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3rd Administrative Review
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November 3, 2004

MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Jeffrey May
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results of the 2002-2003 Administrative Review of Non-Frozen Apple Juice Concentrate from the People's Republic of China

SUMMARY

We have analyzed the brief submitted by Gansu Tongda Fruit Juice & Beverage Co., Ltd. ("Gansu Tongda") for the 2002-2003 administrative review of non-frozen apple juice concentrate ("AJC") from the People's Republic of China ("PRC"). As a result of our analysis, we have made changes to the margin calculations from the Preliminary Results.¹ We recommend that you approve the positions we have developed in the Discussion of Issues section of this memorandum. Below is a complete list of the issues in this review for which we received comments Gansu Tongda:

Comment 1: The Department's use of Poland as the primary surrogate country is contrary to law and unsupported by the administrative record.

Comment 2: The Department should correct the weight for drum labels.

Comment 3: The Department should revise its surrogate value for pomace by applying the "PPI"

¹See Certain Non-Frozen Apple Juice Concentrate From the People's Republic of China: Preliminary Results, Partial Rescission, and Partial Deferral of 2002-2003 Administrative Review, 69 FR 40612 (July 6, 2004) ("Preliminary Results").

inflation factor.

BACKGROUND

On June 29, 2004, the Department of Commerce (“the Department”) issued the Preliminary Results of this third administrative review of AJC from the PRC.

The period of review (“POR”) is June 1, 2002, through May 31, 2003. We invited parties to comment on the Preliminary Results. We received a case brief on August 6, 2004, on behalf of Gansu Tongda. No further briefs were filed and no rebuttal briefs were received. No hearing was held because none was requested.

DISCUSSION OF ISSUES

Comment 1: The Department’s use of Poland as the primary surrogate country is contrary to law and unsupported by the administrative record.

Respondent’s Argument: Gansu Tongda argues that the Department selected Poland as its primary surrogate country even though Poland was not identified as an economically comparable country nor has ever been considered as an appropriate surrogate for China in any other case. Further, Gansu Tongda argues that no interested party in this review has suggested the use of Poland or submitted any surrogate data regarding Poland. Gansu Tongda argues that it has placed valid data on the record showing that India is an economically comparable country to the PRC and is a significant producer of comparable merchandise, and, thus, India should be used as the primary surrogate in this review.

First, Gansu Tongda argues that the record for this segment of the proceeding provides a wealth of information to demonstrate that India has become a significant producer of AJC and comparable merchandise, and it cites data from its February 17, 2004, “Surrogate Value Submission” at Exhibit 1. Thus, Gansu Tongda states that the Department’s cursory rejection of India as a significant producer was erroneous and contrary to substantial record evidence. Although the Department cited one article that stated that “{t}he fruit beverage industry is still in the nascent stage,” it ignores evidence of India’s strong growth of AJC exports and the fact that Indian AJC has gotten “international recognition.”

Second, Gansu Tongda argues that the Department’s statement that there is no evidence that fruit juice and other processed fruit products are comparable merchandise to AJC is contrary to common sense and established precedent regarding comparable merchandise. According to Gansu Tongda, all processed fruit juices have similar physical characteristics, end uses, production processes, and material inputs and should be considered comparable based on the criteria previously established by the Department. Gansu Tongda cites Certain Cased Pencils from the People’s Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 67 FR 48612 (July 25, 2002), and its accompanying Issues and Decision Memorandum at Comment 5 where the Department determined whether merchandise is comparable by considering “whether products have similar physical

characteristics, end uses, and production processes,” and Preliminary Determination of Less Than Fair Value Sales: Certain Partial Extension Steel Drawer Slides With Rollers from China, 60 FR 29571 (June 5, 1995), where the Department determined that all formed metal furniture parts are comparable merchandise for drawer slides because they undergo a similar production process and have similar end uses.

Third, Gansu Tongda argues that the Department has continued to use India as the primary surrogate country in past cases where India was found to not produce the subject merchandise, but only comparable merchandise. Gansu Tongda cites Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review, 67 FR 19546 (April 22, 2002), and its accompanying Issues and Decision Memorandum at Comment 1, where the Department states that “it is undisputed that, in the original investigation of sales at less than fair value (LTFV), and in all subsequent reviews under this order, none of the countries listed in the surrogate country selection memos for this order have been found to be significant producers of crawfish tail meat,” and Preliminary Determination of Sales at Less Than Fair Value: Lawn and Garden Steel Fence Posts from China, 67 FR 72141 (December 4, 2002), where the Department selected India as the primary surrogate country based on its production of circular welded pipe, steel tubes, plates, rods, and pillars, and Sebacic Acid from China: Preliminary Results of Administrative Review, 65 FR 18968 (April 10, 2000), where the Department continued to find India as the primary surrogate country based solely on its production of the comparable product oxalic acid. Gansu Tongda argues that the Department’s precedent is to continue to use India as the primary surrogate, and the Department did not attempt to differentiate the instant case from previous cases before rejecting India as the surrogate. See Cultivos Miramonte S.A. v. United States, 980 F. Supp. 1268, 1274 (CIT 1997) (“{t}he Court has recognized that ‘Commerce has the flexibility to change its position providing that it explains the basis for its change and providing that the explanation is in accordance with law and supported by substantial evidence.’”)

Finally, Gansu Tongda argues that the record in this segment of the proceeding is devoid of any meaningful facts whatsoever regarding the juice industry in Poland. According to Gansu Tongda, the conclusion the Department reached that Poland is a ‘significant producer,’ based on the fact that Poland is a ‘net exporter’ of AJC, is arbitrary and wholly unreliable, because under the ‘net exporter’ test, the United States (one of the largest AJC producers in the world) would not be considered a significant producer. Similarly, Gansu Tongda argues that a small country with much lower AJC production than the U.S. could theoretically qualify as a “significant producer” merely because it is a net exporter. Therefore, according to Gansu Tongda, the net exporter test is inadequate to support the Department’s finding that Poland is an appropriate surrogate country because it ignores absolute production quantities.

Petitioners’ Argument: The petitioners did not comment on this issue.

Department’s Position: Pursuant to section 773(c)(4) of the Tariff Act of 1930, as amended (the

“Act”), the Department will value a non-market economy (“NME”) producer’s factors of production in a market economy that is at a level of economic development comparable to the NME and that is a significant producer of comparable merchandise, to the extent possible. In this review, for the reasons explained below, we have not found a surrogate country that is both economically comparable to the PRC and a significant producer of comparable merchandise. Where it is not possible to find a surrogate country that meets both criteria, the Department must decide whether to place greater emphasis on the economic comparability criterion or on the significant production criterion. As explained in the preamble to the Department’s proposed regulations, the Department may assign more weight to the significant producer criterion where important inputs are not traded, *i.e.*, where inputs must be acquired locally. Antidumping Duties; Countervailing Duties; Proposed Rule, 61 FR 7307 (February 27, 1996). In this case, there is no information indicating that the major input for AJC, juice apples, are traded over long distances or across borders. Given their relatively low value, we would expect that juice apples are usually acquired locally. Consequently, we have placed greater weight on whether a country is a significant producer of comparable merchandise than on its economic comparability to the PRC in selecting the surrogate.

The Department does not agree with Gansu Tongda’s argument that because India produces other fruit and vegetable juice products, the Department is required to consider these juices as comparable products for valuing AJC factors of production. The Court of International Trade has explicitly affirmed the Department’s rejection of India as an appropriate surrogate for the PRC in this case based on the Court’s direction that the Department choose a country that produces the subject merchandise AJC. See Yantai Oriental Juice Co., et al. v. United States and Coloma Frozen Foods, Inc., et al., Slip Op. 02-56 (June 18, 2002) at 14 and Yantai Oriental Juice Co., et al. v. United States and Coloma Frozen Foods, Inc., et al., Slip Op. 03-33 (March 21, 2003) at 11. Poland is a significant producer of AJC, as well as juice apples, the primary input in the subject merchandise. Thus, there is no reason to modify the Department’s product comparison analysis for purposes of this administrative review.

It is true that India is economically comparable to the PRC, but we disagree with Gansu Tongda that India is a significant producer of comparable merchandise. Consistent with the analytical approach adopted in the redetermination on remand (November 15, 2002, “Redetermination Pursuant to Court Remand”), we have relied upon two measures to identify countries as significant producers: (i) significant net-exports (exports minus imports), and (ii) significant exports to the United States. We used these measures because the Department was unable to locate information showing worldwide production of AJC or production figures in potential surrogate countries. The Department contacted the U.S. Department of Agriculture and reviewed the ITC’s preliminary and final reports to confirm that worldwide AJC production statistics were not available.

According to the United Nations Food and Agriculture Organization’s database on their website (“FAOSTAT”), and U.S. customs statistics, during 2002 (encompassing seven months of the period of review), all five comparable countries were net-importers of AJC, and only the Philippines and India

exported a small amount of AJC to the United States for one month each during the June 1, 2002, through May 31, 2003, period of review. Ranking exporters to the United States by volume, the Philippines and India ranked 18th and 13th, respectively, in the month of export only, whereas Poland ranked fifth in both months.

These numbers can be compared to net-export volumes of other countries. In 2002, Poland's net-exports of AJC alone was 187,628 MT. Net-exports in 2002 of AJC from other countries more similar to the PRC in terms of GDP, Turkey, Brazil, Chile, and Argentina, were 29,136 MT, 15,296MT, 42,261 MT, and 42,238 MT, respectively. India had no net-exports of AJC. Thus, these data indicate that Poland is a significant producer, while India's total juice exports are insignificant compared to other countries' net-exports of only AJC. Therefore, we have concluded that India is not a significant producer of AJC.

Finally, we disagree with Gansu Tongda that the record is devoid of meaningful information regarding the AJC industry in Poland. The magnitude of Poland's net-exports is a meaningful indicator that Poland is a significant producer of AJC. Moreover, although Gansu Tongda objects to the use of net-exports to identify significant producers, this measure is specifically recognized by Congress in the report for the House or Representatives discussion of the NME provision. See H.R. Conf. Rep. No. 576, 590, 100th Cong. 2d Sess. (1988), reprinted in 134 Cong. Rec. H2031 (daily ed. April 20, 1988). The legislative history of the current NME provision, which was added to the statute in 1988, gives some guidance on determining whether a country should be considered a significant producer of comparable merchandise. Specifically, the House of Representatives' conference report for the 1988 bill, at p. 590, states: "The term 'significant producer' includes any country that is a significant net exporter and, if appropriate, Commerce may use a significant net exporting country in valuing factors." Id.

Regarding Gansu Tongda's contention that the United States would not qualify as a significant producer because it is not a net-exporter, we note that the United States is a major exporter of AJC (25,170 MT in 2001), whereas Gansu Tongda's suggested surrogate, India, is not. Moreover, if we had information on production of AJC in the potential surrogate countries, we would not need to rely on the more indirect indicators of significant production, net-exports and exports to the United States. Gansu Tongda had the opportunity to find information which it believed supported its allegation and place it on the record of this proceeding. No information it provided objectively and affirmatively supported its claims that India is a significant producer of AJC.

The fact that Poland was not suggested as a surrogate by any party to the proceeding does not enjoin the Department from using Poland as a surrogate. The Department has an affirmative obligation to calculate a dumping margin as accurately as possible, and all options were reviewed and researched before Poland was chosen. Among the countries that could be considered significant producers of comparable merchandise, the Department determined that Poland was the most appropriate surrogate to use because the valuation data for Poland on the record were superior, as we explained in the

Preliminary Results and the June 29, 2004, Memorandum to Jeffrey May entitled, “Surrogate Selection and Valuation - Third Administrative Review of Non-Frozen Apple Juice Concentrate from the People’s Republic of China.”

Comment 2: The Department should correct the weight for drum labels.

Respondent’s Argument: In the June 29, 2004, Preliminary Results the Department calculated a surrogate value for drum labels using a label weight of 0.28 kg per label that had been reported by Gansu Tongda in its November 14, 2003, Section D response at Exhibit 8. This exhibit included a “packing materials consumption worksheet” for Gansu Tongda with the weights of each packing material. Gansu Tongda argues that the drum label weight was reported incorrectly in this exhibit, and that the correct weight, 0.00458 kg per drum label, was pointed out by Gansu Tongda in its 4th supplemental response on July 26, 2004. Gansu Tongda also notes that the correct drum label weight was reported in the April 8, 2004, 2nd supplemental response for Tongda Fruit Juice & Beverage Binxian Co., Ltd., one of Gansu Tongda’s affiliated companies. The respondent further cites to the new shipper review (see Certain Non-Frozen Apple Juice Concentrate from the People’s Republic of China: Final Results and Partial Rescission of the 2001-2002 Administrative Review, and Final Results of the New Shipper Review, 68 FR 71062 (December 22, 2003)) for Gansu Tongda where the Department verified that the weight of 0.00458 kg was the correct weight. See the new shipper review October 8, 2003, Memorandum to Susan Kuhbach entitled, “Gansu Tongda Fruit Juice Beverage Co., Ltd. Verification Report.” Gansu Tongda requests that the Department recalculate the drum label surrogate using the correct weight.

Petitioners’ Argument: The petitioners did not comment on this issue.

Department’s Position: The Department agrees with Gansu Tongda and will recalculate the drum label surrogate value using the 0.00458 kg weight per drum label.

Comment 3: The Department should revise its surrogate value for pomace by applying the U. S. producer price index (“PPI”) inflation factor.

Respondent’s Argument: Gansu Tongda disagrees with the Department’s statement that it did not inflate the by-product pomace price “{b}ecause of the manner in which the data is reported (in terms of the price of corn), we are not able to compute a value contemporaneous with the POR.” Gansu Tongda argues that since the U.S. dollar price for pomace was derived from an April 2000 publication, the Department should use the PPI inflation factor to inflate the price to the period of review. Gansu Tongda cites to the Department’s June 29, 2004, Memorandum to Susan Kuhbach entitled, “Factors of Production Values Used for the Preliminary Results,” in which the Department states that “{f}or all factors where we could not obtain publicly available prices contemporaneous with the POR, we adjusted FOP values to the POR using the wholesale price indices (“WPI”) or, in the case of surrogate values for data denominated in U.S. dollars, the U.S. producer price index (“PPI”).” Gansu Tongda

concludes by arguing that by inflating all values that increase normal value, and refusing to make a corresponding inflation of the pomace value that decreases normal value, the Department has improperly distorted the resulting margin calculation.

Petitioners' Argument: The petitioners did not comment on this issue.

Department's Position: The Department agrees with Gansu Tonga that the value of apple pomace should reflect the value of apple pomace in the POR. The value for apple pomace is taken from an article discussing the use of alternative feeds for beef cattle, specifically alternate feeds in Georgia. The apple pomace price is derived from the value of soybean meal costing \$200/ton and corn costing \$2.50/bushel and \$3.00/bushel. Because the Department does not have enough information on the record on soybean meal and corn prices, or their relationship to one another in the calculation of the cost of pomace during the POR, and has not found any other possible surrogate value for pomace, we find that it is appropriate to inflate the apple pomace price to the POR using the PPI index.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting the related margin calculations accordingly. If these recommendations are accepted, we will publish the final results of this third administrative review and the final dumping margin for Gansu Tongda in the Federal Register.

AGREE _____

DISAGREE _____

James J. Jochum
Assistant Secretary
for Import Administration

Date