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July 2, 2014

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

FROM: Gary Taverman 
Senior Advisor
for Antidumping and Countervailing Duty Operations

SUBJECT: Decision Memorandum for Preliminary Results of Antidumping
Duty New Shipper Review: Certain Frozen Fish Fillets from the
Socialist Republic of Vietnam

SUMMARY

In response to a request from Thanh Hung Co., Ltd. D/B/A Thanh Hung Frozen Seafood Processing Import Export Co., Ltd. ("Thanh Hung"), the Department of Commerce ("the Department") is conducting a new shipper review ("NSR") of the antidumping duty order on certain frozen fish fillets ("fish fillets") from the Socialist Republic of Vietnam ("Vietnam") for the period of review ("POR") August 1, 2012, through July 31, 2013. As discussed below, the Department preliminarily determines that Thanh Hung's sale under review is not *bona fide*. As such, the Department is preliminarily rescinding the NSR for Thanh Hung.

If these preliminary results are adopted in our final results of review, we will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on all appropriate entries of subject merchandise during the POR. Interested parties are invited to comment on these preliminary results. We will issue final results no later than 90 days from the date of publication of this notice, pursuant to section 751(a)(2)(B)(iv) of the Tariff Act of 1930, as amended ("the Act").

Background

On September 30, 2013, the Department initiated an NSR of fish fillets from Vietnam for the period August 1, 2012, through July 31, 2013.¹ As explained in the memorandum from the

¹ See *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Initiation of Antidumping Duty New Shipper Review*, 78 FR 59915 (September 30, 2013).



Assistant Secretary for Enforcement and Compliance, the Department exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 1, through October 16, 2013.² On March 19, 2014, the Department extended the time period for issuing the preliminary results by 71 days.³ On June 11, 2014, the Department partially extended the deadline for issuing the preliminary results by 14 days.⁴ The revised deadline for the preliminary results of this new shipper review is now July 2, 2014.

The Department sent an antidumping duty questionnaire to the Thanh Hung, to which it responded in a timely manner. Between March and May, 2014, the Department issued supplemental questionnaires to Thanh Hung, to which they also responded in a timely manner. During May 2014, the Department received surrogate country/surrogate value comments, and rebuttal comments from interested parties.

Scope of the Order

The product covered by the order is frozen fish fillets, including regular, shank, and strip fillets and portions thereof, whether or not breaded or marinated, of the species *Pangasius Bocourti*, *Pangasius Hypophthalmus* (also known as *Pangasius Pangasius*), and *Pangasius Micronemus*. Frozen fish fillets are lengthwise cuts of whole fish. The fillet products covered by the scope include boneless fillets with the belly flap intact (“regular” fillets), boneless fillets with the belly flap removed (“shank” fillets), boneless shank fillets cut into strips (“fillet strips/finger”), which include fillets cut into strips, chunks, blocks, skewers, or any other shape. Specifically excluded from the scope are frozen whole fish (whether or not dressed), frozen steaks, and frozen belly-flap nuggets. Frozen whole dressed fish are deheaded, skinned, and eviscerated. Steaks are bone-in, cross-section cuts of dressed fish. Nuggets are the belly-flaps. The subject merchandise will be hereinafter referred to as frozen “basa” and “tra” fillets, which are the Vietnamese common names for these species of fish. These products are classifiable under tariff article codes 1604.19.4000, 1604.19.5000, 0305.59.4000, 0304.29.6033 (Frozen Fish Fillets of the species *Pangasius* including basa and tra) of the Harmonized Tariff Schedule of the United States (“HTSUS”).⁵ The order covers all frozen fish fillets meeting the above specification, regardless of tariff classification. Although the HTSUS subheading is provided for convenience and Customs purposes, our written description of the scope of the order is dispositive.

² See Memorandum to the File, “Tolling of Deadlines for Shutdown of the Federal Government,” dated October 22, 2013.

³ See Memorandum to Gary Taverman, Senior Advisor for Antidumping and Countervailing Duty Operations from Susan Pulongbarit, International Trade Compliance Analyst, Antidumping and Countervailing Duty Operations, re: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Extension of Deadline for Preliminary Results of Antidumping Duty New Shipper Review of Thanh Hung Co., Ltd. dated March 19, 2014.

⁴ See Memorandum to Gary Taverman, Senior Advisor for Antidumping and Countervailing Duty Operations from Susan Pulongbarit, International Trade Compliance Analyst, Antidumping and Countervailing Duty Operations, re: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Extension of Deadline for Preliminary Results of Antidumping Duty New Shipper Review of Thanh Hung Co., Ltd. dated June 11, 2014.

⁵ Until July 1, 2004, these products were classifiable under tariff article codes 0304.20.60.30 (“Frozen Catfish Fillets”), 0304.20.60.96 (“Frozen Fish Fillets, NESOI”), 0304.20.60.43 (“Frozen Freshwater Fish Fillets”) and 0304.20.60.57 (“Frozen Sole Fillets”) of the HTSUS. Until February 1, 2007, these products were classifiable under tariff article code 0304.20.60.33 (“Frozen Fish Fillets of the species *Pangasius* including basa and tra”) of the HTSUS.

DISCUSSION OF THE METHODOLOGY

Bona Fides Analysis

Consistent with the Department's practice, we examined the *bona fides* of the sale by Thanh Hung that is under review in this NSR.⁶ In evaluating whether a sale in an NSR is commercially reasonable or typical of normal business practices, and therefore *bona fide*, the Department considers, *inter alia*, such factors as (a) the timing of the sale, (b) the price and quantity, (c) the expenses arising from the transaction, (d) whether the goods were resold at a profit, and (e) whether the transaction was made at an arm's length basis.⁷ Accordingly, the Department considers a number of factors in its *bona fides* analysis, "all of which may speak to the commercial realities surrounding an alleged sale of subject merchandise."⁸ In *TTPC*, the Court of International Trade ("CIT") also affirmed the Department's decision that any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future is relevant,⁹ and found that the weight given to each factor investigated will depend on the circumstances surrounding the sale.¹⁰ Finally, in *New Donghua*, the CIT affirmed the Department's practice of evaluating the circumstances surrounding an NSR sale, so that a respondent does not unfairly benefit from an atypical sale and obtain a lower dumping margin than the producer's usual commercial practice would dictate.¹¹ Where the Department finds that a sale is not *bona fide*, the Department will exclude the sale from its export price calculations.¹² When the respondent under review makes only one sale and the Department finds that transaction atypical, "exclusion of that sale as non-*bona fide* necessarily must end the review, as no data will remain on the export price side of {the Department's} antidumping duty calculation."¹³

Based on the totality of the circumstances, we preliminarily find that the sale made by Thanh Hung during the POR was not a *bona fide* commercial transaction and should be excluded from the Department's calculations. The Department reached this conclusion based on the totality of circumstances, namely: (a) the atypical nature of Thanh Hung's price and quantity; (b) extraordinary expenses arising from the transaction; (c) the importer's regular commercial interest; (d) atypical circumstances surrounding production; and (e) unreported connections to other entities. Because much of the transaction involves business proprietary information, a full discussion of the basis for our preliminary finding that the sale is not *bona fide* is set forth in the Thanh Hung *Bona Fides* Memo.¹⁴ Because we find Thanh Hung's sole sale not to be *bona fide*, we cannot rely on this sale to calculate a dumping margin and, therefore, there is no sale on

⁶ See, e.g., *Honey from the People's Republic of China: Rescission and Final Results of Antidumping Duty New Shipper Reviews*, 71 FR 58579 (October 4, 2006) and accompanying Issues and Decision Memorandum at Comment 1b.

⁷ See *Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States*, 366 F. Supp. 2d 1246, 1249-1250 (CIT 2005) ("*TTPC*").

⁸ See *Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 374 F. Supp. 2d 1333, 1342 (CIT 2005) ("*New Donghua*") (citing *Fresh Garlic from the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review*, 67 FR 11283 (March 13, 2002))

⁹ See *TTPC*, 366 F. Supp. 2d at 1250.

¹⁰ *Id.*, at 1263.

¹¹ See *New Donghua*, 374 F. Supp. 2d at 1344.

¹² See *TTPC*, 366 F. Supp. 2d at 1249.

¹³ *Id.*

