

January 13, 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: New Shipper Reviews of Honey from the People's Republic of
China: Issues and Decision Memorandum

BACKGROUND:

On September 10, 2010, the Department of Commerce (the "Department") published the preliminary results of these new shipper reviews, for the period of review ("POR") December 1, 2008, through November 30, 2009. See Honey From the People's Republic of China: Preliminary Intent To Rescind New Shipper Reviews, 75 FR 55307 (September 10, 2010). In accordance with 19 CFR 351.309(c)(ii), the Department invited parties to comment on our Preliminary Results.

On September 29, 2010, Suzhou Shanding Honey Product Co., Ltd. ("Suzhou") and Wuhu Fenglian Co., Ltd. ("Fenglian")(collectively, "Respondents") submitted information concerning surrogate value ("SV") factors. On November 1, 2010, Suzhou and Fenglian individually submitted case briefs.¹ On November 9, 2010, Petitioners² submitted a rebuttal brief. We received no further comments.

SUMMARY:

General Issues:

Comment 1: Department's Treatment of Respondents' Post-Preliminary Request for Additional Supplemental Questionnaires

Comment 2: Department's Rejection of Respondents' Submission

Comment 3: Accuracy of the CBP Data

¹ Referred to as "Suzhou Case Brief" and "Fenglian Case Brief" respectively.

² The American Honey Producers Association and the Sioux Honey Association (collectively, "Petitioners").

Company Specific Issues

Comment 4: Finding that Suzhou's POR Sale was Non-Bona Fide

Comment 5: Finding that Fenglian's Sale was Non-Bona Fide

Discussion of the Issues:

Comment 1: Department's Treatment of Respondents' Post-Preliminary Request for Additional Supplemental Questionnaires

Respondents' Case Brief Arguments

- The Department should have issued a post-preliminary questionnaire in order to allow Suzhou to address issues raised by Petitioners' August 24, 2010, comments. The Department did not reject the new information placed on the record by Petitioners as being untimely until September 24, 2010, during which time the Department considered the information for its Preliminary Results, which were signed September 2, 2010, only eight days after Petitioners' comments, and two months prior to the original preliminary results deadline.
- The Department did not provide Fenglian with an opportunity to show that its importer was in the process of reselling the honey, because such evidence would be rejected as "untimely filed unsolicited new factual information."
- The Department's practice is unfair and represents an "arbitrary application" of its regulations in violation of 5 U.S.C. 706(2)(A).

Petitioners' Rebuttal Brief Arguments

- The Department has broad discretion in setting its schedules, and Respondents had ample time to rebut all arguments presented prior to August 24, 2010, so no additional questionnaires were necessary to complete the record.
- The new information in their August 24, 2010, submission was rejected by the Department, and a reading of the Department's bona fide sales decision memoranda shows that the Department did not substantively rely on that submission, making Respondents' complaint moot.
- Because the Department based its decision on the record at the time of Fenglian's last submission, eight months after importation, the eventual disposition of the honey is not relevant to the Department's decision.

Department's Position: The Department finds it properly exercised its discretion in setting the timeline for these new shipper reviews, and adhered to the regulations in determining to accept or reject factual information submitted by all parties. As both Respondents and Petitioners should recognize,³ the Department has discretion in setting the schedule for reviews. During these reviews, the Department issued multiple questionnaires to Respondents covering all of the issues in the bona fide analysis, giving Respondents ample opportunity to place information on the record.

³ See Suzhou Case Brief at 9, Fenglian Case Brief at 8, and Petitioners' Rebuttal Comments at 8.

Regarding Respondents' concerns that they were not afforded an opportunity to respond to Petitioners' August 24, 2010 comments, as Petitioners noted, the Department rejected all of the new information in that submission for being untimely submitted in accordance with 19 CFR 351.302(d) and it was removed from the record. Petitioners then resubmitted their comments without any new factual information. The Department concedes that the new factual information submitted by Petitioners was not rejected as untimely until after the Preliminary Results were issued. However, the Department did not take into account any of the information rejected in Petitioners' August 24, 2010 comments in making its finding in the Preliminary Results. Therefore, there was no longer any new factual information for Respondents to rebut or respond to. Furthermore, both Respondents and Petitioners were given the opportunity to comment on the Preliminary Results in their briefs.

Comment 2: Department's Rejection of Respondents' Submission

Respondents' Case Brief Arguments

- The Department improperly rejected the September 22, 2010, joint submission comments on U.S. Customs and Border Patrol ("CBP") Data ("Comments on the CBP Data"), by mistakenly applying 19 CFR 315.301(c)(1) to reject the comments for being past the regulations "10-day rebuttal rule." The rule allows interested parties to rebut factual information "submitted by any other interested party," but according to 19 CFR 351.102(b)(29), the Department is not considered an interested party and therefore the rule does not apply.
- The Department's rejection of the Comments on CBP Data was also unreasonable. The Department placed the data on the record on September 2, 2010, and Respondents received the data on September 8, 2010. It took time for Respondents to meet the deadlines for their respective earlier supplemental questionnaire responses, seek information from commercial data suppliers, and then analyze the CBP data against the Preliminary Results.
- The Department should conduct an investigation into the legitimacy of the honey entries in the CBP data on which it based its decision on, before issuing the final results of these reviews.

Petitioners' Rebuttal Brief Arguments

- The Department properly rejected Respondents' Comments on the CBP Data. The second sentence of 19 CFR 351.301(c)(1) does not mention "interested parties," and refers to the rebuttal of any new factual information placed on the record. There is no reason for a different standard for information placed on the record by the Department or interested parties.
- If Respondents needed more time to respond to the CBP data, they were required to seek an extension in writing before the deadline expired.
- There is no evidence suggesting the CBP data are incorrect, therefore there is no need to investigate the CBP entries upon which the Department relied. Further, as the

Department stated in Hot-Rolled Carbon, absent evidence to the contrary, the accuracy of the CBP data must be presumed.⁴

Department's Position: The Department finds that it properly followed 19 CFR 351.301(c)(1) in rejecting Respondents' Comments on the CBP Data for being past the allotted 10-day time period to rebut new factual information. Further, as stated in 19 CFR 351.302(c), if Respondents needed more time to analyze the data and respond, they were required to submit their request in writing before the deadline expired. The Department notes that it can place new information on the record at any time during a proceeding so long as it affords all interested parties an opportunity to comment. As Petitioners note, Respondents never requested an extension in the deadline to submit rebuttal information well past the 10-day deadline and they did not contact the Department to seek any further guidance as to the deadline for rebuttal information. The Department has a long standing practice of rejecting submissions that are not received within the 10-day rebuttal period, regardless of the party that placed the information on the record.⁵ Accordingly, the Department finds it properly rejected Respondents' Comments on the CBP Data in accordance with 19 CFR 351.301(c)(1) and 351.302(c).

Comment 3: Accuracy of the CBP Data

Respondents' Case Brief Arguments

- Evidence on the record demonstrates that the entries of honey from the People's Republic of China ("PRC") in the CBP data are incorrect. The U.S. Department of Agriculture National Honey Report ("USDA Report")⁶ on the record shows that in June 2009 the United States only imported 7,375 kilograms ("kg") of subject honey from the PRC, which is inconsistent with the CBP data for June 2009.
- The USDA Report also shows that the prices relied on by the Department in the CBP data are aberrational and inconsistent with June 2009 market conditions in either the United States or the PRC. Company specific production cost information submitted by the two companies under review indicates that the prices of the sales in the CBP data are not commercially feasible.
- The USDA price data also show that the price of honey imported from other countries with per capita gross national income much lower than the PRC is much greater than the prices reflected in the CBP data.

Petitioners' Rebuttal Brief Arguments

- The USDA Report is a tertiary source of information, subject to errors. The Department considers the description of what enters the United States to be determined by CBP entry

⁴ Citing Preliminary Rescission of Antidumping Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from the People's Republic of China, 72 FR 32072, 32073-32074 (June 11, 2007) ("Hot-Rolled Carbon").

⁵ See, e.g. NSK Ltd. v. U.S., 16 CIT 745, 750, 798 F. Supp. 721, 725 (CIT 1992); Emerson Power Transmission Corp. v. U.S., 19 C.I.T. 1154, 903 F. Supp. 48 (CIT 1995).

⁶ See Respondents' September 29, 2010 submission.

documentation.⁷ When there is a conflict between the CBP data and secondary sources taken from CBP data, the CBP data should be given more weight.

- Prices in the PRC are irrelevant as a benchmark because the PRC is a non-market economy.
- The prices relied upon by the Department in these reviews were consistent with other prices for Chinese honey in the U.S. market on the record.⁸

Department’s Position: The Department continues to find that the CBP data are the best available data on the record, and are preferable when a conflict exists with secondary sources. We agree with Petitioners that the Department’s preference is to use CBP data because they are a primary source, as opposed to a secondary source which may be prone to errors in the data collection and aggregation process.⁹ As the Department stated in Hot-Rolled Carbon, “[t]he legal description of what enters the United States is determined by CBP entry documentation. Where a conflict exists between PIERS¹⁰ {another secondary aggregate source} and CBP information, the Department weighs the CBP data more heavily because it contains the actual entry documentation for the shipment, including the Customs 7501 form, invoice, and bill of lading.”¹¹ In this case the USDA Report is a secondary, aggregate source similar to the PIERS data referred to in Hot Rolled Carbon. Therefore, the Department has a similar preference for CBP data as a primary source in comparison.

Additionally, the Department has in the past examined the USDA Agricultural Marketing Service (“AMS”) reports, which produces the USDA Report, within the context of a new shipper bona fide analysis, and has found that “without any explanations of the terms, the methodology used to collect and collate the data, or any details about what is and is not included in the data” the Department is unable to determine the probative value of making any comparison with the AMS data.¹² As in the Garlic New Shipper case, the USDA report was placed on the record of these reviews without any additional information which could allow the Department to judge whether the report could serve as a useful source for comparison purposes. Further, there is no information on the record of the instant reviews regarding the timing of the collection of the information or the harmonized tariff schedule (“HTS”) numbers used in the AMS report, making it unclear to what extent the information relates to the POR sales at issue.

⁷ See Hot-Rolled Carbon, 72 FR at 32073-74.

⁸ See, e.g., Administrative Review of Honey from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission of Review, In Part, 75 FR 24880 (May 6, 2010) (“Honey 7th AR Final”), and accompanying Issues and Decision Memorandum at Comment 1.

⁹ In this case, the primary source is considered to be the raw data collected by CBP. By contrast, a secondary source, such as the USDA report, collects and aggregates the information collected by a primary source (such as CBP or the United States Census).

¹⁰ Port Import Export Reporting Service (“PIERS”) is a secondary source of import/export data.

¹¹ See Hot-Rolled Carbon, 72 FR at 32073; see also id.

¹² 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 Comment 3 (“Garlic New Shipper”).

Respondents' argument that the entries cited in the CBP data are aberrational because they are not consistent with the cost of production data submitted by the two companies under review in these new shipper reviews is also misplaced. The two companies in these new shipper reviews by definition have never been reviewed and found to be bona fide sellers of honey, therefore a comparison of their cost and pricing is irrelevant. Additionally, with regard to Respondents' argument that the data in the USDA report demonstrate that the CBP data are aberrational, for the reasons discussed above, without additional information with respect to the USDA report, the Department is unable to rely on it in analyzing either the reliability of the CBP data or the sales under review.

Although Petitioners point to data on the record from the Honey 7th AR Final to illustrate Respondents' prices are aberrational, it is the Department's preference to use POR-specific pricing information rather than information from previous reviews because market conditions are subject to change.¹³ Therefore, we do not find it necessary or appropriate in the instant case to compare Respondents' prices to the data from the seventh administrative review which Petitioners placed on the record of these reviews.

Because there is not sufficient evidence on the record regarding the methodology behind the collection of the USDA data, and no other viable alternatives have been placed on the record, the Department will continue to use CBP data as the sole source of data in our bona fide analysis in these reviews.

Company Specific Issues

Comment 4: Finding that Suzhou's POR Sale was Non-Bona Fide

I. Price

Suzhou's Case Brief Arguments

- The Department should follow Hebei New Donghua Amino Acid Co., Ltd. v. U.S., 374 F. Supp. 2d 1333 (CIT 2005) ("New Donghua"), where the Department compared the respondent's U.S. price to the weighted average unit values ("AUVs") of: 1) all Chinese non-aberrational entries; 2) of all imports based on public statistics; and 3) U.S. imports from all countries during the POR based on publically available data.
- A comparison to the USDA Report weighted AUVs of all subject merchandise from the PRC or with imports from all countries during the POR to Suzhou's U.S. sales price does not support a non-bona fide finding.
- Alternatively, the Department should follow Tianjin Tiancheng Pharm. Co., Ltd. v. U.S., 29 CIT 256, 366 F. Supp. 2d 1246 (CIT 2005) ("TTPC"), and compare Suzhou's U.S. sales price to its own third country POR sales. The difference between Suzhou's U.S. prices and third country prices is insignificant given the multiple market-distorting effects of antidumping duties on prices in the United States and other markets.

¹³ See, e.g., Fresh Garlic From the People's Republic of China: Final Results and Partial Rescission of the 13th Antidumping Duty Administrative and New Shipper Reviews, 74 FR 29174 (June 19, 2009) ("Garlic").

Petitioners' Rebuttal Brief Arguments

- The Department was correct in its analysis because the only relevant price comparison is similar honey from the PRC, not third-countries or other sources.
- In New Donghua, the court ruled that the Department could use Chinese AUVs from public import statistics and AUVs from third country imports, not that the Department was required to.
- As stated the Department stated in Hot-Rolled Carbon, a conflict between two sources of data should be resolved in favor of CBP data.¹⁴
- One of the two sales relied upon by Suzhou in the USDA Report was found to be non-bona fide in the seventh annual review of this Order.
- A comparison of Suzhou's U.S. sales prices to U.S. imports of honey from all countries is appropriate because they do not reflect the behavior Chinese exporters are likely to engage in under the order, and the Department has not relied on AUVs from non-subject countries in the past.
- Suzhou's third-country sale prices support a non-bona fide finding.

Department's Position: In conducting a new shipper review, particularly one where a company's margin would be based on a minimal number of sales and where the issue has been raised on the record, the Department examines the prices associated with the sales under review, and must determine if all aspects of the prices were based on normal commercial considerations and present an accurate picture of a company's typical sales activity. If the Department determines that the prices were not based on normal commercial considerations or are atypical of the respondent's future sales, the sale may be considered non-bona fide.¹⁵

Consistent with the Department's practice, we continue to find that the CBP data are the most reliable data on the record for analyzing the bona fides of Respondents' sales. Respondents have not shown on the record that the CBP prices are aberrational or inconsistent with the market conditions at the time of the sales, aside from pointing to pricing data from the two companies under review, which is not a valid comparison, and to the USDA report, on which the Department is unable to rely in this instance, as discussed above.

The Department agrees with Petitioners' reading of New Donghua, where the Court of International Trade ("CIT") ruled that while the Department may look to the weighted AUVs of: 1) all Chinese non-aberrational entries; 2) of all imports based on public statistics; and 3) U.S. imports from all countries during the POR based on publically available data for price comparison purposes, the Department is not required to make those comparisons. In this case, the most relevant price comparison is similar honey from the PRC, not third countries or other sources. In regards to Suzhou's argument in the alternative that the Department follow TTPC

¹⁴ See Hot-Rolled Carbon, 72 FR at 32073-74

¹⁵ See TTPC, 366 F. Supp. 2d at 1250; see also Fresh Garlic From the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review, 67 FR 11283 (March, 13, 2002) and accompanying Issues and Decision Memorandum: New Shipper Review of Clipper Manufacturing Ltd ("Clipper Decision Memorandum"); see also American Silicon Technologies v. United States, 110 F. Supp. 2d 992, 996, 24 Ct. Int'l Trade 612 (CIT 2000) ("Silicon Technology"); see also Windmill International Pte., Ltd., v. United States, 26 CIT 221, 193 F. Supp. 2d 1303 (CIT 2002) ("Windmill").

and compare Suzhou's U.S. sales price to its own third-country POR sales, it is the Department's practice to normally only consider third-country sales when there are no other U.S. entries of the subject merchandise during the POR to compare to the sales under review.¹⁶ In these new shipper reviews, the Department has comparable CBP entries for honey under the same HTS number in the POR on which to base its comparisons, and therefore the Department determines it was not necessary to make comparisons to sales to third-countries or imports from other countries.

Additionally, as explained above, the Department has found there to be insufficient information on the record of these reviews regarding the methodology behind the collection of AMS data and the source of the data in USDA Report, and thus it cannot be used as for comparison purposes. As a conflict exists between the CBP data and secondary sources, upon review of the data on the record, in this instance the Department has determined that the CBP data carries more weight, as discussed above.¹⁷

Therefore, consistent with the Preliminary Results, the Department continues to find that Suzhou's sales prices were atypical compared to the AUV of the other entries of the same type of honey from the PRC during the POR, indicating a non-bona fide sale.

II. Quantity

Suzhou's Case Brief Arguments

- Assuming the USDA Report monthly entries represent single sale entries, comparisons to the entries for December 2008 and June 2009 do not support a non-bona fide finding.
- Suzhou's normal business practices led it to sell smaller quantities to new customers in the U.S. compared to its third-country sales due to increased financial risk.
- The cash antidumping deposit required of U.S. importers limits the quantity of sales due to increased financial risk.

Petitioners' Rebuttal Brief Arguments

- The USDA Report data are not broken out by individual import entries, and therefore are not useful for comparing quantities.
- Suzhou was unable to provide any evidence that the size of its sale was not atypical, or that it faced a high financial risk by selling at a higher quantity.
- While the Department did not rely on Suzhou's third-country sales in its Preliminary Results analysis, those sales support the Department's non-bona fide finding.
- Suzhou's sale was still abnormal in comparison to all POR entries from the PRC.

Department's Position: It is the Department's practice, in conducting a bona fide analysis, to base its quantity comparison on other United States entries of subject merchandise during the POR as reported by CBP, when available.¹⁸ Suzhou contends that entries for two months in the

¹⁶ See, e.g., Honey 7th AR Final and accompanying Issues and Decision Memorandum at Comment 1.

¹⁷ See Hot-Rolled Carbon, 72 FR at 32073

¹⁸ See, e.g., Garlic and accompanying Issues and Decision Memorandum at Comment 10.

USDA Report demonstrate that its POR sales were not abnormal quantities, based on the assumption that the monthly entries in the USDA Report represent single sales and not cumulative monthly totals. The Department, however, notes that the USDA Report's monthly data are not broken out by individual entry, and instead are reported as aggregate monthly totals. Hence, because the quantity represents the aggregate for all sales for each month and not single entries, the USDA Report does not provide a meaningful basis for quantity comparisons.

Additionally, Suzhou states that the importer was required to pay a "huge" cash deposit in order to purchase honey from Suzhou.¹⁹ The Department has in past cases acknowledged that a decision to limit the quantity of a sale in order to limit a company's exposure to high dumping liabilities is a commercially reasonable business decision.²⁰ The Department also notes that Suzhou placed information on the record regarding its sales of honey to third-country markets and argues that this information demonstrates that Suzhou's sale to the United States was not of an abnormally low quantity.²¹ However, as is the Department's practice,²² because there are CBP entries of subject merchandise in this review for the POR, which have not been demonstrated to be inaccurate, we find it unnecessary and less relevant with respect to the bona fides analysis to look to Suzhou's third-country sales. Based on the CBP data, as in the Preliminary Results, we continue to find the quantity of Suzhou's sale to be atypical compared to the other sales of the same type of honey imported from the PRC to the U.S. during the POR. Additionally, as discussed below, we continue to find that the quantity of Suzhou's sale was atypical for its U.S. customer.²³ However, the quantity of a sale, in and of itself, does not warrant a determination that the sale is not bona fide. Thus, consistent with Department practice, we have looked to other factors, and examined the totality of the circumstances, to determine whether Suzhou's U.S. sales are indeed bona fide transactions.

III. Suzhou's U.S. Customer's Business Practices

Suzhou's Case Brief Arguments

- The U.S. importer's website was functional throughout the POR. Only the on-line sales page was not functional.
- The Department used an arbitrary standard to measure the importer's purchase volume.
- The U.S. importer had to find a new buyer for the honey because the bad economy caused the first buyer to back out. It then had to negotiate a lower price with the new buyer who was being acquired by another company, which delayed the sale.

¹⁹ See Suzhou Case Brief at 20.

²⁰ See, e.g., Final Results of Antidumping Duty Administrative Review: Certain In-Shell Raw Pistachios From Iran, 70 FR 7470 (February 14, 2005) ("Pistachios").

²¹ See Suzhou's Second Supplemental Questionnaire Response, dated June 22, 2010, at Exhibit SSA-1.

²² See, e.g., Honey 7th AR Final and accompanying Issues and Decision Memorandum at Comment 1.

²³ See Memorandum to the James C. Doyle, Director, Office 9, from Katie Marksberry, International Trade Specialist, through Catherine Bertrand, Program Manager, regarding "Antidumping Duty New Shipper Review of Honey from the People's Republic of China: Bona Fide Analysis of the Sale Under Review for Suzhou Shanding Honey Product Co., Ltd.," dated September 2, 2010 ("Suzhou Bona Fide Memo").

- Suzhou immediately tried to collect payment from its customer, and in the end there was little delay in the payment.
- It is common for law firms to advance moderate expenses on behalf of their clients, as Suzhou's counsel did for the domain name of Suzhou's importer, because the importer did not have a credit card to complete the transaction.

Petitioners' Rebuttal Brief Arguments

- Suzhou offered no evidence that its customer's website was ever operational or evidence supporting its reason for why the on-line sales page was not functional.
- It is atypical for the importer to have only imported twice from 2005 through 2009.
- It was economically irrational for the importer who has a history of antidumping liability in new shipper purchases, to buy honey from another new shipper subject to the PRC-wide rate, unless it was prepared to risk losing the entire duty deposit. The inclusion of the duty deposit to the sales price results in a price significantly above the market price from other domestic or import sources.
- The ownership of the U.S. importer's website by its attorney is suspect.

Department's Position: Consistent with the Department's practice, and as affirmed by the CIT, the Department must evaluate the circumstances surrounding the sales, such that Suzhou does not unfairly benefit from atypical sales, and obtain a lower dumping margin than the producer's usual commercial practice would dictate.²⁴ The Department has also considered the U.S. customer's business practices and other purchases of the subject merchandise in determining whether the sales at issue were commercially reasonable and, therefore, bona fide transactions.²⁵ In reviewing Suzhou's U.S. importer's business practices, the Department has found indications that its business practices are inconsistent with normal business practices.

In the Preliminary Results, the Department noted a number of irregularities concerning the U.S. customer's website.²⁶ The customer has stated that it set up its website to develop new business and attract potential customers, but decided to discontinue the online ordering system for other business reasons.²⁷ Although Petitioners argue that Suzhou may have created and updated its website specifically for the purpose of this and/or similar reviews and is not a legitimate commercial website,²⁸ based on the facts on the record, the Department cannot definitively conclude that the importer's business practices in relation to its website were unusual or support a non-bona fide determination.

Aside from the functionality of the U.S. customer's website, however, we continue to find it suspect that the website is owned by Suzhou's counsel. Although Suzhou argues that it is normal for attorneys to advance moderate expenses to clients, it does not explain why the domain

²⁴ See New Donghua, 374 F. Supp. 2d at 1338-39.

²⁵ See Honey 7th AR Final and accompanying Issues and Decisions Memorandum at Comment 1.

²⁶ See Suzhou Bona Fide Memo at 6-8.

²⁷ See Suzhou's Supplemental Section C&D Questionnaire Response, dated May 27, 2010, at 11.

²⁸ See id.

name remains registered to the attorney in question long after the time that the website was registered. The Department continues to find that this circumstance is indicative of highly unusual business practices.

The Department also continues to find that the nature and size of Suzhou's U.S. customer's previous purchases render the POR purchase atypical in its normal operations.²⁹ Suzhou argues that the bad economy explains the reasons for its importer not being able to show many evenly-spaced and identically sized transactions. However, the Department is able only to consider the importer's purchases within the context of the information on the record, *i.e.*, actual purchases and sales. Additionally, Suzhou's claims that the importer's decisions in buying and reselling the honey were "normal for a small business" are unsupported by the record of this review. The Department has considered the information regarding the sale in question within the context of the importer's own business practices and found that, even though the importer was a small business, the quantity of the purchase from Suzhou was atypical when compared to the importer's other purchases.³⁰ Additionally, although it may have been commercially reasonable for the importer to accept a lower price for the honey rather than risk the cost of a lawsuit, the Department considered the totality of the circumstances, including the fact that the importer intended to buy and repackage honey, but did not have adequate facilities and failed to use a local re-packer, ultimately reselling the honey in bulk to a company other than the one with which it originally had a purchase agreement.³¹ Moreover, though the importer claims that it has been trying to do more business with Suzhou since the sale under review, there is no evidence that they have negotiated any further purchases.³² Taken together, these facts lend support to a non-bona fide finding.

In sum, given the totality of the circumstances surrounding Suzhou's U.S. sales, including the atypical price and quantities, the fact that the purchases were atypical for the U.S. customer, and other circumstances further elaborated in the Suzhou Bona Fide Memo, the Department continues to find, as in the Preliminary Results, that Suzhou's POR sales are not bona fide commercial transactions. Therefore, we will rescind the review with respect to Suzhou.

Based on the totality of the circumstances discussed above, for these final results, the Department has determined that Suzhou's sales are not bona fide transactions, and subsequently is rescinding the new shipper review with respect to Suzhou.

²⁹ Much of this information is business proprietary. For a detailed discussion of these factors and additional analysis see Suzhou Bona Fide Memo.

³⁰ Much of this information is business proprietary. For a detailed discussion of this issue see id. at 7.

³¹ See Suzhou's Supplemental Section C&D Questionnaire Response, dated May 27, 2010, at 10; see also Suzhou's Second Supplemental Questionnaire Response, dated June 22, 2010, at 4.

³² See Suzhou Bona Fide Memo at 7.

Comment 5: Finding that Fenglian's Sale was Non-Bona Fide

I. Price

Fenglian's Case Brief Arguments

- The Department should follow New Donghua where the Department compared the respondent's U.S. price to the weighted AUVs of: 1) all Chinese non-aberrational entries; 2) of all imports based on public statistics; and 3) U.S. imports from all countries during the POR based on publically available data.
- A comparison to the USDA Report weighted AUVs of all subject merchandise from China or with imports from all countries during the POR to Fenglian's U.S. sales price does not support a non-bona fide finding.
- Alternatively, the Department should follow TTPC, and compare Fenglian's U.S. sales price to its own third country POR sales. The case record shows the subject honey demands a higher price in the United States and third countries.

Petitioners' Rebuttal Brief Arguments

- The Department was correct in its analysis because the only relevant price comparison is similar honey from the PRC, not third countries or other sources.
- In New Donghua, the court ruled that the Department could use Chinese AUVs from public import statistics and AUVs from third country imports, not that the Department was required to.
- As stated in Hot-Rolled Carbon, a conflict between two sources of data should be resolved in favor of CBP data.³³
- One of the two sales relied upon by Fenglian in the USDA Report was found to be non-bona fide in the seventh administrative review.³⁴
- A comparison of Fenglian's U.S. sale prices to U.S. imports of honey from all countries is appropriate because they do not reflect the behavior Chinese exporters are likely to engage in under the order, and the Department has not relied on AUVs from non-subject countries in the past.
- Fenglian's third country sales prices support a non-*bona fide* finding.

Department's Position: In conducting a review, particularly a review where a company's margin would be based on a minimal number of sales and where the issue has been raised on the record, the Department examines the prices associated with the sales under review, and must determine if all aspects of the prices were based on normal commercial considerations and present an accurate picture of a company's typical sales activity. If the Department determines that the prices were not based on normal commercial considerations or are atypical of the respondent's future sales, the sale may be considered non-bona fide.³⁵

³³ See Hot-Rolled Carbon, at 32073-74

³⁴ See Honey 7th AR Final and accompanying Issues and Decision Memorandum at Comment 1.

³⁵ See TTPC, 366 F. Supp. 2d at 1250; see also Clipper Decision Memorandum; Silicon Techs, 110 F. Supp. 2d at 995; Windmill, 193 F. Supp. 2d at 1307.

Consistent with the Department's practice, we continue to find that the CBP data are the most reliable data on the record. Respondents have not shown on the record that the CBP prices are aberrational or inconsistent with the market conditions at the time of the sales, aside from pointing to the two companies under review, which is not a valid comparison, and the USDA report, which, lacking additional information with respect to the data contained therein, is not useful for comparison purposes, as discussed above.

The Department agrees with Petitioners' reading of New Donghua, where the CIT ruled that while the Department may look to the weighted AUVs of: 1) all Chinese non-aberrational entries; 2) of all imports based on public statistics; and 3) U.S. imports from all countries during the POR based on publically available data for price comparison purposes, the Department is not required to make those comparisons. The most relevant price comparison is similar honey from the PRC, not third countries or other sources. In regards to Respondent's argument in the alternative that the Department follow TTPC and compare Fenglian's U.S. sales price to its own third country POR sales, it is the Department's practice to normally only considers third-country sales when there are no other U.S. entries of the subject merchandise during the POR to compare to the sales under review.³⁶ In this new shipper review, the Department has comparable CBP entries for honey under the same HTS number in the POR on which to base its comparisons, and therefore the Department determines it is not necessary to make comparisons to sales to third countries or imports from other countries.

Additionally, as explained above, the Department has found there to be insufficient information regarding the methodology behind the collection of AMS data, the source of the data in USDA Report, and thus is unable to rely on the report for comparison purposes. As a conflict exists between the CBP data and secondary sources, upon review of the data on the record, in this instance the Department has determined that the CBP data carries more weight, as discussed above.³⁷

Therefore, consistent with the Preliminary Results, the Department continues to find that Fenglian's sales prices were atypical compared to the AUV of the other entries of the same type of honey from the PRC during the POR, indicating a non-bona fide sale.

II. Quantity

Fenglian's Case Brief Arguments

- Assuming the USDA Report monthly entries represent single sales, then comparisons to the entries for December 2008 and June 2009 do not support a non-bona fide finding.
- Fenglian's normal business practices led it to sell smaller quantities to new customers overseas due to increased financial risk.
- The cash dumping deposit required of U.S. importers also limits the quantity of sales due to increased financial risk.

³⁶ See, e.g., Honey 7th AR Final and accompanying Issues and Decision Memorandum at Comment 1.

³⁷ See Hot-Rolled Carbon, 72 FR at 32073

Petitioners' Rebuttal Brief Arguments

- The USDA Report data are not broken out by individual import entries, and therefore are not useable for comparison purposes.
- Fenglian's third country sales support the Department's finding because they were twice the size of the sale in question.
- The fact that Fenglian and the U.S. customer agreed to keep the size smaller than normal due to risk of dumping duties shows the sale is atypical.

Department's Position: It is the Department's practice, in conducting a *bona fide* analysis, to base its quantity comparison on other United States entries of subject merchandise during the POR as reported by CBP, when available.³⁸ Fenglian contends that entries for two months in the USDA Report demonstrate that its POR sales were not atypical quantities, based on the assumption that the monthly entries in the USDA Report represent single sales and not cumulative monthly totals. The Department, however, notes that the USDA Report's monthly data are not broken out by individual entry, and instead is reported as aggregate monthly totals. Hence, because the quantity represents the aggregate for all sales and not single entries, the USDA Report does not provide a meaningful quantity comparison.

Additionally, Fenglian states that the importer was required to pay a "huge" cash deposit in order to purchase honey from Fenglian.³⁹ The Department has in past cases acknowledged that a decision to limit the quantity of a sale in order to limit a company's exposure to high dumping liabilities is a commercially reasonable business decision.⁴⁰ We also note that Fenglian placed information on the record regarding its sales of honey to third-country markets to support its argument that its sales to the United States were not of abnormally small quantities;⁴¹ however, because there are CBP entries for subject merchandise for sales made during the POR on the record, we find it unnecessary and less relevant to examine Fenglian's third-country sales. Therefore, based on the CBP data, as in the Preliminary Results, we continue to find the quantity of Fenglian's sale to be atypical compared to the other sales of the same type of honey imported from the PRC to the U.S. during the POR. However, the quantity of a sale, in and of itself, does not warrant a determination that the sale is not *bona fide*. Thus, consistent with Department practice, we have looked to other factors, and examined the totality of the circumstances, to determine whether Fenglian's U.S. sales are indeed *bona fide* transactions.

III. Business Practices of Fenglian's U.S. Customer

Fenglian's Case Brief Arguments

- Fenglian's U.S. customer had an established history in the honey trade going back to 2008, before the current owner bought it.

³⁸ See, e.g., Garlic and accompanying Issues and Decision Memorandum at Comment 10.

³⁹ See Fenglian Case Brief at 20.

⁴⁰ See, e.g., Pistachios.

⁴¹ See Fenglian's Second Supplemental Questionnaire Response, dated June 16, 2010, at Exhibit SS-1.

- Natural business progression led the importer to buy honey from the PRC because: 1) it purchased honey at a non-dumping price, so the probability of paying antidumping duties was low; 2) it is more profitable to cut out the middleman; 3) Fenglian and the U.S. customer agreed not to sell at dumping prices in the future; and 4) the importer needed alternate suppliers in case the prices of domestic sources became an issue. It is not unusual for importers to buy honey without a buyer lined up.
- The U.S. customer did not resell the honey right away because it had to wait several months to make sure the honey did not crystallize, and then it had to wait for its packing machine to be repaired.

Petitioners' Rebuttal Brief Arguments

- It is still unclear that Fenglian's U.S. customer had an established history in the honey trade.
- The U.S. importer had no means to evaluate the risk of paying dumping duties on a shipment from a new shipper because the parties had no commercial history with each other, which means the importer took a big financial risk in this transaction.
- Combined with the dumping duty deposit, the total price to the importer was a huge financial risk for the importer.
- The importer's explanations for why the honey was not resold are suspect and not backed up with evidence to support them.

Department's Position: Consistent with the Department's practice, and as affirmed by the CIT, the Department must evaluate the circumstances surrounding the sales, such that Fenglian does not unfairly benefit from atypical sales, and obtain a lower dumping margin than the producer's usual commercial practice would dictate.⁴² In the Preliminary Results the Department considered the U.S. customer's business practices with regard to its established history and reasons for importing honey from Fenglian and determined it could not conclude that these business practices were unusual or support a non-*bona fide* determination. However, for these final results, we find that Fenglian's U.S. customer's actions with respect to the sale under review, in particular its failure to resell the honey purchased from Fenglian, support a non-*bona fide* determination. Fenglian argues that it attempted to submit evidence demonstrating that its customer resold the honey. However, as discussed above in Comment 1, the submission was properly rejected as untimely new factual information. Furthermore, although the U.S. customer states that its honey repacking machine has been broken, and that it has had inquiries about the honey, it has only been able to provide the name of a service company and its telephone number as evidence of the disrepair of its machine, and it has not submitted any evidence of purchase inquiries. Additionally, although Fenglian has made claims regarding the possible effect of crystallization on the packing and usability of the honey it sold to its U.S. customer,⁴³ there is no evidence on the record of this review regarding honey crystallization and its effect on honey salability that can be used by the Department to determine the value of this claim within the context of analyzing the U.S. customer's business practices. Therefore, we continue to find that the fact that: 1) the U.S. customer chose to import honey without a buyer lined up; and 2) there

⁴² See New Donghua, 374 F. Supp. 2d at 1338-39.

⁴³ See Fenglian Case Brief at 24.

is no evidence on the record of this review that it resold the honey it purchased are indicative of a non-bona fide sale.

In sum, given the totality of the circumstances surrounding Fenglian’s U.S. sales, including the atypical price and quantities, the fact that the purchases were atypical for the U.S. customer, and other circumstances further elaborated in the above-referenced decision memorandum regarding bona fides,⁴⁴ the Department continues to find, as we did in the Preliminary Results, that Fenglian’s POR sales are not bona fide commercial transactions. Therefore, we will rescind the review with respect to Fenglian.

Based on the totality of the circumstances discussed above, for these final results, the Department has determined that Fenglian’s sales are not bona fide transactions, and subsequently is rescinding the administrative review with respect to Fenglian.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final results of review and the final dumping margins in the Federal Register.

AGREE _____ DISAGREE _____

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date

⁴⁴ See Suzhou Bona Fide Memo; see also Memorandum to the James C. Doyle, Director, Office 9, from Josh Startup, International Trade Compliance Analyst, through Catherine Bertrand, Program Manager, regarding “Antidumping Duty New Shipper Review of Honey from the People’s Republic of China: Bona Fide Analysis of the Sale Under Review for Wuhu Fenglian Co., Ltd.,” dated September 2, 2010.