



July 12, 2011

**MEMORANDUM TO:** Christian Marsh  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

**FROM:** Barbara E. Tillman  
Director  
AD/CVD Operations, Office 6

**SUBJECT:** Antidumping Duty Order on Fresh Garlic from the People's  
Republic of China: Final Scope Ruling – General Mills, Inc.

---

### Summary

On November 16, 1994, the Department of Commerce (the Department) published in the Federal Register the antidumping duty order on fresh garlic from the People's Republic of China (PRC).<sup>1</sup> On April 13, 2011, the Department accepted General Mills, Inc.'s (GMI) submission requesting a scope ruling on whether its imports of minced garlic for use in non-fresh applications are excluded from the scope of the Order.

Pursuant to an analysis under 19 CFR 351.225(k)(1), we recommend that the Department determine that GMI's minced garlic is not within the scope of the Order.

### Background

GMI filed its initial scope ruling request on March 11, 2011, but the Department determined the request was incomplete. On March 22, 2011, the Department notified GMI that it could not accept the request until GMI provided supplementary information. On April 13, 2011, GMI filed supplementary information and the Department determined that the request was complete, thus beginning the 45-day review period as established in 19 CFR 351.225(c)(2). Petitioners<sup>2</sup> filed comments on May 18, 2011, arguing that minced garlic is, in fact, within the scope of the Order. On May 25, 2011, the Department extended the review period by 30 days, until June 27, 2011, to either issue a final scope ruling, or to initiate a scope inquiry under 19 CFR 351.225(e). GMI filed rebuttal comments on June 2, 2011, disputing Petitioners' arguments and arguing that minced garlic for use in non-fresh applications is outside the scope of the Order. Finally, on June 22, 2011, the Department extended the review period an additional 15 days to no later than July 12, 2011.

---

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

<sup>2</sup> The Fresh Garlic Producers Association and its individual members: Christopher Ranch, LLC; The Garlic Company; Valley Garlic; and, Vessey and Company, Inc. (Petitioners).



### **Scope of the Order**

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

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

### **Legal Framework**

The Department examines scope requests in accordance with the Department's scope regulations. See 19 CFR 351.225. On matters concerning the scope of an antidumping duty order, the Department first examines the description of the merchandise contained in the petition, the initial investigation, the determinations of the Secretary (including prior scope determinations) and the International Trade Commission (ITC). See 19 CFR 351.225(k)(1). This determination may take place with or without a formal inquiry. If the Department determines that these descriptions are dispositive of the matter, the Department will issue a final scope ruling as to whether or not the subject merchandise is covered by the order. See 19 CFR 351.225(d).

Where the descriptions of the merchandise are not dispositive, the Department will consider the five additional factors set forth in 19 CFR 351.225(k)(2). These criteria are: i) the physical characteristics of the merchandise; ii) the expectations of the ultimate purchasers; iii) the ultimate use of the product; iv) the channels of trade in which the product is sold; and v) the manner in which the product is advertised and displayed. See 19 CFR 351.225(k)(2). The determination as to which analytical framework is most appropriate in any given scope inquiry is made on a case-by-case basis after consideration of the evidence before the Department.

### **Interested Parties' Arguments**

In its scope ruling request, GMI, citing to the investigation initiation instructions issued by CBP<sup>3</sup> and the garlic scope ruling based on a request from Coppersmith, Inc. and Amexim, Inc., states that the Department has not yet determined whether garlic that is minced is included within the

---

<sup>3</sup> See Initiation of Antidumping Duty Investigation of Fresh Garlic from the People's Republic of China (A-570-831), from Nancy McTiernan, Director, Trade Compliance Division, U.S. Customs and Border Protection Message 4063111 (March 4, 1994).

scope of the Order.<sup>4</sup> GMI then presents its arguments that minced garlic is outside the scope. In taking this position, GMI contends that minced garlic, which is garlic that has been chopped and prepared to be used for further commercial applications, is not described in the scope.<sup>5</sup> Citing the scope of the Order, GMI points out that the language of the Order indicates that it only covers garlic which is “whole or separated into constituent cloves,” whereas GMI’s minced garlic is “further reduced in size, with the cloves being minced into small pieces.”<sup>6</sup> Therefore, GMI holds that the minced garlic is not in whole or constituent clove form and, as such, does not fall within the criteria specified by the scope of the Order.<sup>7</sup> Furthermore, GMI notes that where the scope includes garlic that is “peeled, fresh, chilled, frozen, provisionally preserved or packed in water or other neutral substance, but not prepared or preserved by the addition of other ingredients or heat processing,” the focus is on keeping merchandise fresh rather than the physical form the garlic takes. Citing to Zhengzhou Harmoni Spice Co. v. United States,<sup>8</sup> GMI also argues that the Department has previously held that garlic covered under the Order has been cleaned and packed but not generally processed any further. GMI explains that minced garlic and the process of mincing are not mentioned in the scope and therefore minced garlic is excluded from the scope.

In addition to the arguments above, GMI states that the garlic will only be used as an ingredient in making Muir Glen bottled, canned, and jarred sauces and salsas. As such, GMI argues, this non-fresh use is a “clear exception under subparagraph (a) of the listed exclusions in the scope.”<sup>9</sup> Moreover, GMI maintains that, whereas it is essential that fresh garlic have its protective skins, the garlic used to make minced garlic is harvested by hand in a way that holds no regard for preserving the protective skins, thereby distinguishing the two products from each other.<sup>10</sup> In making this argument, GMI cites to the ITC’s statement that the number of skins on fresh garlic is critical.<sup>11</sup> Furthermore, GMI holds that minced garlic does not compete with the fresh garlic industry, therefore excluding minced garlic from the scope. GMI continues by arguing that like dehydrated and seed garlic, both of which were excluded from the scope of the Order, minced garlic is significantly different from the fresh garlic included in the Order. Finally, GMI points out that there is no overlap in producers, channels of distribution and advertising between fresh garlic destined for consumers and minced garlic used as an ingredient in sauces and salsas.

Petitioners contend that minced garlic is clearly a fresh garlic product that is subject to the Order. First, Petitioners explain that, in the investigation, the ITC determined there were three types of garlic – fresh, dehydrated and seed garlic – but that only domestic producers of fresh garlic were being materially injured.<sup>12</sup> Petitioners note that, as a result of the ITC’s determination, the Department developed a revised scope that included exceptions for seed and dehydrated garlic;

---

<sup>4</sup> See Notice of Scope Rulings, 70 FR 24533, 24534 (May 10, 2005). The Department ruled that certain garlic cloves in brine are within the scope.

<sup>5</sup> See Scope Inquiry: Whether Minced Garlic is Subject to A-570-831 (March 11, 2011) (GMI Request) at 7.

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> See Zhengzhou Harmoni Spice Co., Ltd. v. United States, 617 F. Supp. 2d 1281, 1294 (CIT 2009).

<sup>9</sup> See GMI Request at 10.

<sup>10</sup> Id. at 11.

<sup>11</sup> See Garlic From China, Inv. No. 731-TA-683 (Final), U.S. International Trade Commission Pub. 2825 (November 1994) (ITC Final Determination).

<sup>12</sup> See Antidumping Order on Fresh Garlic from China: Petitioners’ Response in Opposition to Request for Scope Ruling on Certain Minced Garlic Imports (May 18, 2011) at 3-6; see also ITC Final Determination.

the new scope becoming the scope of the Order.<sup>13</sup> Consequently, Petitioners contend that GMI is incorrect in arguing that the minced garlic destined for non-fresh use falls into the scope exceptions carved out for seed and dehydrated garlic. Petitioners clarify that garlic must be mechanically harvested as well as primarily, but not exclusively, destined for non-fresh use in order to qualify for exception (a) in the scope. Pointing to GMI's admission that the raw garlic used to produce its minced garlic is harvested by hand, Petitioners argue that GMI's minced garlic is disqualified from this scope exclusion. Additionally, citing to the ITC Final Determination, Petitioners argue that GMI is incorrect in contending that fresh garlic must be destined for a fresh use buyer to be within the scope.<sup>14</sup>

Finally, Petitioners maintain that GMI's minced garlic imports fall within the category of fresh garlic because the garlic is processed in fresh form and the only inputs into minced garlic are peeled garlic cloves. Petitioners argue that the minced garlic is not "prepared or preserved by the addition of ingredients other than water or other neutral substance" nor is there any evidence it has been subjected to heat processing.<sup>15</sup> As such, Petitioners contend that there is no information on the record which indicates that "fresh garlic cloves that have been chopped into small pieces" are not also "in a fresh condition," thus making the minced garlic clearly subject to the Order. In response to GMI's statement that the scope is limited to "all grades of garlic, whole or separated into constituent cloves," Petitioners argue that the ITC determined that crushed, pureed and chopped garlic which has undergone heat processing and pasteurization is part of the fresh garlic product even though it was excluded from the Order since it was processed to be a shelf-stable good. Based on that evidence, Petitioners maintain that minced garlic that has not been subjected to heat processing and pasteurization would also be considered part of the fresh garlic product as it is not a preserved product, but would, in fact, be included in the Order. Furthermore, Petitioners argue that the HTSUS heading under which GMI's minced garlic entered shows the Department's intention to include fresh garlic products which are reduced in size, and therefore smaller than peeled garlic cloves.<sup>16</sup> Thus, Petitioners argue that GMI's minced garlic is clearly subject to the scope of the Order.

GMI argues that the plain language of the scope of the Order clearly excludes minced garlic and that, had Petitioners wished to include garlic further reduced in size, it would have been included in the scope.<sup>17</sup> Furthermore, GMI notes that there is no evidence on the record of the investigation which indicates that minced garlic not subject to heat-processing and pasteurization was meant to be included in the scope. Therefore, GMI contends that the scope of the Order should only be interpreted by what it says; specifically, that only garlic which is whole or separated into constituent cloves is within the Order.<sup>18</sup> Continuing its rebuttal, GMI points out that while whole or peeled garlic can serve a variety of cooking and processing purposes and is primarily used by consumers in the home, GMI's minced garlic is sold directly and exclusively

---

<sup>13</sup> Id. at 6.

<sup>14</sup> Id. at 8.

<sup>15</sup> Id.

<sup>16</sup> GMI minced garlic entered under HTSUS 0710.80.9750: Vegetables (uncooked or cooked by steaming or boiling in water), frozen: Other vegetables: Other: Reduced In Size: Other

<sup>17</sup> See General Mills Inc: Rebuttal to Petitioner's Opposition to Request for Scope Ruling; Fresh Garlic from the People's Republic of China (June 2, 2011) at 2-3.

<sup>18</sup> Id. at 5.

to food processors and cannot be used for other purposes.<sup>19</sup> GMI further argues its minced garlic does not compete with Petitioners' garlic in terms of consumption, distribution, channels of distribution or even advertising and marketing. Consequently, GMI states that minced garlic is distinct from fresh garlic as detailed in the scope and that the Department should conclude that minced garlic destined for non-fresh use is, in fact, outside the scope of the Order. Petitioners did not file any further information or argument.

### **Analysis**

The Department has evaluated the information submitted by GMI and Petitioners in accordance with 19 CFR 351.225(d) and 19 CFR 351.225(k)(1) and finds that the Department can determine whether the garlic described in GMI's application is within Order. Therefore, the Department finds it unnecessary to consider the additional factors as described under 19 CFR 351.225(k)(2).

In determining whether a product is covered by the scope of an order, the "predicate for the interpretive process is . . . the language in the order itself."<sup>20</sup> Thus, before reviewing the other sources of information listed in 19 CFR 351.225(k)(1), the Department looked to the language of the scope of the Order. The scope of the Order specifically covers "all grades of garlic, whole or separated into constituent cloves, whether or not peeled, fresh, chilled, frozen, provisionally preserved, or packed in water or other neutral substance, but not prepared or preserved by the addition of other ingredients or heat processing." GMI contends that its merchandise is neither whole garlic, nor garlic separated into cloves, but instead chopped into small pieces, and therefore falling outside the scope of the Order. Furthermore, GMI argues that, if Petitioners intended to include garlic which has been reduced in size, the scope language would have addressed this point. Petitioners counter that minced garlic is part of the fresh garlic category subject to the Order because it does not fall into the categories of seed or dehydrated garlic and it is derived solely from fresh, peeled garlic, which is subject to the Order.

Reviewing the scope of the Order, the Department finds that the language of the Order and the discussions on record during the course of the investigation are sufficiently clear to address GMI's request for a scope ruling. Specifically, the scope's first sentence, defining garlic subject to the order as either being in whole form or separated into constituent cloves, makes it clear that GMI's minced garlic does not fall within the four corners of the scope. The modifying phrase after "all grades of garlic," is "whole or separated into constituent cloves, . . ." This modifying phrase appears to be delimiting because it lists only two types of covered garlic, whole *or* cloves, does not describe any type of garlic reduced in size beyond constituent cloves, and does not include any language or phrasing that could be interpreted as a non-exhaustive list of the types of garlic covered.<sup>21</sup> The scope then goes on to modify the phrase "whether whole or separated into

---

<sup>19</sup> Id. at 6.

<sup>20</sup> See Duferco Steel, Inc. v. United States, 296 F.3d 1087, 1097 (Fed. Cir. 2002).

<sup>21</sup> This is in contrast to the scope of the antidumping duty order on petroleum wax candles from the People's Republic of China (Candles) which first provided a broad definition of the scope, e.g., "scented or unscented petroleum wax candles . . ." and then presented a list of shapes within the scope. In Candles, the Department determined in a scope ruling that the list of shapes was not modified by express words of exclusivity and thus should not have restricted the initial definition which set broad parameters for products covered by the scope. See Final Scope Ruling; Antidumping Duty Order on Petroleum Wax Candles From the People's Republic of China (A-570-504); JC Penney Purchasing Corporation (November 9, 2001) at 4. This approach to analyzing what falls within the scope of an order was supported by the Court of International Trade, which emphasized that not every single product

constituent cloves . . . ,” with the phrase, whether or not peeled, fresh, chilled . . .” Again, this language does not mention minced garlic or garlic reduced in size beyond peeling, and it does not contain any language or phrasing that could be interpreted as a non-exhaustive list of the types of garlic covered. Thus, while Petitioners are correct that minced garlic does not fall within the stated exclusions, it does not need to because the plain language of the scope and the structure of the scope do not provide a basis for finding the minced garlic to be within the scope of the order. Additionally, while Petitioners cite to the ITC’s discussion on chopped garlic subjected to heat processing, the Department has no evidence which indicates that garlic which has been chopped, minced or otherwise reduced in size, but not subjected to heat or other processing, was intended to be included in the Order.

The Department notes that during the investigation, there was some debate about including garlic reduced in size in the scope. On March 17, 1994, CBP, based on its interpretation of the products under investigation, suggested the scope include language stating “... garlic, fresh, chilled, or frozen, whether or not peeled or reduced in size, but not otherwise prepared or preserved.”<sup>22</sup> Further along in the investigation, but prior to the publication of the preliminary determination, the Department memorialized a conversation with Stanley Hopard, a national import specialist at CBP, which stated: “{The Department} also indicated to Mr. Hopard that the petitioner did not want to broaden the scope of the investigation to include further processed or preserved garlic; e.g., dried garlic, minced garlic, or garlic flakes or powder.”<sup>23</sup>

In the preliminary determination issued several days after the memorandum, the scope did not contain any language that referred to garlic further reduced in size, nor did the structure of the scope contain language that would indicate that all fresh garlic, including fresh garlic reduced in size would appropriately be covered by the scope.<sup>24</sup> Additionally, in the preliminary determination, the Department noted that the scope description differed from that listed in the initiation notice; the changes being “(a) the addition of more concise language (and additional HTS subheadings) related to the packing of the subject merchandise, and (b) additional language to exclude further processed products.”<sup>25</sup> The Department received no comments on the memorandum or the scope set forth in the preliminary determination, and the scope in the final determination was identical to the scope in the preliminary determination.<sup>26</sup> As such, the scope did not change between the preliminary and final determinations,<sup>27</sup> and was modified only

---

subject to the order must be identified or listed in the scope . See Duferco Steel, Inc. v. United States, Slip Op. 01-62 (CIT, May 31, 2001).

<sup>22</sup> See Memorandum to Richard Moreland, Director, from Chief, National Import Specialist Food and Chemicals Branch – New York Seaport Office of Antidumping Investigations, Subject: Scope of Investigation (March 17, 1994).

<sup>23</sup> See Memorandum for James Maeder, Program Manager, Subject: Scope Discussions with Customs (July 1, 1994).

<sup>24</sup> See Notice of Preliminary Determination of Sales at Less Than Fair Value: Fresh Garlic From the People's Republic of China, 59 FR 35310 (July 11, 1994).

<sup>25</sup> Id.

<sup>26</sup> See Notice of Final Determination of Sales at Less Than Fair Value: Fresh Garlic From the People's Republic of China, 59 FR 49058 (September 26, 1994).

<sup>27</sup> Id.

slightly at publication of the order<sup>28</sup> so as to more clearly define the intended exclusion of garlic destined for use as dehydrated and seed garlic products.<sup>29</sup>

With regard to Petitioners' argument that the HTSUS classification number under which GMI entered the minced garlic indicates that the Department intended on including garlic which has been further reduced in size, the Department notes that the HTSUS number covers other frozen vegetables which are reduced in size, a basket category that does not solely encompass garlic. Basket categories are routinely included in scopes in order to ensure that all possible HTSUS numbers under which a product might enter are included in the scope, but the inclusion of such HTSUS numbers does not mean that all entries under every number are covered by the scope of the order. As clearly stated in the scope of the Order itself, the inclusion of an HTSUS number in the scope of the Order does not supersede the description of the merchandise subject to the order.<sup>30</sup> Consequently, evidence on the record of this case supports a finding that, during the course of the investigation, minced garlic was not intended to be covered by the scope of the investigation and the ITC's definition of the domestic like product did not change the scope set forth in the final determination.

GMI additionally argues that its minced garlic is also excluded from the Order because it is primarily destined for non-fresh use as stated in exclusion (a) of the scope and that its product differs from fresh garlic because it moves through different channels of distribution, has a separate ultimate use with different end users, and is not advertised or marketed. GMI clearly notes in its request that the raw garlic used to produce its minced garlic is harvested by hand.<sup>31</sup> In reviewing exclusion (a), "{g}arlic that has been mechanically harvested and that is primarily, but not exclusively, destined for non-fresh use," the Department finds that GMI's minced garlic does not qualify for this exclusion as it requires the garlic to have been both mechanically harvested and primarily destined for non-fresh use.

GMI's other arguments about minced garlic being different from fresh garlic, having different distribution channels and end users, and, lacking overlapping advertising and marketing are all factors considered under 19 CFR 351.225(k)(2), which the Department would evaluate if the criteria under 19 CFR 351.225(k)(1) were not dispositive. The Department has determined that the investigation record and language of the scope itself are sufficiently dispositive and therefore analysis of the criteria presented in 19 CFR 351.225(k)(2) is not required.

### **Recommendation**

Based upon the foregoing analysis, we recommend finding that, pursuant to 19 CFR 351.224(d) and 19 CRF 351.225(k)(1), the minced garlic in question is outside the scope of the Order.

---

<sup>28</sup> See Order.

<sup>29</sup> The Department notes that the ITC, in its preliminary determination, found the domestic like product to be all fresh garlic, including that intended for use as dehydrated and seed garlic. See Garlic From China, Inv. No. 731-TA-683 (Preliminary), U.S. International Trade Commission Pub. 2755 (March 1994) (ITC Preliminary Determination) at I-9. In its final determination, the ITC determined that only fresh garlic destined for fresh use was the like product, thus excluding dehydrated and seed garlic. See ITC Final Determination at I-12. In both determinations, the ITC also ruled that processed products were not part of the like product. See ITC Preliminary Determination at I-9-10; see also ITC Final Determination at I-12-14.

<sup>30</sup> See Scope of the Order section above.

<sup>31</sup> See GMI Request at 2.

If this recommendation is accepted, we will publish this ruling in the Department's quarterly notice of scope rulings in the Federal Register. We will also instruct CBP to terminate suspension and liquidate all unliquidated entries of minced garlic imported from the PRC by GMI.

✓  
Agree

Disagree

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

7/12/11  
Date