C-489-806
Changed Circumstances Review
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MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the Countervailing Duty Changed Circumstances Review on Certain Pasta from Turkey

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SUMMARY

We have analyzed the case brief filed by Marsan Gida Sanayi ve Ticret A.S. (''Marsan'') in the changed circumstances review ("CCR") of certain pasta from Turkey. As a result of our analysis, we have made no changes to the preliminary results. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Outlined below is the complete list of the issues in this review for which we have received comments from Marsan.

Comment 1: Whether the Facts of the Case Warrant a Finding of Successorship
Comment 2: Whether Marsan was Denied Procedural Due Process
Comment 3: Whether the Department's New Policy Furthers the Goals of the Statute

BACKGROUND

On July 24, 1996, the Department published in the Federal Register the order on certain pasta from Turkey. See Notice of Countervailing Duty Order: Certain Pasta ("Pasta") From Turkey, 61 FR 38546 (July 24, 1996). On December 3, 2008, Marsan requested that the Department

initiate and conduct expedited CCRs to determine that, for purposes of the antidumping duty ("AD") and countervailing duty ("CVD") cash deposit rates, Marsan is the successor to Gidasa Sabanci Gida Sanayi ve Ticaret A.S. ("Gidasa"). See Marsan's December 3, 2008, submission entitled, "Pasta from Turkey: Request for Expedited Changed Circumstances Review of AD/CVD Orders." On January 28, 2009, the Department published a notice of initiation of a CCR of the CVD order for Marsan. See Notice of Initiation of Countervailing Duty Changed Circumstances Review: Certain Pasta from Turkey, 74 FR 4938 (January 28, 2009) ("Initiation Notice"). On April 16, 2009, the Department requested additional information and issued a questionnaire to Marsan, to which it responded on May 1, 2009. See Marsan's May 1, 2009, response entitled, "Pasta from Turkey: Marsan response to the supplemental questionnaire."

On April 14, 2009, and June 2, 2009, the Department published its preliminary and final results, respectively, for the CCR of the AD order on certain pasta from Turkey and found that Marsan was the successor-in-interest to Gidasa. See Certain Pasta from Turkey: Notice of Preliminary Results of Antidumping Duty Changed Circumstances Review, 74 FR 17153 (April 14, 2009); Certain Pasta from Turkey: Notice of Final Results of Antidumping Duty Changed Circumstances Review, 74 FR 26373 (June 2, 2009). On September 15, 2009, the Department published the preliminary results of the CVD CCR of the CVD order on certain pasta from Turkey and preliminarily found that, based on the Department's new methodology and criteria to analyze CVD CCRs, Marsan was not the successor to Gidasa, for purposes of the CVD cash deposit rate, and therefore its merchandise should continue to enter under the "all others" cash deposit rate. See Certain Pasta From Turkey: Preliminary Results of Countervailing Duty Changed Circumstances Review, 74 FR 47225 (September 15, 2009) ("Preliminary Results"). We invited parties to comment on our Preliminary Results and received comments from Marsan on September 24, 2009. We did not receive any rebuttal comments.

DISCUSSION OF THE ISSUES

1. Whether the Facts of the Case Warrant a Finding of Successorship

Marsan argues that the Department's new approach to CVD CCRs, as outlined in the Preliminary Results, is unlawful. In the Preliminary Results, the Department stated that inter alia, it will make an affirmative CVD successorship finding where there is no evidence of significant changes in the respondent's operations, ownership, corporate or legal structure during the relevant period that could have affected the nature and extent of the respondent's subsidy levels.[1] Marsan argues that the Department cannot conclude that Marsan is not the successor to Gidasa based solely on speculation of potential subsidies, and that there must be substantial evidence, such as an actual change in the level of subsidization, for the decision to be supported as a matter

[1] See Preliminary Results at 47227.

of law. To support its claim, Marsan cites to CNART,[2] where the Court of International Trade ("CIT") stated that the "mere possibility" that production of surrogates might have been subsidized was not an adequate basis for rejecting those countries as surrogates.[3] Moreover, in CNART, the CIT stated that "Guesswork is no substitute for substantial evidence in justifying a decision," id. at 424. Marsan claims that there is no supporting evidence in the current case which suggests that the change in ownership, corporate or legal structure affected Gidasa's/Marsan's level of subsidization.

Moreover, Marsan claims that, if the Department believed there was a potential of subsidization, there was ample time to ask supplemental questions. Marsan points out that the transfer of ownership was a transaction between private enterprises and that the record shows the post-acquisition company has the same assets as the pre-acquisition company and, prior to the transfer, Gidasa was reviewed and found to have no countervailable subsidies. In addition, Marsan claims its financial statements do not indicate any potential subsidization. Therefore, Marsan argues there is no reason to suspect that subsidies flowed from one company to the other.

Marsan respectfully contends that the Department's new approach of granting the "all others" rate for private-to-private changes in ownership where the new owners have provided no subsidies is contrary to the goals of the CVD law. Therefore, Marsan urges the Department to revert to its previous CVD CCR approach, which mirrored the AD successor-in-interest CCR approach.

Department's Position:

Marsan contends that the Department's findings are based on presumption and not fact. We disagree. The limited purpose of a successorship-type CCR normally is to determine whether the cash deposit rate previously established for the alleged predecessor company is the best current estimate for cash deposit purposes of the rate of subsidization of the respondent company in the CCR. In this CCR, the Department fully examined all the facts that are relevant under its new methodology with respect to this question, and determined that the changes in ownership and corporate structure leading up to Marsan's name change indicate that the "all others" rate is the best estimate of Marsan's current level of subsidization.

[2] See China National Arts and Crafts Import and Export Corp., Tianjin Branch v. United States, 771 F. Supp. 407 (Ct. Int'l Trade 1991) ("CNART"), citing Asociacion Colombiana de Exportadores de Flores v. United States, 704 F. Supp. 1114, 1117, 13 CIT 13, 15 (1989), aff'd, 901 F.2d 1089 (Fed. Cir. 1990).

[3] See id., 771 F. Supp. at 422.

Moreover, different from what apparently transpired in CNART, the Department provided a reasoned explanation to support the methodology described in the Preliminary Results.[4] In this successorship CCR, the Department announced a new methodology, explained why it was coming up with a new methodology, and why it chose to focus on certain factors (including changes in operations, ownership, corporate or legal structure). Among other reasons, we find that these factors reflect those aspects of a company that generally are most impacted by, the target of, or the vehicle for subsidy benefits. See Preliminary Results at 47228.

As context, we note that the statute leaves the Department broad discretion in determining what constitutes "changed circumstances sufficient to warrant a review." See section 751(b) of the Tariff Act of 1930, as amended ("the Act"). The Department has reasonably exercised this discretion in adopting a policy that the determination of actual subsidy levels and calculation of countervailing duty rates is not warranted in CCRs because those functions are already performed in administrative reviews conducted pursuant to section 751(a) of the Act (periodic review of amount of duty). Instead, the Department has adopted a policy that provides for determining whether the CCR respondent is entitled to the previously calculated cash deposit rate of an alleged "predecessor." Because the CCR respondent is entitled to a determination of its own cash deposit rate to be calculated in an administrative review upon request, the Department has reasonably limited the granting of an alleged "predecessor's" rate to those circumstances where the respondent company has not undergone certain types of fundamental changes that are not feasible or appropriate to analyze and evaluate in the context of a CCR.

The statute provides no entitlement to the respondent to an affirmative successorship finding and the Department has provided a reasoned explanation for why it has limited CCRs in the manner described in its preliminary findings. Marsan disputes what constitutes the relevant facts or standards for a CCR, suggesting that the ultimate consideration in a CCR should only be whether the respondent's subsidy levels actually changed as a result of (in this case) the change in ownership. However, while that analysis may be appropriate in an investigation or administrative review, the Department has explicitly chosen not to adopt that standard for a CCR, nor is that standard required under the statute for a CCR.

As discussed in our Preliminary Results, in the Department's experience, certain types of changes, such as changes in ownership, corporate and legal structure, often result in changes to a company's rate of subsidization. For example, changes in ownership can affect subsidy levels where the new owners (including a new parent corporation) have previously received allocable, non-recurring subsidies and the continuing subsidy benefits are now attributable to the

[4] See Preliminary Results at 47226-8.

respondent subsidiary.[5] Often, governments will provide new subsidies such as discounted land and/or facilities, as well as debt forgiveness, concurrent with a change in ownership precisely to encourage and facilitate the sale to new investors.[6] Also, a change in ownership can extinguish existing non-recurring, allocable subsidies.[7] Additionally, even where new subsidies are not provided, changes in ownership can affect existing subsidy rates with respect to subject merchandise, in that after a corporate restructuring or change in ownership, existing subsidies are attributed across a different sales denominator.[8]

As previously stated in our Preliminary Results, where these types of changes have occurred, the proper avenue to determine whether any of these changes actually affected the respondent's rate of subsidization is in the context of an administrative review, which foreign producers whose merchandise is subject to a CVD order, including Marsan, have the opportunity to request.[9] Marsan argues that the Department "could have easily asked" the respondent whether its change in ownership affected its actual subsidy levels. This is, of course, beside the point. The Department's primary responsibility as investigator is to examine the complete facts, not solicit legal conclusions, regarding subsidization.

2. Whether Marsan was Denied Procedural Due Process

Marsan argues that it was prejudiced by the Department's Preliminary Results which outlines the new policy for CVD CCRs. Marsan claims that in the Initiation Notice, the Department only notified Marsan that it was reconsidering its approach of CVD CCRs and it did not inform Marsan of the criteria which would be applied. Marsan was under the impression that any new policy the Department implemented would avoid substantial prejudice of Marsan's interests. Moreover, Marsan argues that it had no indication either in the Request for Comments or in the Initiation Notice that the Department's results would find that a change in ownership from one private owner to another would warrant a negative CVD successorship determination.[10] Because

[5] See, e.g., 19 CFR 351.525(b)(6).

[6] See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances, 73 FR 40480 (July 15, 2008) and accompanying Issues and Decision Memorandum at 26 and 151.

[7] See Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 FR 37125 (June 23, 2003) (concerning the modification of agency practice regarding privatizations).

[8] See 19 CFR 351.525(b)(6)(iii).

[9] See Preliminary Results at 47227.

[10] See Countervailing Duty Changed Circumstances Reviews; Request for Comment on Agency Practice, 72 FR 3107 (January 24, 2007) ("Request for Comments").

the proposed new policy was not identified in the comments supplied to the Department, Marsan contends it was not given proper notice of the criteria under which it would be reviewed.

Additionally, Marsan argues that because the Department did not issue its Preliminary Results until after the passing of the deadline (i.e., the last day of the anniversary month, July 31, 2009), to request an administrative review, the Department has denied Marsan the chance to have its subsidy levels reviewed and potentially a new cash deposit rate issued in mid-to-late 2010. Consequently, Marsan must now wait an additional year to request an administrative review, for which the cash deposit rate may not be changed until mid-to-late 2011.

Furthermore, Marsan claims this new policy was retroactively applied, and that the Department cannot lawfully change a policy retroactively when the result substantially prejudices a party.[11] Marsan cites to Solvay Solexis,[12] to support its argument that the Department cannot "spring a trap" on a respondent by announcing a new policy at odds with other policies after the record of the proceeding is closed.

Marsan also points to Mittal Steel,[13] where the respondent asked the court to order the re-liquidation of subject merchandise entries that were liquidated prior to the expiration of the statutory time limit for appeal, and prior to the respondent's application for a preliminary injunction. In Mittal Steel, the respondent claimed that it was harmed, because it was in the midst of negotiating a preliminary injunction with the Department when the Department issued liquidation instructions. However, Marsan distinguishes its situation from Mittal Steel, since the respondent was aware of the Department's policy that liquidation instructions would be issued to U.S. Customs and Border Protection ("CBP") within 15 days of publication of the final results in the Federal Register and of the Department's intention to apply this policy. The CIT stated that the respondent had other means to protect its interests and denied its request. Id. at 1316-7. In the current case, Marsan did not know the criteria of the new policy until the issuance of the Preliminary Results.

In light of the fact that Marsan did not have knowledge of the criteria of the new policy when it requested the CCR, Marsan requests that the Department apply the new approach prospectively, and either analyze Marsan's response under the previous criteria, or find it to be the successor to Gidasa under the new approach by including a substantial evidence test.

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[11] See PAM S.p.A. v. United States, 463 F.3d 1345 (Fed. Cir. 2006).

[12] See Solvay Solexis v. United States, 628 F. Supp. 2d 1375,1381 Slip Op. 2009-54 (Ct. Int'l Trade June 11, 2009) ("Solvay Solexis"), citing Transcom, Inc. v. United States, 182 F.3d 876 (Fed. Cir. 1999), and Sigma Corp. v. United States, 17 CIT 1288, 841 F. Supp. 1255, 1267 (1993).

[13] Mittal Steel v. United States, 502 F. Supp. 2d 1295, Slip Op. 2007-110 (Ct. Int'l Trade 2007) ("Mittal Steel").

Department's Position:

First, we disagree with Marsan's statements that it did not have adequate notice. Prior to the initiation of this proceeding, the Department gave notice that it was considering a new methodology to examine CVD CCRs. In SSSSC from Korea,[14] the Department indicated that it intended to consider further the issue of whether alternative or additional successorship criteria, other than those the Department relies upon in an AD successor-in-interest analysis, would be more appropriate in a successorship-type CVD changed circumstances review context. Additionally, the Department issued a Federal Register notice inviting the public to submit comments on the issue.[15] In the Request for Comments, the Department reiterated that the AD successor-in-interest analysis may not be entirely relevant in the CVD context and highlighted various considerations that distinguish CVD CCRs from AD CCRs.

Moreover, to give notice of our intentions in the current review, in our Initiation Notice, we stated that:

> "we intend not to apply the AD successor-in-interest methodology to determine whether Marsan is the successor-in-interest to Gidasa. The Department anticipates requesting additional information for this review and will publish in the Federal Register a notice of the preliminary results of the CVD changed circumstances review, in accordance with 19 CFR 351.221(b)(2) and (4), and 19 CFR 351.221(c)(3)(i). That notice will set forth the factual and legal conclusions upon which our preliminary results are based and a description of any action proposed. Pursuant to 19 CFR 351.221(b)(4)(ii), interested parties will have an opportunity to comment on the preliminary results of review."[16]

Second, concerning Marsan's claim that it was prejudiced by the timing of the Preliminary Results, we note that our regulations concerning CCRs do not set a deadline for CCR preliminary results. Specifically, our regulations only require the Department to issue the final results of CCRs not later than 270 days after the date on which the review is initiated. See 19 CFR 351.216(e). Therefore, consistent with our regulations and, because of the complexity of developing a new policy for conducting CVD CCRs, we find that the timing of our Preliminary Results was reasonable.

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[14] See Stainless Steel Sheet and Strip in Coils from the Republic of Korea: Preliminary Results of Countervailing Duty Changed Circumstances Review, 71 FR 75937, 75940 (December 19, 2006) ("SSSSC from Korea").

[15] See Request for Comments.

[16] See Initiation Notice at 4939.

Moreover, we note that nothing prohibited Marsan from requesting an administrative review. Marsan could have protected its interests and requested an administrative review, since July 2009 was the anniversary month of the order on certain pasta from Turkey. If Marsan had requested an administrative review, and found that the results of the CCR were favorable, i.e., Marsan was determined to be the successor to Gidasa, and was allowed to enter its merchandise under Gidasa's cash deposit rate, Marsan could have withdrawn its request for an administrative review since the final results of the CCR would have been issued before the deadline to withdraw an administrative review.[17] On the other hand, if Marsan found that the results of the CCR were unfavorable, its interests would have been protected, and the Department would calculate an individual subsidy rate for Marsan, based on the information provided to the Department in the context of an administrative review.

Third, we disagree with Marsan that this policy is being applied retroactively. As previously stated, we provided notice at the onset of the current CCR that we did not intend to apply the AD successor-in-interest methodology to determine whether Marsan is the successor to Gidasa.[18] Moreover, generally, following the results of CCRs involving successorship questions, we may establish new cash deposit rates; however, we do not liquidate any previous entries of subject merchandise. Therefore, we find that this policy is not retroactive in nature.

Fourth, we find that Marsan's reference to Solvay Solexis is misplaced. In Solvay Solexis, the plaintiff respondent argued that it was denied due process and that the Department could not announce a last-minute presumption. The CIT denied the plaintiff's due process claims because the Department did not in fact change its practice and the respondent had an opportunity to provide comments to the Department concerning the potential change. Under Solvay Solexis, the CIT did not state that the Department cannot change a pre-existing policy during the course of a proceeding. However, the court noted that the Department has the burden of notifying respondents if it is applying a "new factual presumption that is contrary to, or a significant departure from its previous or traditional methodology."[19] In the context of the current CCR, we have notified the respondent. Additionally, while we acknowledge Marsan's claim that we announced the criteria of the new policy at the Preliminary Results, which occurred after the

[17] Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if the party who requested the review withdraws the request within 90 days of the date of publication of the notice of initiation of the requested review. Because there was no review requested in July 2009 in connection with the CVD order on certain pasta from Turkey, there was no notice of initiation published. However, we note that 90 days after the last day of the anniversary month (which would precede an initiation notice) is October 31, 2009, and takes place after the deadline for the final results of the current CCR.

[18] See Initiation Notice at 4939.

[19] See Solvay Solexis, 628 F. Supp 2d at 1381.

deadline to submit new information, we note that we had all of the information necessary to make our successorship determination, and there were no deficiencies in the record.[20] According to Marsan's responses, it was clear that changes in ownership, corporate, and legal structure occurred, and according to our new policy these types of changes are grounds for not finding Marsan to be a successor.

Lastly, we find that similar to Mittal Steel, Marsan had additional options that it did not take advantage of to protect its interests. For example, Marsan could have requested an administrative review be conducted.

In conclusion, we recognize that in general, the Department may change its practice, even when it is a long-standing practice as long as it explains why it has done so and the new methodology. See, e.g., Koyo Seiko Co., Ltd. v. United States, 516 F. Supp. 2d 1323, 1333-1334 (CIT 2007) aff'd, 551 F.3d 1286 (Fed. Cir. 2008). We have provided adequate notice, we have explained our reason for changing our methodology, we have described our new methodology, and we provided Marsan an opportunity to comment on the methodology. Therefore, we find that Marsan's due process rights were not violated.

3. Whether the Department's New Policy Furthers the Goals of the Statute

Marsan argues that the Department's new approach to CVD CCRs may have a considerable trade-distorting affect. Marsan argues that according to the Department's new policy, a post-sale company is not the successor to a pre-sale company, which brings into question whether a revoked company which changes ownership can be brought back into the order and would be subject to the all-others rate. Marsan further argues that if our new policy implies that all companies (revoked or subject to the order) which undergo a change in ownership are subject to the all-others rate, then there is no legitimate distinction between a revoked company and a company under a CVD order. Marsan claims, if this is a potential result under the new policy, it would be inconsistent with the past 30 years of CVD practice.

As a second point, Marsan argues this approach could not be effectively policed, since the Department has no way to monitor the ownership of every company excluded by revocation from a CVD order.

[20] Pursuant to 19 CFR 351.301(b)(3), the deadline for submitting new information in a CCR is 140 days after publication of initiation notice, which in the current case is June 17, 2009.

Department's Position:
While we take note of Marsan's argument regarding revoked companies, we also note that this is a theoretical argument and is irrelevant to facts of Marsan in the current proceeding. Therefore, we will examine this issue when we are faced with it. See section 751(b)(1) of the Act.

RECOMMENDATION

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

_____ _____
Agree Disagree

_____
Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

_____
Date