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MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

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

SUBJECT: Decision Memorandum for Preliminary Results of Antidumping
Duty Administrative Review: Certain Preserved Mushrooms from
India

SUMMARY

The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on certain preserved mushrooms (mushrooms) from India. The review covers one producer and exporter of the subject merchandise, Agro Dutch Industries Limited (Agro Dutch). The period of review (POR) is February 1, 2011, through January 31, 2012. We have preliminarily assigned to Agro Dutch an antidumping duty margin based upon the application of adverse facts available (AFA) because of its failure to act to the best of its ability in complying with the Department's request for information in this review.

BACKGROUND

Pursuant to section 751(a)(1) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213(b), Monterey Mushrooms, Inc. a petitioner and a domestic interested party (the petitioner), requested an administrative review of the antidumping duty order on mushrooms from India with respect to Agro Dutch, Himalya International Ltd. (Himalya), Hindustan Lever Ltd. (formerly Ponds India, Ltd.) (Hindustan), Transchem Ltd. (Transchem), and Weikfield Foods Pvt. Ltd (Weikfield) on February 29, 2012.¹ On March 30, 2012, in accordance with 19 CFR 351.221(c)(1)(i), we published a notice of initiation of administrative review of the antidumping duty order on mushrooms from India.²

On May 11, 2012, we issued the antidumping duty questionnaire to Agro Dutch. Agro Dutch requested three extensions of the deadline to submit a response to the questionnaire, which we

¹ See the petitioner's letter to the Department, dated February 29, 2012.

² See Initiation of Antidumping Duty Administrative Reviews, Request for Revocation in Part, and Deferral of Administrative Review, 77 FR 19179 (March 30, 2012) (Initiation Notice).



granted.³ On May 10, 2012, the petitioner withdrew its request for review of Himalya, Hindustan, Transchem, and Weikfield. Accordingly, we rescinded the review with respect to these companies.⁴ On July 5, 2012, pursuant to 19 CFR 351.307(b)(1)(iv) and (v), the petitioner requested that the Department conduct verification of the information placed on the record of this proceeding by Agro Dutch. On July 2 and 17, 2012, Agro Dutch filed responses to sections A and C of the Department's questionnaire, respectively, but did not file a response to section D of the questionnaire as required.⁵ On August 2, 2012, counsel to Agro Dutch informed us via email that Agro Dutch would not participate further in the administrative review.⁶ On August 8, 2012, the petitioner filed comments (August 8, 2012 comments) with respect to the preliminary results for Agro Dutch.

We are conducting the administrative review of the order in accordance with section 751(a) of the Act.

SCOPE OF THE ORDER

The merchandise subject to the order is certain preserved mushrooms, whether imported whole, sliced, diced, or as stems and pieces. The preserved mushrooms covered under this order are the species *Agaricus bisporus* and *Agaricus bitorquis*. "Preserved mushrooms" refer to mushrooms that have been prepared or preserved by cleaning, blanching, and sometimes slicing or cutting. These mushrooms are then packed and heated in containers including but not limited to cans or glass jars in a suitable liquid medium, including but not limited to water, brine, butter or butter sauce. Preserved mushrooms may be imported whole, sliced, diced, or as stems and pieces. Included within the scope of this order are "brined" mushrooms, which are presalted and packed in a heavy salt solution to provisionally preserve them for further processing.

Excluded from the scope of this order are the following: (1) All other species of mushroom, including straw mushrooms; (2) all fresh and chilled mushrooms, including "refrigerated" or "quick blanched mushrooms"; (3) dried mushrooms; (4) frozen mushrooms; and (5) "marinated," "acidified" or "pickled" mushrooms, which are prepared or preserved by means of vinegar or acetic acid, but may contain oil or other additives.

The merchandise subject to this order is classifiable under subheadings: 2003.10.0127, 2003.10.0131, 2003.10.0137, 2003.10.0143, 2003.10.0147, 2003.10.0153, 0711.51.0000, 0711.90.4000, 2003.10.0027, 2003.10.0031, 2003.10.0037, 2003.10.0043 and 2003.10.0047 of the Harmonized Tariff Schedule of the United States (HTS). Although the HTS subheadings are provided for convenience and customs purposes, our written description of the scope of this

³ See June 15, 2012, July 2, 2012 and July 16, 2012, letters from the Department to Ronald M. Wisla, counsel to Agro Dutch.

⁴ See Certain Preserved Mushrooms from India: Notice of Partial Rescission of Antidumping Duty Administrative Review, 77 FR 32941 (June 4, 2012).

⁵ In its section A response, Agro Dutch reported that it did not have home market or third country sales of mushrooms during this POR. Therefore, it did not respond to section B of the questionnaire, but was required to respond to section D of the questionnaire. No response to section E of the questionnaire was required.

⁶ See Memorandum to the File, "Agro Dutch Industries Limited Failure to File Section D Questionnaire Response", dated August 13, 2012 (August 13, 2012 Memoranda to the File).

order is dispositive.

DISCUSSION OF THE METHODOLOGY

Application of Facts Available

Section 776(a) of the Act provides that the Department shall, subject to section 782(d) of the Act, apply “the facts otherwise available” if (1) necessary information is not available on the record of an antidumping proceeding or (2) an interested party or any other person: (A) withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i) of the Act.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party with an opportunity to remedy or explain the deficiency. Section 782(e) of the Act provides that the Department “shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority” if the information is submitted in a timely manner, can be verified, is not so incomplete that it cannot be used, and the interested party acted to the best of its ability in providing the information.

Because Agro Dutch did not respond to all the requisite sections of the antidumping duty questionnaire, the Department preliminarily determines that necessary information is not available on the record to serve as the basis for the calculation of a margin for Agro Dutch. See section 776(a)(1) of the Act. We also preliminarily find that Agro Dutch withheld information requested by the Department and significantly impeded the proceeding. See sections 776(a)(2)(A) and (C) of the Act. Specifically, Agro Dutch did not file a response to section D of the Department’s questionnaire. Because Agro Dutch did not have a viable home or third country market during the POR, a section D response was necessary in order to calculate normal value. Moreover, Agro Dutch informed us that it would not participate further in this review. Therefore, pursuant to sections 776(a)(1) and 776(a)(2)(A) and (C) of the Act, the Department preliminarily determines that the use of the facts otherwise available is warranted for Agro Dutch. Because Agro Dutch failed to provide critical information for margin calculation purposes in this administrative review, and informed the Department that it would not participate further in the review sections, 782(d) and (e) of the Act are not applicable in this case.

Application of Adverse Facts Available (AFA)

Section 776(b) of the Act provides that, if the Department finds an interested party has failed to cooperate by not acting to the best of its ability to comply with requests for information, the Department may use an inference that is adverse to the interests of that party in selecting from

the facts otherwise available.⁷ Adverse inferences are appropriate “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”⁸ Furthermore, “affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.”⁹ Section 776(b) of the Act authorizes the Department to use as adverse facts available information derived from the petition, the final determination from the less than fair value (LTFV) investigation, a previous administrative review, or any other information placed on the record. Under section 782(c) of the Act, a respondent has a responsibility not only to notify the Department if it is unable to provide requested information, but also to provide a “full explanation and suggested alternative forms”. After the deadline had passed to submit a response to section D of the antidumping duty questionnaire, Agro Dutch’s counsel informed the Department that Agro Dutch did not respond to section D and would not participate further in this review¹⁰, thereby failing to comply with this provision of the statute. Therefore, we preliminarily determine that Agro Dutch failed to cooperate to the best of its ability, and that an adverse inference is warranted in selecting from the facts otherwise available pursuant to section 776(b) of the Act.¹¹

Selection of AFA Rate

In deciding what rate to apply as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) authorize the Department to rely on information derived from (1) the petition, (2) a final determination in the investigation, (3) any previous review or determination, or (4) any other information placed on the record. The Department’s practice, when selecting an AFA rate from among the possible sources of information, has been to ensure that the margin is sufficiently adverse “as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner”.¹² Specifically, the Department’s practice in reviews, when selecting a rate as total

⁷ See, e.g., Notice of Final Results of Antidumping Duty Administrative Review, and Final Determination to Revoke the Order In Part: Individually Quick Frozen Red Raspberries from Chile, 72 FR 70295, 70297 (December 11, 2007).

⁸ See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, Vol. 1 (1994) (SAA) at 870.

⁹ See Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27340 (May 19, 1997); see also Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382-83 (Fed. Cir. 2003).

¹⁰ See Memorandum to the File, “Telephone Conversation with Counsel to Agro Dutch Industries Limited (Agro Dutch) Regarding July 30, 2012, Deadline to File Section D Questionnaire Response”, dated August 1, 2012; and also August 13, 2012 Memoranda to the File.

¹¹ See, e.g., Stainless Steel Sheet and Strip in Coils From Japan: Preliminary Results of Antidumping Duty Administrative Review, 70 FR 18369 (April 11, 2005), unchanged in Stainless Steel Sheet and Strip in Coils from Japan: Final Results of Antidumping Duty Administrative Review, 70 FR 37759 (June 30, 2005) (KSC/JFE’s counsel contacted the Department to state that KSC/JFE would not be submitting a response to the Department’s antidumping questionnaire).

¹² See, e.g., Carbazole Violet Pigment 23 from India: Preliminary Results of Antidumping Duty Administrative Review, 73 FR 52012 (September 8, 2008) unchanged in Carbazole Violet Pigment 23 from India: Final Results of Antidumping Duty Administrative Review, 73 FR 74141 (December 5, 2008) (Carbazole from India); see also Antifriction Bearings and Parts Thereof from France, et al.: Preliminary Results of Antidumping Duty Administrative Reviews, Partial Rescission of Administrative Reviews, Notice of Intent to Rescind Administrative Reviews, and Notice of Intent to Revoke Order in Part, 69 FR 5949, 5953 (February 9, 2004), unchanged in Antifriction Bearings and Parts Thereof from France, et al.: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Reviews in Part, and Determination To Revoke Order in Part, 69 FR 55574,

AFA, is to use the highest rate on the record of the proceeding which, to the extent practicable, can be corroborated.¹³ The Court of International Trade and the Court of Appeals for the Federal Circuit have affirmed decisions to select the highest margin from any prior segment of the proceeding as the AFA rate on numerous occasions.¹⁴

In its August 8, 2012, comments the petitioner argues that the Department should assign to Agro Dutch the highest margin in this proceeding, the petition rate of 243.87 percent. In particular, the petitioner argues that the petition rate satisfies the statute's corroboration requirement and was used by the Department in the final determination of the LTFV investigation.¹⁵ Although the petition rate was used as AFA in the LTFV final determination, in the 2000 – 2001 administrative review, we could not corroborate the petition rate and therefore did not rely on it as the AFA rate.¹⁶ Similarly, we are unable to corroborate the petition rate in this review and, therefore, are not relying on it as the AFA rate. Pursuant to the Department's practice, we are preliminarily assigning to Agro Dutch an AFA rate of 114.76 percent, which is a rate calculated previously for another respondent and the highest margin on the record of this proceeding that can be corroborated.¹⁷

Corroboration of Information

Section 776(c) of the Act requires the Department to corroborate, to the extent practicable, secondary information used as facts available. Secondary information is defined as information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.¹⁸ The SAA clarifies that "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value.¹⁹ The SAA also states that independent sources used to corroborate such evidence may include, for

55576-77 (September 15, 2004) (Bearings from France, et al).

¹³ See Glycine from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, 74 FR 15930, 15934 (April 8, 2009) unchanged in Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 74 FR 41121 (August 14, 2009); See also Fujian Lianfu Forestry Co., Ltd. v. United States, 638 F. Supp. 2d 1325, 1336 (CIT August 10, 2009) ("Commerce may, of course, begin its total AFA selection process by defaulting to the highest rate in any segment of the proceeding, but that selection must then be corroborated, to the extent practicable.").

¹⁴ See, e.g., KYD, Inc. v. United States, 607F.3d 760, 766-767 (Fed. Cir. 2010) (KYD); See also NSK Ltd. v. United States, 346 F. Supp. 2d 1312, 1335 (CIT 2004) (affirming a 73.55 percent total AFA rate, the highest available dumping margin calculated for a different respondent in the investigation).

¹⁵ See Notice of Final Determination of Sales at Less than Fair Value: Certain Preserved Mushrooms from India, 63 FR 72246 (December 31, 1998).

¹⁶ See Certain Preserved Mushrooms from India: Final Results of Antidumping Duty Administrative Review, 67 FR 46172 (July 12, 2002), and accompanying Issues and Decision Memorandum at Comment 8; unchanged in Certain Preserved Mushrooms from India: Notice of Amended Final Results Pursuant to Final Court Decision, 75 FR 18151 (April 9, 2010).

¹⁷ This rate was calculated for Flex Foods, Ltd. (Flex Foods), a respondent in the 2003-2004 administrative review of the antidumping duty order on mushrooms from India. See Certain Preserved Mushrooms from India: Preliminary Results of Antidumping Duty Administrative Review, 70 FR 10597 (March 4, 2005); unchanged in Certain Preserved Mushrooms from India: Final Results of Antidumping Duty Administrative Review, 70 FR 37757 (June 30, 2005) (2003 -2004 Administrative Review).

¹⁸ See 19 CFR 351.308(c) and (d); See also the SAA at 870.

¹⁹ See the SAA at 870.

example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation.²⁰ To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used.²¹

Unlike other types of information such as input costs or selling expenses, there are no independent sources for calculated dumping margins. The only source for an antidumping margin is the investigation and prior administrative determinations. If the Department chooses as facts available a calculated dumping margin from the investigation or a prior segment of the proceeding, it is not necessary to question the reliability of the margin.²²

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal to determine whether a margin has relevance. Where circumstances indicate that the selected margin is not appropriate as AFA, the Department will disregard the margin and determine an appropriate margin. For example, in Fresh Cut Flowers from Mexico: Final Results of Antidumping Duty Administrative Review, 61 FR 6812, 6814 (February 22, 1996), the Department disregarded the highest margin in that case as adverse best information available (the predecessor to facts available) because the margin was based on another company's uncharacteristic business expense resulting in an unusually high margin. Similarly, the Department does not apply a margin that has been discredited or judicially invalidated.²³

In this case, there are no circumstances present to indicate that the selected margin – the highest calculated margin (114.76 percent) on the record of this proceeding – is not appropriate for use as AFA. Regarding reliability, the Department considers this margin to be reliable because it is a calculated margin for a respondent (Flex Foods) in the 2003 – 2004 administrative review. Regarding relevancy, the Department considers this margin to be relevant to Agro Dutch because it is a weighted-average margin assigned in a prior segment of the proceeding to a respondent which, like Agro Dutch is both a producer and export of subject merchandise.²⁴ We find no basis to conclude that this rate is inappropriate for use as AFA. Accordingly, we determine that the 114.76 percent margin calculated for Flex Foods has probative value, i.e., is reliable and relevant and thus corroborated to the extent practicable. Also, we find that the 114.76 percent margin is sufficiently adverse to ensure that Agro Dutch does not benefit from failing to cooperate to the best of its ability in our review by refusing to respond to all of the requisite sections of our questionnaire.²⁵

²⁰ Id.

²¹ Id.

²² See Carbazole from India and Bearings from France, et al.

²³ See D & L Supply Co. v. United States, 113 F.3d 1220, 1221 (Fed. Cir. 1997).

²⁴ See 2003 -2004 Administrative Review.

²⁵ See Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review in Part, 73 FR 15132, 15133 (March 21, 2008); see also Carbazole from India.

Conclusion

We recommend applying the above methodology for these preliminary results.

✓
Agree

Disagree

Paul Piquado
Paul Piquado
Assistant Secretary
for Import Administration

21 OCTOBER 2012
(Date)