



A-357-812

ARP: 12/01/09-11/30/10

Public Document

AD/CVD Operations, Office 7: JD

June 8, 2012

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

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

SUBJECT: Issues and Decision Memorandum for the Final Results of the
Administrative Review of the Antidumping Duty Order on Honey
from Argentina

Summary

We have analyzed the case briefs of interested parties in the administrative review of the antidumping duty order on honey from Argentina. As a result of our analysis and as discussed below, we have made changes to the rates assigned to non-selected respondents. We recommend that you approve the Department of Commerce's (the Department's) position described in the "Discussion of Interested Party Comments" section of this Issues and Decision Memorandum. Below is the issue for which we received comments from parties.

1. Rates Assigned to Non-Selected Respondents

Background

On January 10, 2012, the Department published the preliminary results of the 2009-2010 administrative review of the antidumping duty order on honey from Argentina. *See Honey From Argentina: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review*, 77 FR 1458 (January 10, 2012) (*Preliminary Results*). This review covers two mandatory respondents (Compania Inversora Platense S.A. (CIPSA) and TransHoney S.A. (TransHoney)) and seven non-selected respondents: AGLH S.A. (AGLH), Algodonera Avellaneda S.A. (Algodonera), El Maná S.A. (El Maná), Industrial Haedo S.A. (Haedo), Mielar S.A./Compañía Apícola Argentina S.A. (Mielar), and Patagonik S.A. (Patagonik). In response to the *Preliminary Results*, we received a case brief from AGLH, Haedo, and Mielar (collectively, "respondents") on February 23, 2012. No party to the review filed a rebuttal brief.



Discussion of Interested Party Comments

Comment 1: Rates Assigned to Non-Selected Respondents

Respondents argue that although the Department's decision to select only a small number of respondents for examination is permissible under 19 U.S.C. § 1677f-1(c)(2), respondents still have a right to receive a calculated margin based on their own sales record. *See* Letter from AGLH, Haedo, and Mieler to the Secretary of Commerce, dated February 23, 2012 (Respondents' Brief) at 2-4. Respondents argue that the Department began limiting the number of respondents actively reviewed in antidumping duty cases involving hundreds of potential respondents, and that the Department has previously reviewed more than two companies in administrative reviews of honey from Argentina. *Id.* at 3. Therefore, respondents argue that they have a legal right to an accurate, calculated dumping margin in this review. *Id.* at 2.

Respondents state that the Department must take care in selecting a rate to be assigned to a non-selected company during a review. The Department should not adopt the statutory formula used to derive an all-others rate in investigations, which excludes facts available margins and *de minimis* and zero margins. *Id.* at 4-6. Instead, respondents aver that the Department has used zero-average rates for non-reviewed companies in other antidumping duty administrative reviews, which is a reasonable methodology. *Id.* at 5. Thus, respondents state that there is no statutory basis for a ban on the use of zero-average rates in an administrative review. *Id.* at 6.

Respondents state that the Department historically has assigned a rate of zero to non-selected companies in honey from Argentina administrative reviews when all the selected companies received a calculated rate of zero. *Id.* at 7. Respondents note that the Department applied this methodology in the 2004-2005 review and the 2005-2006 review. *Id.* at 8-11. Given the Department's past treatment of non-selected companies, respondents argue that deviating from the established practice in this antidumping duty order would be "anomalous, arbitrary, and if confirmed in the final results . . . an abuse of the Department's discretion." *Id.* at 11.

Respondents further argue that the Department's proposed assignment of a non-zero rate to non-selected companies amounts to a violation of the fundamental concept of administrative law. That is, the Department's proposed rate assignment is a sudden and unannounced departure from longstanding practices. *Id.* at 12. Additionally, respondents state that the facts of this administrative review and the history of administrative reviews in this order support the assignment of a zero rate to the non-selected companies. Respondents note that the majority of companies for which the Department calculated margins in previous administrative reviews were margins of zero or *de minimis*. *Id.* at 13-14. Respondents also assert that the two companies that received calculated margins of zero in this administrative review (*i.e.*, CIPSA and TransHoney) account for the vast majority of the quantity of exports of honey from Argentina to the United States. Respondents note that the two companies which the Department initially selected for review, but then rescinded, had quantities of shipments of honey to the United States in excess of those by CIPSA and TransHoney, and will liquidate at a zero rate. *Id.* at 14-15. Respondents conclude by saying it is reasonable to assume that the sales and pricing patterns for the non-selected companies would mirror those of the companies for which the Department calculated

margins in this review, and that such sales and pricing patterns would be at non-dumped levels. *Id.* at 15.

For all of the reasons above, respondents request that the Department assign a margin of zero to the non-selected companies.

Department's Position:

El Maná

A. Use of Facts Available

Section 776(a)(2) of the Tariff Act of 1930, as amended (the Act) provides that, if an interested party withholds information requested by the administering authority, fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act, significantly impedes a proceeding under this title, or provides such information but the information cannot be verified as provided in section 782(i) of the Act, the administering authority shall use the facts otherwise available in reaching the applicable determination.

On February 2, 2012, the Department issued a letter to El Maná soliciting quantity and value information with respect to exports of honey from Argentina to the United States during the period of review (POR). In the February 2, 2012 letter, the Department stated the following: "If the Department does not receive either the requested information or a written extension request before 5 p.m. ET on the established deadline, we may conclude that your company has decided not to cooperate in this proceeding. The Department will not accept any requested information submitted after the deadline. As required by section 351.302(d) of our regulations, we will reject such submissions as untimely. Therefore, failure to properly request extensions for all or part of a questionnaire response may result in the application of partial or total facts available, pursuant to section 776(a) of the Act, which may include adverse inferences, pursuant to section 776(b) of the Act." See Letter from the Department to El Maná, dated February 2, 2012. However, El Maná did not respond to our request for information. We confirmed that our letter was sent to the known address for El Maná. See Memorandum to the File from John K. Drury, dated May 14, 2012.

In this case, El Maná did not respond to our request for information, withheld information the Department requested, and significantly impeded the proceeding. Because El Maná did not provide the requested information, pursuant to section 776(a)(2) of the Act, we are relying upon facts otherwise available for El Maná's antidumping duty margin.

B. Application of Adverse Inferences for Facts Available

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

otherwise available.¹ In addition, the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. 103-316, Vol. 1, 103d Cong. (1994) (SAA) explains that the Department may employ an adverse inference “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”² Furthermore, affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.³ It is the Department’s practice to consider, in employing adverse inferences, the extent to which a party may benefit from its own lack of cooperation.⁴

The Department provided El Maná with notice, informing it of the consequences of the failure to respond to our antidumping questionnaires or request extensions in a timely manner. Nevertheless, El Maná failed to provide a timely response to the Department’s February 2, 2012, request for additional information. *See Essar* at *19 (“Without the ability to enforce full compliance with its questions, Commerce runs the risk of gamesmanship and lack of finality in its investigations.”). This failure indicates that El Maná has not cooperated with our request for information. *See Nippon Steel*, 337 F.3d at 1382 (“Compliance with the ‘best of its ability’ standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation. While the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.”). Moreover, “{i}t is {respondent’s} burden to create an accurate record during Commerce’s investigation.” *See Essar* at *23 (citing *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993)). El Maná’s failure has precluded the Department from performing the necessary analysis, as it did for the other responding companies, to determine whether there was any evidence of dumping by non-selected respondents in this administrative review.

For the reasons discussed above, the Department has determined that El Maná has failed to cooperate to the best of its ability and, therefore, in selecting from among the facts otherwise available, an adverse inference is warranted, pursuant to section 776(b) of the Act.⁵

¹ *See Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India*, 70 FR 54023, 54025-26 (September 13, 2005), and *Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55792, 55794-96 (August 30, 2002).

² *See* SAA at 870; *see also Certain Polyester Staple Fiber from Korea: Final Results of the 2005-2006 Antidumping Duty Administrative Review*, 72 FR 69663 (December 10, 2007).

³ *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products From Japan*, 65 FR 42985 (July 12, 2000); *Antidumping Duties, Countervailing Duties*, 62 FR 27296, 27340 (May 19, 1997); and *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1383 (Fed. Cir. 2003) (“While intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the statute does not contain an intent element.”)

⁴ *See Essar Steel Ltd. v. United States*, 2012 U.S. App. LEXIS 8621 at *18 (Fed. Cir. Apr. 27, 2012) (*Essar*). (“Because Commerce lacks subpoena power, Commerce’s ability to apply adverse facts is an important one. The purpose of the adverse facts statute is ‘to provide respondents with an incentive to cooperate’ with Commerce’s investigation, not to impose punitive damages.”)

⁵ *See, e.g., Notice of Preliminary Determinations of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars From Poland, Indonesia, and Ukraine*, 66 FR 8343, 8346 (January 30, 2001) (*unchanged in Notice of Final Determinations of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars from Indonesia, Poland and Ukraine*, 66 FR 18752, 18753 (April 11, 2001) and *Notice of Final Determination of Sales at Less Than Fair Value:*

C. Selection and Corroboration of Information Used as Facts Available

Where the Department applies adverse facts available (AFA) because a respondent failed to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the Act authorizes the Department to rely on information derived from the petition, a final determination, a previous administrative review, or other information placed on the record.⁶ In selecting a rate for AFA, the Department chooses a rate that is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation as facts available, it must, to the extent practicable, corroborate that information from independent sources reasonably at its disposal. Secondary information is described in the SAA as “information derived from the petition that gave rise to the investigation or review, the final determination concerning subject merchandise, or any previous review under Section 751 concerning the subject merchandise.”⁷ The SAA provides that to “corroborate” means simply that the Department will satisfy itself that the secondary information to be used has probative value.⁸ The Department’s regulations state that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation.⁹ To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used.¹⁰

It is the Department’s practice to use the highest rate from the proceeding, a calculated rate, a rate from the petition, or the all others rate, when a respondent fails to act to the best of its ability to provide the necessary information.¹¹ The rates in the antidumping duty petition range from 28.84 percent to 30.17.¹² The all others rate determined in the investigation is 35.76 percent.¹³

Circular Seamless Stainless Steel Hollow Products From Japan, 65 FR at 42986 (where the Department applied total adverse facts available (AFA) where respondents failed to respond to questionnaires in a timely manner).

⁶ See also 19 CFR 351.308(c) and the SAA at 868-870.

⁷ See SAA at 870.

⁸ *Id.*

⁹ See 19 CFR 351.308(d); see also the SAA at 870.

¹⁰ See *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 FR 57391, 57392 (November 6, 1996), unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in Part*, 62 FR 11825 (March 13, 1997).

¹¹ See, e.g., *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Purified Carboxymethylcellulose From Finland*, 69 FR 77216 (December 27, 2004) (unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Purified Carboxymethylcellulose From Finland*, 70 FR 28279 (May 17, 2005)).

¹² See *Initiation of Antidumping Duty Investigations: Honey From Argentina and the People’s Republic of China*, 65 FR 65831, 65833 (November 2, 2000).

We are not able to corroborate either of the petition rates or the all others rate from the investigation with information from this segment of the proceeding. Further, we note that the history of this order demonstrates a preponderance of zero and de minimis margins. Therefore, we have selected the highest rate on the record of the proceeding which we believe can be corroborated to the extent practicable. That rate of 0.77 percent is a calculated rate determined in a previous segment of this proceeding for the respondent El Maná.

The AFA rate the Department has selected for El Maná is from the 2006-2007 administrative review of honey from Argentina. *See Honey from Argentina: Final Results of Antidumping Duty Administrative Review and Determination to Revoke Order in Part*, 74 FR 32107 (July 7, 2009) (2006-2007 Review). The AFA rate selected represents a rate calculated for an individually-examined company. The Department considers the selected rate of 0.77 percent to be both reliable and relevant. Unlike other types of information, such as input costs or selling expenses, there are no independent sources for calculated margins.

On the issue of reliability, the selected adverse rate was a calculated rate for a mandatory respondent and was also applied to another cooperative respondent in the 2006-2007 administrative review. *See 2006-2007 Review* at 32109. When determining the reliability of an AFA rate, the Department considers whether the rate was reliable when first used and whether the rate continues to be reliable.¹⁴ Here, no information has been presented that calls into question the reliability of this information. *See id.* The rate was reliable when first used as it was calculated for a mandatory respondent. Thus, the Department finds that the rate of 0.77 was reliable when calculated in a previous review and remains reliable for the purposes of this review. With respect to relevance, the Department will consider information reasonably at its disposal to determine whether a margin has relevance, *i.e.* are there any circumstances that would render the rate irrelevant. 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, the Department has disregarded the highest margin in another order as best information available (the predecessor to AFA) because the margin was based on another company's uncharacteristic business expense resulting in an unusually high margin. *See Fresh Cut Flowers from Mexico; Final Results of Antidumping Administrative Review*, 61 FR 6812, 6814 (February 22, 1996) (*Fresh Cut Flowers from Mexico*). That circumstance is not present here. The selected AFA rate is based upon the calculated rate for a mandatory respondent in the most recent administrative review where the Department calculated a margin above *de minimis*, and thus reflects the commercial reality of another respondent in the same industry. Therefore, the Department finds that the 0.77 rate is both reliable and relevant.

To further corroborate the rate, we have reviewed entry data for U.S. Customs and Border Protection (CBP) which supports the application of the 0.77 percent rate to El Mana. *See Gallant Ocean*, 602 F. 3d at 1324 (“{The Department} must select secondary information that has some grounding in commercial reality.”). We found that certain imports of honey from Argentina entered the United States at deposit rates at or above the 0.77 percent. *See*

¹³ *See Notice of Amended Final Determination of Sales at Less Than Fair Value; Honey From Argentina*, 66 FR 58434 (November 21, 2001).

¹⁴ *See Sidenor Indus. SL v. United States*, 664 F. Supp. 2d 1349, 1360-61 (CIT 2009) (citing *KYD v. United States*, 613 F. Supp. 2d 1371, 1379 (CIT 2009)).

Memorandum to Richard O. Weible; Administrative Review of the Antidumping Duty Order on Honey from Argentina: Respondent Selection Memorandum, dated March 18, 2011.

Accordingly, the selected rate represents an individually calculated rate for another respondent in the same industry, and the CBP data reveal this rate represents commercial reality under which entries into the United State of subject merchandise are occurring. For these reasons, we conclude that the rate reflects commercial reality in the industry, in general, and is thus corroborated to the extent practicable, pursuant to section 776(c) of the Act.

All Other Non-Selected Respondents

The statute and the Department's regulations do not directly address the establishment of a rate to be applied to individual companies not selected for examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. The Department's practice in cases involving limited selection based on exporters accounting for the largest volumes of trade has been to look for guidance in section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation. Consequently, the Department generally weight-averages the rates calculated for the mandatory respondents, excluding zero and *de minimis* rates and rates based entirely on facts available, and applies that resulting weighted-average margin to non-selected respondents.¹⁵ Section 735(c)(5)(B) provides that where all margins are zero rates, *de minimis* rates, or rates based entirely on facts available, the Department may use "any reasonable method" for assigning the rate to non-selected respondents. In this case, for the reasons explained below, the Department has determined that a reasonable method is to apply a zero rate to the non-selected respondents.

On February 2, 2012, we solicited quantity and value information from all of the non-selected respondents. With the exception of El Maná, as noted above, all of the non-selected respondents provided the requested information. *See* letters from the other companies dated February 16, 2012. We have analyzed the submitted information and we do not find that the information provided by these respondents is dispositive as to whether they were making sales of honey from Argentina to the United States at less than normal value during the POR. Therefore, we are assigning a rate of zero to the non-selected respondents that responded to our request for quantity and value information based on the calculation of zero and/or *de minimis* margins for the individually examined exporters. As respondents noted, "{i}n every instance, without exception, when all of the actively reviewed 'mandatory' respondents have been assigned a rate of zero percent, the Department has applied the average zero rate to the non-reviewed respondents" in administrative reviews of this order. *See* Respondents' Brief at 8. In accordance with the history of this order including the fact that the Department has not calculated a rate above *de minimis* in the last three administrative reviews of this order,¹⁶ and the absence of other

¹⁵ *See, e.g., Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Results of New Shipper Review and Partial Rescission of Administrative Review*, 73 FR 8273 (February 13, 2008) (unchanged in final results).

¹⁶ As noted above, the Department calculated the 0.77 percent rate for Patagonik during the 2006-2007 administrative review. In that administrative review, the Department also assigned the 0.77 percent rate to a non-selected respondent. *See 2006-2007 Review*. The Department did not calculate margins above *de minimis* in either of the two subsequent antidumping duty administrative reviews. *See Honey from Argentina: Final Results of Antidumping Duty Administrative Review and Determination to Revoke Order in Part*, 75 FR 23674 (May 4, 2010),

dispositive information, we have determined to assign to all non-selected companies in the instant review, with the exception of El Maná, the average of the margins for the individually examined exporters, *i.e.*, zero.

Recommendation

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

Agree ✓ Disagree _____

Paul Piquado
Paul Piquado
Assistant Secretary
for Import Administration

8 JUNE 2012
Date

and *Honey From Argentina: Final Results of Antidumping Duty Administrative Review*, 76 FR 29192 (May 20, 2011).