

DATE: August 15, 2011

MEMORANDUM TO: Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

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

SUBJECT: Issues and Decision Memorandum: Fresh Garlic from the People's Republic of China; Final Rescission of New Shipper Reviews of Jining Yifa Garlic Produce Co. Ltd, Shenzhen Bainong Co., Ltd., and Yantai Jinyan Trading Inc.

SUMMARY

We have analyzed the comments of the interested parties in the above-referenced antidumping duty new shipper reviews of fresh garlic from the People's Republic of China (PRC). Based on this analysis, we recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

Below is the complete list of issues in this review on which we received comments from interested parties:

LIST OF THE ISSUES

- Comment 1: Whether Yantai Jinyan's NSR Request Satisfied the Requirements for Initiation
- Comment 2: Whether Yantai Jinyan Made Inaccurate Representations in its NSR Request
- Comment 3: Whether Yantai Jinyan's Sale to Its Unaffiliated Customer Should Be Reviewed Because the POR Was Expanded
- Comment 4: Whether the Department Has the Discretion to Continue Yantai Jinyan's NSR or to Initiate Another NSR
- Comment 5: Yantai Jinyan's Cash Deposit and Assessment Rate
- Comment 6: Whether the Department's Authority to Rescind Shenzhen Bainong's New Shipper Review is Limited to a Sale That is Unrepresentative and Extremely Distortive

- Comment 7: Whether the Pricing of Shenzhen Bainong's Sale is Commercially Reasonable
Comment 8: Whether the Quantity of Shenzhen Bainong's Sale is Commercially Reasonable
Comment 9: Whether the Department's Concerns Regarding Shenzhen Bainong's Importer as Legitimate Ongoing Business Concern Are Justified
Comment 10: Whether Shenzhen Bainong's Importer Behaved in a Commercially Reasonable Manner

BACKGROUND

On May 3, 2011, the Department of Commerce (the Department) published the preliminary intent to rescind the new shipper reviews (NSRs) of fresh garlic from the PRC. See Fresh Garlic From the People's Republic of China: Preliminary Intent To Rescind New Shipper Reviews, 76 FR 24857 (May 3, 2011) (Preliminary Intent to Rescind). These NSRs cover Jining Yifa Garlic Produce Co., Ltd. (Jining Yifa) and Shenzhen Bainong Co., Ltd. (Shenzhen Bainong) for the period of review (POR) November 1, 2009, through April 30, 2010, and Yantai Jinyan Trading, Inc. (Yantai Jinyan) for the POR November 1, 2009, through May 31, 2010.

On May 16, 2011, we issued an additional supplemental questionnaire for Jining Yifa. On May 18, 2011, Jining Yifa submitted a letter indicating that it would not be responding to our supplemental questionnaire. We did not receive briefs from any party regarding Jining Yifa.

We received a timely case brief from Yantai Jinyan on May 18, 2011, and a timely rebuttal brief from Petitioners, the Fresh Garlic Producers Association and its Individual Members; Christopher Ranch LLC, The Garlic Company, Valley Garlic, and Vessey and Company on May 23, 2010.

On May 19, 2011, the Department issued a supplemental questionnaire to Shenzhen Bainong. On June 9, 2011, Shenzhen Bainong filed its response to our supplemental questionnaire. We received a timely case brief from Shenzhen Bainong on June 22, 2011, and a timely rebuttal brief from Petitioners on June 28, 2011.

No party requested a hearing following the Preliminary Intent to Rescind.

Based on our analysis of the comments we received, we have not revised our decision since our Preliminary Intent to Rescind.

DISCUSSION OF THE ISSUES

Comment 1: Whether Yantai Jinyan's NSR Request Satisfied the Requirements for Initiation

According to Yantai Jinyan, under section 751(1)(2)(B) of the Tariff Act of 1930, as amended (the Act), the Department shall conduct a new shipper review when the administering authority receives a request from an exporter or producer of the subject merchandise and the exporter or producer did not export the merchandise during the period of the investigation. Yantai Jinyan argues that the Act does not require an exporter or producer and its U.S. importer/customer to

provide a certification of affiliation or non-affiliation. Furthermore, the regulations at 19 CFR 351.214(b)(2)(iv)(C), according to Yantai Jinyan, do not require such a certification.

Yantai Jinyan claims that its request for an NSR met the requirements of 19 CFR 351.214(b)(2)(iv)(C) to provide documentation to establish the date of the first sale to an unaffiliated customer. Yantai Jinyan contends that its request for an NSR contained enough information to identify the date of the first sale to an unaffiliated customer in the United States in its May 28, 2010, request, Yantai Jinyan provided the sales contract between Yantai Jinyan and its U.S. importer, dated April 19, 2010, and the invoice between its U.S. importer and its U.S. customer, dated May 25, 2010. As such, Yantai Jinyan contends that it had provided enough information for the Department to determine the date of the sale to the first unaffiliated customer. Petitioners argue that the NSR request that Yantai Jinyan filed with the Department, dated May 28, 2010, failed to include documentation and information identifying the date on which the sale of the subject merchandise to an unaffiliated customer in the United States was completed. According to Petitioners, information provided by Yantai Jinyan, subsequent to the initiation, makes clear that the sale of the subject merchandise to an unaffiliated customer occurred on May 25, 2010, nearly one month after the conclusion of the original six-month NSR POR. Petitioners agree with the Department's Preliminary Intent to Rescind that Yantai Jinyan did not meet the requirements for the NSR.

According to Petitioners, Yantai Jinyan's statement that the Department could have identified the date of the first sale to an unaffiliated customer is not accurate. It was not until August 18, 2010, Petitioners note, that it became known that Yantai Jinyan's customer, presented in its NSR request as unaffiliated, was reportedly an affiliated customer. Petitioners argue that had Yantai Jinyan accurately reported that neither its sale nor its entry occurred during the original six-month POR, the Department would not have initiated this NSR. Petitioners conclude that Yantai Jinyan's failure to fulfill the requirements of 19 CFR 351.214(b)(2)(iv)(C) provides the basis for the Department's rescission of Yantai Jinyan's NSR.

Department's Position: As we explained in the Preliminary Intent to Rescind, "Yantai Jinyan made a representation and certified that it made a sale on April 19, 2010, to an unaffiliated customer and that the sale entered on May 25, 2010. At the time of Yantai Jinyan's request, the Department determined that the request met the requirements of 19 CFR 351.214." In confirming that its request for an NSR contained documentation of Yantai Jinyan's sale to an unaffiliated party, Yantai Jinyan specifically referred to the invoice Yantai Jinyan issued to the importer of the goods at issue. See "Fresh Garlic from the People's Republic of China: Request for Initiation of New Shipper Review by Yantai Jinyan," May 28, 2010, at Exhibits 7 and 8. Yantai Jinyan then claimed in its section A questionnaire response, on August 18, 2010, that this importer that it certified was its first unaffiliated customer was, in fact, affiliated with Yantai Jinyan.

The Department sought, through supplemental questionnaires, to establish the facts surrounding this transaction and the parties involved in this transaction. Although Yantai Jinyan also included with its NSR request the invoice from the U.S. importer to its U.S. customer, this invoice was provided to substantiate the resale of the subject merchandise. It was not identified by Yantai Jinyan as the documentation of the first sale to an unaffiliated customer, nor was it

certified as the first sale to an unaffiliated customer. At the time NSR requests are made, the Department has only the information provided by the requester, and can only analyze the information in the context of the certifications and documentation supporting the certified statements submitted by the requester. When later submitted information contradicts the information provided in the NSR request, we must evaluate that information to determine what impact, if any, it has on our decision to initiate the NSR. In this instance, Yantai Jinyan's questionnaire responses show that Yantai Jinyan did not make a sale and its shipment of subject merchandise did not enter into the United States during the standard NSR POR. Our regulations state that a party must provide "{d}ocumentation establishing...{t}he date of the first sale to an unaffiliated customer in the United States." See 19 CFR 351.214 (b)(2)(iv)(C). As explained above, and taken in context, Yantai Jinyan did not provide documentation establishing the May 25, 2010, date as the date of first sale to an unaffiliated customer. Accordingly, the Department finds that the request did not meet the requirements of 19 CFR 351.214(b); had this information been known at the time we would not have initiated the NSR. In light of our conclusion that the request for review did not meet the regulatory requirements as discussed above, we are rescinding the NSR of Yantai Jinyan.

Comment 2: Whether Yantai Jinyan Made Inaccurate Representations in its NSR Request

Yantai Jinyan disputes the Department's conclusion that its request for an NSR contained an inaccurate representation. According to Yantai Jinyan, it was unaware of the Department's definition of affiliation because it had not yet received the Department's questionnaire at the time it submitted its request for an NSR on May 28, 2010. It was only after July 13, 2010, when Yantai Jinyan received a complete non-market economy questionnaire that Yantai Jinyan was able to determine the definition of an affiliated party. Petitioners did not directly address this argument.

Department's Position: It is the respondent's responsibility to meet the Department's requirements when participating in administrative proceedings. The Department's regulations at 19 CFR 351.214(b)(2) detail the requirements for an NSR request, which includes documentation of the first sale to an unaffiliated party. Factual information provided to the Department must be certified as to its accuracy. See 19 CFR 351.303(g). The Department has made resources available to outside parties to facilitate their participation in Department proceedings. Specifically, the Department has made available on its website the new shipper initiation checklist to assist potential NSR requesters in understanding the new shipper initiation process and to enable them to understand and meet the regulatory requirements for initiation. Part I of the checklist outlines the requirement that the applicant must have a sale to an unaffiliated customer or that goods exported by the applicant must have entered the United States during the relevant POR.

Yantai Jinyan's arguments suggest that, because it was unaware of the definition of affiliated party, the Department cannot now find its NSR request deficient. This argument is not persuasive. First, the statute and the regulations under which Yantai Jinyan filed its NSR request provide the definition of affiliated party. See section 771(33) of the Act and 19 CFR 351.102(b)(3). Second, the Department makes available on its website the standard questionnaires used in these proceedings. The questionnaires themselves contain a detailed

explanation of, among other things, affiliation. Finally, parties wishing to participate in proceedings before the Department have an obligation to understand the requirements using all available resources. The burden was on Yantai Jinyan, prior to filing its request for an NSR, to contact the Department if it needed additional clarification or explanation. Yantai Jinyan made no such effort.

As the Department stated in Honey from the People's Republic of China; Notice of Final Results and Final Rescission, In Part, of Antidumping Duty New Shipper Review, 69 FR 64029, 64029-64030 (November 3, 2004) (Jinfu Final):

In order to qualify for a new shipper review under 19 CFR 351.214. . . a company must provide certifications and documentation establishing, among other things, the date of the first sale to an unaffiliated customer in the United States. See 19 CFR 351.214(b)(2)(iv)(C)... Because Jinfu PRC's certification (which it provided prior to the initiation of the new shipper review) does not include documentation establishing the date of the first sale to an unaffiliated customer in the United States, Jinfu PRC has failed to satisfy the threshold new shipper certification requirements, and is therefore, not entitled to a new shipper review. Therefore, we are rescinding this review with respect to Jinfu PRC.

See also Notice of Preliminary Results and Partial Rescission of Antidumping Duty New Shipper Review: Honey from the People's Republic of China, 69 FR 31348 (June 3, 2004) (Jinfu Prelim). The Department's decision in Jinfu Final was upheld by the Court of International Trade (CIT) in Jinfu Trading Co. v. United States, No.04-00597, Slip Op. 2008-38 (April 4, 2008) (Jinfu Trading).

Comment 3: Whether Yantai Jinyan's Sale to Its Unaffiliated Customer Should Be Reviewed Because the POR Was Expanded

According to Yantai Jinyan, the Department has the flexibility to expand an NSR POR to capture a sale that has not entered during the normal NSR period. Yantai Jinyan cites to the Preamble to the Department's regulations at 19 CFR 351.214(b)(1) (see Antidumping Duties; Countervailing Duties, 62 FR 27296, 27319 (May 19, 1997)), which states that an exporter or producer may request a review if it has exported or sold for export subject merchandise to the United States. Yantai Jinyan explains that the shipment was delayed and cites to the initiation, where the Department expanded the POR through May 2011. See Fresh Garlic From the People's Republic of China: Initiation of New Shipper Reviews, 75 FR 38986 (July 7, 2010). Yantai Jinyan argues that both the sale to its affiliated U.S. importer and the U.S. importer's sale to an unaffiliated U.S. customer were completed within the expanded POR. As such, Yantai Jinyan's sale is an authentic sale to the U.S. market during the expanded POR, reviewable in the expanded POR.

According to Petitioners, Yantai Jinyan acknowledges in its case brief that neither the sale nor the entry of the subject merchandise occurred during the original six month POR. Petitioners cite to the Preamble of the Department's regulations, which states that the Department "do{es}

not believe it is appropriate to base a new shipper review on anything short of a sale.” See also Preliminary Intent to Rescind, 76 FR at 24858 and 19 CFR 351.214(f)(2).

Department’s Position: We expanded the POR for the NSR of Yantai Jinyan to capture the entry into the United States of the April 2010 transaction identified by Yantai Jinyan in its NSR request as its first sale to an unaffiliated party. Once we determined that Yantai Jinyan’s representation of this sale as a sale to an unaffiliated party was inaccurate, we concluded that Yantai Jinyan had neither made a sale nor did subject merchandise exported by Yantai Jinyan enter the United States during the normal NSR POR. Therefore, there was no basis upon which to conduct an NSR during the normal POR. The Department’s exercise of its discretion to expand the POR to capture an entry into the United States is predicated on having a sale to an unaffiliated party during the normal POR. 19 CFR 351.214(f)(2)(ii); see, e.g., Honey From the People’s Republic of China: Preliminary Intent To Rescind New Shipper Reviews, 75 FR 55307, 55307-08 (September 10, 2010)(unchanged in Final, 76 FR 4289 (January 25, 2011)). In the instant case, the Department expanded the POR to the capture the entry based on Yantai Jinyan’s inaccurate representation that it made its first sale to an unaffiliated party during the POR. Thus, we determine that it is appropriate to rescind the NSR of Yantai Jinyan. See Jinfu Prelim; Jinfu Final; Jinfu Trading.

Comment 4: Whether the Department Has the Discretion to Continue Yantai Jinyan’s NSR or Initiate Another NSR

According to Yantai Jinyan, the Department failed to express concern about the sale during the nearly ten months that elapsed between initiation and the Preliminary Intent to Rescind. During that time, Yantai Jinyan responded to the original questionnaire and four supplemental questionnaires. Yantai Jinyan’s Section A response, dated August 18, 2010, identified its importer as an affiliated company and identified the sale to its first unaffiliated customer. Yantai Jinyan argues that, once the Department was aware of the affiliation, it could have exercised its discretion to continue the NSR in process or rescind the NSR and initiate an NSR at the next semi-annual review month. Yantai Jinyan contends that the Department failed to timely reject Yantai Jinyan’s NSR and because of the Department’s delay, Yantai Jinyan assumed that the Department had accepted its information. Yantai Jinyan states that it is not aware of any statute or regulation that would invalidate its NSR request or the continuation of an NSR. Finally, Yantai Jinyan contends that the Department had the discretion initially to accept or reject Yantai Jinyan’s NSR request, but would not have had the discretion to reject a request for a December 2010 initiation if Yantai Jinyan had filed one.

In response, Petitioners argue that Yantai Jinyan offers no authority, statutory, regulatory, or administrative, to support the proposition that the Department continue Yantai Jinyan’s NSR or initiate an NSR at the next opportunity. In addition, given that the Department is moving Yantai Jinyan’s separate rate application to the record of the 2009-2010 administrative review, Petitioners argue that Yantai Jinyan is not prejudiced by the rescission of this NSR.

Department’s Position: We disagree with Yantai Jinyan’s contention that the Department does not have the discretion to rescind the NSR. We have the discretion to rescind when we conclude that we would not have initiated the NSR if we had been given accurate information in the

review request, regardless of the timing of such a conclusion. Further, regardless of when we discover that an NSR request did not meet the regulatory requirements, even if long after initiation, it is appropriate to rescind the NSR because it was initiated based on inaccurate and misleading information. We exercised this discretion in the NSR of honey from the PRC. See, e.g., Jinfu Prelim; Jinfu Final.

There is no basis upon which to conduct an NSR of Yantai Jinyan for any other period. Yantai Jinyan's argument suggests that, because the Department would have had to accept a request for an NSR from Yantai Jinyan at the next opportunity (*i.e.*, according to Yantai Jinyan, the facts regarding the timing of the sale and entry would not have precluded the Department from initiating an NSR), the Department was obligated to self-initiate an NSR of Yantai Jinyan at the next opportunity in December 2010. This argument fails. We cannot reach any conclusions about a hypothetical request for an NSR that was not filed by Yantai Jinyan. Further, there is no statutory or regulatory basis or precedent for the Department to self-initiate an NSR. We have, however, moved Yantai Jinyan's separate rate application to the record of the ongoing 2009-2010 administrative review (see *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 75 FR 81565, 81569 (December 28, 2010)), to which Yantai Jinyan is subject. See "Memorandum from Jacqueline Arrowsmith to the File through Dana S. Mermelstein, Program Manager, AD/CVD Operations 6, Moving Yantai Jinyan's Separate Rates Application to the November 1, 2009 through October 31, 2010 (16th) Administrative Review," dated concurrently with this memorandum. We will consider Yantai Jinyan's request for separate rate status in the context of that administrative review.

Comment 5: Yantai Jinyan's Cash Deposit and Assessment Rate

Yantai Jinyan contends that, if the Department proceeds to a final rescission of this NSR, the Department cannot liquidate the entry and assess final duties because the rate resulting from the NSR is not final. Specifically, in light of the Department's stated intention to move Yantai Jinyan's separate rate application to the record of the ongoing administrative review, Yantai Jinyan argues that the assessment rate will not be final until the Department issues the final results of administrative review. Petitioners did not comment on this issue.

Department's Position: We agree with Yantai Jinyan that the entry at issue cannot be liquidated until after the final results of the ongoing (16th) administrative review, covering the period from November 1, 2009, through October 31, 2010, are published. The final results of that review will establish the assessment rate for Yantai Jinyan and the applicable cash deposit rate to be applied to future entries of subject merchandise exported by Yantai Jinyan. However, with this rescission of Yantai Jinyan's NSR, the cash deposit rate for Yantai Jinyan will be the PRC-wide rate until the conclusion of the final results of the ongoing administrative review.

Comment 6: Whether the Department's Authority to Rescind Shenzhen Bainong's New Shipper Review is Limited to a Sale That is Unrepresentative and Extremely Distortive

Citing Hebei New Donghua Amino Acid Co., Ltd. v. United States, 374 F. Supp. 2d 1333, 1339 (Ct. Int'l Trade 2005)(Hebei), Shenzhen Bainong argues that the Department's authority to

rescind a review of a new shipper sale on the basis of finding it non-bona fide is limited to “exceptional circumstances when those sales are unrepresentative and extremely distortive.” Shenzhen Bainong points out that the Department employs a “totality of the circumstances” test as part of its bona fides analysis, in which the Department usually considers five factors as part of its analysis: 1) the timing of the sale; 2) the price and quantity of the goods sold; 3) the expenses arising from the transaction; 4) whether the goods were resold at a profit; and 5) whether the transaction was made on an arms-length basis. According to Shenzhen Bainong, the analysis of these factors should be limited to the evaluation of whether the totality of the circumstances indicates that the sale under review is “unrepresentative or extremely distortive.” Without substantial evidence indicating that the sale is “unrepresentative or extremely distortive,” the Department should refrain from rescinding the NSR. Shenzhen Bainong urges the Department to evaluate the bona fides nature of its new shipper sale within the parameters delineated by the Hebei court.

According to Petitioners, the record of this proceeding is sufficient to conclude that Shenzhen Bainong’s single sale is “unrepresentative and extremely distortive.” Furthermore, Petitioners believe that, based on the record, the sale at issue cannot be considered indicative of the parties’ future commercial behavior, and thus cannot be considered to be a bona fide sale upon which the Department can establish a separate antidumping duty rate for Shenzhen Bainong.

Department’s Position: We agree that the “totality of the circumstances” test laid out in Hebei is informative to our bona fides analysis. As the CIT stated in Shandong Chenhe Int’l Trading Co., Ltd. v. United States, No. 08-00373, slip op. at 6 (Ct. Int’l Trade Nov. 14, 2010)(Chenhe), “Commerce normally employs a totality of the circumstances test to determine whether the transaction is ‘commercially reasonable’ or ‘atypical of normal business practices.’” (citing Hebei, 374 F. Supp. 2d at 1339). We disagree, though, with Shenzhen Bainong’s contention that a sale must be “extremely distortive” to be found non-bona fide. As the CIT recently held, the claim that a sale must be found to be “extremely distortive” sets “the bar too high.” Chenhe, slip op. at 15. Furthermore, “a single transaction need not be ‘extremely distortive’ in order to be found unsuitable. Rather, to be used as a basis for setting an individual rate, a sale must be typical of normal business practices.” Id. The Court in Chenhe also stated, “in order to calculate an accurate antidumping duty margin for a new shipper, “Commerce must examine sales data that is indicative of the respondent’s normal business practices so as to judge its future commercial behavior.” Id. at 20.

Thus, where information on the record of an NSR indicates that the commercial activities of the parties are not typical of normal business practices or indicative of future commercial behavior, the Department finds the sale non-bona fide and excludes that sale from its analysis. Where there is only one sale under review, the exclusion of that sale necessarily ends the review because the Department has no information on which to calculate a rate for the exporter.

Comment 7: Whether the Pricing of Shenzhen Bainong’s Sale is Commercially Reasonable

In the “Memorandum from Dana S. Mermelstein to Barbara E. Tillman; Bona Fides Analysis of Shenzhen Bainong Co., Ltd.’s New Shipper Sale,” dated April 26, 2011 (Preliminary Bona Fides

Memorandum), the Department compared Shenzhen Bainong's unit price to the average unit value (AUV) derived from the U.S. Customs and Border Protection (CBP) database for all entries during the POR. Based on this analysis, the Department found the pricing of Shenzhen Bainong's sale to be commercially unreasonable. According to Shenzhen Bainong, the Department erred in its pricing analysis in three respects: 1) the AUV derived from CBP data does not reflect seasonal price fluctuations of fresh garlic in the PRC; 2) the CBP data covers abnormal outliers, and therefore do not provide an ideal or accurate benchmark for the pricing analysis; and 3) the Department's analysis does not take into account the fact that transactions of smaller quantities generally have higher prices to cover associated costs.

Shenzhen Bainong argues that information it provided as part of its June 9, 2011 questionnaire response from the International Garlic Exchange website indicates that between March and April 2010, garlic prices in the PRC increased 30 percent. That same website indicates garlic prices in September 2010 were 70 percent higher than prices during the period of January to March 2010. Moreover, according to Shenzhen Bainong's analysis of CBP data on the record, the AUV of fresh garlic imported to the United States during the POR was relatively high as compared to the AUV derived from analyzing only the first two months of the POR, November and December 2009. Conversely, Shenzhen Bainong also claims that prices in the CBP data represent relatively stable prices. Based on this evidence, Shenzhen Bainong concludes, the AUV derived from CBP data cannot accurately cover seasonal price fluctuations, and is, therefore, unsuitable for use in the Department's pricing analysis.

Next, Shenzhen Bainong argues that price outliers in the CBP data from March 2010 were numerous and significant enough to distort the calculated AUV and render it unsuitable as a pricing benchmark in the Department's analysis. Shenzhen Bainong notes several exporters with low per-unit garlic prices in support of its analysis. Shenzhen Bainong also claims that the Department's reliance on CBP data also ignores the commercial reality that new shippers face because new shippers facing high antidumping rates generally have imports in smaller volumes; such transactions normally require higher prices to cover associated costs.

Finally, Shenzhen Bainong claims that its prices were commercially reasonable for the month of March 2010. Shenzhen Bainong's analysis of CBP data for that month indicates that the price for its merchandise falls within a statistically significant group of similar prices, thus, its sale price is neither unrepresentative nor distortive. Shenzhen Bainong also argues that U.S. Department of Agriculture (USDA) prices for garlic imports into the United States on March 22, 2010, placed onto the record by Shenzhen Bainong as part of its November 8, 2010 submission, report high and low prices of white garlic exported from the PRC to eight U.S. cities that indicate that Shenzhen Bainong's pricing is not unrepresentative or distortive.

Petitioners point out that Shenzhen Bainong's argument that the Department's use of CBP data fails to capture seasonal price fluctuations does not account for the fact that the CBP data placed on the record by the Department correspond to a seven-month period, from November 1, 2009, to May 31, 2010. The data correspond to a time period when the supply of garlic would be relatively limited because it lies between the harvesting seasons in the PRC, according to Petitioners. Thus, the prices reflected in the seven months of entry data would naturally be higher than prices that would prevail from June to October, the months closest to the harvest

period. Based on the ordinal ranking of Shenzhen Bainong's sale price in relation to the sale prices of all entries from the PRC during that seven-month period, Petitioners believe that Shenzhen Bainong's argument is undermined even when seasonal price fluctuations are taken into account.

As for Shenzhen Bainong's argument on outlier prices, Petitioners believe Shenzhen Bainong's focus is misplaced. The Department did not compare per-unit prices of other garlic exporters to the per-unit price of Shenzhen Bainong; rather, it compared Shenzhen Bainong's price to the AUV of all shipments during the POR. Even accounting for all the entries as part of the AUV, Petitioners believe that Shenzhen Bainong's ordinal ranking, based on per-unit value, renders its price "unrepresentative and extremely distortive."

Shenzhen Bainong's analysis of March 2010 garlic prices, as reported by CBP, is improper and overly limiting, claim Petitioners. According to Petitioners, when compared to all entries of fresh garlic during the POR, Shenzhen Bainong's percentile ranking establishes its sale as being "unrepresentative and extremely distortive."

Department's Position: First, we note that Shenzhen Bainong made only one sale of subject merchandise during the POR, providing the Department with little information on which it can determine whether the sale price will be indicative of its future sales practices. See Chenhe, slip. op. at 14 ("{A} single sale leaves little to review"); see also Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States, 366 F. Supp. 2d 1246, 1263 (CIT 2005) (Tianjin) ("In one-sale reviews, there is, as a result of the seller's choice to make only one shipment, little data from which to infer what the shipper's future selling practices would look like. This leaves the door wide to the possibility that the sale may not, in fact, be typical, and that any resulting antidumping duty calculation would be based on unreliable data.").

Shenzhen Bainong cites information on the record indicating that the prices for its fresh garlic are commercially reasonable. We find this information to be unpersuasive. The information from the Garlic Exchange Website that was provided by Shenzhen Bainong contains no explanatory narrative or indication that the prices listed refer solely to whole fresh garlic. The USDA statistics are much the same, containing little information on how the prices are determined or what the exact product characteristics are.

We find that Shenzhen Bainong's focus on outlier prices, and its attempt to limit the Department's analysis to the month of March 2010, is misplaced. As the Chenhe Court noted, "use of AUV data has been upheld by this Court in the past because 'the larger the sample, the less risk run that the sample chosen is extreme or unusual simply by chance.' . . . In other words, using the average of a large sample is a better indicator of normal activity than a comparison of a smaller number of selected sales." Chenhe, slip. op. at 17 (citing Tianjin, 366 F. Supp. 2d at 1256). Shenzhen Bainong argues that because of seasonal fluctuations in prices, the Department should limit its price analysis to prices in the same month as its sale; however, Shenzhen Bainong has not provided a convincing reason for the Department to deviate from its practice in this regard. In a previous NSR, a respondent argued that the Department's price comparisons should be limited to sales that occurred in the same month, which would address "the large seasonal price fluctuations that occur in the PRC garlic market." See Fresh Garlic from the

People's Republic of China: Final Results and Final Rescission, In Part, of New Shipper Reviews, 74 FR 50952 (October 2, 2009) and accompanying Issues and Decision Memorandum at 10. In response to that argument, we stated that because no evidence on the record indicated that garlic prices fluctuate on a seasonal basis, and because no seasonal or monthly trends had been established, we would continue to follow our established practice of comparing new shipper sales prices with all other sales prices from the POR. Id., Issues and Decision Memorandum at 12. Further, any claim that seasonality was relevant to the analysis in this POR should have been raised earlier in the proceeding and not in the case brief because, in order for the Department to fully evaluate the claim, extensive research and analysis must be done before a decision regarding seasonality can be reached.

Even if we confine our analysis to March 2010, as Shenzhen Bainong urges us to do, our finding remains the same. The elimination of “outlier” prices during that month does not change our finding on this matter, despite Shenzhen Bainong’s arguments to the contrary. We find that the “outlier” prices identified by Shenzhen Bainong do not significantly distort our analysis of Shenzhen Bainong’s pricing in comparison to the pricing of other sales of whole garlic from the PRC during the POR.

Because much of our analysis regarding the pricing of the sale contains business proprietary information, we have issued a separate memorandum concurrently with this document. See “Memorandum from Justin M. Neuman to Barbara E. Tillman; Antidumping Duty New Shipper Review of Fresh Garlic from the People’s Republic of China: Analysis of Comments Containing Proprietary Information for Shenzhen Bainong Co. Ltd.’s New Shipper Sale,” dated concurrently with this memorandum. However, we note that in that memorandum the pricing of Shenzhen Bainong’s sale is such that we continue to find it commercially unreasonable and not indicative of future business practices.

Comment 8: Whether the Quantity of Shenzhen Bainong’s Sale is Commercially Reasonable

With regard to the quantity of the sale, Shenzhen Bainong concedes that the quantity of its sale was relatively low. However, Shenzhen Bainong denies that the low quantity of a new shipper sale is necessarily indicative of an unrepresentative or distortive transaction; entry quantities for new shippers are generally relatively low. The Department has acknowledged in the past that “a high cash deposit rate would be expected to have some effect on the quantity of merchandise sold,” notes Shenzhen Bainong, citing to Certain In-shell Roasted Pistachios from the Islamic Republic of Iran: Final Results of Countervailing Duty New Shipper Review, 73 FR 9993 (February 25, 2008), and accompanying Issues and Decision Memorandum at Comment 1. Shenzhen Bainong believes that the Department’s expectation that new shippers of fresh garlic from the PRC, in light of a high percent cash deposit rate, should make transactions in large quantities is out of touch with commercial realities. Shenzhen Bainong claims that a majority of the entries in the CBP database were made by exporters that have obtained separate rates, and that compared to those companies, new shippers have no way to achieve the same average quantities as most exporters of garlic. The Department, Shenzhen Bainong argues, erred when it neglected to differentiate between the necessary economic behaviors of new shippers as compared to exporters with their own rates. As such, the Department should not have relied on

CBP data for its quantity analysis. Such a quantity analysis is unavoidably distorted due to the presence of companies with separate antidumping rates.

Petitioners note that Shenzhen Bainong does not address whether its sale is atypical of normal business practices or future commercial behavior. Citing to Tianjin, Petitioners argue that the record makes it clear that the sale reported by Shenzhen Bainong is “not likely to be typical of those which the producer will make in the future.” See Tianjin at 1250.

Department’s Position: Shenzhen Bainong made only one sale, providing the Department with little information on which it can determine whether the quantity of the sale will be indicative of its future sales practices. See Chenhe, slip. op. at 14. Shenzhen Bainong notes that we have, in the past, acknowledged that high cash deposit rates may affect the quantity of the merchandise sold. As we have also noted in the past, where we base our quantity analysis on CBP data, we will seek to compare the sale of garlic at issue “to the other sales of the same type of (garlic) imported from the PRC to the U.S. during the POR.” See Honey From the People's Republic of China: Final Results and Rescission of Antidumping Duty New Shipper Reviews, 76 FR 4289 (January 25, 2011) and accompanying Issues and Decision Memorandum at 9 (Honey 2011 NSR Rescission). Shenzhen Bainong itself concedes that the quantity of its sale was relatively low. We note that the quantity of the sale is only one part of our “totality of the circumstances” analysis. See Chenhe, slip op. at 14 (“{T}he size of an entry does not necessarily control Commerce’s analysis.”). However, “the size of the sale can raise questions as to whether the purchaser would buy the merchandise in the future in the same quantity at the same price.” Id. In Chenhe, the court concluded that “it was reasonable for Commerce to conclude that the small quantity of {the respondent’s} sale would not be indicative of typical future transactions.” Id. at 15-16. We likewise, here, find the quantity to be low, and not typical of other garlic transactions. Where the quantity of the sale is indicative of a non-bona fide sale, it can, combined with other factors in the analysis, be one of the bases for finding the new shipper sale to be non-bona fide.

Comment 9: Whether the Department’s Concerns Regarding Shenzhen Bainong’s Importer As a Legitimate Ongoing Business Concern Are Justified

Shenzhen Bainong claims that the Department’s analysis in the Preliminary Bona Fides Memorandum came to an erroneous conclusion because it was overly speculative and without support of any substantial evidence. Specifically, Shenzhen Bainong argues that several of the Department’s conclusions about Shenzhen Bainong’s importer should not be considered indicative of a non-bona fide sale.

As a preliminary matter, Shenzhen Bainong notes that it was not affiliated with its U.S. importer. The goods were sold in an arm’s length transaction; as such, Shenzhen Bainong’s only concern was with its profit potential from the sale, not that of its unaffiliated importer. Because the exporter and importer are unaffiliated business entities, and because Shenzhen Bainong does not have any control over the economic and business activities of its U.S. customer, Shenzhen Bainong does not believe it should be “held liable” for the actions of that customer.

Addressing the Department’s conclusions in the Preliminary Bona Fides Memorandum, Shenzhen Bainong first argues that the Department should not consider the importer’s short

business history and limited import experience as being indicators of the importer's legitimacy as a business. The importing company was properly formed in the State of New York, and there is no evidence on the record that the company was insolvent, dissolved, or in bankruptcy during the POR. Thus, Shenzhen Bainong concludes, there is no substantial evidence on the record that its importer is not a legitimate ongoing business concern.

Shenzhen Bainong next addresses the Department's concerns relating to the substantial period in which the importing company did not conduct any business. This period of inactivity is explained as the natural "ebb and flow" of a new business. Shenzhen Bainong argues that the fact that the importing company had two imports of non-subject merchandise after this period of inactivity should be taken as an indicator that the importer's business had "turned for the better." That the importer was unable to provide records of any business activity whatsoever during its period of inactivity should not be viewed by the Department as an indicator of the importer's status as a legitimate ongoing business concern, argues Shenzhen Bainong.

Regarding the Department's concerns with how the importer funded its business operations despite not conducting any business, Shenzhen Bainong reiterated that the importer's business was funded through its "normal business operation", as well as "borrowings." The Department's efforts to validate this information should be sufficiently satisfied with the bank statement worksheets provided by the importer showing the inflow and outflow of funds related to the transaction at issue, rather than the several months of bank statements the Department requested to review.

Lastly, Shenzhen Bainong argues that the Department erred in concluding that the importer's decision to stop importing garlic after the purchase under review is not indicative of a non-bona fide transaction. Specifically, the lack of subsequent garlic imports should be viewed under the circumstances that fresh garlic from the PRC must be imported into the U.S. at a very high cash deposit rate. In support of this, Shenzhen Bainong cites to Notice of Final Results of Antidumping Duty New Shipper Review: Certain In-Shell Raw Pistachios from Iran, 68 FR 353 (January 3, 2003) and accompanying Issues and Decision Memorandum at 8 (Raw Pistachios from Iran), arguing that the Department recognized that "it is not unreasonable that a new shipper formed solely for the purpose of selling subject merchandise to the United States would await the outcome of the Department's review before proceeding with additional sales to the U.S. market."

Petitioners point to a number of factors identified in the Department's Preliminary Bona Fides Memorandum supporting its contention that Shenzhen Bainong's importer is not a legitimate ongoing business concern. First, they note the limited amount of time between incorporation and the sale of goods, and the fact that the U.S. importer had no previous experience importing agricultural goods. The fact that the importer only had one purchase and resale of garlic, then lapsed into a long period of inactivity is another indicator cited by Petitioners that the importer was not a legitimate ongoing business concern. Petitioners also note the failure of the importer to adequately identify and document how it funds its operations, as well the importer's failure to document its efforts at expanding its business. Lastly, Petitioners note the Department's preliminary finding that the per-unit price paid by the importer was inconsistent with its efforts to generate profits.

Department's Position: As a preliminary matter, the Department notes that it is not holding Shenzhen Bainong "liable" for the operations and activities of its U.S. importer. As the CIT noted in Chenhe, "{t}he purpose of a new shipper review is to determine if an exporter or producer is entitled to a separate rate and to set that rate. In order for Commerce to set an accurate rate, it must have before it a transaction from which it can reasonably determine a margin." Chenhe, slip op. at 15 (emphasis added). As the Court also points out, "Commerce's goal is to determine whether the sale(s) under review are indicative of future commercial behavior." Chenhe, slip op. at 6. Our purpose in examining the activities and status of Shenzhen Bainong's U.S. importer is not to punish Shenzhen Bainong based on the actions of another party. Our analysis focused on the U.S. importer as part of our effort to determine the bona fide nature of the sale at issue.

In the past, the Department has examined the behavior of U.S. importers when analyzing the bona fide nature of the sale. See, e.g., Fresh Garlic from the People's Republic of China: Final Results and Rescission, In Part, of Twelfth New Shipper Reviews, 73 FR 56550 (September 29, 2008) and accompanying Issues and Decision Memorandum at 10 ("The Department's decision to find Chenhe's single POR sale non-bona fide is based on a combination of factors, including: its high price, its low quantity, and the fact that it was atypical of Chenhe's U.S. customer's normal commercial practices" (emphasis added)). See also Honey 2011 NSR Rescission (where the U.S. importer's website was found to be registered to the respondent's attorney, we found "this circumstance is indicative of highly unusual business practices"); Freshwater Crawfish Tail Meat From the People's Republic of China: Rescission of Antidumping Duty New Shipper Reviews, 68 FR 52746 (September 5, 2003) and the "Memorandum from Scott Lindsay through Barbara E. Tillman to Joseph A. Spetrini; Freshwater Crawfish Tail Meat from The People's Republic of China: Whether the Sale in the New Shipper Review of Hubei Houhu is Bona Fide," dated August 15, 2003 (where the U.S. importer paid a price so high that it was unable to resell the goods in the U.S. market, we found the importer's behavior to be "inconsistent with normal business practices, and otherwise not commercially reasonable;" where that importer indicated that it had never imported crawfish tailmeat from the PRC before, and did not intend to import crawfish tailmeat from the PRC in the future, we found that this behavior "casts additional doubt on the bona fides of this transaction, particularly in light of" the high price paid by the importer).

As part of our analysis in this case, we sought information from the U.S. importer related to the nature of its ongoing commercial operations. After the initial purchase, a substantial period of time passed during which Shenzhen Bainong's U.S. importer conducted no business activities. During this long period of inactivity, Shenzhen Bainong's importer made no further purchases of garlic, or any other product. Shenzhen Bainong claims this is the natural "ebb and flow" of a new business, but in response to our inquiries, the U.S. importer was unable to produce any documentation indicating that it was making efforts to further its business. After this long period of inactivity ended, Shenzhen Bainong's importer began importing goods to the U.S. – two shipments of agricultural products from Shenzhen Bainong that were not garlic. While Shenzhen Bainong cites Raw Pistachios from Iran, indicating that it is reasonable for a company to await the outcome of an NSR before conducting any further sales, we do not believe Shenzhen Bainong's reliance on that review is on point. Our doubts as to the legitimacy of Shenzhen

Bainong's U.S. importer's business operations are not limited to its purchases of garlic. It is clear that Shenzhen Bainong's U.S. importer was capable of conducting other business transactions, including the import of goods other than garlic. It did, in fact, import goods other than garlic, long after the sale at issue occurred. It is the long gap period between the importation of Shenzhen Bainong's garlic, and its next business activity, that causes us to doubt the legitimacy of Shenzhen Bainong's importer as an ongoing business concern and the bona fides of the transaction in question. Combined with the circumstances surrounding the importer's resale of the garlic, discussed in Comment 5, above, we conclude that when viewed as a whole, the importer's activities are not reflective of commercially reasonable business considerations. Taking these facts into consideration as part of the totality of the circumstances, we conclude that the transaction under review between Shenzhen Bainong and its importer is not indicative of future business transactions and thus not a proper basis on which to set Shenzhen Bainong's rate.

Comment 10: Whether Shenzhen Bainong's Importer Behaved in a Commercially Reasonable Manner

Shenzhen Bainong contends that the Department's preliminary conclusion that Shenzhen Bainong's importer did not behave in a commercially reasonable manner was improper. Shenzhen Bainong argues that the fact that the importer's U.S. customer picked up the goods from the port should not be detrimental to the analysis of the sale since it is "not an abnormal practice." Shenzhen Bainong also explains that the importer delayed sending the invoice to its customer because the importer waited for the customer to ensure there were no quality issues with the goods. Shenzhen Bainong also explains that a one or two month delay in payment by the customer after the goods were received by the customer is a "normal business occurrence."

Petitioners did not comment on this issue.

Department's Position: As we noted in the Preliminary Bona Fides Memorandum, an importer of agricultural goods should be expected to conduct its resale of the goods in a commercially reasonable manner. However, the circumstances surrounding the resale of the goods by Shenzhen Bainong's importer appear abnormal. The importer and its customer had never conducted business together before, as the sale under review was the importer's first ever purchase and resale of goods. Despite this, the importer allowed its customer to pick up the goods at the port with no written agreement or contract that obligated the customer to pay for the goods, and without having invoiced that customer or received payment for the goods. We do not accept Shenzhen Bainong's explanation that the long delay in invoicing the customer was to guarantee the quality of the goods, when it is clear from the record that the importer had no other business transactions with which to sustain itself. Nor do we accept Shenzhen Bainong's explanation that the even longer delay in payment to the importer is a "normal business occurrence." With the goods already in the customer's hands, and no other security interest in place, the importer took a commercially unreasonable risk in delaying both the issuance of the invoice and accepting payment long after the goods were picked up by the customer.

Recommendation

Based on our analysis of the comments received, we recommend adopting the positions set forth above. If these recommendations are accepted, we will publish the final results, including the final dumping margins for all companies subject to this review in the Federal Register.

Agree _____ Disagree _____

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date