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Changed Circumstances Review
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January 2, 2009

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

**FROM:** Stephen J. Claeys
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

**RE:** Issues and Decision Memorandum for Certain Pasta from Italy: Final Results of Changed Circumstances Review and Reinstatement of the Antidumping Duty Order

Summary

We have analyzed the comments of interested parties in the above-mentioned antidumping (AD) changed circumstances review (CCR). After analyzing the comments, we have not modified the Preliminary Results. See Certain Pasta From Italy: Notice of Preliminary Results of Antidumping Duty Changed Circumstances Review and Intent To Reinstate the Antidumping Duty Order, 73 FR 9769 (February 22, 2008) (Preliminary Results).

Below is a complete list of the issues in this review for which we received comments and rebuttal comments from interested parties:

**Comment 1:** Whether Lensi's Disclosure Of A Certain Data Discrepancy Should Be Considered As A Mitigating Factor When Assigning The Cash Deposit Rate At Which Lensi Should Be Reinstated

**Comment 2:** Whether The Adverse Facts Available Cash Deposit Rate Applied to Lensi Was In Accordance With The Department's Practice And The Law

**Comment 3:** The Cash Deposit Rate At Which Lensi Should Be Reinstated Into the Antidumping Duty Order

**Comment 4:** Whether The Department's Application Of An Adverse Facts Available Rate Represents A Poor Policy Choice

**Analysis of Comments**

**Comment 1: Whether Lensi's Disclosure Of A Certain Data Discrepancy Should Be Considered As A Mitigating Factor When Assigning The Cash Deposit Rate At Which Lensi Should Be Reinstated**

Pasta Lensi S.r.l. (Lensi) notes that in the Preliminary Results the Department of Commerce (the Department) relied on the disclosure policies of other agencies for guidance in determining how to assess Lensi's disclosure of its misreported data in the Notice of Final Results of the Seventh Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination to Revoke in Part, 70 FR 6832 (February 9, 2005) (Seventh Review of Pasta from Italy).[1] Lensi maintains that there are three principals common to the prior disclosure practices administered by other U.S. government agencies. First, Lensi argues that the agencies explicitly encourage parties to make prior disclosures. See Lensi's citation to the Environmental Protection Agency's (EPA) Incentive for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations, 65 FR 19618 (April 11, 2000) (Incentive for Self-Policing) and 22 CFR 127.12(a) (2007) relating to the Department of Defense. Second, Lensi asserts that prior disclosure merits mitigation to any penalty that could be imposed for the offense being disclosed. See Lensi's citation to 15 CFR 764.5(a) and 15 CFR 764.8(a) relating to the Bureau of Industry and Security (BIS), the EPA's Incentive for Self-Policing, 65 FR at 19625, 22 CFR 127.12(a) relating to the Department of State, and the Department of Justice's Corporate Leniency Policy (August 10, 1993). The third principal common to the prior disclosure practices administered by other U.S. government agencies, argues Lensi, is that a prior disclosure will be considered as a mitigating factor if it is made before a government agency begins an investigation involving the disclosure (or, in some cases, before the disclosing party has knowledge that such an investigation has begun), or before the agency has received the information from another source. See Lensi's citation to 15 CFR 764(b)(3) and 15 CFR 764.8(b)(3) relating to BIS, 19 CFR 162.74(a)(2) relating to Customs and Border Patrol, 22 CFR 127.12(b)(2) relating to the Department of State, the EPA's Incentive for Self-Policing, 65 FR at 19622, the Internal Revenue Service's Revised Voluntary Disclosure Practices, IRM 9.53.3.1.2.1., and the Department of Justice's Corporate Leniency Policy.

Lensi argues that the prior disclosure made in ex parte meetings with the Department in August 2006 and September 2006 and through submissions in August 2006, September 2006, December 2006, April 2008, June 2008, and October 2008, satisfy all of the normal requirements for obtaining mitigation from penalty which, according to Lensi, would mean a reasonable cash deposit rate that would permit the company to export subject merchandise to the United States.

[1] The instant CCR covers Lensi and its parent company, the American Italian Pasta Company (AIPC). AIPC is a co-petitioner in the proceeding. In August 2000, AIPC opened Lensi whose sales to the United States were subject to the antidumping order on pasta from Italy.

Lensi asserts that the principal basis on which the Department appears to have denied any mitigation for Lensi is the fact that AIPC has cooperated with an investigation by the U.S. Securities and Exchange Commission (SEC) and United States Attorney's Office (USAO). Lensi explains that it reported to the Department during ex parte meetings and in its December 2006 filing that AIPC was cooperating with an SEC investigation. However, Lensi argues that, from this fact, the Department incorrectly concluded in the Preliminary Results that the voluntary disclosure by Lensi and AIPC came more than one year after the SEC had learned of the same or similar information. See Preliminary Results, 73 FR at 9771.

Lensi claims the Department's statement in the Preliminary Results is incorrect and that this erroneous statement undermines the Department's principal reason for refusing to recognize AIPC's prior disclosure as a mitigating factor in determining the cash deposit rate at which to reinstate Lensi. Lensi explains that, in 2005, AIPC began to review allegations regarding anomalies in the company's earnings reports. Lensi maintains that the anomalies principally pertained to promotional allowances, related receivables, spare parts, and inventory valuation. Lensi states that, in July 2005, AIPC undertook an internal audit, which included an investigation of AIPC's historical financial statements. Lensi argues that AIPC confirmed that a data discrepancy had occurred in the Seventh Review of Pasta from Italy and reported the error to the Department shortly afterward on August 9, 2006. Lensi adds that it also reported the error from the Seventh Review of Pasta from Italy to the SEC and the USAO on or about the same time. Lensi explains that, prior to its disclosure of the error the SEC, the USAO and the Department, the SEC and the USAO were unaware of the error in the questionnaire response that Lensi originally submitted in the Seventh Review of Pasta from Italy. Thus, according to Lensi, there is no basis for the Department to conclude that the SEC or the USAO had any actual or constructive knowledge of this reporting error either from their own investigations or from a third party source, nor is there any basis on which the Department could conclude that the SEC or the USAO were pursuing their own investigation of the error specifically divulged to the Department by AIPC.

Lensi maintains that its arguments on this point are supported by business proprietary statements in an affidavit it placed on the record on April 7, 2008. [2] According to Lensi, in the affidavit an individual with personal knowledge regarding the SEC's investigation confirms that the subjects under investigation by the SEC were entirely separate from those disclosed to the Department and that there was no reason to believe that the SEC ever would have discovered the error that AIPC voluntarily disclosed to the Department. Lensi further argues that information in the April 7, 2008 affidavit and in its June 9, 2008 questionnaire response make it clear that the data discrepancy divulged to the Department was entirely separate and unrelated to the areas under investigation by the SEC and the USAO. In addition, Lensi asserts that a press release from the SEC, attached as part of its October 17, 2008, submission demonstrates that the trade promotion issues that were under investigation by the SEC were different and separate from the data discrepancy stemming from the Seventh Review of Pasta from Italy. Furthermore, Lensi maintains that record evidence demonstrates that the USAO was not investigating any activities related to the Seventh Review of Pasta from Italy prior to the companies' disclosure of the data

[2] The information in the affidavit is business proprietary and cannot be summarized on the public record.

discrepancy to USAO. Lensi points out that none of the subpoenas issued by the USAO mentioned the data discrepancy from the Seventh Review of Pasta from Italy until after Lensi and AIPC disclosed the matter simultaneously to the USAO, the SEC, and the Department. See Exhibit 5 of Lensi's June 9, 2008 submission. In addition, Lensi states that business proprietary information contained in its October 17, 2008 submission supports its contention. See Exhibit B of Lensi's October 17, 2008 submission.

Thus, argues Lensi, because the investigation of the SEC and USAO were entirely separate from the error disclosed to the Department, the mere existence of an SEC and USAO investigation should not disqualify Lensi from receiving mitigation for its prior disclosure of the data discrepancy in question to the Department.

Lensi further asserts that the fact that the SEC and the USAO were pursuing separate investigations under other federal statutes should not be relevant to the Department's decision of whether to consider AIPC's prior disclosure to be a mitigating factor. Lensi argues that none of the other agency provisions on voluntary disclosure cited in its brief impose such a limitation, and neither should the Department.

Lensi argues that if prior disclosure provisions of other agencies are applied to the factual situation at issue in this proceeding, AIPC's disclosure would entitle the company to mitigation. Lensi asserts that prior disclosure regulations from BIS provide that mitigation shall apply if information is provided to BIS before BIS or another agency learns of the same or substantially similar information and has commenced an investigation or inquiry in connection with that information. See 22 CFR 127.12(b)(2). Lensi argues that it notified the Department of the data discrepancy from the Seventh Review of Pasta from Italy at the same time that it informed the SEC and USAO. Lensi further argues that even for those agencies where the initiation of a formal investigation is not required to negate the benefits of disclosure, AIPC's prior disclosure would still be valid, as there is no evidence that the Department or any other agency of the U.S. government, including the SEC and the USAO, had information regarding the erroneous questionnaire responses submitted during the Seventh Review of Pasta from Italy.

Lensi further notes that the EPA's voluntary disclosure requirements are more strict and that mitigating factors are not considered if it is determined that the EPA or any other government agency likely would have identified the problem either through its own investigative work or from information received through a third party. Lensi argues that even under this more strict interpretation, there is no evidence that the SEC or the USAO likely would have discovered the data discrepancy divulged by Lensi to the Department in its August 2006 filing.

In addition, Lensi takes issue with the Department's statement in the Preliminary Results that, "allowing Lensi and AIPC to revise misreported data over five years after Lensi was revoked from the antidumping duty order contradicts the Department's longstanding practice of requiring respondents to submit accurate and timely data in accordance with the deadlines of the relevant segment of the proceeding." See 73 FR at 9771. Lensi notes that timely disclosure of a past violation is a requirement imposed by only a small number of U.S. agencies. Lensi further argues that its disclosure was prompt and that the Department's characterization of the facts was

misleading. Lensi states that the Department revoked the order with respect to the firm on February 9, 2005 and that the firm divulged the data discrepancy to the Department a year later. Lensi also states that only a few weeks passed between the time Lensi learned of its reporting error and when it reported the error to the Department. Lensi adds that the Department's concern about Lensi's supposed delay in reporting the error rings hollow given that the Department waited over 15 months after Lensi made its initial disclosure before taking any action.

Lensi asserts that the restatement of AIPC's financial statements is not relevant to the validity of Lensi's disclosure of the data discrepancy to the Department. Lensi also disputes the Department statement in the Preliminary Results that AIPC did not disclose that its financial statements were subject to review and restatement. See 73 FR at 9770. Lensi explains its December 2006 letter to the Department made it clear that AIPC was undergoing a review of its financial statements, including those covering the period of review (POR) of the Seventh Review of Pasta from Italy. Lensi further argues that the Department's erroneous claim in the Preliminary Results concerning Lensi's financial statements could be suggesting that the restatement of a company's financial statements is an event that should be disclosed to the Department in order for the Department to reconsider previously calculated margins based on those financial statements. If so, Lensi argues that such an approach by the Department would introduce great uncertainty into otherwise settled proceedings and establish a precedent that the restatement of a respondent's financial statement is a reportable event.

**Department's Position:** In the Preliminary Results, the Department reinstated Pasta Lensi in the antidumping duty order, and, pursuant to sections 776(a)(2) and (b) of the Tariff Act of 1930, as amended (the Act), made an adverse inference when selecting from among the facts available for purposes of determining the dumping margin for the seventh review and the cash deposit rate at which Lensi should reinstated into the antidumping order on pasta from Italy.[3] AIPC/Lensi argue that, in determining the antidumping cash deposit rate, the Department should adopt a new "mitigation" policy tailored after those of some other federal agencies that enforce environmental, criminal, tax and other laws. AIPC/Lensi argue that the Department should mitigate, because after the revocation and while being investigated by the USAO and SEC, Lensi "voluntarily" disclosed that it improperly obtained the revocation. Arguments presented by AIPC/Lensi have not led us to alter our decision to apply adverse facts available (AFA) under sections 776(a)(2) and (b) of the Act.

[3] Subsequent to the initiation of this changed circumstances review and the publication of the Preliminary Results, the Federal Circuit affirmed the Department's authority to reconsider a prior administrative review decision and to reinstate a respondent that improperly obtained a revocation. See Tokyo Kikai Seisakusho, Ltd. v. United States, 529 F.3d 1352, 1360-61 & n. 5 (Fed. Cir. 2008)(also explaining that while Commerce could have (and perhaps should have) labeled the changed circumstances review proceeding as reconsideration of administrative review results, the court would not exalt form over substance by delimiting the scope of the Department's authority based upon how it labeled the Department proceedings).

As stated in the Preliminary Results, the submissions made by Lensi and AIPC in the instant CCR make clear that, during the Seventh Review of Pasta from Italy the firms withheld information requested by the administering authority, failed to provide such information by the deadlines for submission of the information and in the form or manner requested, and significantly impeded the proceeding. See 73 FR at 9770. The record evidence demonstrates that "AIPC made false statements to the U.S. Department of Commerce regarding the price of the pasta that AIPC imported into the United States in order to avoid adverse consequences regarding tariffs that AIPC paid under an antidumping program." See Press Release, US Attorney Announces Guilty Pleas by Two Former Executives of the American Italian Pasta Company for Conspiracy to Fraudulently Overstate Earnings and Deceive Investors, at 3 (September 15, 2008) ("US Attorney's Announcement"). As AIPC itself acknowledged in its agreement with the US Attorney, "the company filed multiple materially false and misleading financial reports with the SEC, and . . . made other material false statements in connection with the Department of Commerce's antidumping program." See US Attorney's Announcement, at 4. As a result of these materially false statements, Lensi improperly obtained revocation from the antidumping duty order on certain pasta from Italy and subsequently imported pasta without paying any antidumping duties.

In evaluating AIPC's/Lensi's request for mitigation, we start our analysis with the language of the antidumping statute and the Department's regulations. Neither the antidumping statute nor the Department's regulations provide for mitigation in determining an antidumping duty rate. In their submissions, AIPC/Lensi acknowledged that the Department does not have a mitigation policy for AD/CVD proceedings. See March 24, 2008, Case Brief on Behalf of Pasta Lensi S.r.L., at 2 (resubmitted to correct for bracketing on April 7, 2008). Although AIPC/Lensi cited several regulations of other agencies, no such policy has been implemented by the Department. We note that in many instances mitigation policies adopted by other agencies are in the context of mitigating damages or penalties imposed for violations of law or regulations. See, e.g., 19 U.S.C. § 1592; 19 U.S.C. § 1618; Export Administration Regulations: Enforcement and Protective Measures, 15 CFR 764.5 (2008). In contrast, the antidumping laws that the Department administers are not penal but remedial in nature, and redress the consequences of dumping. See Huayin Foreign Trade Corp. v. United States, 322 F.3d 1369, 1380-81 (Fed. Cir. 2003); and Allied Tube and Conduit Corp. v. United States, 127 F. Supp 2d 207, 218-19 (CIT 2000).

Moreover, the antidumping statute specifically addresses situations where, as here, parties failed to cooperate with the Department to the best of their ability. See section 776(b) of the Act. The antidumping statute grants the Department discretion to determine when an adverse inference is warranted, and what adverse inference to make when it applies facts available to determine a company's dumping margin.[4] The Department's longstanding practice, affirmed by

[4] "If the administering authority . . . 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 administering authority . . . , in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." Section 776(b) of the Act. "Such adverse inference may include reliance on information derived from– (1) the petition, (2) a final determination . . . , (3) any previous review . . . , or (4) any other information placed on the record." Id.

the courts, is to apply as AFA the highest rate determined from any segment of the proceeding, subject to the statute's requirement to corroborate secondary information under section 776(c) of the Act.[5] As the Federal Circuit explained, "{t}he statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent."[6] Under this standard, Lensi had an obligation to accurately report its data by the deadline established in the administrative review. Instead of cooperating to the best of its ability, "AIPC made false statements to the U.S. Department of Commerce regarding the price of the pasta that AIPC imported into the United States in order to avoid adverse consequences regarding tariffs that AIPC paid under an antidumping program." See US Attorney's Announcement at 3.

In light of AIPC's/Lensi's failure to cooperate to the best of their ability in the underlying administrative review, we do not find it necessary or appropriate to consider the intent or motivation behind Lensi's and AIPC's belated decision to disclose their inaccurate reporting in the Seventh Review of Pasta from Italy. As such, whether AIPC's/Lensi's misreporting to the Department would have been independently discovered by the Department, is also not relevant. As we stated in the Preliminary Results, we determine that Lensi and AIPC failed to act to the best of their ability to comply with a request for information and their belated disclosure does not diminish the failure to act to the best of their ability during the seventh review. Accordingly, for purposes of determining the margin of dumping in the seventh review and for establishing a cash deposit rate, the Department continues to select as AFA the weighted average margin of 45.59 percent. See Section 751(a)(2)(C) of the Act.

In selecting a rate for AFA, the Department selects one that is sufficiently adverse "as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner." See Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 FR 8909 (February 23, 1998). The Department's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See the Statement of Administrative Action Accompanying the URAA, H.R. Rep. No. 103-316, vol. 1, at 870. In choosing the appropriate balance between providing a respondent with an incentive to respond accurately and imposing a rate that is reasonably related to the respondent's prior experience, selecting the highest prior rate "reflects a common sense inference that the highest prior margin is the most probative evidence of current margins, because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less." See Rhone Poulenc, Inc. v. United States, 899 F. 2d 1185, 1190 (Fed. Cir. 1990) (emphasis omitted). Because application of AFA is not a penalty, we find that mitigation is not a

[5] Rhone Poulenc Inc. v. United States, 899 F.2d 1185, 1190 (Fed. Cir. 1990); Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330, 1339 (Fed. Cir. 2002)("it is within Commerce's discretion to presume that the highest prior margin reflects the current margins").

[6] Nippon Steel Corp.v. United States, 337 F.3d 1373, 1383 (Fed. Cir. 2003) (Nippon Steel).

relevant concept in AD/CVD proceedings. As such, the facts concerning the timing and nature of the disclosure made by Lensi and AIPC are not relevant to the Department's analysis when determining the applicable antidumping duty margin and cash deposit rate at which Lensi should be reinstated into the antidumping order.[7]

**Comment 2: Whether The Adverse Facts Available Cash Deposit Rate Applied to Lensi Was In Accordance With The Department's Practice And The Law**

Lensi argues that there was no legal basis for the Department to apply an AFA rate to Lensi because there is no evidence that Lensi failed to act to the best of its abilities in the Seventh Review of Pasta from Italy, which is a statutory prerequisite to making an adverse inference. Lensi states that in Nippon Steel, the Court articulated a two step test for the Department to apply in determining whether a respondent has acted to the best of its abilities such that the application of AFA is warranted under section 776(b) of the Act. According to Lensi, the test articulated in Nippon Steel consists of whether the respondent: (1) kept and maintained all required records, and (2) put forth its maximum efforts to investigate and obtain requested information from its records. See Nippon Steel, 337 F.3d at 1382-83. Lensi asserts that it maintained the necessary information during the Seventh Review of Pasta from Italy, as evidenced by the fact that it subsequently was able to voluntarily disclosure the necessary information to the Department. However, Lensi claims that as to the second step, there is nothing in the Preliminary Results to support the conclusion that Lensi did not put forth its maximum effort to investigate and obtain the requested information from its records. Lensi points out that at no point during the Seventh Review of Pasta from Italy or in the Preliminary Results did the Department note that "more forthcoming responses should have been made" or that "less than full cooperation has been shown." See Nippon Steel, 337 F.3d at 1383.

Lensi admits that it made an error in the Seventh Review of Pasta from Italy. However, Lensi claims that the best of its ability standard does not equate to strict liability and further asserts that such an interpretation would contradict the standard set forth in Nippon Steel, which stated that the "adverse facts available standard does not require perfection and recognizes that mistakes sometimes occur." See Nippon Steel, 337 F.3d at 1382. Lensi claims that in order to apply AFA, the Department must specifically conclude that Lensi's reporting error resulted from its failure to exert its maximum effort to report the data in question. Lensi argues that in light of Lensi's full cooperation in the Seventh Review of Pasta from Italy and the ongoing CCR, the Department cannot reach such a conclusion.

Lensi further argues that the Department is in error to the extent that it takes the position that Lensi's failure to report certain information in the Seventh Review of Pasta from Italy is itself evidence that the company failed to act to the best of its ability. Lensi asserts that treating a

[7] We note that as a result of AIPC's/Lensi's cooperation with the Department of Justice and other federal agencies, the US Attorney, subject to certain conditions, agreed not to prosecute the company. See US Attorney Announcement at 4-5.

failure to report information as per se evidence that a respondent failed to act to the best of its ability would read section 776(b) out of the Act altogether. Lensi also maintains that such an interpretation would be inconsistent with numerous instances in which the Department had discovered errors in a respondent's reported information but nevertheless used the respondent's own data, either without penalty or corrected it without adverse inferences, to calculate a dumping margin. See Seventh Review of Pasta from Italy at Comment 5 of the accompanying Issues and Decision Memorandum (applying partial facts available for Barilla's failure to report certain cash discounts).

Lensi asserts that even if the statutory best of its ability criterion under 776(b) of the Act were met in this case, the Department should exercise its discretion not to apply an AFA margin for Lensi. Lensi notes that the term "may use" under 776(b) of the Act indicates that the use of facts available is discretionary even if the Department concludes that a respondent failed to act to the best of its ability. Lensi maintains that in Tokyo Kikai Seisakusho, Ltd. v. United States, 473 F. Supp. 2d 1349, 1363 (Ct. Int'l Trade 2007) (Tokyo Kikai) (citing Allegheny Ludlum Corp. v. United States, 215 F. Supp. 2d 1322, 1341 (Ct. Int'l Trade 2000), the Court rejected the notion that the "best of its abilities" standard was the only factor in determining whether to apply AFA. According to Lensi, in Tokyo Kikai, the Court held that:

> . . . the deficient response must be analyzed in light of the respondent's overall conduct, the importance of the information, the particular time pressure of the investigation, and any other information that bears on the issue of whether the deficiency was an excusable inadvertence or a demonstration of a lack of regard for its responsibilities in the investigation.

Id.

Lensi asserts that the application of the standard set forth in Tokyo Kikai should lead the Department to reject the application of an AFA rate. Lensi claims its conduct during the Seventh Review of Pasta from Italy did not suggest anything except full and complete cooperation. Lensi concedes the importance of its data discrepancy in that the data omission resulted in a de minimis margin and revocation from the order where accurate reporting would have resulted in an affirmative finding and Lensi's continued inclusion in the antidumping duty order. However, Lensi argues that, in toto, the record evidence indicates a good faith effort by Lensi to participate fully in the Seventh Review of Pasta from Italy.

**Department's Position:** We disagree with Lensi that the application of AFA is not warranted when determining the cash deposit rate at which Lensi should be reinstated. In an agreement it executed with the USAO, AIPC acknowledges that it made "material false statements" in connection with the Seventh Review of Pasta from Italy. See page 4 of the USAO's September 15, 2008 press release, which was attached to the September 29, 2008 Memorandum to File from Eric B. Greynolds, Program Manager, Office 3, Operations. In light of AIPC's

acknowledgement that it made false statements to the Department, we disagree with AIPC's/Lensi's contention that the record demonstrates that Lensi and AIPC made a good faith effort to participate fully during the seventh review period.

We acknowledge that in Nippon Steel the Federal Circuit stated the "adverse facts available standard does not require perfection and recognizes that mistakes sometimes occur." See Nippon Steel, 337 F.3d at 1382. However, AIPC/Lensi cite Nippon Steel selectively. The Federal Circuit also stated that "[c]ompliance with the 'best of its ability' standard is determined by whether respondent has put its maximum effort to provide Commerce with full and complete answers to all inquiries in investigation." Id. The Federal Circuit further clarified that an adverse inference may be drawn

> under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made; i.e., under circumstances in which it is reasonable to conclude that less than full cooperation has been shown. While intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the statute does not contain an intent element . . . . The statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent.

See Nippon Steel, 337 F.3d at 1383.

The discrepancy at issue is not an inconsequential or minor mistake. Rather, the data discrepancy at issue was the direct result of AIPC's decision to submit materially false information to the Department during the Seventh Review of Pasta from Italy. Moreover, the materially false information submitted by AIPC resulted in the firm receiving a third consecutive de minimis margin, thereby allowing Lensi to be revoked from the antidumping order on pasta from Italy and enabling Lensi to avoid paying any applicable antidumping duty cash deposits from July 1, 2003, the time of its revocation, until February 22, 2008, the publication date of the Preliminary Results. Based on these facts, we find that Lensi and AIPC did not put forth their maximum efforts to investigate and obtain requested information from its records and, thus, we determine that the application an adverse inference in selecting among the facts available under section 776(b) of the Act is warranted when determining the cash deposit rate at which Lensi should be reinstated into the antidumping order.

AIPC's/Lensi's reliance upon treatment of Barilla is inapposite because there was no evidence that Barilla deliberately and intentionally withheld information on the discounts at issue in order to obtain a de minimis or lower margin. Thus, the Department had no reason to question the rest of the data submitted by Barilla during the course of that proceeding.

We disagree with AIPC's/Lensi's claim that its conduct during the Seventh Review of Pasta from Italy did not suggest anything except full and complete cooperation. Lensi's decision to submit false information falls far short of full and complete cooperation. Lensi's actions resulted in a de minimis margin and revocation from the order where accurate reporting would have resulted in an affirmative finding and Lensi's continued inclusion in the antidumping duty order.

**Comment 3: The Cash Deposit Rate At Which Lensi Should Be Reinstated Into the Antidumping Duty Order**

Reiterating the arguments made in its earlier submissions, Lensi asserts that the Department should calculate the cash deposit rate using Lensi's own corrected data. If, however, the Department concludes that Lensi's own information cannot be used for purposes of calculating a cash deposit rate, Lensi claims the Department can select from among several non-AFA margins that are not dependent upon Lensi's data but would still reflect the mitigation to which Lensi is entitled. Lensi points out that the Department could issue a cash deposit rate of 3.80 percent, which is equal to the average of all dumping margins calculated in the Seventh Review of Pasta from Italy, or 5.08 percent, the average of firms with above de minimis rates calculated in the Seventh Review of Pasta from Italy. Alternatively, Lensi states that the Department could apply a cash deposit rate of 7.36 percent, the highest rate calculated in the Seventh Review of Pasta from Italy, or the all-others rate of 11.26 percent. Lensi notes, however, that the application of the latter two rates would be unduly punitive in light of the mitigation Lensi should receive as a result of its voluntary disclosure to the Department.

**Department's Position:** Lensi had a full opportunity to submit accurate and complete information during the seventh administrative review of this antidumping duty order, but did not do so. As explained in Comments 1 and 2 above, the application of AFA under sections 776(a) and (b) of the Act is warranted when determining the dumping margin and cash deposit rate at which Lensi should be reinstated into the antidumping order. Where secondary information is used, as long as the data is corroborated,[8] the Department acts within its discretion in determining which sources or facts it will rely upon to support an adverse inference. Ta Chen Stainless Pipe, 298 F.3d at 1339.

The total AFA margin of 45.59 percent ad valorem applied in the instant CCR is equal to the total AFA margin applied to other producers of subject merchandise in this proceeding. See, e.g., Notice of Final Results of the Sixth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination Not to Revoke in Part, 69 FR 6255, February 10, 2004 (Sixth Review of Pasta from Italy) and accompanying Decision Memorandum

[8] AIPC/Lensi do not argue that the AFA rate chosen by the Department has not been adequately corroborated.

at Comment 11, where the Department applied an AFA margin of 45.59 percent to a producer of subject merchandise for failing to report a portion of its home-market sales. In the Sixth Review of Pasta from Italy, petitioners, which included AIPC, supported the Department's use of the 45.59 percent margin to a respondent that failed to cooperate to the best of its ability for purposes of applying total AFA for both assessment and cash deposit rate purposes. Id. Accordingly, the rates suggested by Lensi are inappropriate as AFA rates.

**Comment 4: Whether The Department's Application Of An Adverse Facts Available Rate Represents A Poor Policy Choice**

Lensi contends that the Department's conclusion in the Preliminary Results completely eliminates any incentive for a respondent to come forward with a voluntary disclosure. Lensi claims that, since the Department lacks the authority and resources to investigate potential errors in completed proceedings, it is therefore critical that the Department establish a policy that encourages voluntary disclosure.

Lensi explains that in the Preliminary Results, the Department rejected AIPC's proposal to use its own data in part because the Department concluded that it would somehow set a precedent that would permit respondents to manipulate antidumping and countervailing duty proceedings to their advantage. See 73 FR at 9771. Lensi argues that the scenario described by the Department in the Preliminary Results is highly unrealistic. Lensi contends that the Department may resort to the use of facts available under section 776(b) of the Act and through referral of false statements to the Department of Justice for prosecution under 18 U.S.C. § 1001 ensure that respondents do not intentionally submit false or misleading information to the Department.

However, Lensi argues that a respondent would never seek a revision to the duty rate by providing the Department with revised information, as hypothesized by the Department. Rather, Lensi argues that the respondent would remain silent in the knowledge that once a proceeding is concluded, the chances that its scheme will be discovered are virtually nil. According to Lensi, mitigating the penalty for a company that comes forward to disclose a reporting error would not change this reality. Lensi further argues that the Department's hypothetical scenario would argue against the acceptance of all prior disclosure, which is directly contrary to the position taken by other U.S. government agencies.

Lensi asserts that the approach adopted in the Preliminary Results makes no distinction between voluntary disclosure and involuntary disclosure. Lensi argues that Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan: Final Results of Changed Circumstances Review, 71 FR 11590 (March 8, 2006) (LNPP from Japan) highlights why the Department's decision in the Preliminary Results represents a poor

policy decision. According to Lensi, in LNPP from Japan the evidence that led the Department to reinstate the respondent came to light through the petitioner, who had obtained the evidence through discovery in a parallel civil litigation. See LNPP from Japan Issues and Decision Memorandum at Comment 5. Lensi contends that its situation is entirely different because no third party alerted the Department to the existence of an error in a prior review. Rather, Lensi notes that Lensi itself promptly disclosed the data discrepancy to the Department after learning of the error and before any other government agency was aware of the error. Lensi argues that the Department's approach in the Preliminary Results treats Lensi and the respondent in LNPP from Japan essentially the same by imposing a total AFA rate on both companies. Lensi maintains that by failing to account for the important differences between voluntary and involuntary disclosure, parties in future proceedings will have no incentive to voluntarily disclose their mistakes to the Department.

Lensi argues that the Department's approach in the Preliminary Results treats Lensi less favorably than companies that were revoked from antidumping orders yet were found to have resumed dumping after revocation, not through voluntary disclosure, but because their dumping was brought to light by the petitioners. See Sebacic Acid from the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement of the Antidumping Duty Order, 70 FR 16218 (March 30, 2005), in which Lensi claims the Department established a new cash deposit rate based on data collected in the CCR, and not an AFA rate; see also Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea: Preliminary Results of Changed Circumstances Review and Intent To Reinstate Kolon Industries, Inc. in the Antidumping Duty Order, 72 FR 56048 (October 2, 2007), in which Lensi claims the Department reinstated the respondent at a rate based on the company's own data. Lensi asserts that it is illogical for the Department to treat the respondents in the two aforementioned proceedings more favorably than Lensi when establishing a new cash deposit rate upon reinstatement. Lensi argues that such an approach sends a message that there is little penalty for getting caught resuming dumping after revocation, but that there is substantial penalty for voluntarily alerting the Department to the need for reinstatement under an order.

**Department's Position:** Lensi argues that the application of total AFA in the instant CCR will discourage respondents from voluntarily disclosing mistakes to the Department. The Department's goal, however, is to encourage respondents to submit accurate information in the manner requested by the applicable deadlines during the course of the proceeding. This goal is consistent with the language of sections 776(a) and (b) of the Act that allows the Department to use facts available and draw adverse inferences when a party fails to submit information by the appropriate deadlines and fails to cooperate to the best of its ability. Thus, consistent with sections 776(a) and (b) of the Act, the Department has adopted an AFA practice that advances the goal of encouraging respondents to timely submit accurate information during the normal course of the proceeding.

The disclosure of misreported data after the conclusion of a segment of proceeding is different from situations in which respondents seek to correct errors made during the course of the proceeding prior to the deadline for the submission of new factual information. The Department has long allowed respondents to revise data discrepancies and mistakes during the course of a proceeding leading up to the deadline for submission of new factual information. The Department also has a longstanding practice of allowing respondents to correct minor errors at the outset of verification.[9] The Department's findings in the instant CCR do nothing to overturn or replace the Department's longstanding practices in this regard.

We find it unnecessary and inappropriate to adopt a policy that accommodates rare instances, where a company provides false statements to the Department and subsequently discloses its actions after the completion of a relevant segment of the proceeding, while being under investigation by other federal agencies. By declining to adopt a new policy of encouraging disclosure, after a review has been completed, a very rare occurrence, the Department strikes a proper balance in favor of encouraging timely participation and cooperation during the course of its regular proceedings.

Recommendation

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

Agree: _____ Disagree: _____

_____
David M. Spooner
Assistant Secretary
for Import Administration

_____
Date

[9] On the other hand, the Department may apply adverse facts available if untimely revisions are provided during a proceeding. See, e.g., Tianjin Mach. Imp. & Exp. Corp. v. United States, 353 F.Supp.2d 1294, 1303-1306 (CIT 2005). AIPC/Lensi have not provided a compelling argument as to why their correction, submitted after the completion of the review, should place them in a more favorable position than respondents that seek to make significant revisions to their data in an untimely manner during the course of a proceeding.