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UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

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Scope Inquiry
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MEMORANDUM FOR: Richard W. Moreland
Deputy Assistant Secretary
AD/CVD Enforcement Group 1

FROM: Louis Apple
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AD/CVD Enforcement Group 1, Office 2
Import Administration

THROUGH: Irene Darzenta Tzafolias
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SUBJECT: Recommendation Memorandum -- Final Ruling of Request by Tak Fat, et al. for Exclusion of Certain Marinated, Acidified Mushrooms from the Scope of the Antidumping Duty Order on Certain Preserved Mushrooms from the People's Republic of China

Summary

On April 28, 2000, we preliminarily determined that certain marinated or acidified mushrooms produced, exported or imported by Tak Fat Trading Co., Mei Wei Food Industry Co., Ltd., Leung Mi International, Tak Yeun Corp., and Genex International Corp. (collectively, Tak Fat) are covered by the scope of the antidumping duty order on certain preserved mushrooms (CPMs) from the People's Republic of China (PRC), 64 FR 8308 (February 19, 1999). We invited interested parties to submit comments on the Preliminary Scope Ruling. Tak Fat submitted comments on May 17, 2000, and the petitioners submitted rebuttal comments on May 30, 2000.

For purposes of the final determination, in accordance with 19 CFR 351.225(k)(1), and consistent with our preliminary determination, we recommend that the Department determine that the "marinated or acidified" mushrooms produced, exported or imported by Tak Fat are within the scope of the antidumping duty order on CPMs from the PRC based on their acetic acid content level.

Product Description/ Manufacturing Process

The product subject to this scope inquiry is marinated or acidified mushrooms of the species *agaricus bisporus* that are prepared in the following manner. The mushrooms are washed, blanched in a water-based solution, and placed in cans. The cans are then filled with a liquid medium consisting of water, salt, sugar, vinegar, acetic acid, yeast extract, citric acid, MSG, vitamin C, flavorings, and spices. The cans are sealed and then heated.

Background

The regulations governing the Department's antidumping scope determinations can be found at 19 CFR 351.225. On matters concerning the scope of an antidumping duty order, the Department first examines the descriptions of the merchandise contained in the petition, and the determinations of the Secretary of Commerce (the Secretary) and the International Trade Commission (the Commission). This determination may take place with or without a formal inquiry. Normally, if the Department determines that these descriptions are dispositive of the matter, the Department will issue a final scope ruling as to whether or not the subject merchandise is covered by the order. See 19 CFR 351.225(d).

Conversely, when the descriptions of the merchandise are not dispositive, the Department will consider the additional factors set forth at 19 CFR 351.225(k)(2). These criteria are: i) the physical characteristics of the merchandise; ii) the expectations of the ultimate purchaser; iii) the ultimate use of the product; iv) the channels of trade in which the product is sold; and v) the manner in which the product is advertised and displayed. (Hereafter referred to as the *Diversified Products* criteria.) The determination as to which analytical framework is most appropriate in any given scope inquiry is made on a case-by-case basis after consideration of all evidence before the Department.

In this case, we have evaluated Tak Fat's request in accordance with 19 CFR 351.225(k)(1), because the descriptions of the product contained in the petition, the final determination of the Secretary and the Commission, and the antidumping duty order are dispositive of the issue.[1] While the Department would normally issue only a final scope ruling, in this instance we determined to first issue a preliminary ruling so that we may take any interested party comments into consideration before making a final ruling, given the controversy among the interested parties over the facts of record. We have addressed interested parties' comments bel w.

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[1]In their respective March 15, 2000, and March 20, 2000, responses to the Department's request for comments and additional information, both Tak Fat and the petitioners advocated that the Department conduct this scope inquiry in accordance with 19 CFR 351.225(k)(1), rather than applying the *Diversified Products* criteria set out in 19 CFR 351.225(k)(2).

Documents and parts thereof from the underlying investigation deemed relevant by the Department to this scope ruling were made part of the record of this determination and are referenced herein. Documents that were not presented to the Department, or placed by it on the record, do not constitute part of the administrative record for this scope determination.

In the antidumping petition, the petitioners described the scope as follows:

> The products covered by this antidumping duty order are certain preserved mushrooms whether imported whole, sliced, diced, or as stems and pieces. The preserved mushrooms covered in the less-than-fair value investigation are the species *Agaricus bisporus* and *Agaricus bitorquis*. "Preserved mushrooms" refer to mushrooms that have been prepared or preserved by cleaning, blanching, and sometimes slicing or cutting. These mushrooms are then packed and heated in containers including but not limited to cans or glass jars in a suitable liquid medium, including but not limited to water, brine, butter or butter sauce. Preserved mushrooms may be imported whole, sliced, diced, or as stems and pieces. Included within the scope of the investigation are "brined" mushrooms, which are presalted and packed in a heavy salt solution to provisionally preserve them for further processing.
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> The merchandise subject to these investigations is classifiable under subheadings 2003.10.27, 2003.10.31, 2003.10.37, 2003.10.47, 2003.10.53, and 0711.90.4000 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Although the HTS subheadings are provided for convenience and Customs purposes, the written description of the merchandise under investigation is dispositive.
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> Excluded from the scope of this investigation are the following: (1) all other species of mushroom including straw mushrooms (HTS heading 2003.10.009); (2) all fresh and chilled mushrooms (HTS heading 0709.51.00); including "refrigerated" or "quick blanched mushrooms"; (3) dried mushrooms (HTS headings 0712.30.10); (4) frozen mushrooms (HTS heading 0710.80.20); and (5) "marinated," "acidified" or "pickled" mushrooms, which are packed with solutions such as oil, vinegar or acetic acid (HTS heading 2001.90.39).

Antidumping Petition on Certain Preserved Mushrooms from Chile, China, India and Indonesia, January 6, 1998, pages 12-13 (Petition).

In a supplement to the petition, the petitioners further described the excluded "marinated," "acidified" or "pickled" mushrooms as follows:

> "Acidified" mushrooms are mushrooms preserved in acid, including, but not limited to acetic acid; "pickled" mushrooms are those preserved in vinegar; "marinated" mushrooms are those preserved in either acetic acid or vinegar, but also containing oil. Mushrooms prepared or preserved by means of vinegar or acetic acid are covered under HTS heading 2001.90.39. According to the Note accompanying HTS heading 2001.90, this heading covers
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>> vegetables, fruit, nuts and other edible parts of plants prepared or preserved by means of vinegar or acetic acid, whether or not containing salt, spices, mustard, sugar or other sweetening matter. These products may also contain oil or other additives. They may be in bulk (in casks, drums, etc.) or in jars, bottles, tins or airtight containers ready for resale. The heading includes certain preparations known as pickles, mustard pickles, etc.

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Letter to the Department Supplementing the Petition on Certain Preserved Mushrooms from Chile, China, India and Indonesia (Petition Supplement), January 15, 1998, pages 4-5.

The scope of the less-than-fair value investigation and of the antidumping duty order on CPMs is identical to the scope as specified in the petition with the exception of the last paragraph, which reads as follows:

> Excluded from the scope of this investigation are the following: (1) all other species of mushroom including straw mushrooms; (2) all fresh and chilled mushrooms, including "refrigerated" or "quick blanched mushrooms"; (3) dried mushrooms; (4) frozen mushrooms; and (5) "marinated," "acidified" or "pickled" mushrooms, which are prepared or preserved by means of vinegar or acetic acid, but may contain oil or other additives.

Antidumping Duty Order: Certain Preserved Mushrooms from the People's Republic of China, 64 FR 8308 (February 19, 1999) (Order).

This scope description was adopted by the Commission in defining the domestic like product for purposes of its injury determination. The scope has remained unchanged since the Department's issuance of the antidumping duty order.

In our Preliminary Scope Ruling, we found that the scope descriptions contained in the record of this proceeding are dispositive that Tak Fat's mushrooms are within the scope, and do not fall within the exceptions for acidified, marinated or pickled mushrooms. Tak Fat argued that the Food and Drug Administration (FDA) standard of identity for canned mushrooms, which prohibits the addition of any ascertainable amount of vinegar[2] or sugar, is dispositive of the scope of the order. Tak Fat further argued that its product fell within the exceptions to the scope because it met the FDA requirements for acidified foods.[3] The petitioners argued that they never intended the FDA standards to be dispositive of the scope of the order, and pointed out that, in the petition phase of the p oceeding, they defined the scope exclusions in terms of HTS heading 2001.90.39, as mushrooms that are "prepared or preserved by means of vinegar or acetic acid." The petitioners further argued that the Department should apply the same guidelines as the Customs Service to determine whether a vegetable product is "prepared or preserved by means of vinegar or acetic acid"– that it contains at least 0.5 percent acetic acid. We concluded that the evidence on the record supported the petitioners' arguments in favor of applying the Customs threshold for acetic acid content to determine whether Tak Fat's mushrooms qualify as excluded merchandise. As Tak Fat's mushrooms contain between 0.13 and 0.16 percent acetic acid, we determined that they did not. See, April 28, 2000 Preliminary Scope Ruling Decision Memorandum for a complete discussion.

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[2]Acetic acid is a primary ingredient in vinegar.

[3]The FDA regulations require "acidified foods" to have a minimum pH level of 4.6

Interested Parties' Comments on the Preliminary Scope Ruling

1. The petitioners did not rely on Customs classifications to define the scope, but rather, relied upon the FDA standards of identity.

Tak Fat restates its argument from the March 27, 2000, submission that the petitioners did not rely on HTS classifications to define "marinated" mushrooms for the purposes of the antidumping petition. Tak Fat claims that, even though the Department cites two instances where the petitioners inserted HTS classification references after each type of excluded merchandise, including "marinated" mushrooms, none of the record evidence, including Departmental publications or determinations prior to the Preliminary Scope Ruling, refer to either HTS headings or to the 0.5 percent benchmark for acetic acid content established by the U.S. Customs Service (Customs) and adopted by the Department in the Preliminary Scope Ruling.

Tak Fat argues that the Petition and the Petition Supplement provide compelling record evidence that the petitioners' intent was to use the FDA standards to define the scope of the order. Tak Fat points to the footnote 15 at page 12 of the Petition which stated: "The scope of this petition comports with the Food and Drug Administration's ("FDA") standards of identity for canned mushrooms. 21 C.F.R. §155.201." Tak Fat also cites to the Petition Supplement in which the petitioners reiterated that the scope of the order comports with the FDA regulations for canned mushrooms, and added,

> Petitioners are not concerned with circumvention of an antidumping duty order against certain preserved mushrooms through the use of "marinated," "acidified," or "pickled" mushrooms because the FDA's and USDA's standards of identity provide clear guidance as to which products can be labeled "canned mushrooms." Vinegar, oil, and acids other than ascorbic acid (vitamin C), including acetic acid, are not among the optional ingredients allowed by the standards of identity for canned mushrooms.

Tak Fat argues that page 4 of the Petition Supplement indicates that, in fact, the petitioners did not want acetic acid levels to be determinative of the scope when they stated that "{a}cidified" mushrooms are mushrooms preserved in acid, including, but not limited to acetic acid." (emphasis added). Tak Fat claims that, according to the petitioners' definition, and consistent with the FDA standard, acetic acid need not even predominate, so long as it is present. Tak Fat argues that this is record evidence which the Department overlooked in the Preliminary Scope Ruling.

The Petitioners' Rebuttal Comments

The petitioners argue that a scope inquiry conducted under 19 CFR §351.225(k)(1) is not limited to consideration only of the Department's published determinations, as Tak Fat contends; and that the Department's Preliminary Scope Inquiry properly considered the descriptions of the merchandise contained in the petition, the initial investigation, as well as the determinations of the Secretary and the Commission, as required by the regulations.

The petitioners contend that the Department's omission from the scope of the HTS numbers associated with excluded merchandise is consistent with both administrative practice and the Department's regulations. Petitioners cite to the Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Taiwan (Sheet and Strip), 64 FR 30,592, 30,593-594 (June 8, 1999), in which numerous exceptions to the scope are listed without accompanying HTS numbers. The petitioners note that Sheet and Strip illustrates the administrative procedure whereby interested parties properly sought and obtained additional specific exclusions from the scope of the order, a process Tak Fat could have used to seek an exclusion for its product during the investigation, but did not. The petitioners also cite to 19 CFR 351.202(5), which requires that petitioners list the HTS numbers for in-scope merchandise, but makes no such requirement for scope exclusions. The petitioners add that their intentional inclusion of HTS headings when describing excluded merchandise, even when none were required, is further evidence that they meant to describe the scope exceptions by reference to these HTS headings.

Finally, the petitioners reiterate their claim that they never intended the scope of the investigation to be limited to CPMs meeting certain FDA and USDA standards of identity. They add that their statement that the scope language "comports with" the FDA standard for canned mushrooms can only reasonably be understood to mean that canned mushrooms meeting the FDA standard of identity are included among the types of CPMs under investigation. The petitioners assert that mushrooms meeting the scope description are covered by the scope regardless of whether they meet the FDA standard of identity for canned mushrooms. Furthermore, the petitioners point out that in the investigation, the FDA standard was referenced to describe a type of covered merchandise, rather than to describe a scope exclusion. To describe the scope exclusions, the petitioners reiterate that they specifically referred to and described this merchandise as being covered by HTS heading 2001.90.39 in their January 15, 1998 Petition Supplement.

The Department's Position

The scope states that acidified, marinated or pickled mushrooms that are "prepared or preserved with acetic acid or vinegar" are excluded from the scope of the order. As discussed in the Preliminary Scope Ruling, and acknowledged by Tak Fat, the petitioners clearly referred to the HTS number in the petition, and cited to specific descriptive language of the HTS heading in the Petition Supplement when clarifying for the Department the scope of the excluded merchandise. Although we omitted from the exclusion clause of the scope language the HTS headings provided by the petitioners, we appropriated the phrase "prepared or preserved with vinegar or acetic acid" directly from the HTS heading for products classified under HTS heading 2001. As we have stated in the Preliminary Scope Ruling at page 10, it is not the Department's normal practice to include in the scope language the HTS numbers associated with exceptions to the scopes.

Regarding Tak Fat's arguments with respect to the FDA standards for acetic acid content, we reiterate that we have considered all of the evidence on the record, and we continue to find more

compelling the evidence that the petitioners relied upon the language which was taken from the HTS subheading and which had an established meaning to describe the excluded merchandise. See Department's Position in Part 2 below.

Tak Fat objects to the use of the 0.5 percent standard, principally because it does not appear on the underlying record of the investigation. Tak Fat states that ". . . *no* standard for 'marinated' mushrooms under the HTS tariff heading was referenced by any party..." while "the *only* available standard is that provided by petitioner itself: the FDA standard of identity"(Tak Fat's May 17, 2000 comments at 13). As discussed above, the petitioners' references to HTS 2001.90.39 in connection with the scope exclusions and the adoption of the language of that HTS category are unambiguous. Furthermore, while we acknowledge that the petition referred to the FDA standard of identity for canned mushrooms with respect to covered merchandise, we note that the first time the FDA standard for acidified foods appears on the record in any form is in Tak Fat's January 6, 2000 request for a scope determination. Thus, while we considered Tak Fat's FDA standard for acidified foods, such evidence became part of the record long after the clear references to the HTS number and the use of the language embodied therein as contained in the exclusion language of the Petition and the Petition Supplement.

Tak Fat hinges its argument in favor of the FDA standard to a large extent upon the paragraph in the Petition Supplement in which the petitioners stated their views of possible circumvention of the order. We do not consider this supposition on the part of the petitioners (that the FDA guidelines for canned mushrooms may provide protection against circumvention) to indicate that the FDA guidelines are dispositive of the scope of the order for either covered or excluded merchandise. Moreover, making the scope of the order dependent on the FDA standards of identity for canned mushrooms would facilitate circumvention by allowing a mushroom product containing any amount of vinegar or acetic acid to fall outside the scope of the order, a position that all parties appear to reject.[4] As we state in the Preliminary Scope Ruling, such a broad reading of the scope exceptions is incorrect, and would undermine the remedial effect of the order.

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[4]Tak Fat has taken inconsistent positions on how much acetic acid is necessary to exclude a product from the scope of the order. In the Scope Inquiry Request, Tak Fat states that the FDA standard of identity for acidified foods, requiring an acetic acid level sufficient to maintain a minimum pH of 4.6 is dispositive (see, Tak Fat's January 6, 2000 Scope Request at 5-6). In its March 27, 2000 comments at 3, Tak Fat claims on one hand that the "plaintiff intended to exclude all marinated and acidified mushrooms without regard to the percent by weight of acetic acid contained in such mushrooms," (emphasis added) and, on the other hand that the FDA minimum for acetic acid content applies. In its May 17, 2000 comments at 13, Tak Fat denies that it made the statement quoted above, and adheres to its position that the FDA standard for acetic acid content is dispositive.

2. The Preliminary Scope Ruling departs from long-standing Departmental practice not to define the scope of an order solely on HTS classifications, and relies on non-record evidence to define non-scope merchandise.

Tak Fat argues that the Department cannot rely on the standard for acetic acid content established in Customs Ruling 069121 to define exclusions to the order because this document was first placed on the record on March 20, 2000, and is not part of the underlying record.

Moreover, Tak Fat objects to the Preliminary Scope Ruling's reliance on HTS tariff headings to define the product at issue, a practice which Tak Fat claims contravenes long-standing Departmental policy articulated by the language "{a}lthough the HTS subheadings are provided for convenience and customs purposes, our written description on the scope of these investigations is dispositive." Tak Fat cites to Royal Business Machines, Inc. v. U.S., 507 F.Supp. 1007, 1014, 1 CIT 80, 87 (CIT 1980) (Royal Business Machines) for distinguishing between the Customs Service's reliance on tariff classifications to classify merchandise for import, and the Department's power to determine a class or kind of merchandise under antidumping duty law which may not correspond to tariff classifications.

Tak Fat also argues that HTS headings cannot be relied upon to define the scope because there may be many products within a heading that are not covered by the order, or other products in other HTS headings that are covered by the order. Tak Fat claims that it established in its May 27th submission that marinated product can be classified in both 2001.90 and 2003.10.

The Petitioners' Rebuttal Comments

The petitioners reiterate that the record undeniably reflects their intentional inclusion of the HTS subheading 2001.90.39 when HTS numbers were not required by the regulations. This indicates a deliberate choice in how the exclusion was intended to be understood. Thus, the Department's reference to Customs' application of this subheading was a reasonable act designed to facilitate the Department's responsibility to clarify and interpret the scope of the order. The petitioners contend that the Department properly clarified the scope of the order by enunciating the meaning of the technical phrase "prepared or preserved by means of vinegar or acetic acid" as that phrase consistently has been applied by Customs, the agency responsible for HTS classification, which is the context in which the HTS heading was used in the petition.

The petitioners contend that Tak Fat erroneously equates the preexisting Customs ruling that underlies and gives practical meaning to the HTS description "prepared or preserved with vinegar or acetic acid" with factual evidence not existing at the time of the investigation. The petitioners submit that it was Tak Fat's scope inquiry request that first raised the question of whether its product is covered by HTS heading 2001.90.39. In answering this question, the petitioners assert, the Department properly was guided by statements describing how classification under this heading is achieved. The petitioners add that, contrary to Tak Fat's claim, the Department has not sought to rely upon HRL 069121 as a binding legal precedent, but

has referred to it as providing a "reasonable quantitative standard" guiding both classification under HTS 2001.90.39, and exclusion from the scope for certain products.

The Department's Position

In no sense has the Department determined the scope of this order to be determined solely by HTS headings. As discussed at page 8 of the Preliminary Scope Ruling, the merchandise in question falls within the scope of the antidumping duty order based on the plain text of the order, without reliance on a specific HTS heading. The scope of the order twice contains intentionally broad text so as to include all preserved mushrooms, with some very specific exceptions.

The exclusion to the scope covers ""marinated," "acidified" or "pickled" mushrooms, which are prepared or preserved by means of vinegar or acetic acid." Thus, the main question raised by this scope inquiry is the meaning of "prepared or preserved by means of vinegar or acetic acid." Since both the plain text of the scope of the order, which was the identical language contained in HTS subheading 2001.90.39, and the Petition, which reflects the intent of the petitioners and refers to the HTS subheading, the Customs rulings interpreting this language and HTS subheading are a reasonable and appropriate interpretation of that phrase in the petition and thus the scope of the antidumping duty order. When the Department considered the Petition Supplement, we adopted as part of the exclusionary language the identical text contained in HTS subheading 2001.90.39, in accordance with our authority to define an enforceable scope. The language of HTS subheading 2001.90.39, "prepared or preserved by means of vinegar or acetic acid," was interpreted by Customs in 1983 in Customs Ruling HRL 069121 and applied, consistent with that interpretation, for fifteen years as of the time the petitioners incorporated that language into their scope exclusion request. Given the narrow issue presented by Tak Fat with respect to this language, we find it reasonable to interpret it consistent with the interpretation it had been given for fifteen years by Customs.

Customs Ruling HRL 069121, which established the 0.5 percent acetic acid standard for consideration as products "prepared or preserved by means of vinegar or acetic acid," was promulgated in 1983 and since then, there have been numerous other Customs rulings relying on that precedent, samples of which are on the record of this proceeding (see, e.g., the Department's memorandum of March 15, 2000, and the petitioners' March 20, 2000, submission). While these rulings, as well as others that may relate to any future scope inquiries may not have been on the Department's record prior to this scope proceeding, they have been a matter of public record and have been available to any interested party since long before the filing of the Petition. Accordingly, we have adopted a position for this scope ruling consistent with Customs practice relative to the scope language at issue.

As stated by the Court of International Trade (CIT) in Sanyo Electric Co., Ltd. v. United States, 86 F. Supp. 2d 1232, 1239 (CIT 1999), the record is not limited solely to those documents submitted to the International Trade Administration (ITA). Intrepid v. Int'l Trade Admin., 16

CIT 204, 205, 787 F. Supp. 227, 228 (1992). The ITA may obtain information from public documents "as long as it relates such information to the facts of the case before it," IPSCO, Inc. v. United States, 12 CIT 1128, 1130, 701 F. Supp. 236, 238 (1988), aff'd in part and rev'd in part, 899 F.2d 1192 (Fed. Cir. 1990) (reversed in part and remanded on other grounds), or the record may consist of "those documents at the agency which become sufficiently intertwined with the relevant inquiry . . . no matter how or when they arrived at the agency." Floral Trade Council of Davis, Cal. v. United States, 13 CIT 242, 242-43, 709 F. Supp. 229, 230 (1989) ("The agency cannot ignore relevant information which is before it, and the reviewing court must be in a position to determine if it had done so.") (citing Bethlehem Steel Corp. v. United States, 5 CIT 236, 566 F. Supp. 346 (CIT 1983)). Because we considered Customs' HRL 069121 to be a public document relevant to the meaning of the term "prepared or preserved by means of vinegar or acetic acid," as used in the petition, we placed it on the record in accordance with section 782(g) of the Act, 19 USC 1516a(b)(2)(A) and judicial precedent.

With regard to Tak Fat's point concerning the drawback of reliance on HTS headings, while it is true that the basket categories in the HTS are often too imprecise for the purposes of an antidumping duty order, this is not the issue here. As previously explained, the HTS heading descriptions correspond precisely with the language of the scope, as intended by the petitioners. In Royal Business Machines, cited by Tak Fat, the CIT distinguished between the separate authorities of Customs and the agencies administering the antidumping law to determine a class or kind of merchandise. The Court recognized that the Department is not bound by HTS classifications when defining the scope of an order, and stated, "[w]ithin the context of an antidumping proceeding the administering agency, at the proper time, can define the class in its terms." The reasons for not being bound by HTS descriptions provided by the CIT are sound, but do not apply to this case.[5] As discussed above, the HTS categories associated with in-scope and excluded merchandise do not conflict with the scope language.

While we fully concur that tariff classifications used by the Department within a scope context are usually for general guidance only, petitioners are free, if they so choose, to use HTS numbers as a shorthand means of defining the exclusion of a particular product. See, Torrington v. United States, 995 F. Supp. 117, 123 (CIT 1998) (Commerce may choose to use tariff classification to define scope of certain merchandise); Wheatland Tube Co., v. United States, 21 CIT 808, 973 F. Supp. 149, 156-157 (1997) (recognizing the petitioner's submission to the Department of HTS headings to describe products excluded from the scope). Here, as we have explained, while the Department did not incorporate the HTS number into the scope exclusion stated in the order, the petitioners did refer to the HTS number in the Petition and did propose language which was identical to that contained in the HTS, which the Department adopted. That language had a long-

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[5]"The determinations under the antidumping law may properly result in the creation of classes which do not correspond to classifications found in the tariff schedules or may define or modify a known classification in a manner not contemplated or desired by Customs Service." Royal Business Machines at 1014.

established meaning at the time of its incorporation into the scope language, and we are simply interpreting that language consistent with its meaning.

3. The Preliminary Scope Ruling Violated Tak Fat's Rights to Du Process.

Tak Fat argues that, with its Preliminary Scope Ruling, the Department violates the Due Process Clause of the 5th Amendment of the U.S. Constitution by adopting a legal position or standard materially adverse to affected parties without prior notice. Tak Fat cites Sigma Corporation v. United States, 17 CIT 1288 (1993), in which the Court held that the Department unfairly changed its position between the preliminary and final results, affording interested parties no opportunity to comment on the change. Tak Fat claims that, since petitioners never argued that the scope exclusion for marinated or acidified mushrooms was being defined by either tariff classification or the Customs standard for minimum acetic acid levels, and the Department's less-than-fair-value (LTFV) determinations did not mention subheading 2001.90.39, interested parties had no notice that the exclusion for "marinated" or "acidified" mushrooms would be limited to mushrooms classified in subheading 2001.90.39.

Tak Fat claims this lack of notice prejudiced interested parties by not giving them a fair opportunity to present evidence on this issue during the investigation. Had they known of the classification of marinated mushrooms in HTS subheading 2001.90.39, Tak Fat asserts, it could have placed on the record evidence such as that which it has presented in this scope inquiry. Furthermore, Tak Fat adds, the Commission would have had to include such products in the domestic like-product analysis.

Sec ndly, Tak Fat claims that the Preliminary Scope Ruling prejudiced interested parties because importers did not have notice prior to importing the mushrooms at issue that they would be subject to antidumping duties if they contained less than 0.5 percent acetic acid. Tak Fat claims that, had it known of the standard to be applied, it would not have imported marinated mushrooms containing less than 0.5 percent acetic acid.

Finally, Tak Fat contends that the Department is prohibited by statute from applying the 0.5 p rcent standard to Tak Fat's mushrooms imported prior to April 28, 2000, the date of the Preliminary Scope Ruling. Tak Fat cites 5 USC §552(a)(1)(D) that provides that federal agencies must publish in the Federal Register substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency. Tak Fat claims that t e Customs requirement that vegetable products hav at least 0.5 percent acetic acid to be classified within HTS heading 2001 falls within the publication requirement as an interpretation of general applicability to all importers that is not found in the plain language of the HTS, which states simply that the subject vegetables be prepared or preserved by vinegar or acetic acid. Thus, Tak Fat concludes, because the Department did not publish notice in the Federal Register of the 0.5 percent acetic acid requirement, and the Customs' interpretation of the statutory language imposes a requirement not

found in the literal language of the statute, the Department is barred from applying the scope ruling to Tak Fat's mushrooms imported prior to the April 28th Preliminary Scope Ruling. In suppo t, Tak Fat cites D&W Food Centers v. Block, 786 F.2d 751, 757 (6th Cir. 1986), Appalachian Power Co. v. Train, 566 F.2d 451 (4th Cir. 1977), and Ex Rel. Guste v. United States, 656 F. Supp. 1310 (W.D.LA.1986)(5 USC 553(A)(1)(D)).

The Petitioners' Rebuttal Comments

The petitioners point out that Tak Fat played an active role during the investigation, had access to the petition and all record evidence, and could have sought guidance on this issue at that time, or any time prior to its importation of the product in question. Tak Fat's complaint that it has been prejudiced by attempting to import goods that the Department has determined to be within the scope of the antidumping duty order reflects not a denial of due process, but Tak Fat's attempt to evade the antidumping duty order. The structure of the Department's scope rulings and Customs' classification rulings is a prospective process allowing an importer or producer to seek guidance concerning whether a product is within the scope of an order or is properly classified under a certain HTS heading. As Tak Fat was the party requesting the scope inquiry, the timing of the request was under Tak Fat's control.

The petitioners argue that Tak Fat's reliance on Sigma is misplaced. Unlike in that case, the Depa tment has made no abrupt alteration in position between the preliminary and final determinations in this scope inquiry. Tak Fat had knowledge that the relevant scope exception was defined by reference to HTS subheading 2001.90.39, but did not seek clarification at the time of the investigation. Instead, Tak Fat has exercised its rights by requesting a scope inquiry, during which Tak Fat has had ample opportunity to present information and argument on its own behalf. The petitioners point out that, unlike in Sigma, Tak Fat has had an additional opportunity to comment not required by the regulations, because the Department took the unusual step of issuing a Preliminary Scope Ruling in this case.

The petitioners add that Tak Fat's failure to seek clarification of the scope of the order prior to importing the merchandise in question does not constitute a violation of due process on the Department's part, as the Department simply clarified the scope of the order by reference to specific statements in the record of the investigation.

The petitioners argue that Tak Fat erroneously assumes that the Department is attempting to give legal force and effect to the Customs ruling, when in fact the Department is using the ruling as a reasonable source of information concerning classification under HTS subheading 2001.90.39. Thus, in the context of this scope inquiry, the Department will give force and effect only to its own determination. Furthermore, the petitioners point out, the Department's scope ruling will properly have retroactive effect on all entries beginnin with the period of investigation during which entries of in-scope merchandise were first suspended. The petitioners cite to Wirth Ltd. v.

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United States, 5 F. Supp.2d 968, 982 (CIT 1998); FAG Kugelfischer, 932 F. Supp. at 319; Timken Co. v. United States, 972 F. Supp. at 703.

Furthermore, the petitioners argue, Tak Fat erred in claiming that the referenced Customs rulings are "interpretations of general applicability" that are required under the Administrative Procedures Act to be published in the Federal Register before they can be referenced in any manner. First, the petitioners point that, under 5 USC 553(b)(A), agencies need not publish "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." Secondly, the petitioners argue, Customs would be required to publish an interpretive letter ruling describing the 0.5 percent acetic acid standard only if that ruling reflected a change in Customs' established position concerning the phrase "prepared or preserved by means of vinegar or acetic acid." See, 19 CFR 177.10(c)(2); Jewelpak Corp. v. United States , 950 F.Supp. 343,348 (CIT 1996). The petitioners point out that Tak Fat does not argue that Customs has changed its position regarding the minimum level of acetic acid required for classification under HTS 2001.90.39, and note that Tak Fat itself refers to Customs' 0.5 percent acetic acid requirement is an "interpretation of the tariff statute that had been formulated and adopted by the agency, and that the agency intends to have apply generally to all importers." See, petitioners' May 30, 2000 rebuttal comments at 19. The petitioners conclude that the Department may without question take administrative notice of the interpretive rulings of another U.S. government agency, especially to resolve a dispute concerning the meaning of a scope exclusion by clarifying or interpreting scope language to provide its accurate and intended meaning.

The Department's Position

A scope inquiry is by nature a prospective process, of which Tak Fat logically should have availed itself before importing the mushrooms in question. We agree with the petitioners that Tak Fat controlled the timing of this inquiry by requesting the scope inquiry on January 6, 2000.

We also agree with the petitioners that Sigma is inapposite to this case. In Sigma, respondents were deprived of the notice of a change in position by the Department between the preliminary and the final determinations, and of the opportunity to submit information and argument relevant to the issue. In this case, there is no change in position by the Department between the preliminary scope ruling and the final scope ruling. Tak Fat raised the scope issue in the first instance, was provided with all of the information considered by the Department prior to the preliminary scope ruling, exercised its opportunity to comment and submit argument prior to the preliminary scope ruling, received timely notice of the preliminary scope ruling, and exercised its opportunity to submit additional argument prior to the final scope ruling. The fact that the final scope ruling is adverse to Tak Fat's interest does not mean Tak Fat has not received due process. The Department has not changed its position, or deviated from its normal practice, but has proceeded with the scope inquiry in accordance with the regulations and Departmental practice. Tak Fat has availed itself of its rights under this proceeding, and its comments and arguments have been duly considered and documented in both the preliminary and the final scope rulings.

Moreover, the Department has no authority to create a rule of general applicability for Customs classification rulings. It is well settled that a tariff classification by the Customs Service does not govern an antidumping determination regarding class or kind. It is the responsibility of Commerce to interpret the term class or kind in such a way as to comply with the mandates of the antidumping laws, not the classification statutes. Torrington Co. v. United States, 14 CIT 507, 512-13, 745 F. Supp. 718, 722 (1990), aff'd, 938 F.2d 1276 (Fed. Cir. 1991). Likewise, classification under the antidumping law need not match the customs classification, as the customs valuation statute and antidumping statute are substantially different in both purpose and operation. Koyo Seiko Co., Ltd. v. United States, 955 F. Supp. 1532, 1541 (CIT 1997). Accordingly, our consideration of Customs HRL 069121 in this scope ruling is in no way binding upon Customs' general authority to execute its classification function.

We agree with the petitioners that agencies need not publish in the Federal Register, subject to notice and comment, interpretive rules. 5 USC 553(b)(A); see also 19 CFR 177.8 (publication of Customs rulings in Customs Bulletin). Notwithstanding this fact, Customs is aware that it must publish in the Federal Register, subject to notice and comment, changes to its established position. 19 CFR 177.10(c). However, record evidence in this case provided by the petitioners demonstrates that Customs' HRL 069121 has not changed in 17 years. See Letter from Michael Coursey to Secretary of Commerce (March 20, 2000). Indeed, the CIT does not consider Customs rulings significant enough to be subject to the procedural rigors of the Administrative Procedures Act. Genesco Inc. v. United States, Slip Op. 2000-57 (CIT 2000). Accordingly, Tak Fat has not been deprived of due process by our use of Customs HRL 069121.

We maintain that, in making this scope determination, we have not changed our policies or practices, but we have fulfilled our responsibility to interpret the scope as requested by Tak Fat in its Scope Inquiry Request. Furthermore, we have provided ample opportunity for parties to comment on our interpretation, and parties have availed themselves of those opportunities.

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Recommendation

For the reasons expressed above and in the Preliminary Scope Ruling, we recommend that the Department determine that Tak Fat's marinated or acidified mushrooms are within the scope of the antidumping duty order on CPMs from the PRC. If you agree, we will instruct Customs to continue to suspend liquidation of the merchandise at issue in accordance with 19 CFR 351.225(l)(2).

✓ Agree ___ Disagree

Richard W. Moreland
Deputy Assistant Secretary
for Import Administration

06/19/2000
Date