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Administrative Review
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DATE: December 2, 2011

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

RE: Certain Pasta from Italy (Period of Review: July 1, 2009, through June 30, 2010)

SUBJECT: Issues and Decision Memorandum for the Final Results of the Fourteenth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy (2009-2010)

Summary

We have analyzed the case and rebuttal briefs submitted by domestic interested parties and respondents.[1] Based on our analysis of comments received, these final results remain unchanged from the preliminary results for both Pastificio Lucio Garofalo S.p.A. (Garofalo) and Molino e Pastificio Tomasello S.p.A. (Tomasello) as well as the non-selected companies. We recommend that you approve the positions described in the Discussion of Interested Party Comments, section II infra. Outlined below is the complete list of the issues in this review for which we have received comments from the interested parties.

[1] Case briefs and rebuttal briefs were submitted by the following domestic interested parties and respondents: On September 7, 2011, New World Pasta Company, American Italian Pasta Company, and Dakota Growers Pasta Company (collectively, petitioners) and Garofalo filed a case brief. On September 12, 2011, petitioners filed a rebuttal brief. On September 14, 2011,Tomasello submitted an untimely rebuttal brief. Based on Tomasello's explanation of the circumstances regarding its late filing and its request for acceptance of this brief, the Department extended the deadline and accepted Tomasello's rebuttal brief for these final results. See Letter from Melissa G. Skinner, Director, Office 3, to David L. Simon, counsel for Tomasello, dated September 16, 2011.

I. Background

The Department of Commerce (the Department) initiated this administrative review of the antidumping duty order on certain pasta from Italy on August 31, 2010, for each of the aforementioned respondents.[2] On August 8, 2011, the Department published the preliminary results of this administrative review.[3] The review covers two mandatory manufacturers/exporters, Garofalo and Tomasello, and 11 non-selected companies.[4] The period of review (POR) is July 1, 2009, through June 30, 2010. Garofalo and Tomasello were selected as mandatory respondents.

II. List of Comments

Comment 1: Whether to use Zeroing Methodology in this Administrative Review for Garofalo

Comment 2: Whether the Department Should Modify its Liquidation Instructions to U.S. Customs and Border Protection regarding Garofalo

Comment 3: Whether the Department Should Include Certain Capitalized Labor Costs in its Calculation of Tomasello's Cost of Production

III. Company Specific Issues

Garofalo

Comment 1: Whether to use Zeroing Methodology in this Administrative Review for Garofalo

Garofalo states that, in the Preliminary Results, the Department treated Garofalo's negative dumping margins as zero for numerous sales. Garofalo asserts that, had the Department eliminated the practice of zeroing[5] in the Preliminary Results, it would have calculated a negative overall weighted-average dumping margin for Garofalo in this administrative review. See Garofalo's case brief, dated September 7, 2011, at page 1 and Attachment 1.

Garofalo argues that the Department's use of zeroing in administrative reviews is unlawful. Garofalo states that the Department's continued use of zeroing in administrative reviews rests on

[2] See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Initiation of Administrative Review, 75 FR 53274, (August 31, 2010) (Initiation Notice).
[3] See Certain Pasta from Italy: Notice of Preliminary Results of Antidumping Duty Administrative Review, 76 FR 48125 (August 8, 2011) (Preliminary Results).
[4] The non-selected companies are: Agritalia S.r.L. (Agritalia), Domenico Paone fu Erasmo S.p.A. (Erasmo), Industria Alimentare Colavita, S.p.A. (Indalco), Labor S.r.L. (Labor), PAM S.p.A. and its affiliate, Liguori Pastificio dal 1820 SpA (PAM), P.A.P. SNC Di Pazienza G.B. & C. (P.A.P), Premiato Pastificio Afeltra S.r.L. (Afeltra), Pastificio Fabianelli S.p.A. (Fabianelli), Pastificio Riscossa F.lli Mastromauro S.p.A. (Riscossa), Rummo S.p.A. Molino e Pastificio (Rummo), and Rustichella d'Abruzzo S.p.A (Rustichella).
[5] Where normal value exceeds the export price (EP), or constructed export price (CEP), and the Department treats the comparison results as showing no dumping rather than a negative amount of dumping in calculating the weighted average dumping margin.

its construction of section 771(35)(A) of the Tariff Act of 1930, as amended (the Act), which provides that "{t}he term 'dumping margin' means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." See 19 U.S.C. § 1677(35)(A).

Garofalo states that the U.S. Court of Appeals for the Federal Circuit (CAFC) in Timken[6] and Corus I[7] established that section 771(35)(A) of the Act is ambiguous under the Chevron[8] step one analysis[9] and that under Chevron step two analysis,[10] the Department reasonably could interpret Section 771(35) of the Act to forbid or permit zeroing as a general proposition, when applied consistently to original investigations and administrative reviews.

Garofalo reviews the prior precedent at the CAFC with regard to zeroing, taking issue with the Department's conclusion that the statute allows Commerce to ignore zeroing and offset negative margins in certain original investigations (where the average-to-average methodology is used) but also allows Commerce to set to zero negative margins in administrative reviews, such as in the Preliminary Results, where the average-to-transaction methodology is used. See Garofalo's Case Brief at pages 10-15 (citing Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review, Determination Not to Revoke Antidumping Duty Order in Part, and Final No Shipment Determination, 76 FR 50176 (August 12, 2011), and accompanying Issues and Decision Memorandum at Comment 1 (Certain Orange Juice from Brazil).

Garofalo asserts that the Department changed its interpretation of section 771(35)(A) of the Act in December 2006, but only as applied to investigations. Garofalo claims that the CAFC in Dongbu[11] for the first time addressed the permissibility of the Department's interpretation of section 771(35)(A) of the Act under Chevron step two in light of the Department's allegedly inconsistent interpretations of the term "exceeds" in original investigations and administrative reviews. Garofalo states that subsequent justifications proffered by the Department have already been dismissed as insufficient in JTEKT.[12] Garofalo alleges that Commerce's "additional explanation" in Certain Orange Juice from Brazil that the average-to-average calculation in original investigations "shifts the determination of dumping from the individual sales level to the 'on average' level provides only more words explaining the methodology, not explaining the logic of why the differing methodologies justify treating negative margins in one methodology as if they were zero for one methodology, and treating negative and positive margins equally in the other methodology."[13]

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[6] See Timken Co. v. United States, 354 F.3d 1334 (CAFC 2004) (Timken).
[7] See Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343 (CAFC 2005) (Corus I).
[8] See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (Chevron).
[9] Citing Chevron, the Court applied a two-step process for analyzing the legality of an agency's interpretation of a statute that it administers, in which it first "determine{s} whether the statute unambiguously requires providing for zeroing negative margin transactions and, if not, whether Commerce reasonably interpreted the statute to so require." See Timken at 1341.
[10] Id.
[11] See Dongbu Steel Co., Ltd. v. United States, 635 F.3d 1363 (CAFC 2011) (Dongbu).
[12] See JTEKT Corp. v. United States, 642 F.3d 1378 (CAFC 2011); see also JTEKT Corp. v. United States, Consol. Ct. No. 07-00377, Slip Op. 11-86 (CAFC 2011) (JTEKT).
[13] See Garofalo's Case Brief at page 14.

Garofalo submitted modified SAS programming language in its case brief and suggests that the Department apply such changes to recalculate Garofalo's dumping margin for the final results without zeroing.

Petitioners rebut Garofalo's arguments and assert that, consistent with the Preliminary Results, the Department should continue its practice of zeroing negative margins in the final results for this administrative review. Petitioners state that the Department should reject Garofalo's request to recalculate its dumping margins to offset positive dumping margins with negative margins.

Petitioners state that, like respondents in Certain Orange Juice from Brazil, Garofalo argues that Commerce's decision to zero in the Preliminary Results violates the CAFC's holdings in Dongbu and JTEKT. Petitioners state that Commerce, however, rejected this argument in Certain Orange Juice from Brazil, finding:

> "Moreover, we disagree with the respondents that the CAFC's recent decision in Dongbu requires the Department to change its methodology in this administrative review. The holding of Dongbu, and the recent decision in JTEKT Corporation v US, 2010-1515,-1518 (CAFC June 29, 2011) (JTEKT), was limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews, but the CAFC did not hold that these differing interpretations were contrary to law. Importantly, the panels in neither Dongbu nor JTEKT overturned prior CAFC decisions affirming zeroing in administrative reviews, including SKF,[14] which we discuss above, in which the Court affirmed zeroing in administrative reviews notwithstanding the Department's determination to no longer use zeroing in certain investigations. Unlike the determinations in Dongbu and JTEKT, the Department here is providing additional explanations for its changed interpretation of the statute subsequent to the Final Modification for Antidumping Investigations* -- whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that our determination is consistent with the holdings in Dongbu, JTEKT, U.S. Steel[15] and SKF."

* See i.e., Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006) (Zeroing Notice); and Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Change in Effective

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[14] See SKF USA Inc. v. United States, 630 F.3d 1365 (CAFC 2011) (SKF).

[15] See U.S. Steel Corp. v. United States, 621 F. 3d 1351 (CAFC 2010) (U.S. Steel).

Date of Final Modification, 72 FR 3783 (June 26, 2007) (collectively, Final Modification for Antidumping Investigations).

See Certain Orange Juice from Brazil, and accompanying Issues and Decision Memorandum, Comment 1, at page 7.

Petitioners argue that Garofalo is incorrect in its assessment of the Department's aforementioned position stated in Certain Orange Juice from Brazil because the Department has specifically provided the added explanations and justifications for differing treatment required by the Dongbu and JTEKT courts, neither of which overruled earlier CAFC precedent permitting Commerce to use zeroing in administrative reviews, among other scenarios (such as to prevent masked dumping). Petitioners also assert that Garofalo is incorrect in dismissing the Department's reasoned interpretation that the use of zeroing, and how negative comparison results are to be regarded under 771(35)(A) of the Act, which hinges on "whether the comparisons result in question is the product of an average-to-average comparison or an average-to-transaction comparison."[16]

Petitioners rebut Garofalo's argument that the different calculation methods employed in investigations and reviews, and the resulting differing approach for treating negative margins, is "simply a warmed-over version" of a rationale rejected by the JTEKT court.[17] Specifically, petitioners disagree with Garofalo's arguments that Commerce's "additional explanation" in Certain Orange Juice from Brazil does not explain why the differing methodologies justify treating negative margins as if they were zero for one methodology, and treating negative and positive margins equally in the other methodology. Petitioners assert that it is entirely reasonable for Commerce to reach differing interpretations of the use of zeroing where the statute itself prescribes different methods for calculating dumping margins, with the use of average-to-average comparisons being prescribed for investigations and the resulting deposit rate, and average-to-transactions method being used in reviews for specific assessment rates. Furthermore, petitioners state that "reasonableness" is the yardstick by which the CAFC conducts a Chevron step two analysis, as argued by Garofalo. Petitioners argue that Garofalo simply culls dicta from the CAFC opinions in Dongbu and JTEKT that it prefers, while summarily dismissing the CAFC's SKF opinion permitting zeroing in administrative reviews, even after the Final Modification for Antidumping Investigations, as "tersely disposing" of the issue.

Petitioners reference Commerce's statement, "{n}o U.S. court has required the Department to demonstrate "masked dumping" before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales." See Certain Orange Juice from Brazil, Issues and Decision Memorandum, Comment 1 at pages 5-6 (specifically citing to U.S. Steel Corp. v. United States, 621 F.3d 1351 (CAFC 2010) and that Court's approval of zeroing where masked dumping might be occurring warranting the use of the average-to-transaction method in investigations). Petitioners also state that Commerce also noted that the Final Modification for Antidumping

[16] See Garofalo's Case Brief at page 14; citing Certain Orange Juice from Brazil, Issues and Decision Memorandum, Comment 1 at page 6.
[17] See Garofalo's Case Brief at page 14.

Investigations changed its zeroing practice in the "limited context of investigations using the average-to-average comparisons" made specifically to comply with World Trade Organization (WTO) findings related to the average-to-average comparisons and that no Court has overturned SKF and U.S. Steel, cases. In summary, petitioners contend that Commerce's reasoning in the Orange Juice from Brazil case is reasonable and supports the use of zeroing in administrative reviews. Accordingly, petitioners argue that Commerce should reject Garofalo's arguments calling for the offset of negative margins with positive margins, and petitioners assert that Commerce should continue to set negative margins to zero.

Department's Position:

We have not changed our calculation of the weighted-average dumping margins for the final results of review with respect to our zeroing methodology.

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise" (emphasis added). Outside the context of antidumping investigations involving average-to average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value (NV) is greater than export price (EP) or constructed export price (CEP). We disagree with the respondents that the Department's "zeroing" practice is an inappropriate interpretation of the Act. Because no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of section 771(35) of the Act. See, e.g., Timken; and Corus I.

Section 771(35)(B) of the Act defines weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." The Department applies this section by aggregating all individual dumping margins, each of which is determined by the amount by which NV exceeds EP or CEP, and dividing this amount by the value of all sales. The use of the term "aggregate dumping margins" in section 771(35)(B) of the Act is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) of the Act as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the NV permitted to offset or cancel the dumping margins found on other sales.

This does not mean that non-dumped transactions are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped transactions examined during the POR; the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped transactions is included in the numerator. Thus, a greater amount of non-dumped transactions results in a lower weighted-average margin.

The CAFC explained in Timken that denial of offsets is a "reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value." See Timken, 354 F.3d at 1343. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner interpreted by the Department. No U.S. court has required the Department to demonstrate "masked dumping" before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales. See, e.g., Timken, 354 F.3d at 1343; Corus I, 395 F.3d at 1343; Corus II; and NSK Ltd. v United States, 510 F.3d 1375 (CAFC 2007) (NSK).

In 2007, the Department implemented a modification of its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. See Final Modification for Antidumping Investigations. With this modification, the Department's interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the Uruguay Round Agreements Act (URAA) was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department's interpretation of the statute was unchanged in other contexts.

It is reasonable for the Department to interpret the same ambiguous language differently when using different comparison methodologies in different contexts. In particular, the use of the word "exceeds" in section 771(35)(A) of the Act can reasonably be interpreted in the context of an antidumping investigation to permit negative average-to-average comparison results to offset or reduce the amount of the aggregate dumping margins used in the numerator of the weighted-average dumping margin as defined in section 771(35)(B) of the Act. The average-to-average comparison methodology typically applied in antidumping duty investigations averages together high and low prices for directly comparable merchandise prior to making the comparison. This means that the determination of dumping necessarily is not made for individual sales, but rather at an "on average" level for the comparison. For this reason, the offsetting methodology adopted in the limited context of investigations using average-to-average comparisons is a reasonable manner of aggregating the comparison results produced by this comparison method. Thus, with respect to how negative comparison results are to be regarded under section 771(35)(A) of the Act, and treated in the calculation of the weighted average dumping margin under section 771(35)(B) of the Act, it is reasonable for the Department to consider whether the comparison result in question is the product of an average-to-average comparison or an average-to-transaction comparison.

In U.S. Steel, the CAFC considered the reasonableness of the Department's interpretation not to apply zeroing in the context of investigations using average-to-average comparisons, while continuing to apply zeroing in the context of investigations using average-to-transaction comparisons pursuant to the provision at section 777A(d)(1)(B) of the Act. Specifically, in U.S. Steel, the CAFC was faced with the argument that, if zeroing was never applied in investigations, then the average-to-transaction comparison methodology would be redundant because it would yield the same result as the average-to-average comparison methodology. The Court acknowledged that the Department intended to continue to use zeroing in connection with the average-to-transaction comparison method in the context of those investigations where the facts suggest that masked dumping may be occurring. See U.S. Steel, at 1363. The Court then affirmed as reasonable the Department's application of its modified average-to-average comparison methodology in investigations in light of the Department's stated intent to continue zeroing in other contexts. Id.

In addition, the CAFC recently upheld, as a reasonable interpretation of ambiguous statutory language, the Department's continued application of "zeroing" in the context of an administrative review completed after the implementation of the Zeroing Notice. See SKF. In that case, the Department had explained that the changed interpretation of the ambiguous statutory language was limited to the context of investigations using average-to-average comparisons and was made pursuant to statutory authority for implementing an adverse WTO report. We find that our determination in this administrative review is consistent with the CAFC's recent decision in SKF.

Additionally, in Corus I, the CAFC acknowledged the difference between antidumping duty investigations and administrative reviews, and held that section 771(35) of the Act was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping duty investigations. See Corus I, at 1347. That is, the Court explained that the holding in Timken – that zeroing is neither required nor precluded in administrative reviews – applies to antidumping duty investigations as well. Thus, Corus I does not preclude the use of zeroing in one context and not the other.

Furthermore, we disagree with Garofalo that the CAFC's recent decision in Dongbu requires the Department to change its methodology in this administrative review. The holding of Dongbu, and the recent decision in JTEKT Corporation v. US, 2010-1516, -1518 (CAFC June 29, 2011), was limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews, but the CAFC did not hold that these differing interpretations were contrary to law. Importantly, the panels in neither Dongbu nor JTEKT overturned prior CAFC decisions affirming zeroing in administrative reviews, including SKF, which we discuss above, in which the Court affirmed zeroing in administrative reviews notwithstanding the Department's determination to no longer use zeroing in certain investigations. Unlike the determinations examined in Dongbu and JTEKT, the Department here is providing additional explanation for its changed interpretation of the statute subsequent to the Final Modification for Antidumping Investigations – whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that our determination is consistent with the holdings in Dongbu, JTEKT, U.S. Steel, and SKF.

Moreover, we note that the CAFC has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA. See Corus I, 395 F.3d at 1347-49; accord Corus II, 502 F.3d at 1375; and NSK, 510 F.3d 1375. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 U.S.C. 3533(g); and Zeroing Notice. Specifically, with respect to the United States – Antidumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil, WT/DS 382/R (March 25, 2011), the United States has not yet employed the statutory procedure set forth at 19 U.S.C. 3533(g) to implement the panel's finding. With respect to United States – Measures Relating to Zeroing and Sunset Reviews, Recourse to Article 21.5 of the DSU by Japan, WT/DS322/RW (April 24, 2009), and United States – Final Anti-Dumping Measures on Stainless Steel From Mexico, WT/DS344/AB/R (April 30, 2008), the steps taken in response to these reports do not require a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review.

Finally, the Department notes that it has published a proposed revised calculation methodology to eliminate "zeroing" in administrative reviews when it published a revised calculation methodology. See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 FR 81533 (December 28, 2010) (Proposed Calculation Methodology)(proposed regulations by their very nature are not binding to an agency). See Viraj Forgings Ltd. v. United States, 206 F. Supp. 2d 1288, 1293 (CIT 2002) (rejecting the plaintiff's reliance on a proposed rule as basis for receiving a zero margin). The Proposed Calculation Methodology is only a proposal that remains subject to review of comments from the public and statutory consultation requirements involving Congressional committees, among others. See section 123(g)(1) of the URAA. It does not provide legal rights or expectations for parties in this administrative review. The Proposed Calculation Methodology further makes clear that, in terms of timing, any changes in methodology will be prospective only, and "will be applicable in . . . all {administrative} reviews pending before the Department for which a preliminary result is issued more than 60 business days after the date of publication of the Department's Final Rule and Final Modification." See Proposed Calculation Methodology, 75 FR at 82535. Additionally, the Proposed Calculation Methodology would not apply to the present administrative review because normally, "{a} final rule or other modification . . . may not go into effect before the end of the 60-day period beginning on the date which consultations {between the Trade Representative heads of the relevant departments or agencies, and appropriate Congressional committees}. . . begin." See section 123(g)(2) of the URAA. Because the final results in this administrative review will be completed prior to the effective date of the final rule, any change in the treatment of non-dumped sales, pursuant to the Proposed Calculation Methodology (if implemented) would not apply to this administrative review.

Accordingly, and consistent with the Department's interpretation of the Act described above, in the event that any of the U.S. sales transactions examined in this review are found to exceed NV, the amount by which the price exceeds NV will not offset the dumping found in respect of other transactions.

Comment 2: Whether the Department Should Modify its Liquidation Instructions to U.S. Customs and Border Protection regarding Garofalo

The Department issued draft copies of liquidation instructions to the interested parties subject to the administrative protective order (APO) with the Preliminary Results in order to provide parties with an opportunity to provide any comments for these final results. Garofalo references paragraph 2 of the Department's draft liquidation instructions for Garofalo and the specific percentage listed as a certain importer-specific assessment rate. Garofalo asserts that, because this rate is de minimis, (i.e., it is below 0.5 percent), the Department should liquidate entries imported or sold to this customer at zero, in accordance with the Department's SAS margin output instructions at page 35, and the Preliminary Results.

Garofalo states that the Department's intention to liquidate at zero for any de minimis rate is reflected in the Preliminary Results notice, which states in part, "{u}pon issuance of the final results of this administrative review, if any importer-specific assessment rates calculated in the final results are above de minimis (i.e., at or above 0.5 percent), the Department will issue appraisement instructions directly to CBP to assess antidumping duties on appropriate entries ..." Garofalo asserts that the clear implication of this language is that, if the importer-specific assessment rate is de minimis, the Department will not assess any duties on those entries. Garofalo requests that the Department correct this error to ensure that the Department's final liquidation instructions reflect the Department's practice of liquidating de minimis rate entries at zero percent.

Petitioners did not comment on this issue.

Department's Position:

We agree with Garofalo that where an importer-specific[18] rate is a de minimis rate in the final results of review, such entries should be liquidated at a rate of zero percent in accordance with the Department's practice. Accordingly, the Department will issue importer-specific liquidation instructions in accordance with established practice.

Tomasello

Comment 3: Whether the Department Should Include Certain Capitalized Labor Costs in its Calculation of Tomasello's Cost of Production

Tomasello stated in its March 31, 2011, supplemental section D response that company personnel performed "extraordinary maintenance or revamping" of its wheat silos and machinery in the mill and pasta factory in 2009. The personnel costs associated with these projects were capitalized, rather than expensed, and were not included in the company's reported costs.[19] Petitioners argue that the Department should include these capitalized labor costs in the calculation of Tomasello's cost of production (COP). Petitioners assert that the exclusion of these expenses understates the relevant production costs because they relate to normal, everyday repairs and maintenance of existing machinery, and not some extraordinary project that warrants exclusion. The petitioners continue that the statute at section 773(f)(1)(A) provides for the inclusion in COP all costs "that reasonably reflect the costs associated with the production and sale of the merchandise." Petitioners assert that the repairs and maintenance of machinery in the mill and the pasta factory are directly related to the production and sale of pasta and therefore, consistent with the statutory language, must be included in the reported COP. Petitioners

[18] The importer name is considered business proprietary information (BPI), therefore, see the BPI liquidation instructions regarding Garofalo for additional details.

[19] Tomasello's reported costs include an amortized portion of the capitalized labor expenses.

contend that the classification of these expenses as "extraordinary" is unsupported because there is nothing extraordinary about routine maintenance.

Petitioners state that U.S. generally accepted accounting principles (GAAP) define extraordinary expenses as those that are both unusual in nature and infrequent in occurrence. The petitioners additionally note that the standard establishing what constitutes extraordinary expenses has been addressed by the Court of International Trade in Floral Trade Council v. United States, 16 CIT 1014, 1016, 1992 (Floral Trade). In that case, the CIT ruled that for an event to be extraordinary, it must be both unusual (i.e., highly abnormal and unrelated to the ordinary and typical activities of the entity), and infrequent (i.e., is not expected to recur in the foreseeable future). According to petitioners, it is the Department's long-standing practice to treat items as extraordinary and exclude them from COP only in cases where these criteria are met. Petitioners refer to Certain Pasta from Italy: Notice of Final Results of the Twelfth Administrative Review, 75 FR 6352, February 9, 2010 (Pasta from Italy 2007-2008), where the Department rejected the treatment of certain items as extraordinary, finding that the expenses at issue were typical of general expenses that companies incur in the normal course of business. Petitioners further note that, in Final Determination of the Investigation of Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, 54 FR 19092, May 3, 1989 (AFBs from France), the Department rejected the treatment of restructuring costs as extraordinary on the grounds that they were neither unusual in nature nor infrequent in occurrence.

Petitioners urge the Department to draw the same conclusion with respect to Tomasello's capitalized labor costs, arguing that the itemization of work performed during the year clearly establishes that the activity that generated these costs was not extraordinary in nature. Rather, petitioners assert that the work constituted normal, expected maintenance and revamping of machinery and equipment used in the normal course of production. Petitioners note additionally that, according to International Accounting Standard (IAS) 16 – Property, Plant, and Equipment, an entity is to expense the costs of day-to-day servicing of an item of property, plant, or equipment as incurred. Consistent with this standard, petitioners argue the repair work undertaken by Tomasello falls squarely within this definition and should not be excluded from COP.

Tomasello responds that petitioners' arguments are based on the erroneous premise that the expenses in question were excluded because they were extraordinary. Tomasello asserts that the petitioners fail to distinguish between "extraordinary maintenance," which according to U.S. GAAP is properly capitalized and includes "maintenance that increases the value of the asset or increases the estimated useful life of an asset," and "extraordinary expenses," which are defined as events and transactions that are both unusual in nature and infrequent in occurrence. The respondent argues that the work performed in connection with these projects is explicitly recognized by U.S. GAAP as "extraordinary maintenance" and is properly capitalized, because it adds to the useful life of the equipment, or as "replacements" or "betterments," which are also properly capitalized. The respondent contends that, because of the petitioners' failure to distinguish between these two terms, the cases they cite are not relevant to the instant review. The issue of restructuring costs in AFBs from France was not, Tomasello asserts, whether they constituted extraordinary maintenance, but whether they were sufficiently unusual and infrequent to exclude them from ordinary expenses. Tomasello argues that the petitioners' reliance on

Floral Trade is similarly misplaced because the Court in that case addressed the issue of "extraordinary expenses" and not "extraordinary maintenance."

The respondent disagrees with petitioners' characterizations of the work performed as vague, and argues that the record of this case contradicts such an assertion. Tomasello argues that the actual listing of the specific equipment installations and improvements is exceptionally specific and can hardly be referred to as "vague." Tomasello disputes petitioners' conclusion that the work constituted normal, expected maintenance, arguing that they have provided no support for this proposition. In fact, Tomasello asserts, petitioners themselves characterize the work as "revamping," which clearly qualifies as an "extraordinary maintenance" procedure within the meaning of U.S. GAAP because it increases the useful life of the asset and is beyond mere day-to-day maintenance. Tomasello maintains that every one of the projects described in cost verification exhibit 4 qualifies under U.S. GAAP as "extraordinary repair and maintenance" or as "replacements or betterments" and are therefore properly capitalized. Moreover, argues Tomasello, the work undertaken also meets the IAS 16 criteria establishing what types of expenditures are properly capitalized. Tomasello notes that IAS 16 provides for the recognition in the carrying cost of an asset the "replacement" of "parts of some items of property, plant, and equipment....at regular intervals."

Citing Notice of Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Antidumping Duty Order: Brass Sheet and Strip from the Netherlands, 65 FR 742, January 6, 2000 and Certain Corrosion-Resistant Carbon Steel Flat Products from Korea: Notice of Final Results of the Sixteenth Administrative Review, 76 FR 15291, March 21, 2011, Tomasello adds that the Department has repeatedly emphasized its practice of relying upon a company's normal books and records where they are prepared in accordance with the home country's GAAP and reasonably reflect the cost of producing and selling the merchandise, as mandated by the statute.

The respondent asserts that the Department should not expense the capitalized labor costs in the POR as petitioners suggest. Tomasello concludes that the labor costs associated with the projects undertaken in the mill and the pasta plant in 2009 were properly capitalized as "extraordinary maintenance," and maintains that its treatment of these expenses was consistent with Italian GAAP, as certified by its auditors, and was consistent with U.S. GAAP.

Department's Position:

We disagree with petitioners that Tomasello's total capitalized labor expenses should be included in the calculation COP. As we have articulated in the past, section 773(f)(1)(A) of the Act provides that the Department will normally rely on the costs as recorded in the normal books and records of the producer if such records are kept in accordance with the GAAP of the exporting country, unless those costs do not reasonably reflect the cost of producing and selling the merchandise. See, e.g., Polyvinyl Alcohol from Taiwan: Final Determination of Sales at Less Than Fair Value, 76 FR 5562 (February 11, 2011), and accompanying Issues and Decision Memorandum at Comment 4. In this case, the personnel costs associated with certain business proprietary projects undertaken in the mill and pasta factory to repair and overhaul existing machinery and install new machinery during 2009 were treated as capital expenditures (i.e., they were not expensed as incurred) in the company's normal books and records. The company's normal books and records are prepared in accordance with Italian GAAP and are audited by an independent auditor, who rendered a clean opinion of the 2009 financial statements that reflected the capitalized labor costs at issue.

We have also considered whether the costs recorded in Tomasello's normal books and records "reasonably reflect" the costs associated with the production and sale of the merchandise. GAAP, in general, requires that costs be recognized as expenses in the period that the revenue with which they are associated is recognized. This is referred to as the matching principle. Where costs incurred subsequent to the purchase of an asset add to its useful life, increase its productivity, or improve its operating efficiency, GAAP allows for these costs to be capitalized and expensed systematically over the productive life of the asset. See Epstein, Barry, et. al., "Long-Lived Assets" in Wiley GAAP 2010: Interpretation and Application of Generally Accepted Accounting Principles, New York: John Wiley and Sons, Inc., 2010 (Wiley GAAP), attached to Memorandum to the File titled, "Placement on the Record of Information Relevant to the Proceeding," dated October 20, 2011. Conceptually, this treatment is an application of the matching principle in that the total investment in the asset, including qualifying subsequent costs, is expensed over the periods benefited. Based on our review of the description of business proprietary projects undertaken in the mill and pasta factory that we examined during the cost verification, the associated labor costs were for rather substantial enhancements, overhaul, replacement, and installation of machinery and equipment, and are typical of expenses that increase the useful life of an asset, add to its value, or improve its operating efficiency.[20] In accordance with both Italian and U.S. GAAP, such expenditures are appropriately capitalized.[21] Because Tomasello's treatment of these expenses in its books and records allows for a proper matching of revenues with expenses, we consider the costs in the company's normal books and records to reasonably reflect the costs associated with producing the merchandise.

With regard to the petitioners' conclusion that the work performed constituted normal, routine maintenance that should be expensed entirely in the POR, we disagree. The itemization and complete description of the projects Tomasello provides is considerably more specific and detailed than the few items highlighted by petitioners in their case brief. As discussed above, the projects in the mill and pasta plant involved substantial overhaul and repair of existing machinery and the installation of new equipment.[22] GAAP prescribes that expenses of this nature be recognized over the life of the asset, rather than expensed entirely in the period incurred. Were these expenditures to constitute normal, routine maintenance as petitioners suggest, Tomasello would have been required by Italian GAAP to expense them in the year such expenses were incurred.[23] Instead, the company's audited financial statements, which are prepared in accordance with Italian GAAP, reflect these items as capital expenditures to be expensed over the productive life of the associated assets. Moreover, Tomasello's normal books and records distinguish between the capitalized expenses at issue and those incurred for normal,

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[20] See Cost Verification Exhibit 4 at pages 11-13.
[21] Id., at pages 15-16; see also International Accounting Standard (IAS) 16; Wiley GAAP.
[22] See id.; see also Memorandum to Neal M. Halper, Verification of the Cost Response of Molino e Pastificio Tomasello S.p.A. in the Antidumping Duty Review of Certain Pasta from Italy, dated July 24, 2011, at page 5.
[23] See Cost Verification Exhibit 4, at pages 15-16.

recurring maintenance of mill and plant machinery, which were expensed when incurred and included in the company's reported costs.[24]

For these final results, we have continued to rely on Tomasello's normal books and records and have not included the entire amount of capitalized personnel costs in the calculation of COP.[25] For the reasons discussed above, our reliance on Tomasello's normal books and records is appropriate in this case, as the company's records were maintained in accordance with Italian GAAP, and reasonably reflect the costs associated with the sale and production of the merchandise.

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 of this review and the final weighted-average dumping margins in the Federal Register.

Agree: ✓ Disagree: _______

Ronald K Lorentzen

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

December 2, 2011

Date

[24] See, e.g., Tomasello's February 14, 2011, Supplemental Section D response, at Exhibit 7.
[25] As previously noted, Tomasello's reported costs include an amortized portion of the capitalized labor expenses.