

UNITED STATES COURT OF INTERNATIONAL TRADE

**FRESH GARLIC PRODUCERS
ASSOCIATION, CHRISTOPHER RANCH,
L.L.C., THE GARLIC COMPANY, VALLEY
GARLIC, and VESSEY AND COMPANY,
INC.,**

Plaintiffs,

**HEBEI GOLDEN BIRD TRADING CO.
LTD., CHENGWU COUNTY YUANXIANG
INDUSTRY & COMMERCE CO., LTD.,
QINGDAO XINTIANFENG FOODS CO.,
LTD., SHENZHEN BAINONG CO., LTD.,
YANTAI JINYAN TRADING, INC., JINING
YIFA GARLIC PRODUCE CO., LTD.,
JINAN FARMLADY TRADING CO., LTD.,
WEIFANG HONGQIAO INTERNATIONAL
LOGISTICS CO., LTD., and
SHIJIAZHUANG GOODMAN TRADING
CO., LTD.,**

Consolidated Plaintiffs,

v.

UNITED STATES,

Defendant,

**SHENZHEN XINBODA INDUSTRIAL CO.,
LTD., JINXIANG MERRY VEGETABLE
CO., LTD., and CANGSHAN QINGSHUI
VEGETABLE FOODS CO., LTD.,**

Defendant-Intervenors.

Before: Jane A. Restani, Judge

Consol. Court No. 14-00180

OPINION

[Commerce’s final results in antidumping duty administrative review sustained in part and remanded in part.]

Dated: November 30, 2015

Michael J. Coursey and John M. Herrmann, II, Kelley Drye & Warren, LLP, of Washington, DC, for plaintiffs.

Robert T. Hume, Hume & Associates, LLC, of Ojai, CA, for consolidated plaintiffs Hebei Golden Bird Trading Co., Ltd., Qingdao Xintianfeng Foods Co., Ltd., Shenzhen Bainong Co., Ltd., Yantai Jinyan Trading, Inc., Jining Yifa Garlic Produce Co., Ltd., Jinan Farmlady Trading Co., Ltd., Weifang Hongqiao International Logistics Co., Ltd., and Shijiazhuang Goodman Trading Co., Ltd.

Yingchao Xiao and Jianquan Wu, Lee & Xiao, of San Marino, CA, for consolidated plaintiff Chengwu County Yuanxiang Industry & Commerce Co., Ltd.

Richard P. Schroeder, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Jeanne E. Davidson, Director, and Reginald T. Blades, Jr., Assistant Director. Of counsel on the brief were Justin R. Becker, Senior Attorney, and Khalil N. Gharbieh, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Gregory S. Menegaz, J. Kevin Horgan, and Alexandra H. Salzman, deKieffer & Horgan PLLC, of Washington, DC, for defendant-intervenor Shenzhen Xinboda Industrial Co., Ltd.

John J. Kenkel, deKieffer & Horgan PLLC, of Washington, DC, for defendant-intervenors Jianxiang Merry Vegetable Co., Ltd. and Cangshan Qingshui Vegetable Foods Co., Ltd.

Restani, Judge: This action challenges the Department of Commerce’s (“Commerce”) final results from the eighteenth administrative review of the antidumping (“AD”) duty order on fresh garlic from the People’s Republic of China (“PRC”). Fresh Garlic from the People’s Republic of China: Final Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011-2012, 79 Fed. Reg. 36,721 (Dep’t Commerce Jun. 30, 2014)

(“Final Results”). Before the court are the motions for judgment on the agency record pursuant to U.S. Court of International Trade (“CIT”) Rule 56.2 and accompanying memoranda in support of Chinese producers Shijiazhuang Goodman Trading Co., Ltd. (“Goodman”); Jinan Farmlady Trading Co., Ltd., Qingdao Xintianfeng Foods Co., Ltd., Shenzhen Bainong Co., Ltd., Jining Yifa Garlic Produce Co., Ltd., Weifang Hongqiao International Logistics Co., Ltd., Yantai Jinyan Trading, Inc. (collectively, “QXF”); Hebei Golden Bird Trading Co. Ltd. (“Golden Bird”), and Shenzhen Xinboda Industrial Co., Ltd. (“Xinboda”). See Mem. in Supp. of the Mot. of Pl. Shijiazhuang Goodman Trading Co., Ltd. for J. on the Agency R., ECF No. 31 (“Goodman Br.”); Mem. in Supp. of Mot. for J. on the Agency R. Filed by Qingdao Xintianfeng Foods Co., Ltd., et al., ECF No. 32 (“QXF Br.”); Mem. in Supp. of the Mot. of Pl. Hebei Golden Bird Trading Co. Ltd. for J. on the Agency R., ECF No. 43 (“Golden Bird Br.”); Consol. Pl. Shenzhen Xinboda Indus. Co., Ltd. Mem. in Supp. of Mot. for J. on the Agency R., ECF No. 44 (“Xinboda Br.”). Also before the court is a motion filed by the Fresh Garlic Producers’ Association and its individual members, Christopher Ranch L.L.C., Valley Garlic, The Garlic Company, and Vessey and Company, Inc. (collectively, “FGPA”). Mem. of Law in Supp. of Pls.’ Mot. for J. on the Agency R., DE 41 (“FGPA Br.”). For the reasons stated below, Commerce’s Final Results are sustained in part and remanded in part.

BACKGROUND

In November 1994, Commerce issued an AD duty order covering fresh garlic from the PRC. Antidumping Duty Order: Fresh Garlic from the People’s Republic of China, 59 Fed. Reg. 59,209, 59,209 (Dep’t Commerce Nov. 16, 1994). Following requests from several interested parties, Commerce initiated its eighteenth administrative review of that order on

December 31, 2012, with a period of review (“POR”) of November 1, 2011, through October 31, 2012.¹ Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 77 Fed. Reg. 77,017, 77,019–22 (Dep’t Commerce Dec. 31, 2012) (“Initiation Notice”). On April 15, 2013, Commerce selected as mandatory respondents the two largest exporters by volume, Golden Bird and Xinboda. Decision Memorandum for the Preliminary Results of the 2011-2012 Antidumping Duty Administrative Review: Fresh Garlic from the People’s Republic of China at 3, A-570-831, (Dec. 16, 2013), available at <http://enforcement.trade.gov/frn/summary/prc/2013-30660-1.pdf> (last visited Nov. 18, 2015) (“Preliminary I&D Memo”). Commerce issued the preliminary results of its administrative review on December 24, 2013, assigning weighted-average margins (based on dollars per kilogram) of \$1.17 for Golden Bird, \$1.76 for Xinboda, \$1.47 for QXF and other separate rate respondents, and \$4.71 for the PRC-wide entity.² Fresh Garlic from the People’s Republic of China: Preliminary Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011-2012, 78 Fed. Reg. 77,653, 77,654 (Dep’t Commerce Dec. 24, 2013) (“Preliminary Results”).

¹ Commerce must annually review and determine the amount of an AD duty if it receives a request to do so. See 19 U.S.C. § 1675(a) (2012).

² In the non-market economy (“NME”) context, Commerce has adopted a rebuttable presumption that all companies within the NME country are subject to government control and, thus, should be assessed a single AD duty rate. Decision Memorandum for the Preliminary Results of the 2011-2012 Antidumping Duty Administrative Review: Fresh Garlic from the People’s Republic of China at 5, A-570-831, (Dec. 16, 2013), available at <http://enforcement.trade.gov/frn/summary/prc/2013-30660-1.pdf> (last visited Nov. 18, 2015) (“Preliminary I&D Memo”). Here, because Commerce considers the PRC to be an NME, that rate is the PRC-wide rate.

The PRC is considered by Commerce to be a non-market economy (“NME”). In calculating a dumping margin for products from an NME country, Commerce compares the goods’ normal value,³ derived from factors of production (“FOPs”) as valued in a surrogate market economy (“ME”) country, to the goods’ export price.⁴ Commerce must use the “best available information” in selecting surrogate data. 19 U.S.C. § 1677b(c)(1)(B) (2012). The surrogate data must “to the extent possible” be from a market economy country that is “at a level of economic development comparable to that of the nonmarket economy country” and is a “significant producer[] of comparable merchandise.” *Id.* at § 1677b(c)(4).

In May 2013, Commerce placed on the record a list of potential surrogate countries based on economic comparability to the PRC, which included Colombia, Costa Rica, Indonesia, the Philippines, South Africa, and Thailand. Preliminary I&D Memo at 9. Commerce compiled this list based on World Bank per capita gross national income (“GNI”) data. See id. at 9–10. Next, Commerce narrowed its list by identifying countries that it considered to be significant producers of fresh garlic. *Id.* at 10. To this end, Commerce eliminated Costa Rica due to its lack of garlic

³ Normal value is

the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price,

“at 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),(B)(i).

⁴ Export price is “the price at which the subject merchandise is first sold . . . before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States[.]” 19 U.S.C. § 1677a(a).

production in 2011 and South Africa because of conflicting data concerning whether or not it had fresh garlic production in 2011. Id. at 10–11. Commerce then determined that of the remaining surrogate countries, the Philippines offered the best quality data, and selected it as the surrogate country. Id. at 12.

With respect to the calculation of surrogate values, in its preliminary determination, Commerce excluded from the pricing data all imports from NME countries and countries that maintain broadly available, non-industry specific export subsidies. Id. at 17. To value the raw garlic bulb input, Commerce relied on farm gate prices,⁵ and for labor, Commerce relied on data from the International Labor Organization (“ILO”). Id. at 18.

In April 2014, after the Preliminary Results, but before the Final Results, FGPA alleged that Golden Bird had misreported its fresh garlic sales for the POR. Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review: Fresh Garlic from the People’s Republic of China; 2011-2012 Administrative Review at 2, A-570-831, (Jun. 23, 2014), available at <http://enforcement.trade.gov/frn/summary/prc/2014-15279-1.pdf> (last visited Nov. 18, 2015) (“I&D Memo”). In the Final Results, issued on June 30, 2014, Commerce determined that it was within its discretion to accept FGPA’s untimely allegations. Id. at 30–31;

⁵ In valuing the raw garlic bulb as an input for fresh garlic, Commerce used the intermediate input valuation methodology. Preliminary I&D Memo at 18. When using this methodology, Commerce “choos[es] to apply a surrogate value to an intermediate input instead of the individual FOPs used to produce that intermediate input.” 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 Fed. Reg. 69,942, 69,947 (Dep’t Commerce Nov. 18, 2005). Here, Commerce calculated normal value by starting with the surrogate value for the raw garlic bulb and “adjusting for yield losses during the processing stages, and adding the respondent’s processing costs, which were calculated using its reported usage rate for processing fresh garlic.” Preliminary I&D Memo at 16–17.

Final Results, 79 Fed. Reg. at 36,722. After issuing a supplemental questionnaire, which Golden Bird did not complete to Commerce's satisfaction, Commerce selected total adverse facts available ("total AFA")⁶ for Golden Bird. I&D Memo at 33. Commerce selected the PRC-wide rate of \$4.71 as Golden Bird's total AFA rate. Id. at 39.

For the Final Results, Commerce continued to use the Philippines as the surrogate country. Id. at 10. Commerce also continued to exclude NME country and export subsidy country data from the import statistics used to calculate surrogate values. Id. at 14–15. Additionally, Commerce continued to rely on ILO data to calculate the labor surrogate value and farm gate prices to calculate the raw garlic bulb surrogate value. Id. at 17, 21. Finally, Commerce determined that net weight, as opposed to gross weight, was more accurate for calculating surrogate values for Philippine importers' total input costs for fresh garlic production. Id. at 18–19. The Final Results assigned dumping margins of \$1.82 to Xinboda, QXF, and other separate rate respondents, and \$4.71 for the PRC-wide entity, which included Golden Bird. See Final Results, 79 Fed. Reg. at 36,723.

With respect to Goodman, in the Preliminary Results, Commerce did not consider it for separate rate (non-PRC-wide entity) treatment stating,

⁶ Although the phrase "total AFA" is not referenced in either the statute or the agency's regulations, it can be understood, within the context of this case, as referring to Commerce's application of the "facts otherwise available" and "adverse inferences" provisions of 19 U.S.C. § 1677e to arrive at a total replacement margin. If Commerce determines

that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce, Commerce, in calculating a dumping margin], may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.

19 U.S.C. § 1677e(b)(1).

[a]lthough Goodman had shipments during the POR of this administrative review, these shipments are being analyzed in a concurrent new shipper review. Therefore, Goodman will not be analyzed for the purposes of a separate rate in this review but will maintain the rate it received from its new shipper review.

Preliminary I&D Memo at 6 (footnote omitted). In the Final Results, Commerce determined that because it had concluded in the contemporaneous new shipper review (“NSR”) that Goodman did not have any bona fide sales during the POR, it could not qualify for a separate rate in the administrative review. I&D Memo at 40–41. Commerce thus rescinded the administrative review for Goodman and ordered that “[a]ny entries entered during this POR shall liquidate as entered.” Id.

The parties challenge several aspects of Commerce’s Final Results. Golden Bird disputes three of Commerce’s decisions. First, Golden Bird challenges Commerce’s determination that Golden Bird failed to cooperate to the best of its ability and subsequent selection of total AFA. Golden Bird Br. at 16–20. Second, Golden Bird contests Commerce’s selection of the PRC-wide rate as its total AFA rate. Id. at 20–28. Third, Golden Bird claims that Commerce’s so called “15-day policy”⁷ is unlawful. Id. at 28–34.

Goodman challenges two of Commerce’s determinations. First, Goodman disputes Commerce’s rescission of its administrative review, arguing that a lack of bona fide sales is an insufficient reason to rescind a review. Goodman Br. at 9–10. Second, and alternatively, Goodman contests Commerce’s application and calculation of the PRC-wide rate. Id. at 11–15.

⁷ This refers to Commerce’s policy of issuing liquidation instructions to U.S. Customs and Border Protection (“Customs”) fifteen days after the publication of its Final Results. Golden Bird Br. at 28–29.

QXF and Xinboda each challenge two of Commerce's decisions. First, both parties contest Commerce's selection of the Philippines as the PRC's surrogate country. QXF Br. at 7–10; Xinboda Br. at 3–41. Second, QXF and Xinboda otherwise challenge whether Commerce satisfied its statutory duty to use the best available information to calculate surrogate values for fresh garlic production. QXF Br. at 10–17; Xinboda Br. at 41–45. Finally, FGPA challenges Commerce's use of farm gate prices in calculating the surrogate value of the raw garlic bulb input. FGPA Br. at 17–27.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). Commerce's final results in an administrative review of an AD duty order are upheld unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Golden Bird

A. Specific Facts

In the Preliminary Results, Commerce determined that Golden Bird was independent of Chinese governmental control, selected it as a mandatory respondent, and assigned it a separate rate of \$1.17 per kilogram. See Preliminary Results, 78 Fed. Reg. at 77,653–54. On April 7, 2014, after the Preliminary Results were published, FGPA submitted factual allegations that Golden Bird's Section A responses were incorrect because the volume of shipments included items not reported to Chinese customs. Petitioners' Request for Investigation of Substantial Discrepancies Between Golden Bird's Volume of POR Exports Reported to Commerce/CBP and

Chinese Customs Authorities, bar code 3194440 (Apr. 7, 2014) (“Petitioners’ Golden Bird Export Volume Request”). Commerce accepted FGPA’s untimely⁸ request and asked Golden Bird to verify the amount of garlic it exported by producing the China Export Declaration Forms (“CEDFs”) for all shipments through a supplemental questionnaire. Suppl. Quest., bar code 3200154-01 (May 7, 2014) (“Golden Bird Suppl. Quest.”). Commerce also accepted FGPA’s designation of the data underlying FGPA’s allegations as business proprietary information (“BPI”). I&D Memo at 31. Commerce granted Golden Bird two extensions of time, until May 23, 2014, to submit the information. See Resp. to First Ext. Req., PD 335 (May 9, 2014); Resp. to Suppl. Quest. at 1, PD 350 (May 23, 2014). When Golden Bird was unable to produce sufficient evidence to substantiate its reported sales quantity, Commerce determined that Golden Bird had significantly impeded the proceedings and that it could not trust any of Golden Bird’s submissions, including its Separate Rate Certification. I&D Memo at 33–39. Thus, in its final determination, Commerce determined that Golden Bird had failed to cooperate to the best of its ability, selected total AFA, and assigned Golden Bird the PRC-wide rate of \$4.71 per kilogram. Id. at 39.

Golden Bird argues that Commerce’s decision to allow FGPA to file new allegations long past the deadline for submitting information was an abuse of discretion, and that Commerce’s designation of the data relied on by FGPA in making the untimely allegations as BPI was improper and denied Golden Bird due process. Golden Bird Br. at 16–18. Golden Bird further argues that Commerce improperly selected total AFA because Golden Bird cooperated to the

⁸ The parties agree FGPA’s submission was untimely. Golden Bird Br. at 6; see Def.’s Resp. to Pl.’s Mots. for J. upon the Agency R. 15–16, ECF No. 57 (“Gov. Br.”).

best of its ability and was not given a sufficient amount of time in which to comply with Commerce's request for information.⁹ Id. at 18–20. In challenging its total AFA rate, Golden Bird argues that Commerce improperly disregarded its Separate Rate Certification and assigned Golden Bird the PRC-wide rate, which is unconnected to commercial reality and uncorroborated. Id. at 20–28. Finally, Golden Bird argues that Commerce's 15-day policy is unlawful because it conflicts with the AD statute, Commerce's regulations, and the court's jurisdictional rules. Id. at 28–34.

The government responds that Commerce properly allowed FGPA's late allegations, and that the designation of the data as BPI was proper and did not deny Golden Bird its due process rights. Def.'s Resp. to Pl.'s Mots. for J. upon the Agency R. 19–23, ECF No. 57 (“Gov. Br.”). The government also argues that Commerce properly selected total AFA, given the significant discrepancies in Golden Bird's submissions and Golden Bird's failure to cooperate to the best of its ability. Id. at 23, 26–31. The government further responds that, because none of Golden Bird's submissions could be considered, Commerce properly selected the PRC-wide rate as Golden Bird's total AFA rate. Id. at 31. The government also argues that Commerce properly selected and corroborated the PRC-wide rate. Id. at 31, 33–37. Finally, the government argues that the court does not have jurisdiction over Golden Bird's 15-day policy challenge, and that even if it did, the policy is lawful. Id. at 60–69.

⁹ Golden Bird also argues that the allegations were based on unreliable data. As discussed in the I&D Memo, however, Commerce issued the supplemental questionnaire not based on the data alone, but on the documented allegation, irregularities in Golden Bird's reporting, and concerns from Commerce's prior Golden Bird verification. See I&D Memo at 31.

The court holds that Commerce's decision to allow the untimely allegations, designation of the supporting data as BPI, and selection of total AFA are supported by substantial evidence. Commerce's selection of the PRC-wide rate as Golden Bird's total AFA rate because it considered Golden Bird part of the PRC, however, is not supported by substantial evidence and the court remands the calculation of Golden Bird's AFA rate to Commerce for recalculation. The court also holds that it does not have jurisdiction over Golden Bird's 15-day policy challenge.

B. Acceptance of FGPA Allegations

1. *Untimeliness*

Under 19 C.F.R. § 351.301(b)(2) (2011), the deadline for submitting factual allegations is 140 days after the anniversary month of the AD duty order. Commerce has “discretion in setting, extending, and enforcing deadlines” for submissions. Artisan Mfg. Corp. v. United States, 978 F. Supp. 2d 1334, 1342 (CIT 2014). Commerce may extend a deadline for “good cause.” See 19 C.F.R. § 351.302(b) (2011).¹⁰ Though that discretion is not unlimited, where there is evidence of fraud, Commerce should consider the evidence even when submitted late in the proceeding. See Home Prods. Int’l, Inc. v. United States, 633 F.3d 1369, 1377–78 (Fed. Cir. 2011) (noting that Commerce has the ability to reopen an AD administrative review when fraud allegations arise); Tokyo Kikai Seisakusho, Ltd. v. United States, 529 F.3d 1352, 1361 (Fed. Cir.

¹⁰ The regulation has since been amended to require a showing of “extraordinary circumstances” for an untimely filed extension request. See 19 C.F.R. § 351.302(c) (2014). Because Commerce initiated the administrative review under consideration on December 31, 2012, Initiation Notice, 77 Fed. Reg. 77,019–22, the amended regulation, which applies to segments “initiated on or after October 21, 2013” is not applicable here. Extension of Time Limit, 78 Fed. Reg. 57,790, 57,790 (Dep’t Commerce Sept. 20, 2013). Golden Bird does not argue that FGPA was required to show extraordinary circumstances.

2008) (“An agency’s power to reconsider is even more fundamental when . . . it is exercised to protect the integrity of its own proceedings from fraud.”); US Magnesium LLC v. United States, 895 F. Supp. 2d 1319, 1325 (CIT 2013) (holding that Commerce abused its discretion where it failed to address evidence of fraud raised while the record was still open).

Here, Commerce did not abuse its discretion in allowing the late allegations from FGPA. FGPA certified that it did not have the information earlier in the proceeding, and Golden Bird has not provided evidence that FGPA had the information prior to submitting it. More importantly, the allegations raised serious questions about the veracity of Golden Bird’s submissions and the possibility that Golden Bird was engaged in fraudulent activity. Namely, if the discrepancy between the volumes of goods reported to Chinese authorities and U.S. Customs and Border Protection (“Customs”) was due to the fact that Golden Bird was allowing other Chinese exporters to benefit from its separate rate status, it could indicate a perverse and fraudulent scheme to avoid AD duties. A concern about such a scheme meets the good cause standard for extending a time limit. Additionally, nothing in the regulations precluded Commerce from accepting the late submission. See 19 C.F.R. § 351.302(b). Commerce’s determination that FGPA presented sufficient good cause to accept the late submission is sustained.

2. Designation of FGPA Submissions as “Business Proprietary Information”

When a party designates information as BPI in a submission, Commerce may not disclose that information without the party’s consent. See 19 U.S.C. § 1677f(b)(1)(A). “If [Commerce] determines, on the basis of the nature and extent of the information or its availability from public sources, that designation of [the] information as [BPI] is unwarranted,” then Commerce may ask

the submitting party to explain why the designation is warranted. 19 U.S.C. § 1677f(b)(2).

Here, Commerce did not determine that the designation was unwarranted.

FGPA had a legitimate concern that disclosure of the information would harm its competitive position because the identity of the foreign researcher who gathered the information was important to its business. In Max Fortune Industrial Ltd. v. United States, the court upheld the treatment of the name of a researcher as BPI because to reveal the name “could prove a danger to the researcher and the researcher’s methods of obtaining information in the future.” 853 F. Supp. 2d 1258, 1266 (CIT 2012). The court noted that counsel in that case had access to the relevant information under the Administrative Protective Order (“APO”) and that the party in that case “was provided with sufficient public information to have notice of, and respond to, the allegations made against it.” Id. at 1267. The same is true here. Golden Bird’s counsel had access to the information under the APO and Golden Bird was provided with the total Chinese shipment information such that it had notice of, and could adequately respond to, the allegation that the Chinese shipment volumes did not match its Section A responses. See Golden Bird’s Cmts. on Petitioners’ Export Volume Request at 2–4, barcode 3196023 (Apr. 16, 2014); Pls.’ Reply to the Resps. of Def. and Def.-Intvrs. to Pls.’ Rule 56.2 Mots. for J. upon the Agency R. at 8–9, ECF No. 65 (“Golden Bird and Goodman Reply Br.”). Disclosure of the researcher’s identity could prevent that researcher from assisting FGPA in the future, to the detriment of FGPA’s business. Accordingly, Commerce’s decision not to challenge FGPA’s designation of the information as BPI is supported by substantial evidence.

Additionally, the designation of the information as BPI did not deny Golden Bird due process because Golden Bird had notice of Commerce’s decision and an opportunity to respond

to the allegations. See Sichuan Changhong Elec. Co. v. United States, 30 CIT 1886, 1890, 466 F. Supp. 2d 1323, 1327 (2006) (holding that in order to succeed on a due process claim the party had to show that its opportunity to be heard was “unreasonably curtailed”). The public version of FGPA’s submission contained the relevant information, namely the total quantity of fresh garlic reported to Chinese authorities and the amount of the alleged discrepancy between that quantity and the quantity reported to Customs. See Petitioners’ Golden Bird Export Volume Request at 2. Further, the data concerned Golden Bird’s own shipping information, and Golden Bird presumably had access to the same information from internal sources. Thus, Golden Bird had sufficient notice of the information contained in the allegation to rebut it. Golden Bird was also allowed to present arguments against the BPI treatment of the data as well as the underlying factual allegations before Commerce. See Golden Bird’s Cmts. on Petitioners’ Export Volume Request at 5–7. Accordingly, its opportunity to be heard was not unreasonably curtailed. Because Golden Bird had access to the relevant information and had an opportunity to be heard to rebut the information, there was no due process violation and Commerce’s determination is supported by substantial evidence.

C. Selection of Total Adverse Facts Available

By statute, Commerce shall use facts otherwise available if a party:

- (A) withholds information that has been requested by [Commerce],
- (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested . . . ,
- (C) significantly impedes a proceeding . . . , or
- (D) provides such information but the information cannot be verified

19 U.S.C. § 1677e(a)(2). Commerce may apply an adverse inference in selecting from the facts otherwise available if the party “has failed to cooperate by not acting to the best of its ability to

comply with a request for information.” 19 U.S.C. § 1677e(b). This is referred to as applying AFA. Commerce has discretion over whether to apply or not apply AFA. See AK Steel Corp. v. United States, 28 CIT 1408, 1416–17, 346 F. Supp. 2d 1348, 1355 (2004). The issue of whether a respondent has acted to the best of its ability and whether applying AFA is appropriate “amounts to a line-drawing exercise that is precisely the type of discretion left within the agency’s domain.” Ta Chen Stainless Steel Pipe Co. v. United States, 31 CIT 794, 812 (2007) (quoting Boading Yude Chem. Indus. Co. v. United States, 25 CIT 1118, 1126, 170 F. Supp. 2d 1335, 1343 (2001)) (internal quotation marks and brackets omitted).

The Federal Circuit has described the application of AFA as a two part inquiry. First, Commerce must determine whether 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. Nippon Steel Corp. v. United States, 337 F.3d 1373, 1381 (Fed. Cir. 2003). If so, Commerce must fill gaps in the record with facts otherwise available. Id. The focus of this first inquiry is whether a party failed to provide information; a party’s reason for that failure is irrelevant. Id. Commerce is permitted to draw an adverse inference, however, only if it makes the second, separate determination that the respondent “has failed to cooperate by not acting to the best of its ability to comply.” Id. Commerce is also required by statute to provide a party with the opportunity to correct deficient responses prior to applying AFA. 19 U.S.C. § 1677m(d).

A respondent fails to cooperate to the best of its ability when it fails “to do the maximum it is able to do.” Nippon Steel, 337 F.3d at 1382. The standard in 19 U.S.C. § 1677e(b) “does not condone inattentiveness, carelessness, or inadequate record keeping.” Id. In determining

whether a party has failed to do the maximum it is able to do, Commerce employs another two-part test. Id. at 1382. First, Commerce “make[s] an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations.” Id. Second, Commerce

make[s] a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent’s lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.

Id. at 1382–83.

Depending on the severity of a party’s failure to respond to a request for information and failure to cooperate to the best of its ability, Commerce may select either partial or total AFA. Generally, the “use of partial facts available is not appropriate when the missing information is core to the antidumping analysis and leaves little room for the substitution of partial facts without undue difficulty.” Mukand, Ltd. v. United States, 767 F.3d 1300, 1308 (Fed. Cir. 2014). Where there are “pervasive and persistent deficiencies that cut across all aspects of the data,” all of the reported information may be unreliable, making total AFA appropriate. See Zhejiang DunAn Hetian Metal Co. v. United States, 652 F.3d 1333, 1348 (Fed. Cir. 2011).

Commerce’s selection of AFA is supported by substantial evidence. First, Commerce’s determination that Golden Bird’s response to its supplemental questionnaire was deficient is supported by substantial evidence. Golden Bird produced partially completed CEDFs for only a fraction of the sales during the POR. See Golden Bird Suppl. Quest. Resp. at 1, barcode 3204165 (May 23, 2014) (indicating that Golden Bird was providing “some” of the requested CEDFs). The documents Golden Bird did produce lacked the official stamps and indicia of

authenticity that would allow the documents to be verified. See id. at Ex. 3; see also I&D Memo at 33. Further, Golden Bird admitted to intentionally reporting false pricing information on the documents submitted. Golden Bird Rebuttal Br. at 7–8, barcode 3208559 (Jun. 12, 2014). Accordingly, it was reasonable for Commerce to determine that Golden Bird failed to comply with Commerce’s request for information, thereby significantly impeding the proceeding.

Second, Commerce provided Golden Bird with an adequate opportunity to cure its deficient response. Golden Bird acknowledged in its Supplemental Questionnaire Response that it was not providing Commerce with all of the requested documentation, attempted to justify its deficient response, and argued that it would have been able to provide a more adequate response had it been given more time. Golden Bird Suppl. Quest. Resp. at 4–5. Commerce determined that Golden Bird’s justifications were unsubstantiated and unsatisfactory, and hence, that no additional time to respond was warranted. I&D Memo at 34–38. Commerce’s rejection of Golden Bird’s explanations was reasonable. Golden Bird claimed that the CEDFs could not be recovered in the amount of time allotted because they were retained by the numerous export agents Golden Bird used but, provided no evidence that it used numerous export agents, or that it had attempted to contact such agents to obtain the CEDFs. Golden Bird Suppl. Quest. Resp. at 3–4; I&D Memo at 35. Golden Bird also claimed that it did not retain the CEDFs because of office space concerns, despite the fact that the documents could have been stored electronically, and were required to be maintained under Chinese regulations. See id. at 36–37. Additionally, Golden Bird acknowledges that the forms it did provide contained intentional inaccuracies. See Golden Bird Rebuttal Br. at 7–8. Further, Golden Bird’s alternative method of verifying its reported volume was insufficient, as it failed to account for over half of Golden Bird’s reported

sales. See Golden Bird Suppl. Quest. Resp. at 4–5; Golden Bird and Goodman Reply at 10.

With respect to the amount of time Golden Bird had to respond, not only did Golden Bird receive two time extensions, but it received double the amount of time parties typically have to prepare for verification. I&D Memo at 34. Verification is a far more intensive review process, and Commerce routinely requests export licenses similar to the CEDFs requested in the Supplemental Questionnaire during verification. Id. Golden Bird thus had the opportunity to explain its failure to comply with the information request in the Supplemental Questionnaire, and Commerce acted reasonably in determining that its explanations were lacking.¹¹

Third, Commerce’s determination that Golden Bird failed to cooperate to the best of its ability is supported by substantial evidence. As discussed above, Golden Bird’s explanations for failing to file all of the requested CEDFs are unsubstantiated and unreasonable. See I&D Memo at 35–37; Golden Bird Suppl. Quest. Resp. at 3–4 (indicating that if any export agent was used, the same export agent was used for each shipment and failing to explain why documents could

¹¹ The court notes that although Commerce specifically noted that Golden Bird’s response to its Supplemental Questionnaire was deficient, in determining whether Golden Bird was provided with notice and given an adequate opportunity to correct its deficient response, Commerce stated that it “allowed Golden Bird to provide documentation to support what appeared to be a deficient section A response.” I&D Memo at 34. Thus, it is not abundantly clear whether Commerce is resting its determination on the deficient nature of Golden Bird’s Section A Response or Supplemental Questionnaire Response. Such lack of clarity, however, does not render Commerce’s determination unsupported by substantial evidence.

Golden Bird does not argue that Commerce failed to follow 19 U.S.C. § 1677m(d) in selecting total AFA. If Golden Bird’s deficient response was its Section A Response, the Supplemental Questionnaire provided a sufficient opportunity for Golden Bird to remedy or explain the deficiency. If the deficient response was the Supplemental Questionnaire Response, Golden Bird likely still received an adequate opportunity to remedy or explain the deficiency, given the time constraints Commerce was operating under, the late nature of the allegations, the two time extensions granted, and the fact that Golden Bird acknowledged its response was deficient and attempted to justify such deficiency in the Supplemental Questionnaire Response.

not have been stored electronically). As the CEDFs that Golden Bird failed to produce are required to be maintained for three years by Chinese customs regulations, Golden Bird's failure to maintain them is evidence of its failure to cooperate to the best of its ability. I&D Memo at 38–39. Golden Bird maintains that it acted to the best of its ability because it provided alternative evidence that it was the exporter of the quantity of fresh garlic reported. Golden Bird Br. at 19. This alternate evidence, however, only accounted for a portion of the alleged Golden Bird sales. Accordingly, the alternative evidence did nothing to cure the deficient response.¹² Golden Bird did not explain why it did not supply alternative evidence for all of its alleged shipments. The acknowledged price discrepancies between the evidence Golden Bird submitted in its Supplemental Questionnaire Response and reported to Customs further indicate that Golden Bird was not completely candid with Commerce, and are additional evidence of Golden Bird's failure to cooperate to the best of its ability. Thus, none of Golden Bird's arguments attempting to rationalize or explain its failure to provide the requested documents are persuasive; accordingly, Commerce's decision to select AFA is supported by substantial evidence.

Given the severity of Golden Bird's failure to cooperate and the centrality of the deficient response to the calculation of a dumping margin, Commerce properly selected total AFA. Golden Bird's sales volume is fundamental to the AD analysis, and was a critical component in Golden Bird's selection as a mandatory respondent. I&D Memo at 38–39. It is thus akin to the failure to provide product-specific sales and cost data, which the Federal Circuit determined was

¹² Golden Bird attempts to argue that the Chinese customs data is inaccurate and is responsible for the discrepancies between the reported volumes. Golden Bird Br. at 19. In fact, the amount reported in the Supplemental Questionnaire Response is closer to the amount reported to Chinese customs than it is to the amount reported to Customs and listed in Golden Bird's Section A Response. I&D Memo at 27.

sufficient to select total AFA in Mukand, Ltd. v. United States, 767 F.3d at 1307. Because the sales data concerned the entire POR, this case is also distinguishable from Zhejiang DunAn Hetian Metal Co. v. United States, where Commerce selected partial AFA to account for discrepancies in sales volume for one month of the period of investigation. 652 F.3d at 1345–46, 1348 (reversing selection of partial AFA on other grounds). Further, Golden Bird’s argument that it substantially complied with Commerce’s document request is meritless; Golden Bird acknowledges that the documents submitted account for less than half of its reported sales volume. Golden Bird and Goodman Reply at 10. Additionally, the fact that Golden Bird intentionally submitted false pricing information also supports Commerce’s determination that all of Golden Bird’s sales information was unreliable. See Foshan Shunde Yongjian Housewares & Hardware Co. v. United States, Slip Op. 11-123, 2011 WL 4829947, at *14 (CIT Oct. 12, 2011) (holding that total AFA was appropriate where deficient responses concerned a substantial portion of a party’s production inputs); Shanghai Taoen Int’l Trading Co. v. United States, 29 CIT 189, 199 n.13, 360 F. Supp. 2d 1339, 1348 n.13 (2005) (upholding selection of total AFA where inconsistencies concerned the identity of a party’s suppliers). Thus, Commerce’s decision to select total AFA is supported by substantial evidence.

D. Selection of the PRC-Wide Rate

As discussed above, Commerce’s selection of total AFA is supported by substantial evidence; Commerce’s further selection of the PRC-wide rate, however, is not. Commerce improperly ignored Golden Bird’s Separate Rate Certification in selecting the PRC-wide rate as Golden Bird’s total AFA rate.

1. Commerce's Calculation

In an AD review of products from an NME country, Commerce employs a presumption of state control. See Huaiyin Foreign Trade Corp. v. United States, 322 F.3d 1369, 1372 (Fed. Cir. 2003). Unless a party rebuts the presumption by establishing de jure and de facto independence from the NME country's government, that party is assigned a country-wide AD duty rate. Sigma Corp. v. United States, 117 F.3d 1401, 1405 (Fed. Cir. 1997); Peer Bearing Co.-Changshan v. United States, 32 CIT 1307, 1309, 587 F. Supp. 2d 1319, 1324 (2008). Once a party has demonstrated its independence and been granted a separate rate in one segment of the proceeding, it can demonstrate its separate rate status eligibility by filing a separate rate certification stating that it continues to meet the criteria for obtaining a separate rate. See Initiation Notice, 77 Fed. Reg. at 77,018–19.

Golden Bird filed a separate rate certification, which Commerce determined was sufficient in the Preliminary Results. See Preliminary I&D Memo at 6, 8. Commerce thus had previously determined that Golden Bird was entitled to a separate rate and preliminarily determined that Golden Bird continued to meet the criteria for obtaining a separate rate. See id. at 6. The government argues that because of the pervasive nature of Golden Bird's failure to act to the best of its ability, Commerce could not rely on the information in Golden Bird's Separate Rate Certification in the Final Results. Gov. Br. at 31. According to Commerce's logic, because the only information on the record in the administrative review of Golden Bird's independence from government control was contained in the Separate Rate Certification that Commerce disregarded, Golden Bird failed to rebut the presumption of government control and was

properly assigned the PRC-wide rate. See id. The government's argument improperly conflates the separate rate analysis with the selection of an AFA rate.

The court has held that the separate rate analysis is separate and distinct from the selection of an AFA rate. Yantai Xinke Steel Structure Co. v. United States, Slip Op. 12-95, 2012 WL 2930182, at *14 (CIT July 18, 2012) ("This Court has consistently held that it is unreasonable for Commerce to impute the unreliability of a company's questionnaire responses and submissions concerning its factors of production and/or U.S. sales to its separate rate responses when there is no evidence on the record indicating that the latter were false, incomplete, or otherwise deficient."). Commerce cannot ignore a party's separate rate information solely because it selects total AFA, due to defects related to sales data. Foshan Shunde, 2011 WL 4829947 at *16; Since Hardware (Guangzhou) Co. v. United States, Slip Op. 10-108, 2010 WL 3982277, *5-6 (CIT Sept. 27, 2010); Qingdao Taifa Grp. Co. v. United States, 33 CIT 1090, 1098, 637 F. Supp. 2d 1231, 1240-41 (2009); Shandong Huarong Gen. Grp. Corp. v. United States, 27 CIT 1568, 1595-96 (2003). 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. See Gerber Food (Yunnan) Co. v. United States, 29 CIT 753, 772, 387 F. Supp. 2d 1270, 1287 (2005). When Commerce fails to make findings that a respondent's separate rate responses were inaccurate or deficient, its denial of a separate rate is unsupported by substantial evidence. Yantai Xinke, 2012 WL 2930182 at *14.

Here, Commerce, having found the Separate Rate Certification sufficient, failed to make a new finding that Golden Bird's Separate Rate Certification was deficient in any respect. In fact, Commerce's determination to disregard Golden Bird's Separate Rate Certification was

limited to two sentences in the I&D Memo. I&D Memo at 39 (“Because we determine that the entirety of Golden Bird’s information is unusable, including its separate rate information, we find that Golden Bird has not demonstrated its eligibility for separate rate status. As a result, for purposes of these final results, we are treating Golden Bird as part of the PRC-wide entity.”). Thus, Commerce’s rejection of Golden Bird’s separate rate status is based solely on the discrepancies in its questionnaire responses and supplemental questionnaire responses related to sales volume, neither of which concerned Golden Bird’s independence from government control. To suddenly decide that Golden Bird, which has long been considered to be independent, see, e.g., Fresh Garlic Producers Ass’n v. United States, 83 F. Supp. 3d 1330, 1332 (CIT 2015), is part of the Chinese government because of sales data defects smacks of punishment. The general presumption of state control is tenuous at best and rejecting Golden Bird’s rebuttal evidence on the discrete point of government control is not reasonable. Remand is thus appropriate in this case, as Commerce’s determination is not based on record evidence specific to the question of whether Golden Bird is subject to state control. See Gerber Food, 29 CIT at 772, 387 F. Supp. 2d at 1287.

2. Applicable Law

The parties do not agree as to the applicable law for selecting a separate rate for Golden Bird. On June 29, 2015, President Obama signed the Trade Preferences Extension Act of 2015 (“the Act”). Pub. L. No. 114-27, 129 Stat. 362 (2015). Section 502 of the Act (“§ 502” or “Section 502”) amends 19 U.S.C. § 1677e, which sets the standard by which Commerce may select AFA rates. Id. § 502, 129 Stat. at 383–84. Namely, § 502 significantly reduces the burden for corroborating an AFA rate, as Commerce does not have to corroborate an AD duty rate that

has been applied in a separate segment of the same proceeding. Commerce is also no longer required to tie an AD duty margin to the “commercial reality” of the interested party. Compare id. § 502(d)(3), 129 Stat. at 384 (“If [Commerce] uses an adverse inference . . . [Commerce] is not required . . . to demonstrate that the . . . dumping margin used by [Commerce] reflects an alleged commercial reality of the interested party.”), with Gallant Ocean (Thai.) Co. v. United States, 602 F.3d 1319, 1324 (Fed. Cir. 2010) (“Although Commerce has discretion in choosing from a list of secondary information to support its adverse inferences, Commerce must select secondary information that has some grounding in commercial reality.”).

Given the significant changes to the statute outlined in § 502, whether the Act applies to the court’s remand affects whether Commerce is required to corroborate Golden Bird’s AFA rate and link it to Golden Bird’s commercial reality and whether separate rate status has any practical significance in a total AFA situation. For example, in Qingdao Taifa Group Co. v. United States, the court held that Commerce could not select a PRC-wide rate as an AFA rate when the party had established its independence from government control, even where the selection of AFA was appropriate in other respects. 33 CIT at 1098–99, 637 F. Supp. 2d at 1240–42. The court stated, “[b]ecause an AFA rate must bear some relationship to the respondent’s actual dumping margin, Commerce’s ability to apply the PRC-wide rate as respondent’s AFA rate is limited.” Id. at 1098, 637 F. Supp. 2d at 1240.

Under Bradley v. School Board of City of Richmond, courts are instructed “to apply the law in effect at the time it renders its decision.” 416 U.S. 696, 711 (1974). A statute will not be given retroactive effect, however, unless there is clear congressional intent, effectively creating a presumption against retroactivity. Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994).

When a statute does not have express retroactive language, the court determines whether applying the statute to the case at hand would allow the statute to have retroactive effect. Id. at 280. Retroactive effect is determined by looking at whether applying the statute “would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.” Id. In Republic of Austria v. Altmann, the Supreme Court described this inquiry as whether the relevant activity that the statute regulates occurred after the effective date of the statute. 541 U.S. 677, 697 n.17 (2004) (quoting Landgraf, 511 U.S. at 291 (Scalia, J., concurring)). In Fernandez-Vargas v. Gonzales, the court stated that a retroactive consequence of applying a statute would “affect[] substantive rights, liabilities, or duties on the basis of conduct arising before its enactment.” 548 U.S. 30, 37 (2006) (quoting Landgraf, 511 U.S. at 278) (internal brackets omitted).

The parties agree that § 502 does not apply to the court’s present review of the Final Results. Cmts. on Ct.’s Letter of July 30, 2015 5–7, ECF No. 78 (Sept. 3, 2015) (“Golden Bird, Goodman, and QXF Suppl. Br.”); Consol. Pl. Shenzhen Xinboda Indus. Co., Ltd. Suppl. Br. in Resp. to Ct.’s Questions 2–3, ECF No. 79 (Sept. 3, 2015) (“Xinboda Suppl. Br.”); Domestic Indus.’s Resp. to the Ct.’s July 30, 2015 Letter Requesting Suppl. Briefing 3–4, ECF No. 80 (Sept. 3, 2015) (“FGPA Suppl. Br.”); Def.’s Resp. to the Ct.’s July 30, 2015 Order Requesting Suppl. Briefing 3, ECF No. 81 (Sept. 3, 2015) (“Gov. Suppl. Br.”). The parties disagree, however, as to whether § 502 will apply to a remand determination. The government concedes that the relevant portions of the Act do not have any retroactive language and are not intended to

apply retroactively. Gov. Suppl. Br. at 4–5. Instead, the government argues that because a remand determination is a new action by Commerce, as opposed to an action by a party, the application of § 502 to a remand determination is not retroactive. Id. FGPA agrees with the government that Commerce may apply the Act on remand without retroactive effect. FGPA Suppl. Br. at 4–5. Golden Bird argues that applying § 502 on remand would improperly convert the Act from being remedial to punitive, and would be a retroactive application. Golden Bird, Goodman, and QXF Suppl. Br. at 5–7.

Section 502 does not have an express effective date. Commerce issued an interpretive rule indicating that the Act is to have prospective effect only, and that § 502 will apply to determinations made by Commerce on or after August 6, 2015. Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015, 80 Fed. Reg. 46,793, 46,794 (Dep’t Commerce Aug. 6, 2015) (“Interpretive Rule”). The Federal Circuit recently held that § 502 has prospective effect and does not apply to “final administrative determinations that remain subject to judicial review.” Ad Hoc Shrimp Trade Action Comm. v. United States, 802 F.3d 1339, 1350 (Fed. Cir. 2015) (“Ad Hoc Shrimp”). Accordingly, as the Final Results are a “final administrative determination” currently subject to judicial review, and predate the enactment of the Act, the court did not apply § 502 in reviewing the Final Results.

Although the Federal Circuit did not directly address whether § 502 applies to remand determinations in Ad Hoc Shrimp, the analysis the court conducted in holding that § 502 does not apply to determinations currently subject to judicial review is instructive. Id. at 1351 n.12. In holding that § 502 operates prospectively, the court noted that “[a] statute shall not be given

retroactive effect unless such construction is required by explicit language or by necessary implication.” Id. at 1349 (quoting Fernandez-Vargas, 548 U.S. at 37). The court then looked to the text of § 502, which contains no express effective date or language concerning the section’s temporal reach. Id. at 1350–51. Next, the court relied on the normal rules of statutory construction and held that those rules precluded the application of § 502 to the appeal before the court. The court noted that when the normal rules of statutory construction do not dictate a statute’s proper reach, the court “ask[s] whether applying the statute . . . would have a retroactive consequence in the disfavored sense of affecting substantive rights, liabilities, or duties on the basis of conduct arising before its enactment.” Id. at 1350 (quoting Fernandez-Vargas, 548 U.S. at 37) (internal quotation marks omitted).

Neither § 502’s text nor its legislative history expressly states that § 502 is retroactive or applies to remand determinations of cases that were subject to judicial review at the time of its enactment. See S. Rep. No. 114-45, at 37 (2015) (discussing § 501, ultimately enacted as § 502). Based on the normal rules of statutory construction, § 502 is not intended to apply retroactively. Congress provided explicit effective dates for other provisions in the Act, both preceding and following the date of enactment, indicating that had Congress intended the Act to have retroactive effect, it would have said so. Ad Hoc Shrimp, 802 F.3d at 1350–51 (discussing the statutory principle allowing a presumption of intent when Congress includes language in one statutory provision that is excluded from another provision). This is particularly relevant given the simultaneous enactment of the provisions with specified effective dates and § 502. See id. at 1351 (“The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant

respects.”) (quoting Field v. Mans, 516 U.S. 59, 75 (1995)). Because § 502 is not intended to have retroactive effect, the next question is whether applying § 502 to a remand determination will result in the retroactive application of § 502.

In Landgraf v. USI Film Products, the Supreme Court reasoned that “[a] statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment.” 511 U.S. at 269. Rather, the court determined that it must evaluate “familiar considerations of fair notice, reasonable reliance, and settled expectations” to determine whether applying the statute would have retroactive effect. Id. at 270. The court explained the rationale for this rule:

Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate.

Id. at 272–73.

The government and FGPA make much of the fact that § 502 regulates Commerce’s conduct in administrative proceedings, and that because a remand determination is a new administrative proceeding, applying § 502 would not be retroactive. They also make much of the fact that trade remedies laws, including AD laws, are inherently retroactive and that no party has a right to a certain rate of duty. Consol. Pl. Shenzhen Xinboda Indus. Co., Ltd. Suppl. Br. in Resp. to Court’s Questions Ex. 2, ECF No. 79 (Gov. Suppl. Br. at 2, ECF No. 85, Ad Hoc Shrimp, No. 2014-1647 (Aug. 27, 2015) (citing SKF USA, Inc. v. United States, 537 F.3d 1373, 1380–81 (Fed. Cir. 2008); Arjay Assocs., Inc. v. Bush, 891 F.2d 894, 897 (Fed. Cir. 1989)). As support for this in its supplemental brief filed before the Federal Circuit in Ad Hoc Shrimp, the

government cited SKF USA, Inc. v. United States, where the Federal Circuit relied on the retrospective nature of duties and held that a change in Commerce's methodologies between administrative reviews was acceptable. Id.; see 537 F.3d at 1380–81. As this case concerns a change between an original determination and a remand determination rather than between separate administrative reviews, it is readily distinguishable. The government and FGPA, thus, have misunderstood the critical conduct at issue. The relevant decision does not concern entitlement to a particular rate of duty or the retrospective nature of the trade laws. Rather, it concerns the decision Commerce made when it selected total AFA for Golden Bird. The date Commerce made that determination is controlling, as it is the date on which the decision was made that affected Golden Bird's rights. See Martin v. Hadix, 527 U.S. 343, 357–58 (1999) (“The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment.”) (quoting Landgraf, 511 U.S. at 270) (internal quotation marks omitted).

In Travenol Laboratories, Inc. v. United States, the Federal Circuit held that applying a statutory provision, which was amended after final judgment was awarded by the CIT, but prior to certain entries' re-liquidation, would not result in the retroactive application of that provision. 118 F.3d 749, 752–54 (Fed. Cir. 1997). Central to the court's holding was that the provision concerned the calculation of interest, which was not determined until the entries were re-liquidated. Id. at 753. In reaching that conclusion, the court stated that the retroactivity analysis “focuse[s] on the interrelationship between the new law and past conduct . . . [and] depends upon whether the conduct that allegedly triggers the statute's application occurs before or after the law's effective date.” Id. at 752 (internal quotation marks and citation omitted). Thus, this case

is distinguishable, as the crucial moment for retroactivity in this case is not liquidation, but rather, Commerce's determination that Golden Bird failed to cooperate to the best of its ability and selected total AFA. Because Commerce's decision to select total AFA occurred prior to § 502's enactment, applying § 502 on remand would be an impermissible retroactive application.

To apply § 502 on remand would be in effect to apply the law retroactively by applying it to a determination that occurred before the new law became effective. It would also serve to treat parties differently merely because Commerce made an error in one case and not in another decided at the same time. Additionally, the court rejects the argument that the Act is merely a restatement of the law and does not change the standard by which it selects an AFA rate. The Federal Circuit interpreted the AFA provisions of the old law as requiring corroboration of the rate so that there was some basis in the commercial reality of a respondent. See, e.g., Gallant Ocean, 602 F.3d at 1324. In contrast, the Act permits Commerce to select a rate that is unconnected to such commercial reality. Section 502 thus clearly diverges from the prior statutory AFA standard as interpreted by binding Federal Circuit precedent such that application of the new standard would be an impermissible retroactive application.

The government's reliance on Potomac Electrical Power Co. v. United States, as support for applying § 502 on remand is also misplaced. 584 F.2d 1058 (D.C. Cir. 1978). Although that case did order an agency to apply a new law on remand after finding that the agency's determination did not satisfy the previously-applicable legal standard, Potomac is a pre-Landgraf case, and the court applied a different, now-inapplicable standard. Id. at 1066–67. Specifically, the court determined that the agency should apply the law in effect at the time of a decision

unless it would be manifestly unjust to do so. Id. at 1066. This is in stark contrast to Landgraf's presumption against retroactivity. See Landgraf, 511 U.S. at 265, 270.

Accordingly, § 502 of the Act does not apply to the remand determination ordered in this case and Commerce is instructed not to apply the standards contained in § 502 on remand.

E. Fifteen-Day Liquidation Policy

Golden Bird next challenges Commerce's 15-day liquidation policy. Golden Bird Br. at 28–34. Golden Bird argues that Commerce's policy ignores 19 U.S.C. § 1516a and CIT Rule 3(a)(2)'s 30-day time limit for filing cases before the CIT, Commerce's own timeline for filing ministerial error allegations (within 30 days) under 19 C.F.R. § 351.224, and 19 U.S.C. § 1675(a)(3)(B), which provides “[l]iquidation shall be made . . . to the greatest extent practicable, within 90 days after the instructions to Customs are issued.” Golden Bird Br. at 29–31. The government responds that the court lacks jurisdiction under 28 U.S.C. § 1581(c) to hear this claim, and that Golden Bird has not been harmed by this policy as its entries have not yet been liquidated. Gov. Br. at 60–63. The government further argues that even if the court does have jurisdiction, Commerce's policy permissibly fills a statutory gap. Id. at 60, 63.

Although Golden Bird brought its claim under § 1581(c) jurisdiction, and filed its summons and complaint separately, it asks the court to consider its argument under either § 1581(c) or § 1581(i) jurisdiction. Golden Bird and Goodman Reply at 18–19; Summons at 3, Hebei Golden Bird Trading Co. v. United States, No. 14-00163 (July 7, 2014), ECF No. 1; Compl. at 2, Hebei Golden Bird Trading Co. v. United States, No. 14-00163 (July 7, 2014), ECF No. 7. Golden Bird claims the liquidation instructions are an integral part of the Final Results and are thus reviewable under § 1581(c), and alternatively, that given the similarity between

§ 1581(c) and § 1581(i) jurisdiction, the court should analyze the issue even if they are not an integral part of the Final Results. Golden Bird and Goodman Reply at 18–19. Golden Bird’s arguments are without merit.

As regards Golden Bird individually, there has been no showing of injury that the court can address as its entries have not been liquidated and will not be liquidated until this litigation is complete. That is, it moved swiftly and obtained injunctive relief before liquidation instructions were acted upon. See Statutory Inj., Hebei Golden Bird Trading Co. v. United States, No. 14-00163 (July 17, 2014), ECF No. 9. Additionally, because other cases have addressed Commerce’s 15-day liquidation policy, the issue has not evaded judicial review, at least to the extent of the granting of declaratory relief. See, e.g., NTN Bearing Corp. of America v. United States, 46 F. Supp. 3d 1375, 1380–81, 1383–88 (2015) (exercising § 1581(i) jurisdiction in § 1581(c) case over 15-day policy challenge where parties properly followed procedures for filing a § 1581(i) case); Mittal Steel Galati S.A. v. United States, 31 CIT 730, 736–38, 491 F. Supp. 2d 1273, 1280–82 (2007) (addressing 15-day policy in a § 1581(c) case where Commerce directly addressed the policy in the issues and decision memorandum and where the parties did not challenge the court’s jurisdiction). Although there is a serious issue as to whether Commerce acts lawfully when it forces a party into court before the statutory time for commencing suits, if Golden Bird seeks a remedy on this issue going forward it needs to properly file a case under § 1581(i) seeking broader injunctive relief. There is no remedy that the court can give in this case on this complaint that will ameliorate this situation.

II. Goodman

A. Specific Facts

Goodman requested both an NSR and an administrative review on November 27, 2012. Fresh Garlic from the People's Republic of China: Initiation of Antidumping Duty New Shipper Review; 2011-2012, 78 Fed. Reg. 88, 89 (Dep't Commerce Jan. 2, 2013); Goodman's Req. for Administrative Review, bar code 3107472 (Nov. 27, 2012). Goodman requested that Commerce accept its Section A Questionnaire Response filed in its NSR in lieu of a separate rate application in the administrative review proceeding on February 15, 2013. Goodman's Request for Department to Accept SAQR Resp. in Lieu of Separate Rate Application, bar code 3119618-01 (Feb. 15, 2013). In its Preliminary Results, Commerce did not consider Goodman for a separate rate because Goodman had filed a concurrent NSR and Commerce stated that Goodman would receive the rate determined in the NSR. Preliminary I&D Memo at 6. Goodman's NSR was rescinded on April 21, 2014, because Commerce concluded that Goodman did not have any bona fide sales during the POR. Fresh Garlic from the People's Republic of China: Final Rescission of Antidumping Duty New Shipper Review of Shijiazhuang Goodman Trading Co., Ltd., 79 Fed. Reg. 22,098, 22,098–99 (Dep't Commerce Apr. 21, 2014). Thereafter, Commerce rescinded Goodman's administrative review because, based on the results of the NSR, Goodman did not have any reviewable sales during the POR. I&D Memo at 40–41. In effect, Goodman was subject to the PRC-wide rate.

Goodman alleges that Commerce improperly excluded it from the eighteenth administrative review because Goodman is de facto and de jure independent from the Chinese government and is thus entitled to a separate rate. Goodman Br. at 10. Specifically, Goodman

argues that a lack of bona fide sales is an improper basis on which to rescind an administrative review, and that Commerce's action was arbitrary and capricious because Commerce did not examine the bona fides of any other respondents' sales. Id. Goodman further contends that because it is independent of government control, Commerce's failure to assign it a separate rate was a failure to perform a ministerial act. Id. at 11. Finally, Goodman challenges the validity of the PRC-wide rate, arguing that it is punitive and invalid, as it is out of date and divorced from commercial reality. Id. at 11–15.

The government responds that because Goodman's sales during the POR were not commercially reasonable, there were no reviewable sales during the POR. Gov. Br. at 11. Accordingly, Commerce properly rescinded the administrative review. Id. Additionally, the government and FGPA argue that it was not arbitrary or capricious to examine only Goodman's bona fides because none of the other separate rate respondents filed an NSR. Id. at 12; Domestic Indus.'s Resp. in Opp'n to Foreign Exps.' Mots. for J. on the Agency R. at 39–40, ECF No. 58 ("FGPA Resp."). Although the rescission of the administrative review resulted in the application of the PRC-wide rate, FGPA argues that the rate was not applied in the administrative review, but rather, Commerce's action allowed the determination made during the NSR to stand. FGPA Resp. at 40–41. The government argues that the PRC-wide rate should be challenged in the NSR review. See Gov. Br. at 12. Thus, neither the government nor the FGPA believe it is proper to address Goodman's PRC-wide rate challenge in this case, and the court agrees.

B. Application of the PRC-Wide Rate

Under 19 U.S.C. § 1675(a)(2), in an administrative review, Commerce is instructed to evaluate each entry. Under 19 C.F.R. § 351.213(d)(3), Commerce "may rescind an

administrative review . . . if [Commerce] concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise.” Here, Commerce relied on its determination in the NSR and rescinded the administrative review because Goodman did not have any bona fide sales during the POR, and there were no non-related entries at issue.¹³ Golden Bird, Goodman, and QXF Suppl. Br. at 1–2; Gov. Suppl. Br. at 2.

In evaluating the bona fides of entries, Commerce is permitted to exclude certain sales when they are unrepresentative or extremely distortive. See Windmill Int’l Pte., Ltd. v. United States, 26 CIT 221, 224, 193 F. Supp. 2d 1303, 1307 (2002); FAG U.K., Ltd. v. United States, 20 CIT 1277, 1281–82, 945 F. Supp. 260, 265 (1996). “Given Commerce’s discretion in employing a methodology to exclude sales . . . that are unrepresentative or distortive, that is, non-bona fide ones, the Court must determine whether Commerce’s actions in this case were reasonable.” Windmill, 26 CIT at 230, 193 F. Supp. 2d at 1312. Here, Commerce’s actions were reasonable as it cannot evaluate a company for application of a separate rate to its sales when there are no sales that are not unrepresentative or distortive. As there were no reviewable entries, Commerce properly rescinded the review. Because all of the sales were not bona fide, there were no sales within the POR for which Commerce could grant Goodman a separate rate.

Goodman argues that it was arbitrary and capricious of Commerce to examine the bona fides of its sales when it did not examine the bona fides of any other separate rate respondents’ sales. Goodman, however, ignores the fact that no other separate rate respondent filed an NSR, and, accordingly, Commerce had a reasonable explanation for why it treated Goodman

¹³ The court uses sales and entries interchangeably because the distinction has no import on these facts.

differently. When Goodman filed the NSR hoping for expedited review, it became subject to the potential negative impact of that review on the administrative review. See 19 C.F.R.

§§ 351.214(i) (indicating that an NSR decision is to be issued no later than 450 days after its initiation), 351.213(h) (indicating than an administrative review decision is to be issued no later than 545 days after the last day of the anniversary month). Additionally, once Commerce had the information concerning the non-bona fides of Goodman's sales it could not ignore that relevant information. Floral Trade Council of Davis v. United States, 13 CIT 242, 242, 709 F. Supp. 229, 230 (1989). Finally, because Commerce properly rescinded the administrative review, refusing to grant Goodman a separate rate was not a failure to perform a ministerial act.

Neither party has presented persuasive argument or binding case law concerning Commerce's proper actions where a company may be independent of government control, but has no reviewable entries. At the present time, it appears that Commerce simply assumes that there are not entries of real sales of an independent company. Although the court again notes its skepticism as to the factual basis underlying the presumption of state control, at least for some sectors of the Chinese economy, Goodman has not challenged that presumption and the court will not make such an argument on its behalf. See Henderson ex rel. Henderson v. Shineski, 562 U.S. 428, 434 (2011) ("Under [the adversarial] system, Courts are generally limited to addressing the claims and arguments advanced by the parties."); see also Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief."). Thus, Commerce's refusal to conduct an administrative review and the resulting subsequent application of the PRC-wide rate is supported

by substantial evidence. Any challenge to the PRC rate as applied to Goodman may only proceed in the challenge to the NSR results and not here.

III. Surrogate Country Selection

Xinboda and QXF challenge Commerce's selection of the Philippines as the primary surrogate country. Xinboda Br. at 3; QXF Br. at 7. Specifically, Xinboda contends that Commerce erred when it treated economic comparability as a "threshold" test for surrogate country selection. Xinboda Br. at 13. Xinboda argues that instead, economic comparability should have been concurrently weighed against the other factors impacting Commerce's selection of a surrogate country—significance of production, merchandise comparability, and data quality. *Id.* at 14. Xinboda argues that had Commerce considered these factors simultaneously, it would have selected India, or alternatively, Thailand, as its primary surrogate country. *Id.* at 13, 18. Conversely, the government asserts that economic comparability is indeed a "threshold" test for surrogate country selection and cites the language of 19 U.S.C. § 1677b(c)(4) as support. Gov. Br. at 46–48.

Both Xinboda and QXF challenge Commerce's determination that the Philippines is a significant producer of fresh garlic. Xinboda Br. at 22–24; QXF Br. at 8–10. These respondents contend that a country must produce a comparatively large quantity of merchandise to be designated a significant producer. Xinboda Br. at 24–25; QXF Br. at 8–9. Arguing that the quantity of production is not the sole determiner of significant producer status, the government dismisses their contention. Gov. Br. at 51.

Finally, Xinboda argues that India and Thailand offered better quality data than the Philippines. Xinboda Br. at 26–32, 34–36. The government responds that the Philippines offered

the best available information because it was the only economically comparable country that offered tax and duty-free data that were linked to a governmental source. Gov. Br. at 45, 53.

As discussed in further detail below, the court holds that although it may have been permissible for Commerce to start its analysis by looking at economic comparability, its ultimate selection of the Philippines is not supported by substantial evidence because that country is not a significant producer of fresh garlic under any reasonable criterion selected to date.

A. Surrogate Country Selection Process

To calculate the normal value of merchandise exported from NME countries, Commerce uses surrogate values—the costs of producing comparable merchandise in economically comparable ME countries. 19 U.S.C. § 1677b(c)(4). Prior to calculating surrogate values, however, Commerce must select a country from which to derive these surrogate values. This requires Commerce to engage in a multi-part process, which in an ordinary case should result in a usable surrogate country. Dorbest Ltd. v. United States, 30 CIT 1671, 1679, 462 F. Supp. 2d 1262, 1271 (2006); see also Policy Bulletin 04.1, Non-Market Economy Surrogate Country Selection Process (Mar. 1, 2004), available at <http://enforcement.trade.gov/policy/bull04-1.html> (last visited Nov. 20, 2015) (“Policy Bulletin 04.1”).¹⁴ Initially, Commerce compiles a list of ME countries that are economically comparable to the NME country. Policy Bulletin 04.1. Commerce then identifies which of the listed countries produces comparable merchandise. Id.

¹⁴ This bulletin is a compilation of the International Trade Administration’s guidelines for antidumping administrative reviews. Though not binding authority, courts, including this one, view this bulletin as indicative of Commerce’s best practices and statutory interpretations for reviews of AD duty orders. See, e.g., DuPont Teijin Films v. United States, 997 F. Supp. 2d 1338, 1342–45 (CIT 2014); Foshan Shunde Yongjian Housewares & Hardwares Co. v. United States, 896 F. Supp. 2d 1313, 1320–23 (CIT 2013).

Next, Commerce identifies the countries on the list that are significant producers of the subject merchandise. *Id.* Commerce selects from the remaining countries the one that provides the best available and highest quality data as the primary surrogate country. *Id.*

1. Economic Comparability

Commerce is to value the FOPs from an ME country which is “at a level of economic development comparable” to the NME country. 19 U.S.C. § 1677b(c)(4)(A). Although the statute does not define comparable economic development,¹⁵ because per capita GNI is a “consistent, transparent, and objective measure to determine economic comparability,” courts have concluded that Commerce’s use of this information is a reasonable interpretation of its statutory duty. *See Jiaxing Brother Fastener Co. v. United States*, 961 F. Supp. 2d 1323, 1328, 1330 (CIT 2014) (noting that GNI is both similar to, and more accurate than, Gross Domestic Product (“GDP”), which 19 C.F.R. § 351.408(b) indicates is proper for Commerce to use); *see also Fujian Lianfu Forestry Co. v. United States*, 33 CIT 1056, 1077, 638 F. Supp. 2d 1325, 1349 (2009) (explaining that per capita GNI data provide Commerce with a broad sense of countries’ varying levels of economic development).

Once countries are placed on Commerce’s list of economically comparable ME countries, Commerce does not evaluate how closely each country’s per capita GNI reflects that of the NME

¹⁵ When Commerce interprets the AD statutes to which it must adhere in conducting an administrative review of an AD duty order, the court conducts a two-part test, under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to determine whether that interpretation is entitled to deference. Where Congress has spoken directly to the question at issue, Commerce must give effect to the unambiguously expressed intent of Congress. *Id.* at 842–43. If, however, the statute is vague or silent on an issue, the court upholds Commerce’s interpretation so long as the interpretation is reasonable. *See id.* at 843; *DuPont Teijin Films USA, LP v. United States*, 27 CIT 962, 965–66, 273 F. Supp. 2d 1347, 1351 (2003).

country at issue. See Tehnoimportexport v. United States, 15 CIT 250, 255–56, 766 F. Supp. 1169, 1175 (1991) (explaining that the statutory mandate is simply to ensure that the surrogate country is a comparable economy, not the most comparable economy). Instead, Commerce considers each of these listed countries to be equally economically comparable to the NME country. Policy Bulletin 04.1; see Tehnoimportexport, 15 CIT at 255, 766 F. Supp. at 1175.

Xinboda contends that Commerce should have selected Thailand as the primary surrogate country, because its per capita GNI for the relevant period was closest to that of the PRC.

Xinboda Br. at 32. As the court has held before, however, “the law does not require [Commerce] to choose the most comparable economy, but rather a comparable economy.”

Tehnoimportexport, 15 CIT at 256, 766 F. Supp. at 1175. Because with regard to economic comparability both Thailand and the Philippines “reasonably could have been selected as surrogates,” the court will not disturb Commerce’s selection of the Philippines merely because Thailand’s per capita GNI was closer to that of the PRC. Id. Other problems remain, however.

2. *Significant Producer*¹⁶

Next, Xinboda and QXF contend that the Philippines is not a significant fresh garlic producer, because it produces considerably less than either India or Thailand. Xinboda Br. at 22; QXF Br. at 8–9. Arguing that “significant producer” is not necessarily synonymous with “largest producer,” the government defends Commerce’s selection of the Philippines as the PRC’s surrogate country. Gov. Br. at 51. The government further argues that Philippine production only appears to be de minimis when compared to that of the PRC, the world’s largest

¹⁶ No parties contest Commerce’s determination in the surrogate country selection process that the countries on the list produce comparable merchandise.

fresh garlic producer. Id. The court, however, is not convinced by the government's arguments, and concludes that Commerce's determination is not supported by substantial evidence.

When selecting a surrogate country, Commerce "shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are . . . significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). There is no statutory definition of "significant producer"; however, the International Trade Administration ("ITA") offers some guidance on how to interpret the term. Policy Bulletin 04.1. The ITA explains that Commerce should not compare production levels in the NME country and the potential surrogate countries in order to identify significant producers. Id. Instead, Commerce should define "significant producer" in relation to world production and trade. Id.; see DuPont Teijin Films v. United States, 997 F. Supp. 2d 1338, 1342 (CIT 2014).

Because the court has previously held, and it adheres to that view, that significant producer "is not statutorily defined, and is inherently ambiguous," the only question to be answered is whether Commerce's definition of significant producer is "based on a permissible construction of the statute." Shandong Rongxin Imp. & Exp. Co. v. United States, 774 F. Supp. 2d 1307, 1316 (CIT 2011) (quoting Chevron, 467 U.S. at 843).

The court has suggested that an interpretation of "significant producer" countries as those whose domestic production could influence or affect world trade would be a permissible construction of the statute. Id. This follows from the plain meaning of the word "significant" as something "having or likely to have influence or effect." Significant, Webster's Third New International Dictionary, (1981). This definition, however, necessarily requires comparing potential surrogate countries' production to world production of the subject merchandise. Upon

doing so, it becomes clear that the Philippines is not a significant producer of garlic under Commerce's normal definition of the term. Worldwide production of fresh garlic in 2011 was over 23 million metric tons. See Golden Bird's Submission of Surrogate Country Selection Cmts. and Surrogate Value Info. at Ex. 1, PD 110–15 (June 26, 2013). That same year, Philippine production totaled 9,056 metric tons, or less than 0.04% of the worldwide total. Id. It cannot be plausibly maintained that the Philippines' miniscule garlic production had any meaningful effect on world trade.

Commerce nonetheless argues that this case required a different approach because the output of the PRC—far and away the world's largest—causes all other countries' production to appear minimal by comparison. Gov. Br. at 51. Therefore, the court must determine whether it was permissible for Commerce to identify as significant producers those countries whose production has no meaningful effect on the world garlic trade, but whose production quantity Commerce determined was significant. It is difficult to determine whether Commerce's alternate methodology rested on a permissible construction of the statute, because Commerce has not explained the criteria upon which it relied in concluding that the Philippines was a significant producer of fresh garlic. The court concludes that although Commerce analyzed the significance of the quantity of fresh garlic production, in reality, it improperly determined that a country was a significant producer if it had “any commercially meaningful production.”

A deviation from Commerce's normal approach is reasonable in situations where there are only a handful of producers of comparable merchandise in the entire world. See Policy Bulletin 04.1 (giving the example of a situation where only three countries produce the goods in question). This, however, is not a situation in which there are so few producers of fresh garlic

that “any commercially meaningful production is significant.” Id. In fact, the U.N. lists over ninety-six countries as producers of fresh garlic. Golden Bird’s Submission of Surrogate Country Selection Cmts. and Surrogate Value Info. at Ex. 1. Although not all of these countries are significant producers, this suggests that there was no need for Commerce to deviate from its usual interpretation of significant producer, as there are a multitude of countries engaged in the production of fresh garlic. Still, Commerce is free to depart from its prior practice in evaluating whether a country is a significant producer, so long as that evaluation rests on a reasonable interpretation of the statutory language.

In its I&D Memo, Commerce notes that a country’s production in comparison to the worldwide total “is but one lens that [Commerce] utilizes” in making its determination. I&D Memo at 7. “Here,” Commerce continues, “[we] relie[d] on a different lens” to conclude that “the quantity [of garlic] produced in the Philippines surely qualifies as significant.” Id. at 8. The problem is that Commerce never specifies what this “different lens” was. Commerce was equally conclusory in its Preliminary I&D Memo, where it produced a table of the garlic production of six countries economically comparable to the PRC, stating—without elaboration—that “[t]his production data indicates that [five of the countries, including the Philippines] are significant producers of comparable merchandise.” Preliminary I&D Memo at 10. The production of the five “significant” countries ranged from 1,500 to almost 76,000 metric tons, meaning that the production of countries deemed significant varied by a factor of fifty. See id. On the other hand, the sixth country considered—and the only one deemed non-significant—had no garlic production whatsoever. Id. Where more than a mere handful of garlic-producing countries compete on the global market, there is little justification for interpreting significant

production to mean simply “non-zero” production. See Dorbest Ltd. v. United States, 789 F. Supp. 2d 1364, 1371 (CIT 2011) (concluding that Commerce erred when it identified Equatorial Guinea as a significant producer of wooden bedroom furniture despite the fact that the country’s exports were de minimis).

What is clear from Commerce’s actions, however, is that its interpretation of significant producer involved no comparative analysis. By removing the comparative aspect of the significant producer analysis, and not specifying the criteria on which it relied to determine that the quantity of production was significant, Commerce erred and its determination is not supported by substantial evidence. The court is therefore unpersuaded that Commerce’s identification of the Philippines as a significant producer of fresh garlic was based on a reasonable interpretation of the statute. Thus, the court remands this issue to Commerce for reconsideration.¹⁷

3. *Data Quality*

Finally, both Xinboda and QXF contend that there were potential surrogate countries, specifically India and Thailand, which offered better quality data than the Philippines. Xinboda at 26–36; QXF Br. at 9. Commerce did not evaluate the Indian data’s quality because India was not economically comparable to the PRC. See I&D Memo at 10. Commerce concluded that the

¹⁷ Upon remand, Commerce can decide to compile a second list of potential surrogate countries. DuPont Teijin Films v. United States, 896 F. Supp. 2d 1302, 1306–07 (CIT 2013). To do so, Commerce must redo its multi-part surrogate country selection process. Policy Bulletin 04.1. If Commerce does not identify significant producers on this second list, “[Commerce] may find it is appropriate to rely on data from other countries,” potentially including India. Issues and Decision Memorandum for the Final Results of the Second Administrative Review of Certain Steel Threaded Rod from the People’s Republic of China, A-570-932, at 4 (Nov. 5, 2012), available at <http://enforcement.trade.gov/frn/summary/prc/2012-27438-1.pdf> (last visited Nov. 20, 2015).

Thai data were of lesser quality than the Philippine data because Commerce was unable to confirm that the former were duty-exclusive, tax-exclusive, and linked to a governmental source.¹⁸ Id.

Because there is not substantial evidence to support Commerce's selection of the Philippines as the PRC's surrogate country, the court need not determine whether the Philippines provided the best quality data.

B. Exclusion of India

Xinboda also challenges Commerce's use of economic comparability as a "threshold" test for surrogate country selection. Xinboda argues that if Commerce had instead weighed all of the surrogate country selection criteria simultaneously, Commerce would have placed India on its list of potential surrogate countries. Xinboda Br. at 13. In addition, Xinboda argues that because there were no economically comparable significant producers of fresh garlic with quality data, India should have been considered as a surrogate country, notwithstanding its exclusion from Commerce's initial list. Id. at 14, 17. Although in this case Commerce likely did not err in initially excluding India from its list of comparable countries, the court agrees with Xinboda that India may have to be considered as a potential surrogate country on remand.

In compiling its initial list of potential surrogate countries, Commerce typically treats economic comparability as a first step. See Policy Bulletin 04.1 at n.2 (explicitly rejecting an alternative method whereby the statutory factors are considered simultaneously and weighed against one another). By restricting its list of potential surrogate countries to those that are

¹⁸ The court is unclear about whether a "governmental source" implies reliability versus particular private sources.

economically comparable to the NME country in a normal case, Commerce can better ensure that its normal value calculation accurately reflects the cost of producing the subject merchandise in a hypothetical ME country.

There are cases where Commerce recognizes that economic comparability should not be considered as a first step. See Policy Bulletin 04.1. Generally this is when the subject merchandise is “unusual or unique,” often because only a few countries produce it, or because “major inputs are not widely traded internationally.” Id. Therefore, Commerce almost always compiles its initial list of potential surrogate countries exclusively on the basis of economic comparability. Id. There are two situations in which it is appropriate for Commerce to select a surrogate country that is not on this initial list: (1) when Commerce is unable to identify a significant producer among the potential surrogate countries on its list; and (2) when Commerce is unable to obtain data of a sufficiently high quality from any of the potential surrogate countries on its list. Id.

Xinboda argues that India, as “the only country that can truly be considered a significant garlic producer after China,” should have been selected as the primary surrogate country. Xinboda Br. at 23. Xinboda also notes that India “had been used as a surrogate country in all reviews of fresh garlic from China” in the past, up through the sixteenth administrative review. Id. at 22. Although this latter observation is true, by the eighteenth administrative review, Commerce determined—and Xinboda conceded—that India was no longer economically comparable to the PRC on the basis of per capita GNI.¹⁹ I&D Memo at 6; Xinboda Br. at 16; see

¹⁹ The World Bank reports that India’s 2011 per capita GNI was \$1,410—less than a third of the PRC’s per capita GNI (\$5,000) for the same year. GNI per capita, Atlas Method (Current US\$),
(continued . . .)

also Ad Hoc Shrimp Trade Action Comm. v. United States, 882 F. Supp. 2d 1366, 1372 n.9, 1374–76 (CIT 2012) (remanding Commerce’s selection of India as the PRC’s surrogate country, in part, because Commerce paid little attention to the fact that India’s 2008 per capita GNI was approximately one-third of the PRC’s for that same year). Fresh garlic is neither unique nor unusual merchandise,²⁰ and there is no indication that key inputs are not widely traded. Thus, Commerce likely did not err in employing its usual practice of treating economic comparability as a first step.

Nonetheless, here, Commerce might have to consider India as a potential surrogate country. The government argues that the exceptions to the normal rule do not apply here, as Commerce determined that there was an economically comparable significant producer with quality data on its initial list, namely the Philippines. I&D Memo at 5–10. As discussed above, however, this determination was not supported by substantial evidence. If, on remand, Commerce can identify on its list at least one economically comparable significant producer which has reliable data, then its decision to exclude India will remain supported by substantial

(continued . . .)

The World Bank, available at <http://data.worldbank.org/indicator/NY.GNP.PCAP.CD/countries> (last visited Nov. 20, 2015).

²⁰ The court points to the Philippines’ ranking as the forty-fourth world producer of fresh garlic as evidence that too many countries produce fresh garlic for it to be considered unique or unusual merchandise. See Xinboda Br. at 22–24 (citing 2011 statistics that the Food and Agricultural Organization of the United Nations collected about worldwide fresh garlic production). But see Crawfish Processors Alliance v. United States, 28 CIT 646, 654, 343 F. Supp. 2d 1242, 1250–51 (2004) (concluding that Commerce’s failure to apply economic comparability as a threshold test and subsequent selection of Australia, an ME country, that was not economically comparable to the PRC, the NME country, was supported by substantial evidence because Australia was the only ME country that was also a significant live crawfish producer), rev’d on other grounds, 477 F.3d 1375 (Fed. Cir. 2007).

evidence. See DuPont Teijin Films v. United States, 896 F. Supp. 2d 1302, 1306–07 (CIT 2013). Otherwise, Commerce may have to expand its surrogate country list to include other ME countries, possibly including India.²¹

CONCLUSION

For the foregoing reasons, the Final Results are sustained in part and remanded in part. On remand, Commerce is to consider evidence on the record concerning Golden Bird's independence from government control to determine whether the company is entitled to separate rate status based solely on that evidence. If, upon remand, Commerce determines that Golden Bird is entitled to separate rate status, it is to determine an appropriate AD margin specific to Golden Bird, taking into consideration Commerce's determination, sustained here, to select total AFA and applying the law extant at the time of the Final Results. Finally, Commerce is to reconsider its surrogate country selection in the light of the court's ruling concerning its interpretation of "significant producer." Commerce shall have until January 29, 2016, to file its remand results. The parties shall have until February 29, 2016, to file objections, and the government shall have until March 14, 2016, to file its response.

Dated: November 30, 2015
New York, New York

/s/ Jane A. Restani
Jane A. Restani
Judge

²¹ There is no need to address specific surrogate value issues as there may be a new principal surrogate country selected. The court suggests, however, that if the same surrogate data is used Commerce take a fresh look at its use of net weights and adjustments to import statistics and provide clear explanations for its decisions.