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Administrative Review
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June 5, 2015

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Issues and Decision Memorandum for the Final Results of
Antidumping Duty Administrative Review: Fresh Garlic from the
People's Republic of China; 2012-2013 Administrative Review

SUMMARY

The Department of Commerce (the Department) analyzed the case briefs and rebuttal brief submitted by interested parties in the administrative review of the antidumping duty order on fresh garlic from the People's Republic of China (PRC).¹ As a result of this analysis, we have made no changes to the preliminary results. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

BACKGROUND

On December 8, 2014, the Department published the preliminary results of this administrative review.² The mandatory respondents in this review are: Hebei Golden Bird Trading Co., Ltd. (Golden Bird) and Jinxiang Hejia Co., Ltd. (Hejia)). In the *Preliminary Results*, we relied on adverse facts available (AFA) for each of these mandatory respondents, because each company failed to cooperate to the best of its ability to comply with the Department's requests for information. In-turn, we preliminarily assigned each of these companies the PRC-wide entity rate. Further, we preliminarily found that 16 companies made no shipments during the POR and that seven companies qualified for separate rate status.

¹ See *Antidumping Duty Order: Fresh Garlic From the People's Republic of China*, 59 FR 59209 (November 16, 1994).

² See *Fresh Garlic From the People's Republic of China: Preliminary Results of the Nineteenth Antidumping Duty Administrative Review; 2012-2013*, 79 FR 72625 (December 4, 2014) (*Preliminary Results*) and accompanying Issues and Decision Memorandum (PDM).



Following the *Preliminary Results*, on January 5 and 7, 2015, Golden Bird and Shenzhen Xinboda Industrial Co. Ltd. (Xinboda) filed requests for a hearing, respectively.³ Subsequently, on March 10 and 19, 2015, Golden Bird and Xinboda withdrew their requests for a hearing, respectively. Golden Bird and Xinboda filed their case briefs on January 19 and 20, 2015, respectively, while Petitioners⁴ filed their rebuttal brief on January 29, 2015.

SCOPE OF THE ORDER

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

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

DISCUSSION OF THE ISSUES

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

- Comment 1: Whether Golden Bird Cooperated to the Best of its Ability in this Review
- Comment 2: Whether Golden Bird Should Be Part of the PRC-Wide Entity
- Comment 3: The Separate Rate Assigned to Xinboda
- Comment 4: Whether Xinboda Should Have Been Individually Reviewed
- Comment 5: PRC-Wide Rate Challenge
- Comment 6: 15-Day Liquidation Instruction Policy Challenge

³ See Golden Bird's letter to the Department, "Fresh Garlic from the People's Republic of China – Request for Extension of Time to File Case Brief and Request for a Hearing Filed on Behalf of Hebei Golden Bird Trading Co., Ltd." dated January 5, 2015; see also Xinboda's letter to the Department "Fresh Garlic the People's Republic of China – Request for Public Hearing" dated January 7, 2015.

⁴ Petitioners consist of the following companies: the Fresh Garlic Producers Associations and its individual members: Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc.

Comment 1: Whether Golden Bird Cooperated to the Best of its Ability in this Review

Golden Bird:

- The Department erred in its finding that the company failed to cooperate to the best of its ability in this review by not providing all of its Chinese customs export declaration forms (CEDFs) and Phyto-sanitary certificates.
- All records that were in the company's possession were provided to the Department at the time of the request.
- As a matter of practice, the company does not normally retain copies of its CEDFs. While, by Chinese law, companies are required to maintain a copy of the CEDF, should a company fail to retain these documents, the Chinese government allows for this mistake to be corrected within a limited amount of time.
- There is no evidence that the company ever failed an inspection or was subject to any penalty, nor is there any evidence that the Chinese government ever enforces the requirements with regards to retaining copies of the CEDFs.
- There is no requirement for companies to keep the Phyto-sanitary certificates as they are sent to the importers.
- Golden Bird was the exporter of its reported sales and completely answered the Department's questions as the "exporter."

Petitioners:

- Golden Bird failed to adequately respond to the Department's request for information in a timely manner.
- The Department should continue to find that Golden Bird failed to cooperate to the best of its ability in this proceeding.

Department's Position: As detailed in the *Preliminary Results*, the Department relied upon AFA to determine a rate for the PRC-wide entity, which includes Golden Bird, because Golden Bird failed to cooperate to the best of its ability in providing the requested CEDFs and/or Phyto-sanitary certificates.⁵ For purposes of these final results, we continue to find that Golden Bird failed to cooperate to the best of its ability in providing these documents. As such, we will continue to rely on AFA for purposes of determining a rate for the PRC-wide entity which includes Golden Bird.

Based on allegations submitted by Petitioners, the Department requested that Golden Bird provide all CEDFs and Phyto-sanitary certificates pertaining to the sales/entries of subject merchandise that occurred during the POR.⁶ Golden Bird's response to our first supplemental questionnaire requesting these documents was deficient, and therefore the Department afforded Golden Bird the opportunity to remedy this deficiency. Specifically, between issuing our first supplemental questionnaire and the date Golden Bird responded to our second supplemental response, the Department provided the company with 60 days to take the steps necessary to

⁵ See PDM at 17-20.

⁶ *Id.* at 13-15.

submit these documents.⁷ Further, in light of the final results from the previous administrative review⁸ in which the Department also used AFA when the company did not submit these same documents, Golden Bird was aware it might be required to provide these documents during the course of any subsequent review.

Golden Bird's inability to provide this information is particularly troubling in light of the fact that record information indicates that Chinese exporters are required to maintain these documents.⁹ With regards to the CEDFs, Golden Bird itself does not dispute the fact that it is required by Chinese law to keep these documents. In fact, the company itself has conceded throughout this proceeding that it is required to do so.¹⁰ Thus, pursuant to Chinese law, Golden Bird was required to maintain these documents. Based on this legal requirement, the Department finds that the company should have all CEDFs easily available to it.

Further, should a company fail to maintain the required documents, in accordance with Chinese law, the Chinese government provides companies the opportunity to remedy the situation according to Golden Bird.¹¹ This fact indicates that there is, or should be, a system in place to retrieve such documentation. Thus, even if Golden Bird did not have all the requested CEDFs in its possession at the time of our request, it should have been able to gather these documents within a reasonable amount of time, in the event the Chinese government or the Department requests such documents.

Similarly, with regards to the Phyto-sanitary certificates, Golden Bird has maintained that there is no requirement for companies to maintain these certificates. However, Golden Bird has also indicated it could "obtain copies from its U.S. customers and/or their Customs' brokers."¹² As such, while the company has stated that it could take steps to obtain these documents, it has failed to demonstrate that it has done so in this proceeding. Golden Bird did not provide any information demonstrating its effort to gather these documents from any source, including the customers or brokers it claims obtains copies of such documents.¹³ Thus, there is no indication that Golden Bird ever attempted to gather these documents during the time period provided by the Department. As a result, we find no indication that the company attempted to comply with the Department's request for information to the best of its ability.

We continue to find that necessary information is not on the record, within the meaning of section 776(a)(1) of the Tariff Act of 1930, as amended (the Act), and that Golden Bird withheld requested information, failed to provide requested information by the established deadlines, and

⁷ We issued our first supplemental questionnaire on August 15, 2014. Golden Bird filed the response to our second supplemental questionnaire on October 14, 2014.

⁸ See *Fresh Garlic From the People's Republic of China: Final Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011-2012*, 79 FR 36721 (June 30, 2014) (*Garlic 18*) and accompanying Issues and Decision Memorandum (*Garlic 18 IDM*).

⁹ See, e.g., Petitioners' letter to the Department "19th Administrative Review of Fresh Garlic from the People's Republic of China – Petitioners' Submission of Public Information to Rebut, Clarify or Correct Information Submitted by Golden Bird" dated July 9, 2014 (Petitioners' July 9 Letter) at Attachment 1 (Articles 2 and 3) and Attachment 2 (Article 7).

¹⁰ See, e.g., Golden Bird Case Brief at 4.

¹¹ See Petitioners' July 9 Letter at Attachment 1 (Article 30).

¹² See Golden Bird's September 5, 2014 supplemental questionnaire response at page 3.

¹³ *Id.*

significantly impeded the proceeding, within the meaning of section 776(a)(2)(A)-(C) of the Act. Further, Golden Bird failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information. As a result, we continue to rely on AFA for these final results.

Comment 2: Whether Golden Bird Should Be Part of the PRC-Wide Entity

Golden Bird:

- The company has provided all requested information regarding its independent status.
- Golden Bird has demonstrated that it is entitled to a separate rate in previous administrative reviews.

Petitioners:

- The Department properly treated Golden Bird as part of the PRC-wide entity in the *Preliminary Results*.
- The Department found that it could not rely on any information in Golden Bird's Section A questionnaire response (the section of the questionnaire responses that addresses a company's independent status).

Department's Position: As discussed above in Comment 1, we continue to find that Golden Bird failed to cooperate by not acting to the best of its ability in this proceeding. Therefore, as explained in the *Preliminary Results*, we find that Golden Bird did not establish its eligibility for a separate rate and thus is treated as part of the PRC-wide entity. As a result, we will rely on AFA in determining a dumping margin for the PRC-wide entity which includes Golden Bird in these results.¹⁴

Golden Bird was unable to substantiate the amount of garlic it claimed it exported to the United States in its Section A questionnaire response, a fundamental component and basis of our administrative review process.¹⁵ Section A of the questionnaire requests general information about the company including the quantity and value of sales, separate rate eligibility, corporate structure and affiliations, sales process, accounting/financial practices, merchandise, and exports through intermediate countries. In the end, Golden Bird was unable to substantiate its Section A response and its sales transactions. Because Golden Bird's Section A response and SQR are the very documents in which discrepancies have been revealed (*i.e.*, Golden Bird has not been able to corroborate its volume and the price in CEDFs differed from those reported to the Department) we cannot rely on Golden Bird's submitted Section A responses. The Section A response includes the separate rate information. Golden Bird's failures in reporting its Section A information taint its reported separate rate information, as well. Because we determine that the entirety of Golden Bird's information is unusable, including its separate rate information, we find that Golden Bird has failed to rebut the presumption that it is part of the PRC-wide entity.

¹⁴ See PDM at 9-20.

¹⁵ See PDM at 19.

Because the PRC-wide entity, which includes Golden Bird, failed to cooperate to the best of its ability, the use of total AFA, pursuant to section 776(b) of the Act, is warranted.¹⁶ Finally, Golden Bird has noted the fact that it has been granted a separate rate in previous administrative reviews. We find this argument is irrelevant as companies are required to demonstrate or certify their independent status in each review.¹⁷ Therefore, since we have found responses submitted by Golden Bird to be unreliable for purposes of this administrative review, we find that the company has not demonstrated the absence of government control, and therefore, will remain part of the PRC-wide entity for these final results.

Comment 3: The Separate Rate Assigned to Xinboda

Xinboda:

- The Department's method of assigning Xinboda's separate rate, specifically, carrying through the rate assigned to Xinboda in the immediately preceding review,¹⁸ is not reasonable.
- *Garlic 18* relied upon the Philippines as the surrogate country. In the current review, the Department has determined that the Philippines is not economically comparable to China. Therefore the Department should not rely on margins in this review that were calculated using the Philippines data.
- Instead the Department should base Xinboda's rate on the 2010/2011 garlic administrative review.¹⁹ The rate calculated in *Garlic 17* relied upon the Ukraine as the surrogate country. The Ukraine continues to be a significant producer of garlic and remains economically comparable to China.
- Per the CIT's ruling in *Clearon*,²⁰ because the Philippines is no longer considered equally comparable to China in this review, the Department is obligated to reject the rate calculated in the prior review, *Garlic 18*, from consideration.

Petitioners:

- The Department should continue to rely on Xinboda's rate calculated in *Garlic 18* to establish the separate rate in this final.
- Xinboda's argument conflates the Department's reliance on a margin calculated in the preceding review, in which the Philippines was found to be economically comparable to China, with the Department's determination that the country is no longer economically comparable to China.

¹⁶ *Id.* at 20.

¹⁷ See, e.g., *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 78 FR 79392-93 (December 30, 2013).

¹⁸ See *Garlic 18* at 36723.

¹⁹ See *Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 36168 (June 17, 2013) (*Garlic 17*) and accompanying Issues and Decision Memorandum.

²⁰ See *Clearon Corp. v. United States*, 2014 Ct. Intl. Trade LEXIS 88, *38 (Ct. Int'l Trade July 24, 2014) (*Clearon*).

- Xinboda’s reliance on *Clearon* is misplaced, as the finding in that case related to selection of a surrogate country in the administrative review at issue in that case, rather than the use of a prior dumping margin in a later review.

Department’s Position: For purposes of these final results, the Department will continue to rely on the dumping margin calculated in *Garlic 18* as the basis for determining the separate rate in this proceeding for all qualifying non-selected companies, including Xinboda.

In the current administrative review, the weighted-average dumping margins determined for the individually-examined respondents are based entirely on facts available. In these circumstances, it is the Department’s preference is to select a rate that was calculated using information close to the POR.²¹ *Garlic 18* was the administrative review immediately preceding this review, and thus the separate rate from that review is the closest rate determined in terms of contemporaneity to the current POR. We find this to be a reasonable method.²²

Xinboda argues that the Department should instead use a margin calculated in *Garlic 17* because the surrogate country selected in that review remained economically comparable to China in this POR, while the surrogate country selected in *Garlic 18* did not remain economically comparable. This argument is misplaced. In *Garlic 18*, the Department found that the Philippines was economically comparable to China, and thus was a viable surrogate country for purposes of calculating normal value.²³ Based on our analysis in that review, the Department selected the Philippines as the surrogate country since it qualified as a significant producer of comparable merchandise and provided the best available information.²⁴ Surrogate values from the Philippines were used to calculate dumping margins for the mandatory respondents.²⁵ In the final of *Garlic 18*, Xinboda was the only individually investigated respondent with its own calculated margin. As such, the margin calculated for Xinboda was also the rate used for non-selected respondents who qualified for separate rates in *Garlic 18*.²⁶ This rate remains valid as of the date of publication of these final results.

²¹ See, e.g., *Freshwater Crawfish Tail Meat from the People’s Republic of China*, 78 FR 22228 (April 15, 2013) (final results of admin. review) (applying rate from a new shipper review); see also *Folding Metal Tables and Chairs from the People’s Republic of China*, 76 FR 66036 (October 25, 2011) (final results of admin. review) (same); see also *Certain Frozen Warmwater Shrimp from the People’s Republic of China*, 76 FR 51940, 51942 (August 19, 2011) (final results of admin review) (applying rate from a prior review); see also *Certain Frozen Warmwater Shrimp from the People’s Republic of China*, 75 FR 49460, 49462-63 (August 13, 2010) (final results of admin. review) (same); see also *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 73 FR 52015, 52017 (September 8, 2008) (preliminary results of admin. review) (same).

²² Although section 735(c)(5) of the Act, which governs the determination of the “all others” rate in an investigation, is inapplicable here, we find it instructive and analogous. It provides that when all of the dumping margins for the individually investigated companies are based on facts available (or are zero or *de minimis*), any reasonable method can be used to establish the all others rate.

²³ See, e.g., *Fresh Garlic From the People’s Republic of China: Preliminary Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011-2012*, 78 FR 77653 (December 24, 2013) and accompanying Issues and Decision Memorandum at 10.

²⁴ See *Garlic 18* IDM at Comment 1.

²⁵ *Id.*

²⁶ See *Garlic 18* at 36723.

Further, the fact that the Department did not include the Philippines as an economically comparable country in this review does not render previous decisions using the Philippines as a surrogate country to be irrelevant. In *Garlic 18*, the Department found that the Philippines provided the best surrogate information and used Philippines data to calculate margins for that time period.²⁷ Although the Philippines was not selected in the current review due to changes in economic conditions during the current POR, in *Garlic 18*, the economic conditions at that time in the Philippines were found to be comparable to China. The Department is not relying on data from the Philippines for this POR, but rather on a rate that was calculated using data from the Philippines at a time when the country was considered to be economically comparable to China.²⁸ For this reason, the rate in *Garlic 18* is the most accurate and relevant for Xinboda as a separate rate respondent in this review. There is no information on the record that suggests this data was unreliable or not relevant during that time. As such, the rate calculated for that particular POR is viable.

The Department finds Xinboda's argument, that changes in economic comparability of the surrogate countries render the margin from *Garlic 17* preferable to that from *Garlic 18*, to be unpersuasive. Xinboda relies on the fact that Ukraine's 2012 per capita GNI remains within the range of the countries on the surrogate country list for this review, while the Philippines' per capita GNI does not, to support its contention that the Department should use the margin from *Garlic 17*.²⁹ However, as explained above, the fact that Ukraine's per capita GNI is more comparable to China's during this POR is not relevant for purposes of selecting a rate for the non-selected companies qualifying for separate rate status in this review. Xinboda's dumping margin from *Garlic 18* is closer in time than the margin from *Garlic 17*. Further, we note that the selection of an economically comparable surrogate country is just one element in the calculation of a dumping margin for a non-market economy exporter.

Finally, Xinboda's reliance on *Clearon* to support its argument is misplaced. In *Clearon*, the CIT found that the per capita GNI ranking threshold must be met before other criteria should be considered for purposes of selecting surrogate values in order to calculate a dumping margin for the mandatory respondent in a non-market economy proceeding pursuant to section 773(c)(2) of the Act.³⁰ Although, in that case, the Court found that the Department must first evaluate per capita GNI as part of its surrogate country selection process, the holding is limited to when the Department is *calculating* an individual dumping margin for a mandatory respondent, pursuant to section 773(c)(2) of the Act. As such, Xinboda's argument regarding *Clearon* is misplaced.

²⁷ See *Garlic 18* IDM at Comment 1.

²⁸ *Id.*

²⁹ See Xinboda's Case Brief at 5-8.

³⁰ See *Clearon* at 38.

Comment 4: Whether Xinboda Should Have Been Individually Reviewed

Xinboda:

- Xinboda was unlawfully denied the opportunity to be individually reviewed, either as a mandatory or voluntary respondent, in this review.
- Very few exporters were implicated in this review, and therefore, the Department could not reasonably make the finding that the number of exporters or producers subject to selection was “large.”
- The Department’s reliance on the “exception” to the general rule, that all exporters requesting review should be subject to individual review, was contrary to law and unsupported by evidence.

Petitioners:

- The Department’s decision to decline to review Xinboda, either as a mandatory or voluntary respondent, was correct.
- Hejia withdrew its participation from this review on September 12, 2014, two and a half months prior to the fully extended preliminary results, and as a result, the Department’s decision not to select an additional respondent at that point in the proceeding was reasonable and appropriate.
- Xinboda failed to timely submit responses to the Department’s questionnaire that would have allowed it to be considered as a voluntary respondent.

Department’s Position: On April 28, 2014, the Department issued the respondent selection memorandum for this administrative review, which stated that we would be selecting two mandatory respondents for this proceeding, specifically Golden Bird and Hejia.³¹ We subsequently issued questionnaires to these companies on May 7, 2014. In light of concerns raised by petitioners with regards to these two companies, on July 1, 2014, Xinboda submitted a request that we consider the company as a mandatory or voluntary respondent. However, Xinboda did not submit the requisite documentation necessary to request voluntary respondent treatment, in accordance with section 782(a)(1) of the Act.³²

As discussed in the Department’s August 6, 2014, memorandum, we found that it was not practicable to add another respondent.³³ At the time of that memorandum, both Golden Bird and Hejia were participating respondents in this administrative review. Further, there was no evidence on the record at that time suggesting that neither of the respondents would participate to

³¹ See Memorandum to Edward Yang, “Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People’s Republic of China: Respondent Selection Memorandum,” dated April 28, 2014 (Respondent Selection Memorandum).

³² See Letter from Xinboda to the Department, “Fresh Garlic from the People’s Republic of China – Request for Selection as Respondent,” dated July 1, 2014.

³³ See Memorandum to Edward Yang “2012-2013 Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People’s Republic of China: Shenzhen Xinboda Industrial Co., Ltd.’s Request to be a Mandatory Respondent or a Voluntary Respondent,” dated August 6, 2014 (Xinboda Memorandum).

the best of its ability. As such, at that time the Department chose not to review Xinboda as an additional respondent.

Xinboda argues that the number of exporters “implicated in this review” was small and therefore the Department’s reliance on the “exception” to the general rule (*i.e.*, section 777A(c)(2) of the Act) was contrary to law and unsupported by record evidence.³⁴ However, the Department finds that this argument is misplaced and incorrect. The “general rule” at section 777A(c)(1) of the Act stipulates that the Department shall determine individual margins for each known exporter and producer of the subject merchandise. However, if it is not practical to calculate individual dumping margins for each known exporter and producer because of the large number of exporters or producers involved in the review, the “exception” at section 777A(c)(2) of the Act states that the Department may limit the number of companies individually reviewed.

In reviewing the CBP data,³⁵ Xinboda argues that there was only a small number of “potential respondents.” The Department disagrees. At the time of the respondent selection, there were 54 producers/exporters subject to this review.³⁶ Moreover, a review of the CBP data indicated that a number of companies whose requests for review were not withdrawn had entries during the POR. Without the “exception,” the Department would have been obligated to determine individual dumping margins for all these known exporters and producers of garlic. This was not practical. Therefore, at the time of respondent selection, in accordance with the statute, the Department limited its selection of respondents and determined that it was reasonable to review two exporters of garlic.³⁷ In-turn, the Department selected the two companies subject to the review that accounted for the largest volume of garlic from China during the POR, Golden Bird and Hejia. Xinboda was not selected because it was not one of the two largest exporters of garlic during the POR. As noted above, at the time of the Department’s Xinboda Memorandum (August 6) both Golden Bird and Hejia were participating respondents in this administrative review. Hejia did not withdraw from this review until Friday, September 12, 2014. Even if the Department issued a questionnaire to Xinboda the following business day, Monday, September 15, 2014, following standard procedures, the earliest the Department would have received Xinboda’s full responses would have been October 22, 2014, less than six weeks before the signature date for the preliminary results of this review. As such, the Department determined it did not have sufficient time remaining in the review to take on Xinboda as a mandatory respondent. The Department’s decision not to select Xinboda as a mandatory respondent was reasonable.

With regard to Xinboda’s request to be treated as a voluntary respondent, section 782 of the Act requires requesting parties to submit responses to the general questionnaire at the same time the responses of the mandatory respondents would be due.³⁸ Between June 11 and June 30, 2014, both Golden Bird and Hejia provided responses to all sections of the initial questionnaire. For a company interested in qualifying as a voluntary respondent, it would have had to submit

³⁴ See Xinboda’s Case Brief at 10-11.

³⁵ See Memorandum to the File, “Customs Entries from November 1, 2012, to October 31, 2013,” dated February 24, 2014.

³⁶ See Respondent Selection Memorandum at 3.

³⁷ *Id.* at 4.

³⁸ See section 782(a)(1)(A) of the Act.

responses to the Department’s questionnaire during this time. At no point did Xinboda submit any responses to any sections of the questionnaire, as required by section 782(a)(1)(A) of the Act. As such, Xinboda failed to timely submit responses to the Department’s request for information and thus failed to satisfy the statute’s requirements when requesting voluntary respondent status.³⁹

Xinboda does not deny that it missed the due date for filing the responses as required by the Act, but instead argues that the Department should have made an exception to this requirement, in this “highly unusual case.” However, the circumstances of this case have not been “highly unusual.” At the time Xinboda requested voluntary status, both mandatory respondents were fully responding.⁴⁰ It is not unusual (much less “highly” unusual) for mandatory respondents to stop cooperating to the best of their ability during an antidumping duty proceeding. Moreover, the statute clearly outlines when and what a party is required to file with a voluntary respondent request.⁴¹ Even if this was a highly unusual case (which it is not), Xinboda made no effort to submit any information in accordance with the statutory requirements. Xinboda now attempts to create an exception to this statutory requirement, which does not exist. As such, we find that our decision not to review Xinboda as a voluntary respondent was sound.

Comment 5: PRC-Wide Rate Challenge

Golden Bird:

- The Department cannot use the \$4.71 per kilogram PRC wide rate, because the \$4.71 rate was established prior to the current law.
- In *Tianjin Machinery*,⁴² the court questioned the Department’s basis for selecting the highest prior margin, and its reliance on *Rhone Poulenc*,⁴³ noting that *Rhone Poulenc* was a pre-Uruguay Round case. Congress changed the law following the Uruguay Round. Further, the court stated that the rate must have some “grounding” in commercial reality.
- While the Department has discretion in selecting an AFA rate, the courts, in *Gallant Ocean*,⁴⁴ *KYD*⁴⁵ and *Di Cecco*,⁴⁶ have limited the Department’s discretion.
- The Department’s reliance on *Watanabe*⁴⁷ and *Peer Bearing*⁴⁸ are misplaced.
- The Department has never calculated a rate comparable to the current PRC-wide rate of \$4.71 per kilogram. This rate is based on a calculation that included non-comparable

³⁹ *Id.*

⁴⁰ *See, e.g.,* Xinboda Memorandum.

⁴¹ *See* section 782(a).

⁴² *See Tianjin Machinery Import & Export Corp. v. United States*, 752 F. Supp. 2d 1336 (CIT 2011) (*Tianjin Machinery*).

⁴³ *See Rhone Poulenc, Inc. v. United States*, 899 F. 2d 1185 (Fed. Cir. 1990) (*Rhone Poulenc*).

⁴⁴ *See Gallant Ocean (Thailand) Co., Ltd. v. United States*, 602 F.3d 1319 (Fed. Cir. 2010) (*Gallant Ocean*).

⁴⁵ *See KYD, Inc. v. United States*, 602 F.3d 1319 (Fed. Cir. 2010) (*KYD*).

⁴⁶ *See F. Ili Di Cecco De Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027 (Fed. Cir. 2000) (*Di Cecco*).

⁴⁷ *See Watanabe Group v. United States*, Court No. 09-00520 Slip Op. 10-139 (CIT December 22, 2010) (*Watanabe*).

⁴⁸ *See Peer Bearing Company - Changshan v. United States*, 587 F. Supp. 2d 1319 (CIT December 8, 2008) (*Peer Bearing*).

surrogate value data and statutorily prescribed rates, methodologies that are no longer used.

Petitioners:

- The current PRC-wide rate was not invalidated by the passage of the Uruguay Round Agreements Act.
- The \$4.71 per kilogram rate is reflective of commercial realities and has been corroborated by the Department.

Department's Position: The Department has reasonably determined that the \$4.71 per kilogram rate is the appropriate PRC-wide rate and corroborated the rate in accordance with section 776(c) of the Act.

In accordance with section 776(c) of the Act, the Department is required to corroborate, to the extent practicable, secondary information used as facts available. Secondary information is defined as “{i}nformation derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise.”⁴⁹

The SAA provides further that the term “corroborate” means that the Department will satisfy itself that the secondary information to be used has probative value.⁵⁰ Thus, to corroborate secondary information, the Department will examine, to the extent practicable, the reliability and relevance of the information used. The SAA also states that independent sources used to corroborate secondary information may include, for example, published price lists, official import statistics, and customs data, as well as information obtained from interested parties.⁵¹ Nothing in the statute precludes the Department from relying on this information based on the age of the information, unless there is evidence demonstrating that this information is no longer relevant or reliable.⁵² Here, we relied on information from the petition (*i.e.*, the petition rate) and no evidence has been placed on the record that undermines the reliability or relevance of that rate.

The *ad valorem* rate of 376.67 percent is the highest rate on the record of any segment of this fresh garlic antidumping duty proceeding. This rate was applied to the PRC-wide entity in the original investigation and was consistently applied to the PRC-wide entity until the thirteenth administrative review.⁵³ In *Garlic 13*, the Department converted the *ad valorem* rate to a per-

⁴⁹ See Statement of Administrative Action accompanying the URAA, H.R. Rep No. 103-316 (SAA) at 870.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See section 776(c) of the Act; see also *Dongtai Peak Honey Industry Co. v. United States*, 777 F.3d 1343, 1354-56 (Fed. Cir. 2015) (*Dongtai Peak*) (finding that even though appellant argued that the rate was too old to be relevant or reliable, this alone did not undermine the relevance or reliability of the PRC-wide rate).

⁵³ See *Fresh Garlic From the People's Republic of China: Final Results and Partial Rescission of the 13th Antidumping Duty Administrative Review and New Shipper Reviews*, 74 FR 29174 (June 19, 2009) (*Garlic 13*); see also *Notice of Preliminary Determination of Sales at Less Than Fair Value: Fresh Garlic From the People's Republic of China*, 59 FR 35310 (July 11, 1994), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Fresh Garlic From the People's Republic of China*, 59 FR 49058 (September 26, 1994).

unit rate of \$4.71/kg. The rate of \$4.71/kg has been applied to the PRC-wide entity in each review since *Garlic 13*.⁵⁴

Moreover, the Department corroborated the PRC-wide entity rate in the 2003/2004 administrative review by comparing the rate to the margin calculations of all respondents in the prior reviews, finding that the margin assigned to the PRC-wide entity was within the range of these margins.⁵⁵ No information raised in this review calls into question the reliability or relevance of the PRC-wide rate.

The issue in *Tianjin Machinery* was different than the issue in this review. In *Tianjin Machinery*, the Court rejected the Department's determination that it could satisfy the corroboration requirement by reference to the presumption in *Rhone Poulenc*.⁵⁶ In *Rhone Poulenc*, the Federal Circuit affirmed the Department's "common sense" presumption "that if an uncooperative respondent could have demonstrated that its dumping margin is lower than the highest prior margin{,} it would have provided information showing the margin to be less."⁵⁷ Whatever the merits are of the Court's reasoning in *Tianjin Machinery*, the facts in this review are different. The Department has not based its finding on the *Rhone Poulenc* presumption. We also note that we corroborated the contested rate in a prior review by comparing it to transaction-specific margins.

Golden Bird further argues that the Department's citations to *Watanabe* and *Peer Bearing* are misplaced. Specifically, Golden Bird attempts to distinguish *Watanabe* from the proceeding at issue by arguing that 1) the issue in *Watanabe* did not involve an adverse facts available rate originally calculated before Congress enacted the corroboration requirement, as it was here, and 2) that the complaining party in that case did not certify, unlike Golden Bird, that it was independent of government control. Foremost, although the rate in *Watanabe* was calculated after the Department enacted the corroboration requirement, this does not diminish the fact that in the proceeding at issue, the rate has been corroborated in accordance with the statutory requirement. The fact that the Department was not required to corroborate the rate in the past has no bearing on the relevance or the reliability of the rate as it is today. Additionally, as explained above, Golden Bird's separate rate certification is unreliable, because of the extensive deficiencies in Golden Bird's reported Section A information. Thus, Golden Bird fails to distinguish *Watanabe*.

As to *Peer Bearing*, Golden Bird notes that the contested adverse facts available rate in that case was calculated in 2005 and that the complaining party did not respond to the Department's questionnaire. Again, these arguments are of no moment. As explained above, the passage of

⁵⁴ See *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 14th Antidumping Duty Administrative Review*, 75 FR 34976 (June 21, 2010); see also *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 FR 37321 (June 27, 2011).

⁵⁵ See *Fresh Garlic from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Preliminary Results of New Shipper Reviews*, 70 FR 69942, 69945 (November 18, 2005) unchanged in *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review and Final Results of New Shipper Reviews*, 71 FR 26329 (May 4, 2015).

⁵⁶ See *Rhone Poulenc*; see also *Tianjin Machinery*, 752 F. Supp. 2d at 1347–50.

⁵⁷ See *Tianjin Machinery*, 752 F. Supp. 2d at 1347 (citing *Rhone Poulenc*, 899 F.2d at 1190).

time is not sufficient evidence to demonstrate that a rate is no longer relevant or reliable.⁵⁸ There must be facts demonstrating that the rate is no longer relevant or reliable.⁵⁹ Moreover, because we have disregarded Golden Bird's submissions, effectively, the result is as if Golden Bird never responded, like in *Peer Bearing*. Thus, we find both cases remain applicable.

Finally, Golden Bird argues that the Department has never calculated a rate that converts to the \$4.71 per kilogram PRC-wide rate. Golden Bird notes that the rate is based on a calculation that includes methodologies that are no longer used following the law change in 1994. Specifically, Golden Bird cites to the inclusion of non-comparable surrogate country value data (namely, U.S. costs) and statutorily prescribed minimum rates.⁶⁰ However, as explained in further detail below, we continue to find the rate relevant and reliable, as the effect of these older practices does not undermine the reliability or relevance of the margin.

As an initial matter, the Department has calculated individual weighted-average dumping margins of \$3.33 and \$3.06 per kilogram, in a recent new shipper review of this order.⁶¹ These margins demonstrate that the PRC-wide rate assigned here is within range of recently calculated individual rates. Further, the Department finds that country value data and prescribed minimum rate methodologies that are no longer used by the Department had limited impact on the current the PRC-wide rate. The original 376.67 percent PRC-wide rate, calculated in the petition, used the statutory minimum of ten percent (of the cost of production) for selling, general, and administrative (SG&A) expenses and eight percent (of the cost of manufacturing plus SG&A) for profit. Applying the SG&A (23.83 percent) and profit (6.28 percent) rates used for in the final of the most recent administrative review (*Garlic 18*)⁶² would result in a PRC-wide rate of 423.42 percent, higher than the petition margin. Further, while the petition rate did use U.S. costs in some instances, the petition explains clearly that "Petitioners first attempted to value the factors of production using Indian Information"⁶³ and only when they did not have information from India did they use U.S. costs. Finally, we note in only two instances, "other labor" and "packing," did the Petitioners have to rely on US costs in calculating the petition rate.⁶⁴ Thus, the Department finds the current PRC-wide rate of \$4.71 per kilogram to be reliable.

⁵⁸ See *Dongtai Peak*, 777 F.3d at 1356.

⁵⁹ *Id.*

⁶⁰ See Golden Bird Case Brief at 17.

⁶¹ See *Fresh Garlic From the People's Republic of China: Final Results of the Semiannual Antidumping Duty New Shipper Review of Jinxiang Merry Vegetable Co., Ltd. and Cangshan Qingshui Vegetable Foods Co., Ltd.; 2012-2013*, 79 FR 62103, 62104 (October 16, 2014).

⁶² See Memorandum to the File, "Final Results of Antidumping Duty Administrative Review: Fresh Garlic from the People's Republic of China; 2012-2013 Administrative Review; Garlic 18 Surrogate Value Information," dated concurrently with this memorandum at Attachment I.

⁶³ See *Initiation of Antidumping Duty Investigation: Fresh Garlic From the People's Republic of China*, 59 FR 9470 (February 28, 1994).

⁶⁴ *Id.*

Comment 6: 15-Day Liquidation Instruction Policy Challenge

Golden Bird:

- The 15-day liquidation instruction policy is contrary to law and must be modified.
- Specifically, this policy is direct conflict with:
 - Section 751(h) of the Act and 19 CFR 351.224.
 - The Statement of Administrative Action (“liquidation of entries following the completion of an administrative review, to the greatest extent practicable, within ninety days after the issuance of liquidation instructions to Customs”).
 - *Tianjin Machinery*
 - Rule 3(a)(2) of the CIT, which allows interested parties to challenge a determination by filing a summons 30 days after publication of the results in the *Federal Register* and a complaint 60 days after.
- This policy conflicts with the ministerial errors provision of the Act.

Petitioners:

- The Department has previously considered and rejected these arguments. None of the arguments raised by Golden Bird provide a basis for the Department to depart from this practice.
- The SAA makes clear the importance of promptly issuing its liquidation instructions.

Department’s Position: The Department addressed this issue in the last administrative review of this order and rejected the arguments against our 15-day liquidation policy.⁶⁵ The Department intends to continue its policy of issuing liquidation instructions 15 days after the publication of the final results as explained below. The Department restates our position from *Garlic 16*.

The CIT examined the Department’s 15-day liquidation policy in *Mittal Steel II* and concluded that it was a reasonable statutory interpretation.⁶⁶ After noting that the Department had developed the 15-day policy pursuant to section 751(a)(3) of the Act to facilitate timely liquidations,⁶⁷ the CIT determined that “Customs cannot liquidate promptly if Commerce does not issue the instructions in a timely manner.”⁶⁸ The CIT also determined that the 15-day policy advances the legislative intent behind the antidumping statutory framework to create more transparent antidumping review procedures and to further the protection of parties’ rights through heightened due process “by informing affected parties of the Department’s anticipated timetable for transmitting liquidation instructions to Customs” and “by encouraging affected parties to exercise their rights of judicial review in a timely manner.”⁶⁹ Finally, the CIT noted that the Department’s action in adopting the 15-day policy “was within Commerce’s area of particular expertise and statutory authority.”⁷⁰ Overall, the CIT sustained the Department’s 15-

⁶⁵ See *Garlic 16* at Comment 13; see also *Garlic 17* at Comment 2; see also *Garlic 18* at Comment 15.

⁶⁶ See *Mittal Steel Galati S.A. v. United States*, 502 F. Supp. 2d 1295 (CIT 2007) (*Mittal Steel II*) at 1317.

⁶⁷ *Id.* at 1314.

⁶⁸ *Id.* at 1316.

⁶⁹ *Id.* (citation omitted).

⁷⁰ *Id.* at 1317.

day policy as reasonable because it “fill{ed} the statutory gap in a manner consistent with the statute’s language and the legislative intent” and because the Department had adopted the policy “based on its own, special expertise.”⁷¹ In doing so, the CIT also relied upon *Mukand*,⁷² and upon *Mittal Steel I*.⁷³

Furthermore, any other reading of the statute would render the CIT’s injunctive powers superfluous, as there would be no need for injunctive relief if the Department were required to voluntarily refrain from issuing liquidation instructions pending litigation. “It is a cardinal rule of statutory construction that significance and effect shall be accorded, if possible, to every word.”⁷⁴ Injunctive relief is available only upon a proper showing that the requested relief should be granted, thus, there is no reason for the Department to voluntarily refrain from issuing liquidation pending a party’s decision to pursue judicial review and request injunctive relief. As the appellate court in *Zenith* stated, “without a preliminary injunction, all of the entries occurring during the review period will be liquidated immediately,” in accordance with the review results.⁷⁵ Accordingly, the Department’s interpretation of the statute not to require the agency to await a party’s litigation decision before issuing liquidation instructions is reasonable.⁷⁶ We recognize that other decisions by the CIT have disagreed with the ruling in *Mittal Steel II* that the 15-day policy is reasonable.⁷⁷ We respectfully disagree with those decisions. While the Department’s policy at issue in the *Mittal Steel I* and *Mittal Steel II* cases and *Mukand* was to issue liquidation instructions within 15 days of publishing its final results, the Department modified its policy in November 2010 to indicate that it will issue liquidation instructions after 15 days from publication elapse.⁷⁸

Golden Bird’s arguments regarding ministerial error allegations do not undermine our policy of issuing liquidation instructions 15 days after publication. The Department’s general practice is to withhold issuing instructions until a decision upon the allegation is issued to the parties. If the Department finds that an error does exist, but the error does not affect all entries covered by the final results, it will issue CBP instructions in accordance with its 15-day policy for those entries *not* affected by the allegation, because the six-month window prior to deemed liquidation begins to run from the issuance of the final results.⁷⁹ If the Department finds that the error is not ministerial, it places a memorandum on the record of the proceeding. There is no set time for the issuance of these decisions. Depending upon the specific facts of the case, they could be issued within or outside of the normal 30-day time period in the regulations. Once the decision is

⁷¹ *Id.*

⁷² See *Mukand Int’l, Ltd. v. United States*, 452 F. Supp. 2d 1329, 1334-35 (CIT 2006) (*Mukand*) (“Commerce’s issuance of liquidation instructions within the combined 60-day period under 19 U.S.C. § 1516a(a)(2)(A) for commencement of an action in the United States Court of International Trade was not unlawful . . .”).

⁷³ See *Mittal Steel Point Lisas Ltd. v. United States*, 491 F. Supp. 2d 1222 (CIT 2007) (sustaining 15-day policy). (*Mittal Steel I*).

⁷⁴ See *Timken*, 893 F.2d at 337 (citing *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 410 (1914); *United States v. Measche*, 348 U.S. 528, 538 (1955)).

⁷⁵ See *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983).

⁷⁶ See *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995) (quoting *Daewoo Elecs. Co. v. Int’l Union*, 6 F.3d 1511, 1516 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1204 (1994)).

⁷⁷ See, e.g., *Tianjin Machinery*.

⁷⁸ See Announcement Concerning Issuance of Liquidation Instructions Reflecting Results of Administrative Reviews (August 9, 2010).

⁷⁹ See *Mazak Corp. v. United States*, 659 F. Supp. 2d 1352, 1360-62 (CIT 2009).

issued, a reasonable period of time is allowed for the party to contact the Department of Justice to circulate its draft preliminary injunction. Of course, this time is not unlimited because the deemed liquidation deadline in 19 U.S.C. §1504(d) is fixed from the date of the final results.

If, however, the Department determines that a ministerial error allegation has merit and that there is a ministerial error, it generally issues a memorandum to the record notifying the parties and subsequently publishes amended final results fixing the error.⁸⁰ The amended final results reset the clock with respect to the 15-day policy for the affected entries. Thereafter, the Department issues the liquidation instructions to CBP concerning those entries subject to the amended final results 15 days after the issuance of the amended final results.⁸¹ In short, our 15-day liquidation policy is not inconsistent with any provision of law regarding ministerial errors.

RECOMMENDATION

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

✓

Agree

Disagree

Ronald K. Lorentzen

Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

June 5, 2015

(Date)

⁸⁰ See 19 C.F.R. § 351.224(e).

⁸¹ See, e.g., *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 78 FR 48415, 48416 (August 8, 2013) (amended final results); see also *Certain Steel Nails from the People's Republic of China*, 78 FR 24721, 24722 (April 26, 2013) (amended final results).