is [Commerce's] practice to rely on information in financial statements on an 'as is' basis when calculating surrogate financial ratios." Issues & Decision Memorandum at 20.

Shenzhen Xinboda I remanded this issue with instructions for Commerce to reconsider and explain in detail the agency's practice in evaluating surrogate financial statements for possible use in deriving surrogate financial ratios, focusing particularly on the agency's interpretation and application of the "reason to believe or suspect" standard (including its consistency with Congress' intent) and on the nature of the evidence that the agency considers in applying that standard. Commerce also was directed to review anew the evidence of alleged subsidies placed on the record by Xinboda, if appropriate. In addition, Commerce was directed to clearly explain the rationale for whatever determination it reached on remand. *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1375–76.

In the Remand Results, Commerce summarizes its practice in the application of the "reason to believe or suspect" standard and reviews the evidence that Xinboda has proffered, concluding once again that in the words of the Remand Results "there is no reason to believe or *suspect* that Tata Tea *may have received* countervailable subsidies." Remand Results at 21 (emphases added); *see generally id.* at 14–21, 48–52 (addressing Xinboda's claim that there is "reason to believe or suspect" that Tata Tea may have received subsidies, reviewing Xinboda's evidence of alleged subsidies, and summarizing Commerce

policy and practice on application of the standard); *see also* Def.'s Brief at 20–29 (arguing that Commerce correctly applied "reason to believe or suspect" standard and properly concluded that evidence of alleged subsidies proffered by Xinboda was insufficient); Def.-Ints.' Brief at 26–29 (same).[43] Commerce's conclusion in the Remand Results quoted above is an accurate recitation (or at least a near accurate recitation) of the relevant standard, as set forth in the legislative history.[44] However, it is not clear that the quoted conclusion accurately reflects either the standard that Commerce has actually applied in this case or the standard that Commerce generally applies in other similar cases.[45]

As outlined below, the Remand Results do not adequately explain Commerce's practice in the interpretation and application of the "rea-

[43] Specifically, according to one statement in the Remand Results, Commerce has "concluded that [the evidence submitted by Xinboda] indicated that Tata Tea was *eligible* to eventually receive [certain] subsidies but did not indicate that Tata Tea *received* subsidies during the [period of review]." *See* Remand Results at 49–50 (emphasis added). This particular statement indicates that Commerce recognizes that the documentation supplied by Xinboda in fact relates to Tata Tea's receipt of subsidies, but that under the agency's interpretation and application of the "reason to believe or suspect" standard Commerce declines to exclude Tata Tea's financial statements because Commerce views the documentation as "mere" evidence of Tata Tea's "eligibility" for subsidies and/or because Commerce believes that Tata Tea did not actually "receive" subsidies. As explained here, however, Commerce's *belief* as to whether Tata Tea actually "received" subsidies may not be reconcilable with Congress' "*reason to* believe or *suspect*" standard, which is intended to capture cases whether there is mere room to "suspect" that a company "may be" the beneficiary of subsidies. Similarly, as also explained here, Commerce's dismissal of evidence of a company's "eligibility" for subsidies is arguably at odds with the position that Commerce has taken elsewhere *i.e.*, the position that a company that is eligible for a subsidy will take advantage of that subsidy and "will not leave money on the table."

[44] Commerce's formulation of the "reason to believe or suspect" standard refers to "countervailable" subsidies. The legislative history does not. In discussing the standard elsewhere, Commerce has emphasized that the United States' countervailing duty statute allows duties to be imposed "only upon a finding that a *countervailable* subsidy is being provided." *See* Defendant's Response to Order for Supplemental Briefing (filed by Government in *Itochu Building Prods. Co. v.* United States, Consol Court No. 12–000065, on January 6, 2014) (citing 19 U.S.C. § 1671(a)). However, as explained in greater detail below, Commerce in this context is not deciding whether or not to impose duties. Commerce here is determining only whether there is "reason to believe or suspect" that a potential surrogate company (here, Tata Tea) "may" have received subsidies, for purposes of deciding whether to consider that company's financial statements for possible use in deriving surrogate financial ratios for use in calculating the dumping margin for a non-market economy producer/exporter (here, Xinboda). If Commerce decides that there is such "reason to believe or suspect," Commerce disregards the financial statement. There are no consequences whatsoever for the potential surrogate company, which has no stake at all in the underlying administrative review (or this litigation) and, indeed, may not be aware that its financial statements have been placed on the record and have been the subject of discussion by Commerce and the parties.

[45] At some points in the Remand Results, Commerce articulates the "reason to believe or suspect" standard in a way that is consistent with Congress' language. *See*, *e.g.*, Remand Results at 18 (stating that Xinboda's evidence of alleged subsidies "is not sufficient to undermine [Commerce's] initial conclusion . . . that there is no *reason to believe or suspect* that Tata Tea *may have* received countervailable subsidies") (emphases added). Elsewhere, however, the standard is formulated differently most often, indicating that the standard

son to believe or suspect" standard in the selection of financial statements for Commerce's use in deriving surrogate financial ratios in this case, and more generally, in other cases as well. Specifically, it is not clear that Commerce is attaching any meaning to the words "suspect" and "may be" in the relevant standard. *See*, *e.g.*, 2A N. Singer & S. Singer, Sutherland on Statutory Construction § 46.6 (7th ed. 2014) (explaining that "[i]t is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute"; that "[c]ourts construe a statute to give effect to all its provisions, so that no part is inoperative or superfluous, void, or insignificant"; and that "[c]ourts assume that every word, phrase, and clause . . . is intended and has some meaning") (footnotes omitted).[46]

requires proof of the actual receipt of a subsidy during the period of review. *See*, *e.g.*, Remand Results at 19 (stating that "[e]ven if [the documents that Xinboda has presented as evidence] could be viewed as the completion of an application for credit or for additional credit, they do not indicate if or when credits *were ever disbursed*") (emphasis added); *id*. at 20 (stating that "the fact that Tata Tea signed . . . hypothecation agreements . . . does not mean that it *was approved for or received* any packing credits during the [period of review]" (emphasis added); *id*. (stating that "none of the documents submitted by Xinboda provide a reason to believe or suspect that Tata Tea *was approved to receive or did receive*. . . countervailable subsidies during the [period of review]") (emphasis added); *id*. (stating that "[w]ith respect to Xinboda's argument that Tata Tea's financial statements . . . include evidence that Tata Tea *received* countervailable subsidies during the [period of review], [Commerce] finds no information in the financial statements to support this conclusion") (emphasis added); *id*. (stating that "[Commerce's] conclusion that there is not a sufficient basis to believe or suspect that Tata Tea *received* countervailable subsidies during the [period of review] is not altered by a review of Schedule 3 found in Tata Tea's financial statements") (emphasis added); *id*. at 21 (stating that "no item in Schedule 3 mentions 'packing credits,' 'export credit,' 'pre-shipment financing,' or anything else indicating *the receipt* of countervailable subsidies") (emphasis added); *id*. at 50 (stating that "the lack of any identification of . . . subsidies in Tata Tea's financial statements was consistent with the conclusion that the subsidies were likely *not disbursed* during the [period of review]" (emphasis added); *id.* at 51 (stating that "the words and phrases Xinboda finds in the consolidated financial statements do not indicate that the consolidated companies . . . *benefited from* subsidy programs") (emphasis added).

[46] The Remand Results state that "financial statements are, *for many types of subsidies*, valuable evidence of whether a company has been subsidized." Remand Results at 16 (emphasis added). The Remand Results further state that "[s]ubsidies *frequently* constitute revenue that must be accounted for in a company's books and records and acknowledged as subsidy or non-operational income, counterbalanced through offsetting accounts." *Id*. (emphasis added); *see also id*. at 17 (stating that "aside from a full subsidy investigation, a company's financial statements will *often* be the best source of information regarding its receipt of subsidies") (emphasis added). It may be true that a company's financial statements must necessarily reflect subsidies that are in the form of grants. However, Commerce has not explained whether (and, if so, how) financial statements reflect subsidies that are in the form of exemptions (*e.g.*, tax exemptions). Similarly, and more generally, Commerce has not identified and explained the types of subsidies as to which financial statements are not "valuable evidence." Nor has Commerce explained the circumstances in which subsidies do not need to be "accounted for in a company's books and records." *See, e.g., Shenzhen Xinboda I*, 38 CIT at ____ n.49, 976 F. Supp. 2d at 1375 n.49 (discussing, *inter alia, Itochu* plaintiffs' argument that "[c]ertain subsidies (*e.g.*, receipt of grants) often are reported as line items in financial statements," but "[o]ther subsidies (*e.g.*, reductions in costs, such as

As a threshold matter, the Remand Results clarify that, contrary to some statements that Commerce has made in this case and elsewhere, Commerce in fact does not limit its evaluation of potential surrogate financial statements to the "four corners" of the statements themselves.[47] Instead, in applying the "reason to believe or suspect" standard, Commerce "reviews the record, as a whole." Remand Results at 15. Endorsing Commerce's statement made in another proceeding, the Remand Results note that: "Commerce bases its determination on the totality of the circumstances, from information generally available to it at that time [*i.e.*, when it is reviewing possible surrogate financial statements for use in deriving surrogate financial ratios] . . . . When Commerce does rely on the financial statement to make its determination, this does not mean Commerce is precluded from reviewing other evidence. If other evidence were to exist that is . . . [the] opposite of or conflicts with a financial statement, Commerce would account for this information in its determination." *Id.* (quoting Defendant's Response to Order for Supplemental Briefing (filed by Government in *Itochu Building Prods. Co. v. United States*, Consol Court No. 12–000065, on January 6, 2014) ("Def.'s Supp. Brief in *Itochu*) at 10)); *see also* Remand Results at 16 (stating that "it is [Commerce's] policy to limit its search for evidence to the 'four corners' of the financial statements (and accompanying notes) and any other information placed on the record. In other words, [Commerce] does not seek out additional information in evaluating the presence or absence of countervailable subsidies. Instead, [Commerce] rel[ies] solely on that which is placed on the record of the proceeding, which, in most proceedings, is generally limited to financial statements.").

The Remand Results also explain that when reviewing a set of financial statements for evidence of countervailable subsidies Commerce "employs a couple of general guideposts": "(1) If a financial

exemptions from taxes, duties, etc.) are not normally reported as line items"). Commerce has not explained how it applies the "reason to believe or suspect" standard in cases such as these.

[47] Even in the Remand Results here, Commerce continues to state that "it is [Commerce's] policy to limit its search for evidence to the 'four corners' of the financial statements (and accompanying notes)." *See* Remand Results at 16; *see also id*. at 17 (referring to "[Commerce's] focus on the four corners of a set of financial statements"). That statement, which appears in one form or another in many agency determinations, might reasonably be read as indicating that Commerce does not consider evidence of subsidies beyond the "four corners" of financial statements themselves. *See Shenzhen Xinboda I*, 38 CIT at ____ n.49, 976 F. Supp. 2d at 1375 n.49. As noted above, however, Commerce has clarified here that other record evidence will be considered. Thus, the meaning of Commerce's statement concerning the "four corners" of financial statements is apparently that, in applying the "reason to believe or suspect" standard to a set of potential surrogate financial statements, the agency does not itself seek out additional information beyond that which the parties place on the record and/or that the agency does not undertake a formal countervailing duty investigation.

statement contains a *reference* to a *specific subsidy program* [which has previously been] found to be countervailable *in a formal CVD* [*countervailing duty*] *determination*, [Commerce] will exclude that financial statement from consideration. (2) If a financial statement contains only a *mere mention* that a subsidy *was received*, and for which there is no additional information as to *the specific nature of the subsidy*, [Commerce] will not exclude the financial statement from consideration." Remand Results at 17–18 (emphases added); *see also, e.g., Clearon Corp. v. United States*, 35 CIT ____, ____, 800 F. Supp. 2d 1355, 1359 (2011) (quoting same "general guideposts" set forth in the Remand Results); Def.'s Supp. Brief in *Itochu* at 8 (quoting *Clearon*).

The Remand Results elaborate further: "[I]f *a specific subsidy program* is mentioned or identified within a company's financial statements, *with a dollar amount received*, and that subsidy program *has been determined to be countervailable*, [Commerce] will exclude the financial statements from consideration. . . . However, *mere mention of a subsidy*, without information that the company *actually received the subsidy*, or further information as to *the specific nature of the subsidy*, is not enough for [Commerce] to exclude the statements. Such evidence would not rise to the level of a 'reason to believe or suspect.'" Remand Results at 18 (emphases added).[48]

As the quotations above indicate, in reviewing a set of financial statements for evidence of countervailable subsidies, Commerce does not exclude the financial statements unless, *inter alia*, the statements include "a reference to a specific subsidy program." *See* Remand Results at 17–18. According to Commerce, a "mere mention of a subsidy" in the financial statements does not "rise to the level of a 'reason to believe or suspect." *See id*. at 18 (emphasis added). Thus, to exclude a set of financial statements from consideration for possible

[48] At two points in the Remand Results, Commerce makes the point that "the 'believe or suspect' standard is also the standard for making a preliminary affirmative determination of countervailable subsidies in a countervailing duty investigation" and emphasizes that the agency "does not make an affirmative preliminary countervailing duty determination in an investigation based merely upon a company's *eligibility* for a subsidy." Remand Results at 20 n.53 (emphasis added); *see also id*. at 52 (similar). But this comparison lacks the potency that Commerce suggests. An affirmative preliminary determination in a countervailing duty investigation carries with it major consequences for companies (*e.g.*, foreign producers and exporters). In stark contrast, there are no consequences whatsoever for a potential surrogate company if Commerce elects not to consider that company's financial statements for purposes of deriving surrogate financial ratios because Commerce is concerned that there is "reason to . . . suspect" (or even "reason to believe") that the company "may" have received subsidies. (Indeed, companies in a surrogate country often do not even know when their financial statements are being considered or have been selected for use by Commerce in deriving surrogate financial ratios.) There is thus an obvious reason for a demanding standard of proof in a countervailing duty investigation that simply does not exist when Commerce is making a "reason to believe or suspect" determination in a case such as this. The two contexts are entirely different.

use in deriving surrogate financial ratios, Commerce requires, in essence, that the financial statements identify a subsidy program precisely, by its exact title. *See, e.g., Clearon Corp. and Occidental Chemical Corp., et al. v. United States* Final Results of Redetermination Pursuant to Remand (filed by Commerce in Court No. 13–00073 on March 22, 2016) ("*Clearon* Remand Results") at 43 (stating that Commerce would not disregard a company's financial statements where "the tax incentive references" (*i.e.*, the references to subsidies) "are . . . too vague to tie to a previously countervailed subsidy"); *id*. at 23–24 (similar).

No matter how close the comparison of the verbiage used in financial statements to the official title of a subsidy program, Commerce does not accept it as a basis for excluding financial statements. In that sense, it seems that Commerce excludes financial statements only if there is a rock-solid, conclusive "reason to believe" vis-a-vis the subsidy program. Commerce's position appears to afford no allowance for evidence that gives "reason to . . . suspect" by, for example, listing a subsidy using terminology that differs somewhat from the official name of the subsidy program. Similarly, Commerce's position appears to give no effect to the words "may be." Commerce's position means, logically, that the agency is (at least occasionally, if not frequently) relying on the financial statements of companies that are, in fact, recipients of subsidies all because Commerce requires that the name of the subsidy program as listed in the financial statements precisely match the official title of the program.

Similarly, as the quotations above indicate, even if a potential surrogate company's financial statements list a subsidy by its exact, official title, Commerce will not exclude the financial statements unless, *inter alia*, the financial statements also specify the precise "*dollar amount received*." *See* Remand Results at 18 (emphasis added).[49] Thus, again, it seems that Commerce excludes financial statements only if there is actual, irrefutable proof that the company in fact received the named subsidy and only if the precise amount of that subsidy is specified in the financial statements which would seem to constitute "reason to believe." Commerce gives no indication that anything short of that proof would serve to exclude a surrogate company's financial statements. Commerce's position appears to be

[49] *See also, e.g., DuPont Teijin Films v. United States*, 37 CIT ____, ____, 896 F. Supp. 2d 1302, 1312–13 (2013) (Commerce required "actual dollar amount") (relied on by Commerce in *Clearon* Remand Results at 43 n.100); Def.'s Supp. Brief in *Itochu* at 8 (stating that Commerce will exclude a company's financial statements "if a specific subsidy program is mentioned or identified within . . . [the] financial statement, *with a dollar amount received*, and that subsidy program has been determined to be countervailable") (emphasis added).

clear *i.e.*, that Commerce will not exclude financial statements on the strength of evidence that gives rise to "reason to . . . suspect" that the company "may be" the recipient of subsidies.

Further, and even more to that point (immediately above), Commerce expressly states that it will disregard a company's financial statements only if evidence establishes that a subsidy, in fact, "*was received*" by the company at issue. *See* Remand Results at 17–18 (emphasis added). "[M]ere mention of a subsidy [in a company's financial statements], without information that the company *actually received the subsidy* . . . is not enough for [Commerce] to exclude the statements." *Id*. at 18 (emphasis added).[50] In other words, Commerce requires definitive proof that the subsidy at issue indeed actually was received by the surrogate company.[51] That sounds like "reason to believe" that a company has received a subsidy *not* "reason to . . . suspect" that the company "may" have received a subsidy.[52]

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[50] *See also, e.g.*, Def.'s Supp. Brief in *Itochu* at 8–9 (stating that "mere mention of a subsidy, without information that the company actually received the subsidy, . . . is not enough for Commerce to exclude the statement"); *Clearon* Remand Results at 43 (stating that Commerce would not disregard a company's financial statements absent proof "that the company actually received" the subsidies at issue); Final Results of Redetermination Pursuant to *Stanley Works (Langfang) Fastening Systems Co., Ltd. and the Stanley Works/Stanley Fastening Systems, LP v. United States*, Slip Op. 13–118 (filed by Commerce in Consol. Court No. 11–00102 on April 16, 2015) ("*Stanley* Remand Results") at 2–3 (stating that Commerce "will not normally rely on financial statements where there is evidence that the company received countervailable subsidies," with no reference to "reason to . . . suspect" or "may" have received countervailable subsidies); *id*. at 3 (stating that companies' financial statements "do not show receipt of countervailable subsidies nor is there reason to believe that they received countervailable subsidies," with no reference to "reason to . . . suspect" or "may" have received countervailable subsidies).

[51] Commerce has stated (in this case and elsewhere) that it will exclude a surrogate company's financial statements from consideration under the "reason to believe or suspect" standard only if Commerce concludes that the surrogate company actually received subsidies and only if those subsidies were received during the period of review. *See, e.g.*, Remand Results at 20 (referring to "[Commerce's] conclusion that there is not a sufficient basis to believe or suspect that Tata Tea received countervailable subsidies *during the POR* [period of review]") (emphasis added); *id.* at 4950 (referring to Commerce's conclusion that the evidence submitted by Xinboda "did not indicate that Tata Tea received subsidies *during the POR*") (emphasis added). Elsewhere, however, Commerce has taken the position that a company that has previously been determined to have received subsidies may be assumed to be a continuing beneficiary. *See, e.g., Jiaxing Brother Fastener Co. v. United States*, 34 CIT 1455, 1458–59, 751 F. Supp. 2d 1345, 1350 (2010) (discussing Commerce's decision to disregard financial statements of company where statements indicated company's receipt of subsidy in prior year, but not in period of review; noting Government's argument that "what matters is whether a company received or may have received a countervailable subsidy at any point, . . . regardless of the year in which the funds were received"). Commerce has not explained the basis for here focusing solely on the period of review.

[52] The fact that Commerce will not disregard financial statements absent concrete proof that a subsidy in fact actually "was received," including a specification of the precise "*dollar amount received*," would appear to be at least somewhat at odds with the agency's pragmatic presumption (in a related context) that a company that is eligible for a subsidy will

Lastly, as the quotations above indicate, Commerce will disregard financial statements that evidence receipt of subsidies only if Commerce itself has previously "found [the exact same subsidy program] to be countervailable *in a formal CVD determination*." *See, e.g.*, Remand Results at 18 (referring to the requirement for identification of "a specific subsidy program found to be countervailable in a formal CVD determination"); *id*. (referring to requirement "that the subsidy program has been determined to be countervailable").[53] In short, it

take advantage of that subsidy *i.e.*, that a company in a competitive market economy "will not leave money on the table." *See, e.g., China Nat'l Machinery Import & Export Corp. v. United States*, 27 CIT 255, 259, 264 F. Supp. 2d 1229, 1233 (2003) (noting Government's position that "as a matter of common sense, we can assume that no one is going to leave money on the table. [Companies] are going to take advantage of a program that's out there and exists."); *Gold East Paper (Jiangsu) Co. v. United States*, Court No. 10–00371; Slip Op. 15–37 (CIT 2015) Final Results of Redetermination Pursuant to Court Remand (filed by Commerce in Court No. 10–00371 on July 10, 2015) ("*Gold East* Remand Results") at 17 (in case challenging Commerce decision concerning use of market prices *versus* surrogate prices in determining a foreign exporter's dumping margin, invoking Commerce's presumption that a company that is eligible for subsidies will "take advantage" of them).

The Remand Results do not explain why such a presumption would not be reasonable in cases such as this and give no indication why evidence of a company's eligibility for a subsidy does not constitute at least "reason to . . . suspect" (if not "reason to believe") that the company "may" have received subsidies. *Compare, e.g., Clearon* Remand Results at 43 (where Commerce acknowledges that programs at issue "are all tax programs [*i.e.*, subsidies] to which [the company] is entitled," but Commerce nevertheless declines to exclude the company's financial statements, citing an absence of evidence "that the company actually received any of these tax incentives").

[53] *See also, e.g., Stanley* Remand Results at 10 (declining to disregard financial statements in absence of prior formal determination of countervailability by Commerce; emphasizing that, "because [Commerce] never found [the subsidy program at issue] to be countervailable, [Commerce] finds that this evidence [i.e., financial statements reflecting receipt of a subsidy] is insufficient to satisfy the reason to believe or suspect standard," and, similarly, that Commerce "never found [the subsidy program at issue] to be a countervailable subsidy"); *Clearon* Remand Results at 23 (stating the "[Commerce's] practice is to only exclude financial statements that contain a subsidy that [Commerce] has found countervailable in the past"); *id*. at 43 (dismissing party's argument that tax incentives in the financial statements of company at issue are countervailable, Commerce stated that "the tax incentive references . . . are for disbursements [Commerce] has not previously countervailed as a subsidy"); *id*. at 43 (similar).

In the same vein, Commerce has not been receptive to arguments that a set of financial statements should be excluded because the company at issue has received subsidies under a program that is very similar (even identical) to a program that Commerce has previously found to be countervailable. *See, e.g., Clearon* Remand Results at 42–43 (where party sought to have Commerce disregard a company's financial statements based on the company's receipt of subsidies which the party emphasized "very closely match programs [Commerce] found are countervailable" in formal countervailing duty determinations, and where the party explained that "the same types of programs have been found countervailable," Commerce rejected the party's argument, stating that "[Commerce's practice is only to exclude financial statements that contain a subsidy that [Commerce] has found countervailable in the past"); *Stanley* Remand Results at 10 (where Commerce had previously found "Interest Free Tax Loans from the Government of Maharashtra [India]" to be countervailable, and where a party was arguing that a company's financial statements should be disregarded because that company received "Interest Free Tax Loans from the Government of Tamil Nadu [India]," Commerce dismissed the party's argument, stating that "the countervailability of a [subsidy] program in Maharashtra is not relevant to a program established and administered in another state [in India] such as Tamil Nadu").

appears that Commerce requires "reason to believe" or something even stronger that a subsidy is countervailable. Evidence that gives "reason to . . . *suspect*" that a subsidy *may* be countervailable does not suffice.[54] Logically, Commerce's position here means, once again, that seemingly contrary to Congress' expressed intent the agency is (at least occasionally, if not routinely) relying on the financial statements of companies that are, in fact, recipients of subsidies and, indeed, subsidies that are countervailable but which have not been the subject of a formal Commerce countervailing duty investigation,[55] and thus, by definition, could not have been ruled to be countervailable by Commerce in a formal countervailing duty determination.[56]

Commerce casts its requirement that a subsidy have been previously determined to be countervailable in a formal Commerce coun-

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[54] *See supra* n.44 (noting that the legislative history refers only to "subsidies" and makes no mention of "*countervailable* subsidies"). An argument can be made that, based on the legislative history, Congress' intent is that Commerce exclude financial statements where-never there is "reason to believe or suspect" a subsidy, without regard to whether or not that subsidy is (or even may be) countervailable.

[55] There are a number of reasons why a subsidy might not have been the subject of a formal countervailing duty investigation by Commerce. *Cf. Gold East Paper (Jiangsu) Co. v. United States*, 39 CIT ____, ____, 121 F. Supp. 3d 1304, 1308–09 (2015) (noting that revocation of a countervailing duty order does not necessarily mean that a subsidy program has been terminated and that the flow of benefits instead, but may instead result from, for example, "a lack of interest by the domestic industry").

[56] To further illustrate this point with a hypothetical that is somewhat metaphysical, consider a subsidy that is evidenced on the face of a set of financial statements but which has never been the subject of an official Commerce countervailing duty proceeding and thus could not have been found to be countervailable by Commerce. Under Commerce's existing practice, Commerce would not exclude that set of financial statements no matter how clear the countervailability of the subsidy might be (*i.e.*, even if there were "reason to believe" or even if it were a certainty that the subsidy was countervailable) because there had been no formal determination of countervailability by Commerce. Commerce thus would rely on those financial statements, if they satisfied all other applicable agency criteria and were determined to be the best available information on the record. Assume further that, subsequently, in a formal countervailing duty proceeding, Commerce made an official determination of countervailability as to the very same subsidy program that was evidenced in the financial statements earlier (as hypothesized above). In this second situation, Commerce would exclude the financial statements. The two scenarios involve the exact same grant or exemption (subsidy) by a foreign government; but there are two completely different outcomes, based solely on the absence or existence of a formal countervailing duty determination of countervailability by Commerce. Nothing about the subsidy changed. By its nature, the subsidy was *always* "countervailable," even when it had not yet been officially pronounced "countervailable" by Commerce.

As another example, assume that a subsidy that is evidenced on the face of a set of financial statements has been found to be countervailable by Commerce in a *preliminary* determination in a formal countervailing duty proceeding, but the subsidy is not yet the subject of a *final* countervailing duty determination (and thus has not been definitively declared to be countervailable). In such circumstances, it appears that Commerce would not exclude the financial statements. Commerce apparently would not credit a preliminary determination of countervailability by the agency itself even as "reason to . . . suspect," much less "reason to believe."

Similarly, Commerce apparently would not credit a determination of countervailability by another official international trade authority, such as Commerce's EU counterpart.

tervailing duty investigation as a matter of "[e]xpediency" that is consistent with "Congress' intent as recognizing the need to filter information quickly without initiating a countervailing duty investigation." Remand Results at 17. Commerce argues that "the legislative history reveals that Congress was concerned about [Commerce's] ability to determine quickly whether there is reason to believe or suspect that a company received subsidies. [Commerce] therefore looks to past determinations of countervailable subsidies." *Id*. Commerce continues: "Given Congress' evident concern with expediency and the ability of [Commerce] to make these decisions quickly in an antidumping duty proceeding, [Commerce's] practice is reconcilable with the 'reason to believe or suspect' standard in the legislative history." *Id*.[57]

However, if Congress had intended Commerce to base its decision as to whether to use potential surrogate financial statements on whether Commerce had previously found the alleged subsidy to be countervailable in a formal Commerce countervailing duty investigation, Congress easily could have said exactly that. But Congress did not do so. *See, e.g., Tulips Investments, LLC v. Colorado*, 340 P.3d 1126, 1135 (Col. 2015) (*en banc*) (explaining that "[i]f the legislature intended that such proceeding was to be handled as just another civil proceeding, it could have said so. But it did not.") (citation omitted); *see also, e.g.*, *Michigan v. EPA*, ____ U.S. ____, ____, 135 S. Ct. 2699, 2710 (2015) (noting "if uncertainty about the need for regulation were the *only* reason to treat power plants differently, Congress would have required the [EPA] to decide only whether regulation remains 'necessary,' not whether regulation is 'appropriate *and* necessary'").

Commerce's rationale also reflects a big leap in logic. Commerce assumes that, to the extent that Congress was concerned about Commerce's ability to quickly make determinations concerning the use of potentially tainted surrogate financial statements (or other surrogate

[57] The Remand Results further state that "the 'reason to believe or suspect' standard allows [Commerce] to exclude information in an antidumping proceeding even though [Commerce] [is] not making the formal finding of a countervailable subsidy (*i.e.*, financial contribution, benefit and specificity) that would be required if the case were a countervailing duty proceeding." *See* Remand Results at 17. However, that is not the issue presented here. Xinboda is not concerned that Commerce is, under the "reason to believe or suspect" standard, *excluding* financial statements that Xinboda contends should be considered. Xinboda's concern is the exact opposite: Xinboda is concerned that Commerce is *refusing to exclude* financial statements which, according to Xinboda, should be excluded. As discussed herein, Commerce's *modus operandi* seems to be to err on the side of *using* potentially tainted surrogate financial statements, absent evidence that proves conclusively that, during the period of review, the company received subsidies that Commerce previously determined to be countervailable in a countervailing duty investigation.

values), Congress intended for Commerce to err on the side of *using* the potentially tainted data. However, based on the language of Congress' instructions, it seems at least more likely (if not certain) that Congress intended Commerce to err on the side of *disregarding* such data an approach that would serve both of Congress' goals: (1) avoiding the use of tainted values and (2) allowing Commerce to make quick determinations without initiating a formal countervailing duty investigation.

Further, although Congress did express concern for Commerce's administrative convenience, Commerce's administrative convenience was not Congress' principal concern. Congress' principal concern was ensuring that Commerce avoids the use of surrogate values (including surrogate financial ratios derived from surrogate financial statements) where there is any "reason to . . . suspect" that those values "may be" subsidized.[58]

In light of points such as those outlined above, as well as discussions with counsel in the course of oral argument, this matter must be remanded to Commerce once again, to afford the agency a second opportunity to do what *Shenzhen Xinboda I* requested *i.e.*, "to reconsider and fully explain its stated practice (in light of, *inter alia*, the legislative history of the 'reason to believe or suspect' standard, as well as the agency's fundamental obligation to base its determinations on substantial evidence on the record as a whole), to review and consider the evidence of alleged subsidies placed on the record by Xinboda (if appropriate), and to explain in detail the rationale for the agency's determination on remand." *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1375–76; *see also id*., 38 CIT at ____ n.49, 976 F. Supp. 2d at 1375 n.49 (encouraging Commerce "to undertake a comprehensive review of its interpretation and application of the 'reason to believe or suspect' standard, . . . to ensure the consistency and coherency of its determination on remand and agency practice as a whole," and identifying various issues for consideration).[59]

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[58] Commerce makes another similar argument based on a claim of administrative convenience. Specifically, Commerce asserts that "Congress cannot have intended that information indicating that a company is eligible to receive subsidies is sufficient to meet the 'reason to believe or suspect' standard because many companies are eligible for subsidies and such a standard would significantly limit the data available for [Commerce's] use." *See* Remand Results at 20.

For the reasons discussed above, like Commerce's other administrative convenience claim, this argument also holds little water. And, to the extent that Commerce seeks to attribute to Congress a specific concern that an interpretation other than that which Commerce is now applying would "significantly limit the data available for [Commerce's] use," Congress' language evidences no such concern.

[59] In the Remand Results, Commerce reaffirms the Final Determination's analysis of the relative comparability of Garlico, Tata Tea, and Xinboda, as well as the Final Determination's decision, based on that analysis, to rely on the financial statements of Tata Tea (to the

C. *Zeroing*

Xinboda's final remaining claim challenges Commerce's application of the agency's practice of "zeroing" in cases such as this, involving an administrative review of an exporter in a non-market economy country. Xinboda contends that, rather than assigning a value of zero to sales where goods were sold at prices above the calculated normal value (*i.e.*, "zeroing"), Commerce instead should have used such sales to offset other sales where goods were sold at prices below normal value (*i.e.*, "offsetting"). *See generally* Complaint ¶¶ 13, 21–22 (Count IV); Pl.'s Brief at 34–44; Pl.'s Reply Brief at 10–14; *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1385–88.[60]

Acknowledging that Commerce's Final Determination "did not provide a full explanation about its interpretation of the statute permitting offsetting . . . in certain proceedings but not in others," the Government sought a voluntary remand to permit Commerce to "revisit the zeroing issue," and, as appropriate, to further explain its decision. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1387 (quoting Government's pre-remand brief); *see also* Issues & Decision Memorandum at 31–33 (addressing Xinboda's challenge to use of zeroing). Over the objections of Xinboda, *Shenzhen Xinboda I*

exclusion of those of Garlico) in deriving surrogate financial ratios. *See generally* Remand Results at 3, 21–28, 53–55; *see also* Issues & Decision Memorandum at 20–22; *Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1376–85. Xinboda continues to contest Commerce's analysis and to dispute the agency's decision. *See, e.g.*, Pl.'s Brief at 20, 29–34; Pl.'s Reply Brief at 9–10. *But see* Def.'s Brief at 29–33; Def.-Ints.' Brief at 26–27, 30–34. If, on remand, Commerce concludes that in light of any changes, refinements, or clarifications to its interpretation and application of the "reason to believe or suspect" standard Tata Tea's financial statements must be disregarded because there is (at a minimum) *reason to suspect* that those statements *may be* tainted by subsidies, Garlico's financial statements will be the only set of financial statements remaining for Commerce's use in deriving surrogate financial ratios. Because such an outcome presumably would moot the issue of comparability, further consideration of the parties' arguments on the matter is not necessary at this time.

[60] The practice of "zeroing" is explained in greater detail in *Union Steel. See generally Union Steel v. United States*, 36 CIT ____, ____, 823 F. Supp. 2d 1346, 1348–50 (2012), *aff'd*, 713 F.3d 1101, 1103–04 (Fed. Cir. 2013); *see also JTEKT Corp. v. United States*, 642 F.3d 1378, 1383–84 (Fed. Cir. 2011); *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1365–66 (Fed. Cir. 2011).

After the conclusion of the administrative review at issue here, Commerce changed its policy on zeroing in administrative reviews. *See* Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 Fed. Reg. 8101, 8101 (Dep't Commerce Feb. 14, 2012) (announcing Commerce's adoption of the average-to-average methodology (without zeroing) as its default comparison method for all administrative reviews, including both market economy and non-market economy proceedings). Commerce's change in policy did not entirely abandon the practice of zeroing in administrative reviews; there is a caveat. Under the new policy, Commerce compares "monthly weighted-average export prices with monthly weighted-average normal values" *and grants an offset*, "except where [Commerce] determines that application of a different comparison method is more appropriate." Final Modification, 77 Fed. Reg. at 8102; *see, e.g., Fine Furniture (Shanghai) Ltd. v. United States*, 40 CIT ____, ____, 182 F. Supp. 3d 1350, 1367 (2016).

granted the Government's request. *See Shenzhen Xinboda I*, 38 CIT at ____, 976 F. Supp. 2d at 1388.

In the Remand Results, Commerce has continued to use zeroing in calculating Xinboda's dumping margin. *See generally* Remand Results at 29–44, 55–57. The Remand Results rely heavily on the Court of Appeals' decision in *Union Steel*, which affirmed Commerce's rationale for using zeroing in administrative reviews but not in investigations as a reasonable interpretation of an ambiguous statute. *See* Remand Results at 35–36, 41–42, 55; *Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013).

Xinboda contests Commerce's reliance on *Union Steel*, asserting that the Remand Results misrepresent the facts and implications of that case and arguing that Commerce's use of zeroing in administrative reviews involving non-market economy countries is unreasonable. *See generally* Pl.'s Brief at 35–43; Pl.'s Reply Brief at 10–14.

For example, much like the plaintiff in *Since Hardware* (where the same zeroing issue was raised),[61] Xinboda argues that *Union Steel* sustained Commerce's practice of zeroing in proceedings involving market economy countries because of the "greater specificity" that zeroing provided in administrative reviews (where Commerce made "average-to-transaction" comparisons) relative to the "average-to-average" comparisons made in investigations. *See* Pl.'s Brief at 42; *see also id.* at 40–41; Pl.'s Reply Brief at 11; *Since Hardware (Guangzhou) Co. v. United States*, 38 CIT ____, ____, 37 F. Supp. 3d 1354, 1361 (2014), *aff'd sub nom. Since Hardware (Guangzhou) Co. v. Home Prods. Int'l., Inc.*, 636 F. App'x 800 (Fed. Cir. 2016) (*per curiam*). Like the plaintiff in *Since Hardware*, Xinboda asserts that *Union Steel*'s approval of Commerce's use of zeroing in administrative reviews but not in investigations "was only justified by the greater accuracy resulting from the use of monthly normal values (calculated from actual invoiced sales prices)." *See Since Hardware*, 38 CIT at ____, 37 F. Supp. 3d at 1361–62*;* Pl.'s Brief at 40–41, 42–43; Pl.'s Reply Brief at 11–14. Like the plaintiff in *Since Hardware*, Xinboda contends that, due to Commerce's use of a yearly average normal value in the instant non-market economy administrative review (instead of monthly average normal values), *Union Steel* does not apply. *See* Pl.'s Brief at 42–43; *see also* Pl.'s Reply Brief at 10–14; *Since Hardware*, 38 CIT at ____, 37 F. Supp. 3d at 1362. And like the plaintiff in *Since Hardware*, Xinboda concludes that zeroing in administrative reviews

[61] In the course of oral argument on the Remand Results, Xinboda's counsel acknowledged that Xinboda's arguments in this case are framed to parallel the plaintiff's arguments before the Court of International Trade and the Court of Appeals in *Since Hardware*. Plaintiffs in both cases are represented by the same counsel.

involving non-market economy countries "tends to artificially drive some sales below fair value and others above fair value" and "unfairly disadvantages NME [non-market economy] respondents." *See* Pl.'s Brief at 43; *Since Hardware*, 38 CIT at ____, 37 F. Supp. 3d at 1362; *see also* Pl.'s Reply Brief at 10–14. *But see* Def.'s Brief at 33–41; Def.-Int.'s Brief at 35.

The Government's brief cites the Court of International Trade's decision in *Since Hardware*, which had recently issued and which found no merit in the zeroing claims of the plaintiff there. *See* Def.'s Brief at 37, 40–41; *Since Hardware*, 38 CIT at ____, 37 F. Supp. 3d at 1361–63. As the Government observed here, "Xinboda's arguments [in this case] are the same arguments that the Court [of International Trade] rejected in *Since Hardware*." *See* Def.'s Brief at 37. In its Reply Brief, Xinboda sought to minimize the significance of that opinion, emphasizing that it was "not a final court decision." Pl.'s Reply Brief at 12. Xinboda's statement was correct at the time that Xinboda made it, but it is no longer true.

The plaintiff in *Since Hardware* appealed the zeroing issue, and the Court of Appeals affirmed the decision of the Court of International Trade dismissing Since Hardware's zeroing claims. *See Since Hardware*, 636 F. App'x 800. The same result must obtain here. Xinboda's challenge to Commerce's use of zeroing in the administrative review at issue here therefore must be rejected.

IV. Conclusion

For all the reasons set forth above, the Final Results of Redetermination Pursuant to Remand must be sustained as to Commerce's determination on the surrogate value for labor, as well as Commerce's application of zeroing in this administrative review. This matter is again remanded to Commerce for further consideration of the surrogate value for whole raw garlic bulbs and the selection of surrogate financial statements for use in calculating surrogate financial ratios.

A separate order will enter accordingly.

Dated: December 15, 2017
New York, New York

/*s*/ *Delissa A. Ridgway*
DELISSA A. RIDGWAY
JUDGE

Slip Op. 17–167

UNITED STATES Plaintiff, v. GREENLIGHT ORGANIC, INC., Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 17–00031

[Defendant's motion to compel discovery is granted in part and denied in part.]

Dated: December 18, 2017

William Kanellis, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Plaintiff. With him on brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director.

Josh Levy, Marlow, Adler, Abrams, Newman and Lewis, P.A., of Coral Gables, FL, for Defendant. With him on brief were *Peter S. Herrick*, Peter S. Herrick, P.A., of St. Petersburg, FL, and *Frances Pierson Hadfield*, Crowell & Moring LLP, of New York, N.Y.

MEMORANDUM AND ORDER

Choe-Groves, Judge:

This matter involves a discovery dispute in a claim brought under 19 U.S.C. § 1592 for alleged fraudulent misrepresentations made in the course of importing merchandise into the commerce of the United States. Before the court is a motion to compel discovery brought by Defendant Greenlight Organic, Inc. ("Greenlight") against Plaintiff United States ("Government"). *See* Mem. Supp. Def.'s Expedited Mot. Compel, Oct. 14, 2017, ECF No. 37 ("Def.'s Mot."). Greenlight asserts that the Government has failed to comply with discovery requests pursuant to USCIT Rules 26 and 34, and requests that the court order Plaintiff to (1) produce or compel *in camera* inspection by the court of the Report of Investigation and other documents, (2) provide an amended privilege log, (3) produce approximately 145 documents that the Government has claimed as privileged, and (4) provide written responses and objections to Greenlight's document requests. *See* Def.'s Mot. 3–4. Plaintiff has filed a response to Defendant's motion. *See* The United States' Resp. Def.'s Mot. Compel Disc., Oct. 27, 2017, ECF No. 42 ("Pl.'s Resp."). The Government claims that the 145 documents identified on its privilege log are protected under various theories of privilege, and contends that non-privileged documents have been provided to Greenlight. *See id.* at 9 n. 5. The court held a telephone conference with the Parties regarding this motion on December 4, 2017. *See* Teleconference, Dec. 4, 2017, ECF No. 52.

First, the court will address the document requests propounded by Greenlight to the Government. The court notes that the Government produced approximately 2,861 documents in this case. Def.'s Mot. 13.

The Government withheld approximately 145 documents and provided an "enhanced" privilege log that the Government states "identified the sender, recipient, custodian, date, subject, a description of each document for which a privilege was claimed, and the privileges claimed." Pl.'s Resp. 9–10. The Government has not provided, however, formal written responses with objections to Greenlight's first and second document requests, including identification of responsive documents to those requests. In this Court, parties must respond to each item in a document request, and documents must be produced unless a specific objection is made, including the reasons for the objection. USCIT R. 34(b)(2)(B). A party must respond or object to a document request within 30 days. USCIT R. 34(b)(2)(A). The court orders the Government to provide written responses and objections to Greenlight's first and second document requests. The Government is instructed to identify with specific Bates numbers which documents are related to each of the document requests, including any documents related to the Report of Investigation and the Audit Report, and whether such documents have been produced or are being withheld as privileged. The Government is instructed to produce any remaining documents that are responsive.[1]

Second, the court will address the issue of the privilege log and the Government's related argument that approximately 145 documents are protected from discovery due to the deliberative process privilege. When a party claims privilege as the basis for withholding information from discovery, USCIT Rule 26(b)(5)(a) requires the party to "expressly make the claim" and provide a privilege log that "describe[s] the nature of the documents . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." The deliberative process privilege, and the related law enforcement privilege, are often referred to as common law executive privileges. *See Landry v. F.D.I.C.*, 204 F.3d 1125, 1135 (D.C. Cir. 2000); *Marriott Intern. Resorts, L.P. v. United States*, 437 F.3d 1302, 1306–07 (Fed. Cir. 2006) (adopting the rule in *Landry*). The executive privilege "protects agency officials' deliberations, advisory opinions and recommendations in order to promote frank discussion of legal or policy matters in the decision-making process." *Zenith Radio Corp. v. United States*, 764 F.2d 1577, 1580 (Fed. Cir. 1985). In order to invoke executive privilege, the party claiming it must (1) make a formal claim of privilege via the head of the agency or his delegate, (2) submit an affidavit showing "actual personal

[1] The Government produced one document that is fully redacted and appears completely blacked-out. The Government acknowledged that the fully-redacted document should not have been produced, and that it would correct its privilege log. *See* Pl.'s Resp. 11.

consideration by that official," and (3) provide a detailed explanation of what the document is and why it falls within the scope of the privilege. *Landry*, 204 F.3d at 1135. Executive privilege is a qualified privilege, and once it is successfully established, the burden shifts to the party seeking discovery of the privileged information to show "compelling need" to overcome it. *Marriott Intern. Resorts, L.P.*, 437 F.3d at 1307.

The Government has not yet satisfied the requirements to assert deliberative process privilege over the documents in question because it only claims the privilege on its privilege log. Greenlight notes correctly that the Government must provide the requisite affidavit for each document in order to assert the deliberative process privilege. *See* Def.'s Mot. 16. The court instructs the Government to provide the requisite affidavit and the necessary explanation for each document if it wishes to assert the deliberative process privilege under the applicable law.

Third, the court will address Greenlight's request for *in camera* review of certain documents for which the Government claims privilege. When balancing competing interests in discovery, courts have discretion to conduct *in camera* review to determine whether documents are protected by the executive privilege. *See Kerr v. U.S. Dist. Court*, 426 U.S. 394, 405–06 (1976) (describing *in camera* review as "a highly appropriate and useful means of dealing with claims of governmental privilege"); *Marriott Intern. Resorts, L.P.*, 437 F.3d at 1307 (noting the same). A court may conduct *in camera* review when the requesting party shows "a factual basis adequate to support a good faith belief by a reasonable person . . . that *in camera* review of the materials may reveal evidence to establish" that the privilege applies. *United States v. Zolin*, 491 U.S. 554, 572 (1989) (creating the standard for *in camera* review); *see also Gilmore v. Palestinian Interim Self-Gov't Auth.*, 843 F.3d 958, 967 (D.C. Cir. 2016) (affirming lower court's application of the *Zolin* standard for discovery invoking executive privilege).

As noted above, the Government has not yet satisfied the requirements to establish executive privilege over the Report of Investigation, Audit Report, or any of the documents on its privilege log. It is premature for the court to entertain a request to inspect the documents *in camera*.[2] The court denies without prejudice Greenlight's

[2] During the telephone conference, the Government offered to submit the Report of Investigation to the court for *in camera* review, asserting deliberative process privilege over the document because its contents relate to the Department of Homeland Security's internal investigation procedures. *See* Teleconference at 1:07:41–1:08:09. The court received the document, but declines to conduct *in camera* review at this time until the Government properly asserts the privilege with the necessary affidavit and explanation.

request to inspect the documents *in camera* at this time.

Fourth, the court will address Defendant's request to compel production of the approximately 145 documents identified on the Government's privilege log. Executive privilege is a qualified privilege, and once it is successfully established, the burden shifts to the party seeking discovery of the privileged information to show a "compelling need" to overcome it. *Marriott Intern. Resorts, L.P.*, 437 F.3d at 1307. As noted above, it is premature for the court to entertain a request to compel production of the documents identified on the Government's privilege log. After the Government has the opportunity to establish executive privilege through the requisite affidavit and explanation for each document, Greenlight may then seek discovery of the privileged documents by specifying which documents it requests and demonstrating why those particular documents are needed for its case.

Upon consideration of the motion, and all other papers and proceedings in this action, it is hereby:

ORDERED that Defendant's motion is granted in part and denied in part; and it is further

ORDERED that Plaintiff will provide written responses and objections to Defendant's first and second document requests, produce any additional documents, and amend its privilege log as necessary by January 12, 2018; and it is further

ORDERED that Plaintiff will provide the requisite affidavits and other information to support its claims of deliberative process privilege by January 12, 2018; and it is further

ORDERED that Defendant's motion for *in camera* inspection by the court of Plaintiff's privileged documents is denied without prejudice; and it is further

ORDERED that Defendant's motion to compel the production of Plaintiff's privileged documents is denied without prejudice.

Dated: December 18, 2017
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 17–168

UNITED STATES Plaintiff, v. GREENLIGHT ORGANIC, INC., Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 17–00031

[Plaintiff's motion to compel discovery is granted. Defendant's motion for a protective order is denied.]

Dated: December 18, 2017

William Kanellis, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Plaintiff. With him on brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director.

Josh Levy, Marlow, Adler, Abrams, Newman and Lewis, P.A., of Coral Gables, FL, for Defendant. With him on brief were *Peter S. Herrick*, Peter S. Herrick, P.A., of St. Petersburg, FL, and *Frances Pierson Hadfield*, Crowell & Moring LLP, of New York, N.Y.

MEMORANDUM AND ORDER

Choe-Groves, Judge:

Plaintiff United States ("Government") brings this case against Defendant Greenlight Organic, Inc. ("Greenlight") to recover civil penalties, unpaid duties, and fees under 19 U.S.C. § 1592. The statute prohibits companies from making false statements or omitting material information in the course of importing merchandise into the United States through fraud, gross negligence, or negligence. 19 U.S.C. § 1592(a)(1) (2012). The Government alleges that Greenlight misclassified and undervalued its subject merchandise fraudulently in violation of the statute.

Before the court are two discovery motions. The first is the Government's Motion to Compel Discovery Responses pursuant to Rule 37 of this Court. *See* The United States' Mot. Compel Disc. Resps., Oct. 25, 2017, ECF No. 40 ("Pl.'s Mot."). The Government claims that Greenlight "has delayed producing and has withheld disclosure" of information "integral to the prosecution of its case," *id.* at 1, and requests that the court order Greenlight to produce complete responses to the Government's Requests for Admission 1–4, as well as all documents, information, and other evidence related to Government Interrogatories 3, 5, 8–11, and 15. *See id.* at 14. Greenlight objects to the Government's motion and argues, in part, that the Government's requests are overbroad and irrelevant to the case, and that Greenlight has already produced documents to the Government over the course of the investigation. *See* Def's Resp. Opposing Pl.'s Mot. Compel Disc. Resps. 1–3, Nov. 7, 2017, ECF No. 43 ("Def's Resp.").

The second discovery motion is Greenlight's Motion for Protective Order Limiting Discovery of Parambir Aulakh and Monika Gill's Personal Finances pursuant to Rule 26(c) of this Court. *See* Def.'s Mot. Protective Order Limiting Disc. Parambir Aulakh & Monika Gill's Personal Finances, Nov. 7, 2017, ECF No. 44 ("Def.'s Mot."). Greenlight seeks a protective order to limit discovery with respect to the personal finances of two of its officers, Mr. Parambir Aulakh and Ms. Monika Gill, arguing that the Government has not properly alleged claims to establish the relevancy of the proposed discovery. *See id.* at 11. The Government disagrees, stating that the requested discovery is relevant to its case-in-chief for a fraudulent business scheme and to a potential claim for piercing the corporate veil. *See* The United States' Opp'n Def.'s Mot. Protective Order 5, 10, Nov. 22, 2017, ECF No. 49 ("Pl.'s Resp."). The court held a telephone conference with the Parties regarding both motions on December 4, 2017. *See* Teleconference, Dec. 4, 2017, ECF No. 52. The court will address each discovery issue in turn.

A. Legal Standard

District courts have broad discretion in deciding discovery matters. *See generally Accent Packaging, Inc. v. Leggett & Platt, Inc.*, 707 F.3d 1318, 1329 (Fed. Cir. 2013) (acknowledging court's discretion in denying additional discovery); *Univ. of W. Va. Bd. of Tr. v. VanVoorhies*, 278 F.3d 1288, 1304 (Fed. Cir. 2002) (noting court's discretion in denying motion to compel discovery). Discovery must be relevant to the issues in the case, including any party's claim or defense, or reasonably calculated to lead to the discovery of admissible evidence. *See* USCIT R. 26(b)(1). The court must limit discovery if it finds that "the burden or expense of the proposed discovery outweighs its likely benefit." USCIT R. 26(b)(2)(C)(iii).

B. The Government's Motion to Compel

1. Requests for Admission 1–4

The Government's Requests for Admission 1–4 seek an admission from Greenlight that Mr. Aulakh and Ms. Gill "participated in Greenlight's determination" of both the valuation and classification of the subject merchandise. Pl. Mot. Ex. 1, at 1–2. Greenlight objects to the requests, arguing that they seek discovery on matters outside of the scope of the case and irrelevant to Plaintiff's claims. *See* Def.'s Resp. 15. The Government responds that the requests are relevant because they relate to "who made the valuation and classification decisions at Greenlight." Pl.'s Mot. 4–5.

USCIT Rule 36 permits a party to serve a request for admission on another party. A party has thirty days to answer or object to the admission, or else the matter is admitted for the purpose of the case. USCIT R. 36(a)(3). The responding party must "specifically deny it or state in detail why the answering party cannot truthfully admit or deny it" in its answer, USCIT R. 36(a)(4), or state the grounds for objection. USCIT R. 36(a)(5). In the event of a dispute, "[t]he requesting party may move to determine the sufficiency of an answer or objections. Unless the court finds an objection justified, it must order that an answer be served." USCIT R. 36(a)(6).

The Government's Requests for Admission are relevant to the case because they seek information regarding the actions of Ms. Aulakh and Ms. Gill in their capacities as Greenlight's officers. It is a well-known principle that officers serve as agents of the corporation, and thus, the officers' actions in their official capacities represent the conduct of the entity. *See Jones v. N.Y. Guar. & Indem. Co.*, 101 U.S. 622, 628 (1879) ("A corporation can act only by its agents."); *Kellogg Brown & Root Serv., Inc. v. United States*, 728 F.3d 1348, 1369 (Fed. Cir. 2013) ("[T]he general rule is that an agent's knowledge is imputed to the principal when employees are acting within the scope of their authority or employment, absent special circumstances.") (citing *Meyer v. Holley*, 537 U.S. 280, 285 (2003)); *see also Long Island Sav. Bank, FSB v. United States* , 503 F.3d 1234, 1250 (Fed. Cir. 2007) (applying general rule of imputing agent's knowledge to principal in action against financial institution); *Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544, 553 (Fed. Cir. 1990) (officers' knowledge of acts, conducted within the scope of their employment, made the company liable for direct infringement). In its Requests for Admission, the Government inquired about Mr. Aulakh's and Ms. Gill's conduct in their capacities as officers of Greenlight. Because Greenlight is the named Defendant in this case, and Mr. Aulakh and Ms. Gill are officers of the corporation, the court will allow discovery regarding the conduct of Mr. Aulakh and Ms. Gill in their capacities as Court No. 17–00031 Page 5 officers of the Defendant. The court directs Greenlight to respond to the Government's Requests for Admissions 1–4.

2. Government Interrogatories

The Government served Greenlight with multiple interrogatories, seven of which are at issue in this dispute.[1] The Government con-

[1] The Government does not explicitly request relief from the court with respect to Government Interrogatory 6. Because both Parties discuss Government Interrogatory 6 in their briefings, however, the court will take it into consideration and address it here.

tends that Greenlight has not fully complied with requests for documents, information, and other evidence related to the seven interrogatories, and asks the court to compel Greenlight to produce any and all missing documents, information, and other evidence.

USCIT Rule 33(a)(2) allows a party to serve any other party with an interrogatory that "may relate to any matter that may be inquired into under Rule 26(b)." The responding party must "separately and fully" answer or object to each interrogatory within thirty days of service of the interrogatory. USCIT R. 33(b). Objections should be "stated with specificity," and "[a]ny ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure." USCIT R. 33(b)(4). USCIT Rule 34(a) permits a party to serve any other party with a request to produce "any designated documents or electronically stored information," as well as tangible items. Similar to Rule 33, the responding party must respond within thirty days of service of the request. USCIT R. 34(b)(2)(A). Objections to part of the request "must specify the part and permit inspection of the rest." USCIT R. 34(b)(2)(C).

a. Government Interrogatory 3

Government Interrogatory 3 requests that Greenlight "[n]ame all manufacturers of Subject Merchandise imported by Greenlight from January 1, 2007 through February 9, 2012." Pl.'s Mot. Ex. 1, at 5. The interrogatory asks Greenlight to identify contact information for Greenlight's manufacturers, documents related to the subject merchandise, and all communications between its manufacturers and Greenlight. *Id.* Greenlight objects to the interrogatory, arguing that it is overbroad and that the timeframe requested is outside the scope of the claims alleged in the complaint. *See* Def.'s Resp. 8–9. Greenlight asserts also that it cannot produce communications with certain vendors because Greenlight no longer has access to a "defunct and inaccessible" former email address associated with the website "greenlightorganic.com." *See id.* at 3–4, 10.

Greenlight's first objection that the interrogatory is overbroad is improper because it constitutes a general objection, which is insufficient to contest an interrogatory. Courts have recognized that the "mere assertion that interrogatories are overly broad, burdensome, oppressive, or irrelevant is not adequate to constitute a successful objection." *Sellick Equip. Ltd. v. United States*, 18 CIT 352, 354 (1994). "A successful objection offers a recognized reason for objection

buttressed by substantiated, detailed proof of the claim." *United States v. Optrex America, Inc.*, 28 CIT 993, 995 (2004). The court finds that Greenlight's general objection is insufficient with respect to Government Interrogatory 3.

The court rejects also Greenlight's objection that Government Interrogatory 3 requests information outside the time period alleged in the complaint. The complaint seeks penalties and unpaid duties for athletic wearing apparel imported between January 1, 2007 and December 31, 2011, while the interrogatory requests information between January 1, 2007 and February 9, 2012. The Government argues that in order to prove a trade fraud case, it is helpful to compare a company's actions before and after the alleged fraud occurred. *See* Telephone Conference at 0:28:33–0:31:42, 0:32:48–0:33:33. The court finds that the Government's inquiry into Greenlight's actions between January 1, 2012 and February 9, 2012, the time period outside the scope of the period alleged in the complaint, is relevant to the Government's claims and is reasonably calculated to lead to admissible evidence. *See* USCIT R. 26(b)(1). The court instructs Greenlight to supplement its response to Government Interrogatory 3 with information, documents, and other evidence for the full time period from January 1, 2007 to February 9, 2012.

With respect to email communications associated with the defunct website "greenlightorganic.com," Greenlight argues that it cannot produce or search for any of these prior emails because it abandoned its former website. *See* Def.'s Resp. 3–4, 10. Greenlight's counsel agreed during the telephone conference call with the court that he will send a letter to the third-party email service provider requesting copies of the communications. *See* Telephone Conference at 0:40:05–0:41:00. Counsel for Greenlight also represented that he will consult with his client regarding any additional relevant documents that may be in his client's possession. *See id.* at 1:01:35–1:01:40, 1:04:40–1:04:45. The court orders Greenlight's counsel to file a letter with the court reporting on Greenlight's efforts to obtain communications from its third-party email service provider.

b. Government Interrogatories 5, 6, and 15

Government Interrogatory 5 asks Greenlight to "[i]dentify every company, other than Greenlight, with which any owner, director, manager, or employee of Greenlight participated in the importation of merchandise into the United States." Pl.'s Mot. Ex. 1, at 7. The interrogatory also asks Greenlight to provide contact information for

every company. *Id.* Greenlight contends that it has "turned over the documents and communications of which it is aware and in possession regarding customs brokers." Def.'s Resp. 13.

Government Interrogatory 6 asks Greenlight to "[i]dentify all documents and communications relating to Greenlight's determinations that the Subject Merchandise was made of woven or knit materials." Pl.'s Mot. Ex. 1, at 8. Greenlight responds that the documents have already been provided to the Government, and that "Greenlight relied upon the expertise and certifications of its vendors, suppliers, and customs brokers for tariff classification advice." *Id.; see also* Def.'s Resp. 12.

The Government asserts that Greenlight has failed to produce documents with respect to Government Interrogatory 15, which asks Greenlight to "[i]dentify all documents and communications of Greenlight relating to the labeling of Greenlight Wearing Apparel as 'recycled polyester.'" Pl.'s Mot. Ex. 1, at 16. Greenlight argues that it has already produced documents related to the interrogatory to the Government. Def.'s Resp. 12–13.

During the telephone conference with the court, the Government stated that additional documents acquired from third parties provide it with good faith reason to believe that Greenlight has failed to produce all relevant documents. *See* Telephone Conference at 1:04:45–1:05:06. Accordingly, the court orders Greenlight to conduct another search of its documents and to produce any remaining materials that are responsive to Government Interrogatories 5, 6, and 15, or are responsive to any other discovery requests for which Greenlight has performed incomplete document searches. The court instructs counsel for Greenlight to file a letter with the court reporting on Greenlight's efforts to search for responsive documents in compliance with this order.

c. Government Interrogatories 8–11

Government Interrogatories 8–11 ask Greenlight to "[i]dentify all sources of income" for Mr. Aulakh and Ms. Gill from January 1, 2007 through June 19, 2017 and to "[i]dentify all companies or persons" with whom the officers engaged professionally. Pl.'s Mot. Ex. 1, at 13–15. Greenlight objects on the basis that the Government's complaint does not allege individual wrongdoing or individual liability and the inquiry is outside of the scope of the complaint. *Id.*

The Supreme Court has held consistently that discovery statutes are to be broadly construed "to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v.*

Sanders, 437 U.S. 340, 351 (1978) (citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)). Discovery is not necessarily limited to the issues in the pleadings because "discovery itself is designed to help define and clarify the issues." *Oppenheimer Fund, Inc.*, 437 U.S. at 351. Greenlight's argument contradicts the traditionally liberal nature of discovery. Because discovery is not limited to the complaint, Greenlight's objection that the Government has not yet alleged individual wrongdoing is improper at this stage of litigation. The Government has stated that the purpose of Government Interrogatories 8–11 is for the Government to obtain information to assist it with determining whether to amend its complaint to include charges of individual liability against Greenlight's officers. *See* Telephone Conference at 1:09:28–1:10:20. The Government's actions fall within the liberal nature of discovery and thus will be allowed.

Liability for claims brought under Section 1592 is not limited to companies. Under principles of agency law, "an agent who actually commits a tort is generally liable for the tort along with the principal, even though the agent was acting for the principal." *United States v. Trek Leather, Inc.*, 767 F.3d 1288, 1299 (Fed. Cir. 2014) (citing Restatement (Second) of Agency § 343 (Am. Law Inst. 1958); Restatement (Third) of Agency § 7.01 (Am. Law Inst. 2006)). An officer of a corporation may be liable personally for violating Section 1592, even when the conduct falls within the scope of the officer's authority. *Trek Leather, Inc.*, 767 F.3d at 1299. The court will allow discovery into the officers' sources of income and the companies with whom the officers have conducted business, in order to determine whether Greenlight's officers may be liable individually in the Government's Section 1592 case. The court directs Greenlight to respond to Government Interrogatories 8–11.

C. Greenlight's Motion for Protective Order

Defendant's motion for a protective order seeks to limit discovery into Mr. Aulakh's and Ms. Gill's personal finances, asserting that discovery is improper and irrelevant. *See* Def.'s Mot. 11. The Government argues that the information is necessary in order to prove the existence of a business fraud scheme and is probative as to "whether it would be appropriate to pierce the corporate veil." *See* Pl.'s Resp. 5–6.

USCIT Rule 26(c)(1) permits a party to move for a protective order in the course of discovery. The court may issue a protective order if it finds good cause, including "forbidding inquiry into certain matters, or limiting the scope of disclosure of discovery to certain matters." USCIT R. 26(c)(1)(D).

The Government provides adequate justification as to why the court should allow discovery regarding the personal finances of Greenlight's principals, stating that "[e]vidence of financial benefits received by Greenlight principals and their business associations are central to the fraud scheme the Government will detail at trial." Pl.'s Resp. 6. For instance, "[e]vidence collected thus far shows that soon after they became aware of the Government's investigation," Greenlight's officers "took steps to deplete Greenlight's assets and establish a new apparel company." *Id.* The Government believes that "[e]vidence of financial benefits and other business opportunities received" by Greenlight's officers are "probative of a common plan" for fraud and evasion of customs penalties. *Id.* at 8. Because the proposed discovery is related to the Government's claims against Greenlight, the court determines that discovery related to the personal finances of Mr. Aulakh and Ms. Gill will be permitted. The motion for a protective order relating to Mr. Aulakh's and Ms. Gill's personal finances is denied.

Upon consideration of the motion, and all other papers and proceedings in this action, it is hereby:

ORDERED that Plaintiff's motion to compel discovery is granted; and it is further

ORDERED that Defendant will provide complete responses to the Requests for Admission 1–4 by January 12, 2018; and it is further

ORDERED that Defendant will provide all documents, information, and other evidence related to Government Interrogatories 3, 5, 6, 8–11, and 15; and it is further

ORDERED that Defendant will file a letter with the court by January 12, 2018 reporting on Greenlight's efforts to search for responsive documents and to obtain email communications from the third-party service provider; and it is further

ORDERED that Defendant's motion for a protective order is denied.

Dated: December 18, 2017
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 17–169

BAODING MANTONG FINE CHEMISTRY CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and GEO SPECIALTY CHEMICALS, INC., Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 12–00362

[Sustaining a decision responding to court order in litigation contesting a determination in a review of an antidumping duty order on glycine from the People's Republic of China]

Dated: December 20, 2017

Ronald M. Wisla, Fox Rothschild LLP, of Washington, D.C., for plaintiff Baoding Mantong Fine Chemistry Co., Ltd. With him on the brief was *Lizbeth R. Levinson*.

Antonia R. Soares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., for defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr*., Assistant Director. Of counsel on the brief was *Christopher P. Hyner*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

David M. Schwartz, Thompson Hine LLP, of Washington D.C., for defendant-intervenor GEO Specialty Chemicals, Inc.

OPINION

Stanceu, Chief Judge:

In this action, plaintiff Baoding Mantong Fine Chemistry Co., Ltd. ("Baoding Mantong") challenged the determination issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") to conclude an administrative review of an antidumping duty order on glycine from the People's Republic of China. *Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 Fed. Reg. 64,100 (Int'l Trade Admin. Oct. 18, 2012) ("*Final Results*"). The administrative review at issue pertained to entries of subject merchandise made during the period of March 1, 2010 through February 28, 2011. *Id*.

Before the court is the Department's decision submitted in response to the court's opinion and order in *Baoding Mantong Fine Chemistry Co. v. United States*, 41 CIT __, 222 F. Supp. 3d 1231 (2017) ("*Baoding Mantong II"). See Final Results of Redetermination Pursuant to Court Remand* (July 18, 2017), ECF No. 87–1 ("*Second Remand Redeterm.*"). The Second Remand Redetermination addresses the three remaining issues in this litigation. For the reasons that follow, the court will enter judgment sustaining the Second Remand Redetermination.

I. BACKGROUND

The background of this action is set forth in the court's two prior opinions, which are summarized and supplemented, as necessary, herein. *See Baoding Mantong Fine Chemistry Co. v. United States*, 39 CIT __, __, 113 F. Supp. 3d 1332, 1334–36 (2015) ("*Baoding Mantong I"); Baoding Mantong II*, 41 CIT at __, 222 F. Supp. 3d at 1234–37.

A. The Parties to this Litigation

Plaintiff Baoding Mantong is a Chinese producer and exporter of glycine. *Final Results*, 77 Fed. Reg. at 64,101. Baoding Mantong was the sole respondent in the administrative review at issue. *Id*. at 64,100. Defendant-intervenor GEO Specialty Chemicals, Inc. is a domestic producer of glycine and was a party to the administrative proceeding before Commerce. *Id*.

B. Procedural History

Commerce issued the underlying antidumping duty order in 1995. *Antidumping Duty Order: Glycine From the People's Republic of China*, 60 Fed. Reg. 16,116 (Int'l Trade Admin. Mar. 29, 1995) (the "Order"). Commerce initiated the administrative review at issue in 2011. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 76 Fed. Reg. 23,545 (Int'l Trade Admin. Apr. 27, 2011). In the Final Results, Commerce assigned Baoding Mantong a weighted-average dumping margin of 453.79%. *Final Results*, 77 Fed. Reg. at 64,101. This margin was a calculated margin that did not result from the use of an adverse inference.

Before the court, plaintiff challenged the 453.79% dumping margin on various grounds. Mem. of P. & A. in Supp. of Pl.'s Rule 56.2 Mot. for J. on the Agency R. 2, 10, 13 (July 22, 2013), ECF No. 30–1 ("Pl.'s Br."); *see also* Rule 56.2 Mot. for J. on the Agency R. (July 22, 2013), ECF No. 30. Plaintiff advanced a general argument that the margin was inaccurate, unfair, and inconsistent with commercial and economic reality, pointing out that during the administrative review it had reported that it did not suffer any financial loss on export sales during the period of review. *Baoding Mantong I*, 39 CIT at __, 113 F. Supp. 3d at 1339. It also argued, specifically, that Commerce applied invalid surrogate values to four factors of production—for chlorine, liquid ammonia, formaldehyde, and steam coal—when calculating the normal value of Baoding Mantong's subject merchandise. Pl.'s Br. 19–34. Finally, plaintiff challenged the surrogate financial ratios Commerce used to value Baoding Mantong's factory overhead, selling, general, and administrative ("SG&A") expenses, and profit (col-

lectively, the "financial ratios") for the normal value calculation. *Id*. at 34–39. Noting the plaintiff had made a general challenge to the margin as well as specific challenges to surrogate value determinations, the court ordered Commerce to reconsider and redetermine "any and all aspects of the Department's calculation of the 453.79% margin as necessary and appropriate" in arriving at a redetermined margin for Baoding Mantong. *Baoding Mantong I*, 39 CIT at __, 113 F. Supp. 3d at 1341.

Following the court's decision in *Baoding Mantong I*, Commerce submitted a redetermination ("First Remand Redetermination") that calculated a new dumping margin of 64.97%. *Baoding Mantong II*, 41 CIT at __, 222 F. Supp. 3d at 1234; *see also Final Results of Redetermination Pursuant to Court Remand* (Mar. 30, 2016), ECF No. 73–1 ("*First Remand Redeterm.*"). The reduction from the previous 453.79% margin to the new margin of 64.97% resulted from the Department's basing the financial ratios "upon the financial information for an Indonesian producer of urea, rather than the financial information of three Indonesian pharmaceutical companies," as it had in the Final Results. *Baoding Mantong II*, 41 CIT at __, 222 F. Supp. 3d at 1237 (quoting *First Remand Redeterm.* at 5).

Commerce submitted the First Remand Redetermination partially under protest. Having sought, through its counsel, a voluntary remand from the court in order to reconsider the financial ratios, Commerce stated that "respectfully, under protest, we have also reconsidered the remaining aspects of Baoding Mantong's normal value calculation." *First Remand Redeterm.* at 5. This included the four surrogate values that Baoding Mantong specifically challenged in its motion for judgment on the agency record, *i.e.*, chlorine, liquid ammonia, formaldehyde, and steam coal. *Id*. at 12–20. While protesting the obligation to do so, Commerce reconsidered its surrogate values for these and others of Baoding Mantong's production inputs. *Id*. at 12–26. It concluded that, as to each of these inputs, its surrogate values as determined in the Final Results were supported by substantial evidence and otherwise in accordance with law. *Id*. at 12–20.

In *Baoding Mantong II*, the court affirmed in part and remanded in part the First Remand Redetermination. The court sustained the Department's new selection of information used to calculate the financial ratios and the Department's selection of a surrogate value for liquid chlorine. *Baoding Mantong II*, 41 CIT at __, __, 222 F. Supp. 3d at 1240–45, 1247–48. The court did not sustain the Department's determination of the surrogate values Commerce applied to Baoding Mantong's production inputs of ammonia, formaldehyde, and steam

coal. *Id*., 41 CIT at __, 222 F. Supp. 3d at 1248–54. In the Second Remand Redetermination, Commerce redetermined each of these three surrogate values and used them in a recalculated weighted-average dumping margin for Baoding Mantong. The result was a margin of 0.00%. *Second Remand Redeterm.* at 16.

On August 17, 2017, Baoding Mantong filed comments in support of the Second Remand Redetermination, taking issue only with certain statements therein pertaining to the Department's reaching certain of its decisions under protest. Baoding Mantong Fine Chemistry Co., Ltd.'s Comments on Commerce's Second Remand Results (Aug. 17, 2017), ECF No. 91 ("Pl.'s Comments on Second Remand"). Defendant-intervenor GEO Specialty Chemicals, Inc. did not file comments on the Second Remand Redetermination. Defendant filed a response to Baoding Mantong's comments on the Second Remand Redetermination on August 28, 2017. Def.'s Reply to Pl.'s Comments on the Remand Results (Aug. 28, 2017), ECF No. 92 ("Def.'s Response to Comments on Second Remand"). Both Baoding Mantong and defendant request that the court sustain the Department's Second Remand Redetermination. *See* Pl.'s Comments on Second Remand 1, 3; Def.'s Response to Comments on Second Remand 1, 2.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), under which the court reviews actions commenced under section 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a.[1] In reviewing an agency determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

B. The Redetermined Surrogate Values for Steam Coal, Ammonia, and Formaldehyde as Set Forth in the Second Remand Redetermination

In the Final Results, Commerce valued all of Baoding Mantong's production inputs using import data that it obtained from the Global Trade Atlas ("GTA"). For each production input, it chose import data from Indonesia, which is the country Commerce chose as its principal surrogate country. The Department's regulations provide that "[e]x-

[1] All citations to the United States Code herein are to the 2012 edition and all citations to the Code of Federal Regulations herein are to the 2012 edition.

cept for labor, . . . the Secretary normally will value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2). Because the regulation uses the word "normally," Commerce retained in the regulation the discretion to use data from more than one market-economy country in valuing the various factors of production. Relevant to this point is that the statute contemplates situations in which Commerce may need to rely upon data from more than one surrogate country in order to fulfill its statutory obligation to value a factor of production according to the "best available information." *See* 19 U.S.C. § 1677b(c) ("the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country *or countries* considered to be appropriate by the administering authority." (emphasis added)). While the regulation expresses a preference for using information from only one surrogate country (except for the labor factor of production), the regulation cannot be read so broadly as to defeat the congressional directive that factors of production be valued according to the best available information. The flexibility inherent in the word "normally" might be necessary in a case in which data in one surrogate country is the best available information for valuing only some, but not all, factors of production. In other words, the comparability of data that results from having all surrogate values determined according to data in the same surrogate country, per 19 C.F.R. § 351.408(c)(2), is a consideration in deciding which surrogate data to use for a particular factor of production, but in light of the statutory directive of 19 U.S.C. § 1677b(c) to use the best available information from a surrogate country "or countries," it cannot be the sole consideration. By using those words, the provision allows for instances in which data in the country Commerce otherwise might choose as its single surrogate country poses a significant problem for a particular factor of production. This is such a case, for as the court noted in *Baoding Mantong II*, there was a significant problem with the Indonesian GTA import data Commerce used to value Baoding Mantong's use of steam coal in the Final Results and again in the First Remand Redetermination.

1. Surrogate Value for Steam Coal

The court ruled that the Department's finding that the Indonesian GTA import data relevant to steam coal met the "best available information" standard was not supported by substantial evidence. *Baoding Mantong II*, 41 CIT at __, 222 F. Supp. 3d at 1253–54. The court agreed with Baoding Mantong's position that the average unit value ("AUV") Commerce obtained from those data, $0.66 per kilogram, was disproportionately high relative to the AUVs obtained

from other GTA import value information on the record, which pertained to Thailand and the Philippines (each with an AUV of $0.05 per kilogram), Ukraine (AUV of $0.20 per kilogram), and South Africa (AUV of $0.21 per kilogram). *Id*. Moreover, the quantity upon which the Indonesian AUV was based (less than 604 metric tons) did not compare favorably with the other quantity data (Thailand, 954,648 metric tons; Ukraine, 638,189 metric tons; South Africa, 234,389 metric tons; the Philippines, 15,920 metric tons[2]) and was less than Baoding Mantong's own consumption of 1,037 metric tons. *Id*. Commerce itself had acknowledged that Indonesia had GTA data with the lowest import volume and the highest value among the economically comparable countries. *Id*. (citing *First Remand Redeterm.* at 19). In support of its decision to continue to use the Indonesian data, Commerce explained that "it is the Department's practice to value all factors from a single surrogate country." *First Remand Redeterm.* at 19.

In the Second Remand Redetermination, Commerce valued the steam coal input using the GTA import data from Thailand, calculating a value of $0.05 per kilogram, noting that the data from Thailand represented the largest quantity of the four countries considered. *Second Remand Redeterm.* at 14. Commerce found that "the Thai data are the most representative of a broad-market average, as well as being product-specific, publicly available, contemporaneous with the period of review, and exclusive of taxes and duties." *Id*. These findings are supported by substantial evidence on the record.

Commerce concluded by stating that "pursuant to section 773(c)(1) of the Act, we respectfully under protest, find that the *GTA* import data from Thailand constitute the best available information on the record and that the value of $0.05 per kilogram, which is based on these data, should be selected as the surrogate value for steam coal." *Id*. at 15. Commerce did not explain the reason for its protest. Despite the significant deficiencies the court had identified in the Indonesian GTA import data on steam coal, Commerce did not provide a specific basis for its apparent belief that the court had erred in ruling that Commerce lacked evidentiary support for its finding that these data were the best available information on the record. Instead, Commerce offered the general statement that "we continue to find that the most appropriate surrogate country for this review is Indonesia, pursuant to section 773(c)(4) of the Act [19 U.S.C. § 1677b(c)(4)]." *Id*. at 5. This general statement applied to all surrogate value determinations dis-

[2] *Baoding Mantong II* erroneously stated the quantity as 15,919,558 metric tons rather than 15,919,558 kilograms.

cussed in the Second Remand Redetermination and was not specific to the issue of the steam coal surrogate value.

2. Surrogate Value for Ammonia

In the Final Results and again in the First Remand Redetermination, Commerce chose, as the best available information for valuing Baoding Mantong's ammonia production input, import data for Indonesian HTS subheading 2814.20 (obtained from the GTA), which pertained to ammonia in aqueous solution, *i.e.*, aqueous ammonia. *First Remand Redeterm.* at 14–17. From those data, Commerce calculated a surrogate value of $4.06 per kilogram for Baoding Mantong's ammonia input in the Final Results and adhered to that determination in the First Remand Redetermination. *Id*. at 17. Before the court, Baoding Mantong argued that the "liquid ammonia" input it used in producing glycine was anhydrous ammonia, not aqueous ammonia as Commerce had found. Pl.'s Br. 23–28.

The court directed Commerce to reconsider its finding that the production input was aqueous ammonia. *Baoding Mantong II*, 41 CIT at __, 222 F. Supp. 3d at 1248–52. After noting that the record contained conflicting evidence on the question of the identity of the input, the opinion stated that "the court cannot conclude from the Department's discussion and the record information that Commerce correctly made its decision based on substantial record evidence." *Id*., 41 CIT at __, 222 F. Supp. 3d at 1250. "The court does *not* conclude that the finding that the production input was aqueous ammonia necessarily was incorrect as a factual matter, but in light of the deficiencies in the Department's explanation, the court directs Commerce to review the relevant record evidence and reach a well-reasoned and adequately explained finding as to what the input actually was." *Id*., 41 CIT at __, 222 F. Supp. 3d at 1251.

During the second remand proceeding, Commerce issued a supplemental questionnaire to Baoding Mantong on the type of ammonia used in its production of glycine during the period of review. *Second Remand Redeterm.* at 8. Baoding Mantong submitted a response, along with certificates of analysis for its ammonia purchases indicating that the liquid ammonia Baoding Mantong purchased was a gas at room temperature and was sold commercially as a compressed liquid under pressure and refrigeration (*i.e.*, anhydrous), rather than a liquid at room temperature (*i.e.*, aqueous). *Id*. at 8–9. In the Second Remand Redetermination, Commerce determined that the input at issue in fact was anhydrous ammonia, a finding supported by the

record evidence as supplemented by the questionnaire response. *Second Remand Redeterm.* at 5–10. Commerce did not reach this decision under protest.

Commerce then considered the record data relevant to valuation of liquid ammonia. In specific reference to the ammonia surrogate value, Commerce explained its criteria as follows: "in selecting a surrogate value and pursuant to 19 CFR 351.408(c)(1) and (2), the Department normally will utilize publicly available information and will normally value all factors of production from a single surrogate country." *Second Remand Redeterm.* at 10. "In addition, it is the Department's practice to select values that are product-specific, representative of a broad-market average, publicly available, contemporaneous with the period of review, and exclusive of taxes and duties." *Id*. The record contained GTA import data for anhydrous ammonia from the Philippines, Indonesia, Ukraine, Thailand, Colombia, and South Africa. *See id*. Commerce concluded that the value data on anhydrous ammonia from all six countries were specific to the input, publicly available, contemporaneous with the period of review, and exclusive of taxes and duties. *Id*. Commerce also found that the data were not all equal when viewed according to the criterion of being representative of a broad market average. *Id*. at 11. Commerce chose, on that basis, the GTA import data for Thailand, observing that "[a]lthough the volume of Indonesian imports of anhydrous ammonia is greater than the import volumes for four other potential surrogate countries, it represents only slightly more than half the import volume for Thailand." *Id*. Commerce further stated that "[t]hus, there is nothing to suggest, either nominally or comparatively, that the volume of Indonesian imports of anhydrous ammonia is commercially insignificant" but also stated that "[h]owever, as the volume of Thai imports was much greater, it may be found to be superior and, consequently, the most representative of a broad-market average." *Id*. Substantial evidence of record supports the choice of the Thai data and the surrogate value Commerce obtained from them.

Commerce further explained that it was influenced to choose the GTA data for Thailand over those of Indonesia because of the court's opinion in *Baoding Mantong II*, stating that "it remains our preference, consistent with 19 CFR 351.408(c)(2), to select all values from the primary surrogate country" and that "it is respectfully under protest that we find, pursuant to section 773(c)(1) of the Act [19 U.S.C. § 1677(c)(1)], the Thai *GTA* import data to constitute the best available information on the record and that we select the value of $0.45 per kilogram, based on these data, as the surrogate value for anhydrous ammonia." *Id*. To support its statement that it was mak-

ing its decision under protest, Commerce cited language in *Baoding Mantong II* related to the GTA data for aqueous ammonia. *Id*. According to Commerce, "[i]n *Baoding Mantong II*, the Court found that the Indonesian *GTA* import data for aqueous ammonia were not the data that were most representative of a broad-market average, particularly when compared to the import data for the Philippines." *Id*. This characterization of the court's opinion in *Baoding Mantong II* is not entirely correct.

In *Baoding Mantong II*, the court did not reach any conclusion as to the quantities in the GTA import data on *anhydrous* ammonia; instead, the discussion pertained to the GTA data on *aqueous* ammonia. Nor, as to those data, did the court *find* that the Indonesian GTA import data for aqueous ammonia were not the most representative of a broad market average. It is not the role of the court to make findings. Instead, the court pointed out that Commerce, in the First Remand Redetermination, failed to respond to Baoding Mantong's comment that the quantity of Indonesian aqueous ammonia relied upon by Commerce, 82 metric tons, was too small to serve as the basis for a surrogate value, especially when viewed against Baoding Mantong's own liquid ammonia consumption of 660 metric tons during the period of review. *Baoding Mantong II*, 41 CIT at __, 222 F. Supp. 3d at 1251. The court further discussed the issue as follows:

> In the Remand Redetermination, Commerce mentioned the quantity of 82 metric tons for Indonesian imports of aqueous ammonia but did not address the question of whether this quantity is commercially significant or why the Philippine data, which are based on a much larger quantity, would not be superior in that respect. *[First] Remand Redeterm.* at 17. Instead of addressing the question of quantity, Commerce discussed the question of whether the value was aberrational, concluding that it was not because "Indonesia's AUV is 4.06 USD/kilogram, which falls within the range of economic[ally] comparable countries of 0.28 to 6.94 USD/kilogram." *Id*. Commerce does not address the point Baoding Mantong raised concerning the relatively low quantities upon which all of the GTA data were based other than the data from the Philippines. Commerce concluded that "[t]he GTA data from Indonesia is representative of a broad market-average of liquid ammonia that is specific to this product HTS code," *id*. at 16, but does not explain in the [First] Remand Redetermination why the Philippine GTA data, which is based on 52,304 metric tons as compared to 82 metric tons for Indonesia, would not reflect a much broader market average. Although Commerce prefers using data from a single surrogate

> country, *see* 19 C.F.R. § 351.408(c)(2), choosing the Indonesian data over the Philippine data, which were based on a substantially larger quantity, raises a question as to whether the Indonesian data were the "best available information" as required by 19 U.S.C. § 1677b(c)(1).

Id., 41 CIT at __, 222 F. Supp. 3d at 1251–52 (second and third alterations in original). As to the issue of relative quantities and commercial insignificance, the court pointed out that Commerce failed to address the objections Baoding Mantong specifically had raised. The court, moreover, specifically recognized the Department's competing considerations of preferring a broad market average and also preferring to use surrogate values from a single surrogate country. In making its decision under protest, Commerce suggests that the Indonesian GTA import data on anhydrous ammonia were superior to the Thai GTA import data because they pertain to Indonesia, the chosen surrogate country, and, therefore, are the best available information for purposes of 19 U.S.C. § 1677(c)(1). Commerce implies that it chose the Thai data over the Indonesian data only because of the court's discussion regarding data on aqueous ammonia. But the court's prior opinion and order did not compel Commerce to choose the Thai data to value the anhydrous ammonia production input.

3. Surrogate Value for Formaldehyde

In the Final Results and again in the First Remand Redetermination, Commerce chose, as the best available information for valuing Baoding Mantong's formaldehyde input, GTA data for Indonesian imports under HTS subheading 2912.11(Methanal (formaldehyde)). *First Remand Redeterm.* at 17–18. Based on these data, Commerce calculated a surrogate value of $0.49 per kilogram. *Id*. In challenging this surrogate value, Baoding Mantong had argued that the quantity of Indonesian imports on which the value was based, just over 357 metric tons, was not a commercially and statistically significant quantity. *See Baoding Mantong II*, 41 CIT at __, 222 F. Supp. 3d at 1252. Baoding Mantong advocated that Commerce use the GTA import data for the Philippines, which Baoding Mantong argued would support a surrogate value of $0.27 per kilogram based on a quantity of 6,025 metric tons. *Id*.

In *Baoding Mantong II*, the court did not hold that the 357 metric ton quantity was commercially insignificant. The court did agree with Baoding Mantong that the quantities in the GTA data set for Colombia (3 metric tons) and South Africa (828 kilograms, or approximately 0.8 metric tons) were aberrantly low when compared to the GTA data

of record for the other economically comparable countries. *Id*. The court also noted that the AUVs for Colombia ($5.64 per kilogram) and South Africa ($23.54 per kilogram) were aberrational when compared to the AUVs for the other four countries, each of which showed AUVs of less than $1.00 per kilogram. *Id*. The court then opined that "the Indonesian data showed the smallest quantity of the four data sets that actually merited consideration," *i.e.*, the data sets for the Philippines, Thailand, Ukraine, and Indonesia.[3] *Id*., 41 CIT at __, 222 F. Supp. 3d at 1253. The court directed Commerce to explain "why the Philippine data would have been, or would not have been, a better source of information than the Indonesian data for valuing formaldehyde." *Id*. "The explanation must consider the record data as a whole, including the data showing that the quantity for the Philippine data was substantially higher than those for the other countries (and between seven and eight times higher than the next largest quantity, which was the quantity for Thailand)." *Id*. The court added that "[t]he huge disparity between the Philippine quantity and the quantities for the other three countries that merited consideration must be considered in light of the Department's stated preference for using data that represent a broad market average." *Id*.

Commerce, under protest, chose the GTA import data for the Philippines as the best available information on the record for valuing formaldehyde, calculating a surrogate value of $0.27 per kilogram. *Second Remand Redeterm.* at 13. ("we find that the Philippine data are the most representative of a broad-market average, as well as being product-specific, publicly available, contemporaneous with the period of review, and exclusive of taxes and duties."). Substantial record evidence supports this decision, including the record evidence that these data were superior according to the "broad market average" criterion, having been derived from the largest quantity among the data sets. Commerce further explained that "[b]ecause use of these data is against the Department's preference for selections from a single surrogate country, we respectfully under protest find that, pursuant to section 773(c)(1) of the Act [19 U.S.C. § 1677b(c)(1)], the Philippine *GTA* import data constitute the best available information on the record and that the value of $0.27 per kilogram, which is based on these data, should be selected as the surrogate value for formaldehyde." *Id*.

[3] The quantities and average unit values for the four countries were as follows: the Philippines, 6,025 metric tons and $0.27 per kilogram; Thailand, 791 metric tons and $0.32 per kilogram; Ukraine, 493 metric tons and $0.90 per kilogram; Indonesia, 357 metric tons and $0.49 per kilogram. *Baoding Mantong's Submission of Surrogate Value Information and Comment* Attach. 3 (July 16, 2012), (P.R. Doc. 99).

The rationale for the Department's protest presumes that the court *required* Commerce to reject the Indonesian GTA data. In fact, the court *questioned* whether the Indonesian data were the best available information on the record and required an *explanation* for why the Philippine GTA import data, which are based on a much larger quantity than any other GTA data set on the record, would, or would not, be superior. *Baoding Mantong II*, 41 CIT at __, 222 F. Supp. 3d at 1253. The Department's preference for a single surrogate country is the only consideration in favor of the Indonesian data, and the premise of the Department's rationale for reaching its decision under protest is that this preference outweighs the superiority of the Philippine GTA import data when viewed according to the Department's "broad market average" criterion. On that issue, the court also opined that Commerce will be required to use data other than Indonesian import data when valuing steam coal and that "[d]eparture from the single surrogate country practice thus will be required in any event, which reduces, if not defeats, the relevance of the preference reflected in 19 C.F.R. § 351.408(c)(2)." *Id*.

III. CONCLUSION

As discussed above, the court's opinion and order in *Baoding Mantong II* affirmed the Department's choice of information for the calculation of financial ratios, affirmed the Department's surrogate value for liquid chlorine, found unsupported by substantial evidence the Department's surrogate value for steam coal, directed Commerce to reconsider whether, and reach a well-reasoned and adequately explained finding as to whether, the ammonia input was aqueous or anhydrous ammonia, and, in light of the need to use data other than the Indonesian GTA data to value steam coal, directed Commerce to explain why the Indonesian GTA data it used to value formaldehyde was, or was not, the best available information in light of the substantially greater quantity shown in the Philippine GTA data.

Commerce responded to the court's directive by making several new findings in the Second Remand Redetermination. Commerce found that the GTA data from Thailand for steam coal were the best available information because they were based on the largest quantity among the data sets. Commerce stated that it was doing so under protest but stated no specific rationale for its protest. Commerce found, but not under protest, that the ammonia production input was anhydrous ammonia and not aqueous ammonia. Commerce valued the anhydrous ammonia according to GTA import data for Thailand, stating that it was doing so under protest, even though the court had not required Commerce to choose these data. Finally, Commerce

valued formaldehyde according to GTA import data from the Philippines, protesting on the inaccurate premise that the court had required Commerce to depart from its preference for valuing factors of production in a single surrogate country.

As discussed above, the court does not agree with all of the statements Commerce made in the Second Remand Redetermination. Specifically, the court has identified certain shortcomings in the grounds, or lack thereof, for the Department's reaching some decisions in the Second Remand Redetermination under protest, but the court does not consider these shortcomings to necessitate or justify another remand. The decisions Commerce reached in the Second Remand Redetermination are supported by record evidence for the reasons the court has discussed in this Opinion. Plaintiff Baoding Mantong supports the findings, and the ultimate conclusion, Commerce reached in the Second Remand Redetermination, and defendant-intervenor GEO Specialty Chemicals, Inc. has waived any objection by declining to submit comments on the Second Remand Redetermination to the court. Therefore, the court sustains the Second Remand Redetermination. Judgment will enter accordingly.

Dated: December 20, 2017
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, CHIEF JUDGE