

C-507-601
New Shipper Review
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February 19, 2007

MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

RE: Countervailing Duty New Shipper Review: Certain In-shell
Roasted Pistachios from the Islamic Republic of Iran

SUBJECT: Issues and Decision Memorandum: Final Results of
Countervailing Duty New Shipper Review

SUMMARY:

We have analyzed the comments of interested parties in the final results of the above-mentioned countervailing duty (CVD) new shipper review (NSR) covering the period of review (POR) January 1, 2006, through December 31, 2006. The "Analysis of Programs" section below describes the decisions made in this review. Also below is the "Analysis of Comments" section, which contains the Department of Commerce's (the Department's) responses to the issues raised in the parties' briefs. We recommend that you approve the positions we have developed in this memorandum. Below is a complete list of the issues in this review for which we received comments from parties.

Comment 1: Whether Ahmadi's Sale of Subject Merchandise Constitutes a Bona Fide Sale

Comment 2: Whether the Department Should Assign an Adverse Facts Available Net Subsidy Rate to Ahmadi Because of the GOI's Failure to Cooperate with the Department By Providing Incomplete Questionnaire Responses

Comment 3: Whether the Department Should Assign an Adverse Facts Available Net Subsidy Rate to Ahmadi on the Grounds That it Failed to Respond to the Department's Questionnaires to the Best of its Ability

Comment 4: Whether the All-Others Rate Stated in the Preliminary Results Is Inaccurate and Should Be Corrected

I. Analysis of Programs

In the preliminary results of this NSR, we found, based on the information supplied by Ahmadi's Agricultural Productions, Processing and Trade Complex (Ahmadi), the producer and exporter of subject merchandise, and Kerman Corporation (Kerman), the U.S. importer, that Ahmadi did not use any of the alleged subsidy programs. See Certain In-shell Roasted Pistachios from the Islamic Republic of Iran: Preliminary Results of Countervailing Duty New Shipper Review, 72 FR 67276 (November 28, 2007) (Preliminary Results).

The Western Pistachio Association (WPA) and Cal Pure Pistachios (Cal Pure) (collectively, the petitioners) submitted comments on our Preliminary Results. Ahmadi and Kerman did not comment on the Preliminary Results. Upon review of the comments received from petitioners, we have not modified our findings in the Preliminary Results.

A. Programs Determined to Be Not Used

For the purposes of these final results, we find that the programs listed below were not used by Ahmadi during the POR:

1. Provision of Fertilizer and Machinery
2. Provision of Credit
3. Tax Exemptions
4. Provision of Water and Irrigation Equipment
5. Technical Support
6. Duty Refunds on Imported Raw or Intermediate Materials Used in the Production of Export Goods
7. Program to Improve Quality of Exports of Dried Fruit
8. Iranian Export Guarantee Fund
9. GOI Grants and Loans to Pistachio Farmers
10. Crop Insurance for Pistachios

II. Total Ad Valorem Rate

The total net subsidy rate for Ahmadi for the POR is 0.00 percent ad valorem.

III. Analysis of Comments

Comment 1: Whether Ahmadi's sale of Subject Merchandise Constitutes a Bona Fide Sale

Cal Pure argues that the Department has established criteria for evaluating whether a bona fide sale has occurred. It contends that the Department evaluates the bona fides of a sale by examining the totality of the circumstances of the sale in question, including an examination of whether the sale has been artificially structured as to be commercially unreasonable. Cal Pure contends that, as part of the analysis, the Department considers the timing of the sale, price, quantity, expenses arising from the transaction, whether the merchandise was sold at a loss, and whether the sale in the United States was on an arm's-length basis. See Honey from Argentina: Final Results of New Shipper Review, 72 FR 19177 (April 17, 2007), and accompanying Issues and Decision Memorandum at Comment 1.

Cal Pure further maintains that the Department's practice is to rescind the review if it concludes that all sales during the POR are not bona fide. See e.g., Notice of Final Rescission of Antidumping Duty New Shipper Review: Freshwater Crawfish Tail Meat from the People's Republic of China, 68 FR 68028 (December 5, 2003), and accompanying Issues and Decision Memorandum at Comment 1.

In the instant NSR, Cal Pure asserts that the Department failed to consider all of the relevant facts in reaching its preliminary conclusion that Ahmadi's sale of subject merchandise constituted a bona fide sale. Cal Pure notes that there is no antidumping order on roasted in-shell pistachios from Iran and, thus, it contends that neither Ahmadi nor Kerman needed to concern itself with charging a price sufficient to ensure that it had not engaged in dumping. Cal Pure contends this fact allowed Kerman to charge a price to its customers in the United States that was well below Kerman's acquisition price. Cal Pure contends that in determining whether a bona fide sale has occurred the Department has, in prior cases, examined whether the U.S. sale to the unrelated customer was made at a commercially reasonable price. Cal Pure notes that in Certain Cut-to-Length Carbon Steel Plate From Romania: Notice of Rescission of Antidumping Duty Administrative Review, 63 FR 47232, 47234 (September 4, 1998) (CTL Plate from Romania), the Department found that no bona fide sale occurred stating that:

. . . the reasonableness of the transaction must be judged by the total costs borne by the U.S. importer. The extraordinarily high transportation costs incurred by the importer, combined with other expenses borne by the importer in connection with this sale and the fact that the merchandise was subsequently resold at a significant loss (excluding transportation and other costs) lead us to conclude that there is no basis upon which it could be found that the sale was commercially reasonable. Therefore, we find that the sale is not bona fide.

Cal Pure argues that the facts in the instant NSR mirror those in CTL Plate from Romania because Kerman (1) incurred extremely high shipping costs due to the fact that Kerman air-freighted the subject merchandise to the United States, (2) incurred additional importation expenses that further increased Kerman's acquisition costs, and (3) sold the merchandise to its

U.S. customers at a significant loss. Cal Pure maintains that the Department's November 20, 2007 memorandum from Eric B. Greynolds, Program Manager, Office 3, Operations, to Melissa G. Skinner, Director, Office 3, Operations, entitled "Preliminary Bona Fide Sales Analysis," omits any discussion of the facts noted above and thus, the Department's preliminary analysis is deficient for this reason alone. Cal Pure further argues that a consistent application of the precedent from CTL Plate from Romania requires a finding that the sales to the two U.S. customers were not made on commercially reasonable terms.

Cal Pure further argues that the Department failed to consider the timing and method of the importation and sale of subject merchandise, factors that it claims the Department has consistently examined in the past. See e.g., CTL Plate from Romania, 63 FR at 47232-47233. Cal Pure explains that Ahmadi shipped the subject merchandise to the United States via air, which it contends is commercially unreasonable given the shipping and handling rates charged by the air carrier. Cal Pure contends that air freight is not the normal method of shipping pistachios from Iran to the United States.

Cal Pure also notes that the air shipment and subsequent sales occurred very near the end of the POR. Cal Pure maintains that if Ahmadi had shipped the subject merchandise via ocean freight, the sale would not have arrived in time to qualify Ahmadi for an NSR covering the POR. Cal Pure asserts that the air shipment was commercially unreasonable and was obviously arranged solely in order to allow the sale to be made prior to the end of the POR. Cal Pure argues that the Department encountered a similar fact pattern in CTL Plate from Romania and found that the timing of the shipment weighed against a finding that a bona fide sale occurred:

By Windmill's {the respondent} own admission, the decision to send the shipment by air, rather than by ocean, was based solely on the need to enter the merchandise into the United States before the end of the POR. There was no customer emergency or particular need for costly air shipment rather than the usual surface shipment.

See CTL Plate from Romania, 63 FR at 47233.

Cal Pure argues that Ahmadi and Kerman have failed to demonstrate any customer emergency or particular need requiring the air shipment of subject merchandise. Cal Pure asserts that the Department's Preliminary Bona Fide Sales Analysis memorandum fails to take this factor into consideration.

Cal Pure also argues that the nature of Kerman's two U.S. customers weighs against a finding of a bona fide sale. Cal Pure maintains that the two customers do not appear to be in the business of purchasing and reselling roasted in-shell pistachios. Cal Pure notes that one customer is a flower shop and the other is a Persian-style bakery. Cal Pure claims these facts suggest that two commercially unreasonable transactions occurred. Cal Pure claims that it would not be surprising to learn that a personal relationship exists between Mr. Ali Ahmadi of Kerman and the owners of the flower shop and bakery. Cal Pure argues that, in any event, the Department's Preliminary Bona Fide Sales Analysis memorandum omits any discussion of the relevance of Kerman's customers to the bona fide sales issue.

Cal Pure argues that the quantity of subject merchandise each customer purchased constitutes further proof that the sales of subject merchandise were not bona fide. On this point,

Cal Pure notes that it is not arguing that the sale by a new shipper is necessarily invalid because the quantity imported in a single sale is small and, thus, not typical of normal commercial importations. Rather, Cal Pure argues that in NSRs the quantity that is subsequently resold in the United States is highly relevant, and in this particular case, the quantities sold to the U.S. customers is very small. Cal Pure argues that the small sales quantities suggest that the U.S. customers purchased the subject merchandise as an accommodation to Mr. Ahmadi and not because the U.S. customers had any real interest in developing a long-term supplier/customer relationship.

In addition, Cal Pure argues that Ahmadi does not normally engage in the business of producing and selling roasted pistachios. Cal Pure argues that Ahmadi sold over 200,000 pounds of raw pistachios during the 24-month period from March 2005 through March 2007 while its sales of roasted in-shell pistachios were limited to the amounts sold to its two U.S. customers during the POR. Thus, Cal Pure maintains that it is clear that Ahmadi is in the business of selling raw, not roasted, in-shell pistachios. For this reason, Cal Pure argues that the Department should find that Ahmadi's de minimis sale of roasted pistachios was artificial and contrived.

The WPA did not comment on this issue.

Department's Position: We disagree with Cal Pure and continue to find that Ahmadi's sale of roasted pistachios constitutes a bona fide sale. As in the Preliminary Bona Fide Sales Analysis memorandum, we continue to find that the quantity of subject merchandise Ahmadi shipped to the United States does not, in and of itself, render the sale not bona fide. Further, we continue to find that Ahmadi and Kerman are legitimate enterprises that conducted commercially reasonable transactions with unaffiliated U.S. customers. In addition, we continue to find that record evidence does not support the conclusion that Ahmadi's sales involve selling practices atypical for a new shipper of pistachios.

Cal Pure bases its argument on the Department's findings in CTL Plate from Romania, asserting that the facts that led the Department to rescind the NSR in the Romanian proceeding apply equally to the facts surrounding Ahmadi's sale to the United States. The Department's approach in CTL Plate from Romania was affirmed by the Court of International Trade (CIT) in American Silicon Technologies v. United States, 110 F. Supp 2d. 992 (American Silicon). Our review of the record of the instant NSR indicates, however, that the fact patterns addressed by the Department in CTL Plate from Romania are distinct from the facts of this case.

In determining whether respondent's sale was bona fide in CTL Plate from Romania, the Department looked to whether the transaction was so artificially structured as to be commercially unreasonable. See CTL Plate from Romania, 63 FR at 47234. The Department further explained that the CIT has affirmed this review standard: "where a transaction is an orchestrated scheme involving artificially high prices, the Department may disregard the sale as not resulting from a bona fide transaction."¹ CTL Plate from Romania, 63 FR at 47234, citing to Chang Tieh Industry Co. v. United States, 840 F. Supp. 141, 146 (CIT 1993) (Chang Tieh). Following this approach,

¹ CTL Plate from Romania and Chang Tieh were antidumping duty proceedings. Hence, the emphasis on the validity of U.S. price in CTL Plate from Romania and Chang Tieh.

in CTL Plate from Romania, the Department concluded that the transaction in question was not bona fide based on six factors:

1. The cost of the air freight, customs fees, brokerage expenses, warehousing, and miscellaneous expenses (which were borne by the U.S. customer, and not the respondent) were significantly greater than the total value of the sale.
2. By respondent's own admission, the decision to send the shipment by air, rather than by ocean, was based solely on the need to enter the merchandise into the United States before the end of the POR. There was no customer emergency or particular need for costly air shipment rather than the usual surface shipment.
3. The quantity of the sale was atypical of that which respondent normally sold to the U.S. customer, which was a trading company and not an end-user.
4. The U.S. customer's purchase of the merchandise prior to receiving an order for it from a customer was atypical of its normal business practice.
5. The same legal counsel guided both respondent and the U.S. customer through the sales process, and by its admission helped negotiate a price for the sale solely for the purpose of obtaining for respondent a lower cash deposit rate.
6. The U.S. customer resold the merchandise at a substantial loss.

See CTL Plate from Romania, 63 FR at 47234.

Cal Pure notes that Ahmadi shipped subject merchandise to the United States via air freight at considerably high costs. It contends that Ahmadi's decision to utilize such a costly shipping method demonstrates that the sale was not bona fide. First, we note that the CIT has affirmed the Department's conclusion that a high shipping price or unusual mode of shipment does not alone render a sale commercially unreasonable. See American Silicon Technologies v. United States, 110 F. Supp 2d. 992, 997 (American Silicon) (the mere fact that the buyer requested an unusual mode of shipment does not make this request unreasonable).

In addition, the Department has previously examined the issue of air freight in the context of a separate NSR in this proceeding. See Certain In-Shell Pistachios (C-507-501) and Certain Roasted In-Shell Pistachios (C-507-601) from the Islamic Republic of Iran: Final Results of New Shipper Countervailing Duty Reviews, 68 FR 4997 (January 31, 2003), and accompanying Issues and Decision Memorandum at Comment 1 (2003 Pistachios from Iran), in which the Department found that respondent's shipment of subject merchandise via air freight was commercially reasonable.

Specifically, in 2003 Pistachios from Iran, the Department determined that:

We do not find evidence on the record of these reviews, however, that the unit price established between Nima {the respondent} and AHON {the U.S. customer} was in any way affected by the costs of transportation. It is reasonable that a customer purchasing goods on an FOB basis would consider freight costs in determining the final quantity of goods he intends to purchase, as he is responsible for those costs. Absent any evidence that the unit price of subject merchandise was in some way affected, and/or distorted, by the transportation costs borne by the U.S. customer, we do not find this argument persuasive. . . Absent evidence that the sale to AHON was distorted or unreflective of normal business practice, the fact that it may have been a small shipment sent via air freight does not warrant a finding that the sale is not bona fide.

See 2003 Pistachios from Iran at Comment 1.

As in 2003 Pistachios from Iran, there is no evidence on the record of the instant NSR indicating that the quantity or unit price Ahmadi charged to its U.S. customers was in some way affected or distorted by the decision to ship the subject merchandise via air freight. Also, in the instant NSR, there is no evidence indicating that the U.S. customers played a collaborating role in establishing the delivery terms or paid for the air freight, as was the case in CTL Plate from Romania. See CTL Plate from Romania, 63 FR at 47233.

Furthermore, we find that Ahmadi's decision to transport its shipment of subject merchandise via air freight was reasonable. Information on the record indicates that Ahmadi shipped, via air freight, a total of 120 kilograms of roasted pistachios to the United States during the POR. The Department and the Court have determined that test sales in an NSR may constitute bona fide transactions. See, e.g., 2003 Pistachios from Iran at Comment 1 ("the Department has stated and the Courts have upheld that a small quantity test sale/shipment is not necessarily contrary to normal business considerations"); see also American Silicon, 110 F. Supp 2d. at 966 (in which the Court affirmed the Department's finding that a test sale constituted a bona fide transaction).

We find Ahmadi's decision to ship its test sale to the United States via air freight to be rational given the fact that the goods were subject to an all-others rate of 317.89 percent ad valorem. In addition, such a high cash deposit rate would be expected to have some effect on the quantity of merchandise sold and the means of transporting used to ship the test sale merchandise. In prior NSRs, the Department has acknowledged the impact that a high all-others rate can have on the manner in which subject merchandise is shipped to the United States. See e.g., CTL Plate from Romania, 63 FR at 47234, in which the Department stated that it "recognizes that exporters may make only a single sale in order to establish their own antidumping duty rate, particularly where the all-others rate is high."

We also disagree with Cal Pure's criticism that Ahmadi's decision to transport the merchandise via air freight incurred high unit costs and, thus, makes the transaction commercially unreasonable. Ahmadi's test shipment of roasted pistachios weighed 120 kilograms. Ahmadi incurred an air freight charge of USD 6.00 per kilogram. Therefore, its total cost to transport the roasted pistachios via air freight was USD 720. In CTL Plate from Romania,

the Department correctly doubted the commercial reasonableness of shipping the merchandise via air freight because the merchandise under review was a steel product. The amount of air freight paid by respondent in CTL Plate from Romania is not on the record of the instant NSR. However, a unit of CTL plate is far heavier than a unit of pistachios and, therefore, it is exceedingly more costly to transport a steel product by air. Therefore, in CTL Plate from Romania, it was appropriate for the Department to question the practicality of transporting commercial quantities of CTL Plate by air and, thus, reasonable to doubt the legitimacy of the transaction under review. In contrast, we find the USD 720 Ahmadi paid to transport its 120 kilogram test shipment of roasted pistachios via air freight was not a commercially unreasonable price to pay.

We also disagree with Cal Pure's contention that the timing of Ahmadi's shipment of subject merchandise resembles the sequence of events in CTL Plate from Romania, and, thus, indicates that the sale, and subsequent shipment by air freight, were arranged solely in order to allow the sale to be made at the very end of the POR. In CTL Plate from Romania, information on the record of the administrative review indicated that when it became apparent to the respondent in late July 1997 that the sale in question would not enter U.S. customs territory by the end of the POR, the respondent and the U.S. customer negotiated another sale, which was shipped by air, that entered U.S. customs territory on July 31, 1997, the last day of the POR.² Unlike the situation encountered in CTL Plate from Romania and Allied Tube, Ahmadi's shipment entered U.S. customs territory more than a month before the end of the POR. Furthermore, even if the sale was made for the sole purpose of obtaining a separate rate, such a purpose does not render a sale non-bona fide, as long as the sale itself is arguably commercially reasonable. See CTL Plate from Romania, 63 FR at 47234. Moreover, unlike CTL Plate from Romania, there is no evidence indicating that Ahmadi or Kerman made special arrangements with its U.S. customers to expedite the shipment prior to the end of the POR.

We also disagree with Cal Pure's reliance on CTL Plate from Romania for the claim that Kerman's acquisition costs and sale of subject merchandise to its U.S. customers at a loss indicates that the transaction at issue was not bona fide. In CTL Plate from Romania, the Department focused on the acquisition costs (e.g., air freight, brokerage expenses, warehousing, and miscellaneous expenses) incurred by the U.S. customer and not on acquisition costs incurred by the importer. For example, in CTL Plate from Romania, in finding that the sale was not bona fide, the Department emphasized that the U.S. customer incurred the acquisition costs in spite of the fact that the costs greatly exceeded the total value of the sale. See CTL Plate from Romania, 63 FR at 47233.³

² In Allied Tube & Conduit Corp. v. United States, the CIT questioned the bona fides of a sale with a similar timing pattern. See e.g. Allied Tube & Conduit Corp. v. United States, 2007 Ct. Intl. Trade LEXIS 109 (CIT 2007) (Allied Tube), in which the Court remanded the issue of whether respondent's single U.S. shipment constituted a bona fide transaction based in part on the fact that respondent's single shipment entered the United States only two days before the end of the POR.

³ In this instant case, Kerman, and not its U.S. customers, established the delivery terms and incurred the acquisition costs. The CIT has made a similar distinction when examining the issue of air freight in the context of a sales bona fides analysis. See American Silicon, 110 F. Supp. 2d. at 997, where the Court distinguished the

Further, a primary factor that led the Department to discount the bona fides of the sale under review in CTL Plate from Romania was the fact that the U.S. customer resold the subject merchandise at a substantial loss. See 63 FR at 47234. In contrast, in the instant NSR there is no evidence on the record to indicate that Ahmadi's U.S. customers sold the subject merchandise at a loss.⁴

We also disagree with Cal Pure's contention that the nature of Kerman's two U.S. customers weighs against a finding of a bona fide sale. Petitioner contends that the two customers do not appear to be in the business of selling pistachios. They further allege that it is possible that a personal relationship exists between Kerman and the owners of the two U.S. customers. We find that Cal Pure's arguments on these points are speculative and are not supported by any factual evidence on the record of the review. Thus, we cannot agree that these unfounded claims support the determination that the transaction at issue in this case is not a bona fide sale.

Additionally, we disagree with Cal Pure's claim that the quantity of subject merchandise sold to the two U.S. customers is small, thus, not typical of normal commercial importations. In making this point, Cal Pure explains that it is not arguing that an NSR is necessarily invalid because the quantity imported is small. Rather, it asserts that the small quantities sold to the two U.S. customers suggest that the customers purchased subject merchandise as an accommodation to owners of Kerman and not because of a genuine interest in developing a long-term supplier/customer relationship. On this point, we find Cal Pure's arguments devoid of any factual support on the record of this NSR. In addition, information on the record of the NSR indicates that the quantity of subject merchandise sold to the two U.S. customers equals the quantity of subject merchandise Kerman imported into the United States during the POR. See Ahmadi's March 22, 2007, NSR request, a public document on file in room 1117 of the Central Records Unit (CRU), which contains a copy of the entry summary as well as the invoices issued to the two U.S. customers.

Thus, by Cal Pure's own reasoning, if the commercial reasonableness of the quantity of subject merchandise Kerman imported into the United States is not in question, then the quantities resold by Kerman must also be commercially reasonable. Also, as the CIT has affirmed, small quantity test sales/shipments examined in Department proceedings are not necessarily contrary to normal business considerations. See e.g., American Silicon, 110 F. Supp

transaction at issue from the one examined in CTL Plate from Romania based, in part, on the fact that there was no evidence to indicate that the respondent and the U.S. customer worked together to transport the subject merchandise via air freight: "Moreover, in this case there is no evidence that LIASA {the respondent} played a role in setting the delivery terms, and LIASA asserts it merely accepted the terms requested by the buyer."

⁴ Further, in CTL Plate from Romania, the Department found that the sale in question was not bona fide based on a number of factors, several of which are not even alleged by Cal Pure with respect to the transaction under consideration in the instant NSR. For example, unlike in CTL Plate from Romania, Cal Pure does not allege and the record does not reflect that: (1) the quantity of the sale was atypical of that which respondent normally sold to the U.S. customer; (2) the U.S. customer's purchase of the merchandise prior to receiving an order for it from a customer was atypical of its normal business practice; or (3) the same legal counsel guided both respondent and the U.S. customer through the sales process, and by its admission helped negotiate a price for the sale solely for the purpose of obtaining for respondent a lower cash deposit rate. None of these situations are present in the instant case.

2d. at 966. The importation of a small quantity test sale is not necessarily contrary to normal business considerations. Thus, the subsequent resale of the same quantity of merchandise to U.S. customers cannot, by itself, serve as the basis for questioning the bona fides of a transaction.

Lastly, we disagree with Cal Pure's argument that the sale in question was artificial and contrived based on the fact that Ahmadi does not normally engage in the business of producing and selling roasted pistachios. The Department has previously determined that the mere fact that a particular sale in the U.S. market represents a new product line for a prospective new shipper is not necessarily grounds to find that the transaction is not bona fide. See e.g., Fresh and Chilled Atlantic Salmon From Norway; Final Results of New Shipper Antidumping Duty Administrative Review, 62 FR 1430, 1431 (January 10, 1997), in which the Department found the sale in question constituted a bona fide transaction in spite of petitioners' arguments that respondent's sales history indicated that it did not normally sell subject merchandise to the United States.

On this basis and based on the totality of facts concerning the transaction at issue in the instant NSR, we continue to find that Ahmadi's sale of roasted in-shell pistachios to the United States during the POR constitutes a bona fide, commercial transaction.

Comment 2: Whether the Department Should Assign an Adverse Facts Available Net Subsidy Rate to Ahmadi Because of the GOI's Failure to Cooperate with the Department By Providing Incomplete Questionnaire Responses

Cal Pure argues that the Department's consistent practice is to find that a government has conferred countervailable subsidies when governmental and/or private parties fail to provide the basic information needed to evaluate whether the statutory and regulatory criteria for a finding of subsidization have been met. Cal Pure contends that the Department should implement its long-standing practice with respect to the government of Iran's (GOI) failure to adequately respond to the Department's questionnaires. Cal Pure argues that, as a result of the GOI's refusal to supply complete questionnaire responses, the record does not contain substantial evidence that Ahmadi did not receive countervailable benefits under the ten subsidy programs at issue in the instant NSR. As a result, Cal Pure asserts that the facts concerning how the GOI provides benefits to the pistachio industry remain unknown.

Cal Pure argues that any foreign government that seeks access to the U.S. market for its exporters has an obligation to comply with legitimate requests for information regardless of the burden entailed. Cal Pure argues that if the Department assigns a zero net subsidy rate to Ahmadi, it will implicitly approve the GOI's decision to disregard lawful and reasonable information requests. Cal Pure claims that such a policy would enable other foreign governments in other subsidy cases to choose not to respond to the Department's questionnaires that they find too difficult or burdensome without the fear of causing an adverse outcome for the respondent firms.

For these reasons, Cal Pure argues that, pursuant to sections 776(a) and (b) of the Tariff Act of 1930, as amended (the Act), the Department should find that the GOI did not act to the best of its ability and therefore should assign an adverse facts available net subsidy rate to Ahmadi. Specifically, Cal Pure argues that as adverse facts available, the Department should assign to Ahmadi a net subsidy rate of 66.50 percent ad valorem, which was the adverse facts

available rate applied to the respondent company in the Certain In-shell Roasted Pistachios from the Islamic Republic of Iran: Final Results of Countervailing Duty Administrative Review, 71 FR 66165 (November 13, 2006) (2004 Review of Roasted Pistachios from Iran), or, alternatively, the all-others net subsidy rate of 317.89 percent ad valorem.

The WPA echoes the comments of Cal Pure. The WPA argues that a CVD case, by its nature, requires the collection of information regarding subsidy programs from the affected foreign government. According to the WPA, it is for this reason that the Department's draft regulations require that respondents include in their request for an NSR "a certification that the exporter or producer has informed the government of the exporting country that the government will be required to provide a full response to the Department's questionnaire." See 19 CFR 351.214(b)(2)(v). The WPA explains that in 1997 a commenter to the Department's regulations argued that if a foreign government cooperated during the original CVD investigation and provided a full response to the Department's questionnaire, it should be unnecessary for the foreign government to respond to additional questionnaires in subsequent NSRs. The WPA notes that the Department refused to revise 19 CFR 351.214(b)(2)(v) in light of the comment explaining that such an argument:

. . . overlooks the fact that the period of review in a new shipper review will be different from the POI of the original investigation. Therefore, just as in the case of an administrative review, the Department will require information from the foreign government concerning any countervailable subsidies conferred during the period of review. In addition, as stated in the AD Proposed Regulations, the purpose of this requirement is to minimize situations in which the Department will be forced to rely upon facts available.

See Antidumping Duties; Countervailing Duties; Final Rule, Preamble, 62 FR 27296, 27319 (May 19, 1997). The WPA further notes that when the Department first proposed 19 CFR 351.214(b)(2)(v), it stated that the requirement "is intended to put parties on notice that, in a review of a countervailing duty order, the party will have to have the cooperation of the government." See Antidumping Duties; Countervailing Duties; Proposed Rule, 61 FR 7308, 7319 (February 27, 1996).

The WPA asserts that the Department has repeatedly applied adverse inferences where the information alleged by a CVD respondent has not been adequately corroborated by the respondent's foreign government. In support of its contention, the WPA cites to the following cases:

- Certain Pasta From Italy: Final Results of the Second Countervailing Duty Administrative Review, 64 FR 44489, 44492 (August 16, 1999) (Pasta from Italy), where, the WPA claims as adverse facts available, the Department found a regional worker training program used by respondent to be countervailable because the European Union, the Government of Italy, and the Italian State Government failed to adequately respond to the Department's questions concerning the distribution of benefits under the program.

- Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia, 64 FR 73155, 73157 (December 29, 1999) (CTL Plate from Indonesia), where the WPA claims that the Department applied adverse facts available against the respondent as a result of the Government of Indonesia failing to fully respond to the Department's supplemental questionnaires.
- Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon Quality Steel Plate from France, 64 FR 73277, 73282 (December 29, 1999) (CTL Plate from France), where the WPA claims as adverse facts available, the Department found various investment/operating subsidies used by respondent to be countervailable because the Government of France failed to fully respond to the Department's questionnaires concerning the program.
- Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products from Canada, 69 FR 75917 (December 20, 2004) (Lumber from Canada), and accompanying Issues and Decision Memorandum at "Use of Adverse Facts Available for Manitoba and Saskatchewan" section and Comment 17, where the WPA claims the Department applied adverse facts available against the Government of Canada when it failed to seek waivers permitting it to disclose certain information requested by the Department.
- Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review, 72 FR 51602, 51604 (September 10, 2007) (Preliminary Results of CORE from Korea) (unchanged in the Final Results of Countervailing Duty Administrative Review: Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, 72 FR 119 (January 3, 2007) (CORE from Korea)), where the WPA claims as adverse facts available, the Department found that certain loans respondents had outstanding during the POR were countervailable because the Government of Korea failed to respond to the Department's questions concerning the extent to which the government directed credit to the steel sector.
- Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, 72 FR 63875, 63879 (November 13, 2007) (Preliminary Determination of CWP from the PRC), where the WPA claims the Department applied adverse facts available against the respondent because the Government of China (GOC) failed to provide responses to the Department's questions concerning China's steel industry.
- Laminated Woven Sacks from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, 72 FR 67893, 67894 (December 3, 2007) (Preliminary Determination of Sacks from the PRC), where the WPA claims the Department applied adverse facts available to respondents under certain loan programs because the GOC failed to fully respond to the Department's questionnaires.

The WPA maintains that the failure to apply adverse facts available to Ahmadi in response to the GOI's lack of cooperation goes against the Department's practice and would strike a damaging blow to the Department's ability to motivate foreign firms and governments to provide timely and accurate information.

The WPA asserts that, pursuant to section 516(A)(b)(1)(B)(i) of the Act, the Department's factual determination in this proceeding is subject to judicial review under the substantial evidence standard and that there is no substantial evidence to support the conclusion that the information filed by the Interests Section of the GOI was obtained from competent authorities (i.e., authorities having actual knowledge of the facts asserted) of the GOI. Thus, the WPA argues that reliance upon the single questionnaire response filed by the Interests Section of the GOI is precluded by the substantial evidence standard.

The WPA asserts that in spite of the Department's requests, the Interests Section of the GOI failed to identify the sources of the information relied upon when responding to the initial CVD questionnaire. The WPA also maintains that under 19 CFR 351.301(g)(1), information submitted by respondent is to be accompanied by a certification from the "providers of the information" which the WPA claims is distinct from the persons covered under 19 CFR 351.301(g)(2) who merely act in a representative capacity. The WPA notes that the questionnaire response filed by the GOI was certified by a single person, Dr. Mustafa Rahmani, an employee of the Interests Section of the GOI. The WPA argues that before the Department can have faith in Dr. Rahmani's certification, it must obtain credible information that he is, in fact, in a position to know the details contained in the GOI's questionnaire response. The WPA also argues that the GOI should include a certification of accuracy from the GOI officials that actually provided the factual information to Dr. Rahmani for each program at issue in the NSR.

The WPA further argues that there is no basis under U.S. law for treating the Interests Section of the GOI as an organ of the GOI. The WPA notes that the United States severed all diplomatic and consular relations with the GOI in 1980 and has expelled all of the GOI's diplomatic and consular employees. The WPA adds that there is no current U.S. statute, Executive Order, administrative regulation, judicial decision, or other legal authority which would permit the Department, as a matter of law, to equate the Interests Section of the GOI with the federal government of Iran. In fact, the WPA points out that in proceedings before U.S. courts, the GOI appears through counsel under its own name, without mention of the Interests Section of the GOI. For these reasons, the WPA argues that the record contains no factual information regarding the nature or scope of the duties or authority, if any, vested by the GOI in Mr. Rahmani or the Interests Section of the GOI and, thus, the information supplied by the Interests Section of the GOI does not constitute substantial evidence. Accordingly, in light of the GOI's failure to supply substantial evidence supporting the statements made in its questionnaire response, the Department should assign an adverse facts available net subsidy rate to Ahmadi.

Department's Position: We disagree with petitioners' argument that the failure of the GOI to respond to the Department's questionnaires necessarily warrants the application of an adverse facts available rate to Ahmadi. Contrary to petitioners' claims, it is not the Department's practice to assign an adverse facts available rate to a respondent in CVD proceedings based solely on the

fact that the foreign government failed to participate to the best of its ability. Rather, in instances in which the foreign government fails to adequately respond to the Department's questionnaires, it is the Department's practice to apply adverse inferences and assume that the alleged subsidy programs constitute a financial contribution and are specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively. In such instances, the Department calculates the benefit by relying, to the extent possible, on information supplied by the respondent firm. Thus, if the respondent firm's books and records confirm that it used the alleged program, the Department will assume that the program is countervailable to the extent that the program conferred a benefit during the review period. However, if information on the record indicates that the respondent did not use the program, the Department will find the program was not used, regardless of whether the foreign government participated to the best of its ability. See e.g., Stainless Steel Sheet and Strip in Coils from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review, 72 FR 51615, 51617-51618 (September 10, 2007) (Preliminary Results of SSSS from Korea) (unchanged in Stainless Steel Sheet and Strip in Coils from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 73 FR 2456 (January 15, 2008):

Therefore, consistent with sections 776(a)(2)(A) and 776(b) of the Act, we find that the GOK did not act to the best of its ability and, therefore, we are employing an adverse inference in selecting from among the facts otherwise available. Therefore, we find that lending to Korean steel producers from domestic banks and government-owned banks through 2005 is countervailable. Thus, any loans received by Korean steel producers through 2005 from domestic banks and government-owned banks that were outstanding during the POR are countervailable, to the extent that the interest amount paid on the loan is less than what would have been paid on a comparable commercial loan. The Department's decision to rely on adverse inferences when lacking a response from the GOK regarding the direction of credit issue, as it applies to the Korean steel industry, is in accordance with its practice.

See also Final Results of Countervailing Duty Administrative Review: Certain In-shell Roasted Pistachios from the Islamic Republic of Iran, 71 FR 27682 (May 12, 2006) and accompanying Issues and Decision Memorandum at Comment 2 (2006 Administrative Review of Roasted Pistachios from Iran):

in CVD administrative reviews, if a respondent has claimed that it can establish non-use of a program as a factual matter, without an accompanying or complete government response, the Department has determined that it will analyze the responses provided by the company to determine if the information on the record is sufficient to establish non-use.

Petitioners cite several cases which they argue support their contention that the Department resorts to adverse inferences with respect to the respondent firm when the foreign government fails to adequately respond to the Department's questionnaires. However,

petitioners' interpretations of the Department's determinations are off point. In Pasta from Italy, CTL Plate from France, Lumber from Canada, and CORE from Korea, the Department established that the respondent firms in question used the alleged subsidy programs at issue. Thus, in absence of complete responses from the foreign governments, the Department applied adverse inferences and assumed that the alleged subsidy programs constituted a financial contribution and/or were specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively. However, the Department used the respondents' information to calculate the benefit in instances in which the respondent firms participated to the best of their ability. See Pasta from Italy, 64 FR at 44492; CTL Plate from France, 64 FR at 73281-73282, Lumber from Canada at the "Provincial Crown Stumpage Programs" section, and the Preliminary Results of CORE from Korea, 72 FR at 51604.

Regarding CTL Plate from Indonesia, the respondent firm chose not to participate in the investigation. As a result, the Department attempted to ascertain whether the respondent firm received subsidies under the alleged subsidy programs using, where possible, information supplied by the Indonesian Government. Where the Indonesian Government was unable to adequately establish non-use, the Department assumed the program was countervailable and assigned the respondent firm an adverse facts available rate. See 64 FR at 73156-73157.

Regarding the Preliminary Determination of CWP from the PRC, the respondent company withdrew from the investigation and requested that the Department remove its proprietary filings from the record. As a result, the Department calculated an adverse facts available rate. However, even when faced with an uncooperative respondent, the Department refrained from assigning an adverse facts available rate with respect to subsidy programs from which the respondent could not have received a benefit:

Because Shuangjie {the respondent} failed to act to the best of its ability, as discussed above, for each program examined, we made the adverse inference that Shuangjie benefitted from the program unless the record evidence made it clear that Shuangjie could not have received benefits from the program because, for example, we have preliminarily found the program not countervailable. See e.g., Certain Cold-Rolled Carbon Steel Flat Products From Korea; Final Affirmative CVD Determination, 67 FR 62102 (October 3, 2002) and accompanying Issues and Decision Memorandum at 'Methodology and Background Information.'

See Preliminary Determination of CWP from the PRC, 72 FR at 63878.

Concerning the Preliminary Determination of Sacks from the PRC, the Government of China failed to respond to the best of its ability with respect to a loan program. As a result, the Department assumed that the program constituted a financial contribution and was specific under sections 771(5)(D) and 771(5A) of the Act, respectively. See Preliminary Determination of Sacks from the PRC, 72 FR at 67903. Thus, the Department found the loan program countervailable to the extent that information from the respondents participating in the investigation indicated a difference between what the recipients paid on loans from government-owned banks and the amount they would have paid on comparable commercial loans. *Id.* In the Preliminary Determination of Sacks from the PRC, the Department also applied total adverse

facts available to two respondent firms that failed to respond to the Department's questionnaires. However, as in other CVD proceedings, the Department refrained from applying adverse inferences in instances in which the record evidence made it clear that the reviewed companies did not or could not have received benefits from the program. See Preliminary Determination of Sacks from the PRC, 72 FR at 67896.

Thus, the Department's decision in the Preliminary Results to base its finding of non-use on information supplied by Ahmadi is consistent with its long-standing practice and the cases cited by petitioners further demonstrate the appropriateness of the Department's approach in the Preliminary Results.

We further disagree with petitioners' claim that, pursuant to section 516(A)(b)(1)(B)(i) of the Act, the Department's preliminary finding fails to meet the substantial evidence standard because there is no substantial evidence to support the conclusion that the information supplied by the staff at the Interests Section of the GOI was obtained from competent authorities. As explained above, in the Preliminary Results the Department found that Ahmadi did not use the alleged subsidy programs based on information supplied by Ahmadi itself. See Preliminary Results, 72 FR at 67276-77. Thus, petitioners' claims concerning the legitimacy of the staff at the Iranian Interests Section and their ability to speak on behalf of the GOI are moot.

Accordingly, in these final results, we have continued to rely on information from Ahmadi's questionnaire responses for purposes of determining that Ahmadi did not use any of the alleged subsidy programs during the POR.

Comment 3: Whether the Department Should Assign an Adverse Facts Available Net Subsidy Rate to Ahmadi on the Grounds That it Failed to Respond to the Department's Questionnaires to the Best of its Ability

The WPA notes that the president of Kerman Corporation, Ali R. Ahmadi, shares the same family name as the reported proprietor of Ahmadi, Mohammed Ahmadi. The WPA explains that the statute defines affiliates to include members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants. See section 771(33)(A) of the Act. In light of the statutory requirements, the WPA argues that Ahmadi was required to explain whether Ali R. Ahmadi and Mohammad Ahmadi are members of the same family and Ahmadi was required to provide information on any affiliates of the Kerman Corporation. However, according to the WPA, Ahmadi failed to provide the necessary information.

The WPA further argues that Ahmadi may not be a corporation but instead may be a sole proprietorship operated by the Ahmadi family. In support of its contention, the WPA notes that Ahmadi's questionnaire response states that the business is a family-run farm and the export certificate provided in its questionnaire response was not issued to Ahmadi but to Mrs. Nourjahan Ahmadi, daughter of Abdolhossein. The WPA further notes that Ahmadi has provided no evidence demonstrating Ahmadi's incorporation. Thus, the WPA argues that the apparent informality of Ahmadi's business structure makes it all the more important for the Department to have clear and complete information regarding the involvement of any other affiliated persons, including family members (as defined by section 771(33)(A) of the Act), in the

pistachio business in Iran.

The WPA maintains that in spite of the Department's full instructions in the questionnaires, Ahmadi's responses are inadequate to resolve the fundamental questions regarding potential affiliates and corporate structure. Accordingly, the WPA argues that the Department should find that Ahmadi failed to provide necessary information to the best of its ability. See Nippon Steel, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Thus, argues the WPA, while the unresponsiveness of the Interests Section of the GOI is sufficient, by itself, to warrant the application of adverse facts available, Ahmadi's failure to provide requested information also independently supports such action by the Department.

Cal Pure did not comment on this issue.

Department's Position: As explained above, we find that Ahmadi has participated in the instant NSR to the best of its ability and has provided the Department with sufficient information to establish that Ahmadi did not use any of the alleged subsidy programs. We also find that Ahmadi adequately responded to the Department's questions concerning company structure, affiliation, and cross-ownership and indicated that it is not in a partnership. Ahmadi indicates in its questionnaire response that it is not in a partnership nor does it have any affiliation with any other company or person. In addition, we cannot surmise a family connection exists merely because these individuals may share a surname. Further, even if, as the WPA alleges, the president of the U.S.-based Kerman Corporation is affiliated, through familial relationship, with the proprietor of Ahmadi, it is unclear how any such affiliation with an entity in the United States would result in the subsidization of Ahmadi's production of roasted pistachios in Iran. Therefore, we continue to find that Ahmadi did not use any of the alleged subsidy programs during the POR.

Comment 4: Whether the All-Others Rate Stated in the Preliminary Results Is Inaccurate and Should Be Corrected

The WPA argues that it appears that the all-others rate stated in the Preliminary Results, 99.52 percent ad valorem, was erroneously transposed from the CVD order relating to raw in-shell pistachios. See e.g., Certain In-shell Pistachios from the Islamic Republic of Iran: Final Results of Countervailing Duty Administrative Review, 71 FR 37056, 37057 (June 29, 2006), which lists the all-others rate for raw in-shell pistachios as 99.52 percent ad valorem. The WPA argues that the Department should have listed the correct all-other rates of 317.89 percent ad valorem. See e.g., 2004 Review of Roasted Pistachios from Iran, 71 FR at 66167.

Cal Pure did not comment on this issue.

Department's Position: We agree with the WPA. In the Preliminary Results, we inadvertently listed the all-others rate for the CVD order on raw in-shell pistachios from Iran instead of the all-others rate for the CVD order on roasted in-shell pistachios from Iran. We have corrected this inadvertent error in the final results. The cash deposit instructions we send to U.S. Customs and

Border Protection will reflect the correct all-others rate for this proceeding, which is 317.89 percent ad valorem.

IV. Recommendation

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

Agree

Disagree

David M. Spooner
Assistant Secretary
for Import Administration

Date