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International Trade Administration
Washington, D.C. 20230

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Administrative Review
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DATE: February 1, 2013

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

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

RE: Certain Pasta from Italy (Period of Review: July 1, 2010, through June 30, 2011)

SUBJECT: Issues and Decision Memorandum for the Final Results of the 15th Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy; 2010-2011

Summary

We have analyzed the case and rebuttal briefs submitted by domestic interested parties[1] and respondents. Based on our analysis of comments received, these final results remain unchanged from the Post-Preliminary Analysis (PPA)[2] results for Pastificio Attilio Mastromauro Granoro S.r.L. (Granoro) but reflect changes from the PPA for Rummo S.p.A. Molino e Pastificio (Rummo) and the companies not selected for individual review (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.

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[1] New World Pasta Company, Dakota Growers Pasta Company and American Italian Pasta Company (collectively, petitioners).

[2] See Memorandum to Lynn Fischer Fox, Deputy Assistant Secretary for Policy and Negotiations from Gary Taverman, Senior Advisor for Antidumping and Countervailing Duty Operations, titled 2010/2011 Review of the Antidumping Duty Order on Certain Pasta from Italy: Post-Preliminary Analysis (Post-Preliminary Analysis) dated December 26, 2012.

I. Background

The Department of Commerce (the Department) initiated this administrative review of the antidumping duty order on certain pasta from Italy on August 26, 2011, for each of the aforementioned respondents.[3] On August 3, 2012, the Department published the Preliminary Results of this administrative review.[4] On December 26, 2012, the Department issued a targeted dumping post-preliminary analysis and invited interested parties to comment.[5] The review covers one mandatory manufacturer and exporter, one voluntary manufacturer and exporter, two non-shippers, and three companies not selected for individual examination.[6] The period of review (POR) is July 1, 2010, through June 30, 2011.

Scope of the Order

Imports covered by the order are shipments of certain non-egg dry pasta in packages of five pounds four ounces or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastasis, vitamins, coloring and flavorings, and up to two percent egg white.

Excluded from the scope of the order are refrigerated, frozen, or canned pastas, as well as all forms of egg pasta, with the exception of non-egg dry pasta containing up to two percent egg white. Also excluded are imports of organic pasta from Italy that are certified by a European Union (EU) authorized body and accompanied by a National Organic Program import certificate for organic products.[7] Pursuant to the Department's May 12, 2011 changed circumstances review, effective January 1, 2009, gluten-free pasta is also excluded from the scope of the countervailing duty order.[8]

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[3] See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 76 FR 53404, (August 26, 2011) (Initiation Notice).

[4] See Certain Pasta From Italy: Notice of Preliminary Results of Antidumping Duty Administrative Review, Preliminary No Shipment Determination and Preliminary Intent To Revoke Order, in Part, 77 FR 46377 (August 3, 2012) (Preliminary Results).

[5] See Memorandum to Lynn Fischer Fox, Deputy Assistant Secretary for Policy and Negotiations from Gary Taverman, Senior Advisor for Antidumping and Countervailing Duty Operations, titled 2010/2011 Review of the Antidumping Duty Order on Certain Pasta from Italy: Post-Preliminary Analysis (Post-Preliminary Analysis) dated December 26, 2012.

[6] The mandatory company is Rummo; the voluntary company is Granoro; the two non-shippers are Botticelli Mediterraneo S.a.r.l. (Botticelli), and Fiamma Vesuviana S.r.L. (Fiamma); and the three non-selected companies are Industria Alimentare Filiberto Bianconi 1947 S.p.A. (Filiberto), Pastificio Fratelli Cellino, S.r.L. (Cellino), and Pastificio Zaffiri (Zaffiri).

[7] On October 10, 2012, the Department revised the "Scope of the Order" to recognize the EU-authorized Italian agents for purposes of the antidumping and countervailing duty orders on pasta from Italy. See Memorandum from Yasmin Nair to Susan Kuhbach, titled "Recognition of EU Organic Certifying Agents for Certifying Organic Pasta from Italy," dated October 10, 2012, which is on file in the Department's CRU. We have adopted this scope decision in this current administrative review of certain pasta from Italy.

[8] See Certain Pasta From Italy: Final Results of Countervailing Duty Changed Circumstances Review and Revocation, In Part, 76 FR 27634 (May 12, 2011).

The merchandise subject to review is currently classifiable under items 1901.90.90.95 and 1902.19.20 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to the order is dispositive.

II. List of Comments

Comment 1: Whether the Department Should Collapse the Reported Control Numbers for Granoro

Comment 2: Whether the Department Should Offset Transport Recovery Against U.S. Freight for Granoro

Comment 3: Whether the Department Erred In Applying Quarterly Cost to Granoro

Comment 4: Whether the Department Should Continue to Rely on Protein Content Based on the Nutritional Label

Comment 5: Whether the Department Should Review All of Rummo's EP Entries During the POR

Comment 6: Analysis of Targeted Dumping Allegation

III. Analysis of Comments

A. Granoro

Comment 1: Whether the Department Should Collapse the Reported Control Numbers for Granoro

Granoro's Arguments

The Department erred in collapsing the control numbers (CONNUMs) for the pasta "specialita" shapes with those for normal shapes. Because of the unique physical properties of the pasta and the packaging in the specialita di Attilio line, Granoro assigned unique CONNUMs to the long and short pasta cuts in this line.

Granoro argues that it has demonstrated that: (1) the unit cost and unit packing cost of the specialita products vastly exceed the unit cost and unit packing cost of the normal CONNUMs; (2) the processing times for the specialita shapes are significantly longer than those for normal CONNUMs; (3) the packing material cost is much higher than that for normal CONNUMs; and (4) packing must be done by an outside subcontractor who has the necessary specialized equipment. Thus, there are differences in magnitude and kind, between Granoro's production and packing of the specialita shapes and its production and packing than of all other shapes of pasta that it produces.

Granoro argues that in a very similar situation in the fourth, fifth, sixth, and seventh administrative reviews, Pastificio Guido Ferrara produced a special line of pasta in very special and expensive packing, and, upon its demonstration that the production was more expensive than the production for other brands and its packing was unique and much more costly than that for other brands, the Department concurred and permitted the assignment of separate CONNUMs to such products.[9] Likewise, in the present case, Granoro argues that it produces "specialita" short and long cut pasta where the cost of manufacturing (COM) and packing costs were significantly higher than the COM and packing costs for all the other pasta products. Thus, if the specialita products are not deemed to have their own CONNUMs that are separate and apart from the CONNUMs and shape codes for normal pasta, then the specialita pasta would be weight-averaged with normal products. As a result, the cost and packing cost for the normal products would be grossly distortive given the disparity in COM and packing cost between normal products and the specialita di Attilio line.

Granoro further argues that the Department's treatment of Granoro's CONNUMs in the Preliminary Results is unlawful insofar as it fails to treat similarly situated parties in the same way. As noted above, Granoro contends that Pastificio Ferrara was faced with the same type of distortion in the fourth, fifth, sixth and seventh reviews of the dumping order on pasta from Italy, and Pastificio Ferrara eliminated the distortion by creating further CONNUMs for those of its products that were the equivalent of the specialita shapes herein, i.e., shapes with high manufacturing costs and slow throughput rates together with extremely high packing costs arising because they had unique packing materials that required non-standard packing treatment.

Similarly, in the instant review, Granoro argues that the Department is constrained by its past practice and must act consistently with that past practice. There has been no change in the law since the time of the Pastificio Ferrara reviews, and the CONNUM changes that the Department implemented after the Ferrara reviews have no bearing on the instant issue. Therefore, in the Preliminary Results the Department was wrong to collapse the specialita CONNUMs with the normal CONNUMs, and should reverse its preliminary decision and use the CONNUM structure as reported by Granoro for purposes of the final results.

Petitioners

Petitioner did not comment on this issue.

Department's Position:

In Granoro's November 22, 2011, voluntary questionnaire response, Granoro classified its long cuts of specialita di attilio pasta with shape code 9 and the short cuts with shape code 8, instead of using the codes provided in the Department's original questionnaire.[10] The codes listed in the

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[9] See Granoro's case brief dated October 26, 2012, at page 5.

[10] See Letter to Granoro in response to its request to be a Voluntary Respondent, dated October 19, 2011. The Department referred Granoro to the "Letter to Rummo S.p.A. Molino e Pastificio from the Department of Commerce; Request for Information from Rummo S.p.A. Molino e Pastificio; and Antidumping Duty Questionnaire Sections A – E and Appendices 1 – 7, dated October 4, 2011" (collectively, "original questionnaire"). The shape

Department's original questionnaire are not considered to be all inclusive and, thus, allow respondents to report other materials or shapes used in the production of subject merchandise, but not included in the list provided by the Department. However, the differences between the long and short cuts of pasta are already included in the codes listed in the Department's original questionnaire, and do not represent other materials or new shapes.[11]

The codes for the CONNUMs assigned to each reported sales transaction should be based on the model match physical characteristics established in the investigation and refined by the Department in the subsequent first three administrative reviews, based on detailed production and cost information.[12] The Department's CONNUMs for the shape categories have been applied repeatedly to the pasta reviews using the same CONNUM for products sharing identical physical characteristics.[13] Therefore, we properly reclassified the new codes provided by Granoro into the appropriate existing codes in the original questionnaire.

Granoro's argument that its specialita di attilio pasta warrants different CONNUMs than the "normal" specialty pasta is largely based on its claim that there is a difference in packing and packing cost associated with this product. However, packing and packaging costs are not model match criteria that the Department has applied in this order. Rather, these costs are accounted for under packing adjustments. Moreover, whatever is unique in the manner in which these products are distributed and advertised is more appropriately covered by advertising expenses, and the level of trade analysis.

Regarding Granoro's assertion that this case is very similar to the fourth, fifth, sixth, and seventh administrative reviews where the Department permitted Ferrara to assign separate CONNUMs to such products is inaccurate. In the fourth review, the Department verified the physical differences, cost differences, and throughput rate differences between the Teflon-die production technology and the older, more traditional bronze-die production technology for Ferrara products.[14] The Department had not previously reviewed the differences between these two

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codes were listed in Section B at B-9, and Section C at C-8. In addition, the classification of shape code listing was included in Appendix III of the original questionnaire.

[11] Id.

[12] See Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Pasta From Italy, 63 FR 42368, 42372 (August 7, 1998), unchanged in the First Review Final Results; Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Pasta From Italy, 64 FR 6615 (February 10, 1999) (First Review Final Results), and accompanying Issues and Decision Memorandum at Comment 7 and Notice of Final Results of Antidumping Duty Administrative Review: Certain Pasta From Italy, 65 FR 7349 (February 14, 2000) (Second Review Final Results); and Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review, 65 FR 77852 (December 13, 2000) (Third Review Final Results), and accompanying Issues and Decision Memorandum at Comment 6.

[13] See Notice of Final Results of Antidumping Duty Administrative Review, Partial Rescission of Antidumping Duty Administrative Review and Revocation of Antidumping Duty Order in Part: Certain Pasta From Italy, 66 FR 300 (January 3, 2002) (Fourth Pasta Review), and accompanying Issues and Decision Memorandum at Comment 2; Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part: Certain Pasta from Italy, 68 FR 6882 (February 11, 2003) (Fifth Pasta Review), and accompanying Issues and Decision Memorandum at Comment 17; and Notice of Final Results of the Sixth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination Not to Revoke in Part, 69 FR 6255 (February 10, 2004) (Sixth Pasta Review), and accompanying Issues and Decision Memorandum at Comment 51.

[14] See Fourth Pasta Review, and accompanying Issues and Decision Memorandum at Comment 2.

production technologies in prior reviews where the model match methodology was developed. In the final results of the fourth review, the Department allowed Ferrara to use a five-digit CONNUM, instead of a four-digit CONNUM to account for the differences between bronze-die pasta and Teflon-die pasta for purposes of model matching.[15] However, all companies used the same shape codes in the CONNUMs. Thus, in the reviews cited by Granoro, the change accepted by the Department was based on the differences between bronze die and Teflon-die production methods and outcomes. Although we found that the physical and cost differences of products produced using these two different methods merited separate treatment, this was not a change to the reported variables used to create the CONNUM that we use for model matching purposes.

In addition, in the instant case, Granoro did not present sufficient evidence that its specialita di attilio pasta did not match the physical dimensions of the shape categories in the Department's original questionnaire. Granoro stated that the Department's shape codes for specialty long cuts and specialty short cuts are not appropriate for Granoro's specialita di attilio pasta because these products differ with respect to the throughput rate because they have different production processes; have grossly different packing costs; and because they are marketed differently. In the investigation the Department used a 75 percent throughput rate to distinguish pasta shape for specialty long and short pasta cuts.[16] We do not use the throughput rates to further differentiate between specialty short and super-specialty short or specialty long and super-specialty long. Based on the throughput rates of the pasta at issue, we can classify them as specialty short and specialty long because the line speed or the throughput rates are 75 percent or less than the corresponding line speed or throughput rates of the short and long pasta. Furthermore, in the current review, Granoro cites our analysis of the differences between bronze die and Teflon-die, which is not on the record of this review, or relevant to their claims, as the basis for asserting that the Department should change its long-standing CONNUM variables.

Based on record evidence we find that Granoro has not demonstrated that a reclassification of its specialty shape codes is warranted. Therefore, we will follow what we did in the Preliminary Results and continue to recode Granoro's shape code 9 to the Department's shape code 2, (specialty long cuts), and Granoro's shape code 8 to the Department's shape code 6 (specialty long cuts), because these specialty pasta are already included in the product shapes listed in the Department's initial questionnaire.

Comment 2: Whether the Department Should Offset Transport Recovery Against U.S. Freight Expenses for Granoro

Granoro's Arguments:

Granoro argues that it appears that in the Preliminary Results the Department may have offset the transport recovery against Granoro's U.S. freight expense in the margin program, and if that practice is continued in the final results then Granoro will be in agreement.[17] However, Granoro

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[15] See id., at Comments 18 and 19.
[16] See First Review Final Results, and accompanying Issues and Decision Memorandum at Comment 7.
[17] See Granoro's case brief at 13; see also Department's Calculation Memorandum regarding Pastificio Attilio

disagrees with the Department's narrative in the preliminary calculation memorandum.[18] Specifically, in the narrative of the preliminary calculation memorandum, the Department denies the adjustment to U.S. price, and does not state that it implements the adjustment to transport expense in the margin program.[19]

In the 2008/09 review of this proceeding, although the Department agreed to offset the transport expense by the transport recovery, it failed to implement this methodology in the final results. As a result, in the 2008/2009 review Granoro filed a request for correction of ministerial error, which the Department accepted, and issued amended final results implementing the adjustment by subtracting transport recovery from transport expense, capped at the actual amount of the expense.[20] Likewise, in the instant review, the Department should apply the same methodology as in the 2008/2009 and offset the U.S. transport expenses incurred on subject merchandise by the transport recovery amounts.

Petitioners

The Petitioners did not comment on this issue.

Department's Position:

In Granoro's preliminary margin calculation program, the Department added the transportation recovery amounts reported in the RECOVERX field to U.S. price. The transportation recovery amounts were capped at the amount of freight expense incurred on subject merchandise. However, in the narrative of Granoro's preliminary calculation memo, we incorrectly stated that we did not add the transportation recovery amounts reported in the RECOVERX field to U.S. price. The narrative in the final calculation memo will properly reflect the methodology used in the final margin calculation.

Comment 3: Whether the Department Erred In Applying Quarterly Cost to Granoro

Granoro's Arguments:

Granoro argues that the Department erred in applying its quarterly cost methodology for the Preliminary Results by incorrectly concluding that cost and price are reasonably correlated.[21] Granoro's sales prices are not reasonably correlated with its quarterly costs, because the difference between the minimum and maximum cost during the POR far exceeds the corresponding minimum and maximum price for both the home and U.S. markets.

Mastromauro - Pasta Granoro S.r.L. (Granoro) for the Preliminary Results (Preliminary Calculation Memo), dated July 27, 2012.

[18] See Preliminary Calculation Memo, at page 4.

[19] See id.

[20] See Certain Pasta from Italy: Notice of Amended Final Results of the Thirteenth Antidumping Duty Administrative Review, 76 FR 6601 (February 9, 2011).

[21] See the Memorandum to Neal M. Halper, Director, Office of Accounting, through Theresa C. Deeley, Lead Accountant, from Sheikh M. Hannan, Senior Accountant, titled "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – Pastificio Attilio Mastromauro – Pasta Granoro S.r.L." dated July 27, 2012 (Preliminary Cost Memo) at pages 2 to 4 and attachments 3 to 5.

The Department's analysis indicates that Granoro's selected home market sales are all reasonably correlated with costs while none of the U.S. products selected have a reasonable correlation between cost and price. Thus, the application of the Department's quarterly cost methodology will smooth the differences between cost and price for the home market sales but exacerbate the difference for the U.S. market sales, and therefore, lead to inaccurate antidumping margins. In addition, the inconsistencies in the cost-price movements between the markets will further distort the antidumping margins. For all five of the highest-sale volume home market CONNUMs, the lowest price and cost were in the second quarter and the highest price and cost were in the fourth quarter. For all five of the highest-sale volume U.S. market CONNUMs, the lowest cost was also in the second quarter and the highest cost in the fourth quarter. The high and low prices for the U.S. market CONNUMs, however, occurred in quarters other than the high and low cost quarters.

Further, the Department should not find that there is correlation between the cost and price for the five highest-sale volume home market CONNUMs when comparing the percentage cost change to the corresponding percentage price change. For all five home market sales CONNUMs, the percent cost change is significantly greater than the percent price change. As such, there is no reasonable correlation between the cost change and the price change for all five home market CONNUMs.

The graphs prepared by the Department for the five highest-sale volume home market CONNUMs show no correlation between the changes in cost and price. A graph plot for CONNUM 711111 illustrates that the two lines are not correlated and the slopes are not nearly the same. From the second quarter to the third quarter the cost increased by five euro cents per kilogram while the price increased by less than one euro cent. From the third to fourth quarter, the cost increased by another five euro cents per kilograms while the price increased by less than three euro cents. Moreover, Granoro's pricing strategy was to "hold the line" on price increases in response to its cost increase, and, as a result, costs and prices were not reasonably correlated in either market.

Petitioners

The Petitioners did not comment on this issue.

Department's Position:

We disagree with Granoro that there is no linkage between the quarterly costs and prices. The Department's normal practice is to utilize an annual weighted-average cost for the POR.[22] However, we recognize that distortions may result if we use our normal annual-average cost method during a period of significant cost changes. In determining whether to deviate from our

[22] See Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review, 65 FR 77852 (December 13, 2000), and accompanying Issues and Decision Memorandum at Comment 18, and Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada, 71 FR 3822 (January 24, 2006), and accompanying Issues and Decision Memorandum at Comment 5 (explaining the Department's practice of computing a single weighted-average cost for the entire period).

normal methodology of calculating an annual weighted-average cost, we evaluate the case-specific record evidence using two primary factors: (1) the change in the cost of manufacturing (COM) recognized by the respondent during the POR must be significant; and (2) the record evidence must show that the changes in sales prices during the shorter cost-averaging periods are reasonably correlated with changes in the cost during the same shorter cost-averaging periods (i.e., linkage).[23] This methodology has been upheld by the Court of International Trade.[24]

For the Preliminary Results, the Department applied its quarterly cost methodology because the change in the COM recognized by Granoro during the POR was significant[25] and there was a reasonable correlation between the changes in the quarterly-average unit costs and sales prices during the shorter cost averaging periods. To determine whether a reasonable correlation existed between the sales prices and underlying costs during the POR, we compared the weighted-average quarterly prices charged by Granoro to the corresponding quarterly COM for the five CONNUMs with the highest volume of sales in the home market and the five CONNUMs with the highest volume of sales in the U.S. market.[26] The Department analyzed whether prices and costs moved in the same direction for the majority of quarters, whether the magnitude of the changes in the quarterly costs and sales prices were comparable, and whether the slope lines for the quarterly costs and sales prices trended consistently during the POR.[27] The results of our analysis indicated that for five of the ten largest sales volume CONNUMs tested, the quarterly average costs and prices were reasonably correlated.[28] Because the prices and costs appeared to be reasonably correlated, we found that linkage between Granoro's quarterly costs and sales prices existed during the POR.[29]

In determining whether costs and prices moved in the same direction for the majority of the quarters during the POR, we looked at whether costs and prices either increased or decreased from first quarter to second quarter, from second quarter to third quarter, and from third quarter to fourth quarter. For the five home market CONNUMs analyzed, we found that prices and costs for four of the five home market CONNUMs trended in the same direction for all three periods.[30] That is, from the first to the second quarter, the prices and costs both decreased. From the second to the third quarter and the third quarter to the fourth quarter, the prices and costs both

[23] See Stainless Steel Sheet and Strip in Coils From Mexico: Final Results of Antidumping Duty Administrative Review, 75 FR 6627 (February 10, 2010) (SSSS from Mexico), and accompanying Issues and Decision Memorandum at Comment 6 and Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review, 73 FR 75398 (December 11, 2008) (SSPC from Belgium), and accompanying Issues and Decision Memorandum at Comment 4.
[24] See Final Results of Redetermination Pursuant to Court Remand aff'd Habas Sinai ve Tibbi Gazlar Isthihsal Endustrisi A.S. v. United States, Slip Op. 09-133 (CIT November 23, 2009), SeAH Steel Corporation v. United States, Slip Op. 10-60 (CIT May 19, 2010), and Pastificio Lucio Garofalo S.P.A. v. United States, Slip Op. 11-65 (CIT June 8, 2011), affirmed by 469 Fed. Appx. 901; 2012 U.S. App. LEXIS 5302; 34 Int'l Trade Rep. BNA 1224 (Federal Circuit March 14, 2012).
[25] Granoro does not dispute this fact in its October 26, 2012 case brief.
[26] Preliminary Cost Memo at 2.
[27] See id., at 2 and 3.
[28] See id., at 2.
[29] See id., at 2 to 4, and attachments 3 to 5.
[30] See id., at attachment 4.

increased.[31] The prices and costs for the remaining home market CONNUM trended in the same direction for two periods and in the opposite direction for one period.[32] In determining whether the magnitude of the quarterly cost changes were comparable to the quarterly price changes, we compared the percentage difference between the high and low quarterly costs to the percentage difference between the high and low quarterly prices of each CONNUM analyzed. We determined that the magnitude of the quarterly price changes to the corresponding cost changes was comparable for one of the home market CONNUMs and not comparable for the remaining four CONNUMs.[33] In determining, whether the slope lines of the quarterly prices and costs trended consistently, we charted the overall POR trend lines of the quarterly prices and costs.[34] We do not require the lines to be parallel, only that they trend in a reasonably consistent manner. We found that the slope lines of the quarterly prices and costs trended consistently during the POR for all five home market CONNUMs. Taking into account all the above information, we determined that for all five home market CONNUMs, there was evidence of reasonable correlation.[35]

For the U.S. market products analyzed, the prices and costs for all five U.S. CONNUMs trended in the opposite direction for the majority of the quarterly periods.[36] The magnitude of the quarterly price changes compared to the corresponding cost changes was comparable for one U.S. CONNUM and not comparable for the remaining four CONNUMs.[37] Lastly, the slope lines of the quarterly prices and costs did not trend consistently during the POR for all the five CONNUMs. Taking into account all of the above information, we determined that none of the five U.S. CONNUMs was reasonably correlated.[38]

In summary, for the home market CONNUMs we found that all five were reasonably correlated while we found that none of the five U.S. market CONNUMs were reasonably correlated.[39] Thus, overall we find that five out of the ten CONNUMs analyzed show a reasonable correlation between quarterly cost and price changes. Since at least half of the top ten CONNUMs tested show reasonable correlation, we find that linkage has been met.[40] We note that this is the first time where our linkage analysis has resulted in a 50/50 split. It is the Department's preference in situations of a 50/50 split in our linkage analysis that we rely on our alternative quarterly cost methodology because using shorter cost averaging periods generally helps to minimize the distortion that significantly changing costs has on the overall dumping analysis.

Granoro focuses solely on the percentage changes in the prices to the corresponding percentage changes in the costs. This comparison accounts for only a part of the Department's analysis for finding linkage and misstates our alternative cost analysis. In finding linkage, the Department

[31] See id.
[32] See id.
[33] See id.
[34] See id.
[35] See id.
[36] See id., at attachment 5.
[37] See id.
[38] See id., at attachment 5.
[39] See id., at Attachments 4 and 5.
[40] See id., at 2.

does not require direct traceability between specific sales and their specific production costs, but rather relies on whether there are elements which show a reasonably positive correlation between the underlying costs and the final sales prices charged by a company.[41] Requiring too strict of a standard for linkage would preclude this remedy for products where there is no formal cost based pricing mechanism in place and it may be difficult to precisely link production costs to specific sales.[42] In the instant review, we find that Granoro has no formal pricing mechanism in place to absorb cost changes.

While the outcome of our linkage analysis reveals a market-specific result (i.e., all home market CONNUMs analyzed show a reasonable correlation while all U.S. CONNUMs analyzed do not), we must still make a determination for the company as a whole. That is, we must decide to either use our alternative cost methodology for all parts of the dumping analysis or not at all. To use quarterly costs for the home market products (i.e., for calculating COP when performing the cost test and calculating CV profit), but use annual average costs for the U.S. products (i.e., for calculating CV)[43] would introduce many complications and distortions such as completely different costs for the very same CONNUM that is sold in the HM and the US market. In addition, the adoption of our quarterly cost methodology impacts how we make price-to-price comparisons (i.e., we do not go outside of a quarter to make price comparisons). As such, it would not be possible to adopt a mixed, market-specific approach for using our alternative quarterly cost methodology. Since at least half of the CONNUMs tested showed a reasonable correlation, we find that the linkage requirement has been met. Accordingly, for the final results, we have continued to apply the quarterly cost methodology for Granoro.

Lastly, with regard to Granoro's claim that using the Department's quarterly cost methodology in this case will exacerbate the difference between cost and price for the U.S. market sales, we note that Granoro provided no evidence or explanation of how this creates distortion or results in an inaccurate margin calculation. While in some instances using our alternative cost methodology may result in bigger differences between cost and price for certain U.S. market sales, this does not necessarily mean that it results in a distorted dumping calculation.

B. Rummo

Comment 4: Whether the Department Should Continue to Rely on Protein Content Based on the Nutritional Label

Rummo's Arguments

In the Preliminary Results, the Department changed its position with respect to its classification of products in the model match criteria CONNUMs, as compared to the two previous administrative reviews. Specifically, the Department altered its model match by basing its product definitions on the protein content as stated on the nutritional label of pasta, rather than

[41] See SSSS from Mexico and SSPC from Belgium.
[42] See SSSS from Mexico, and accompanying Issues and Decision Memorandum at Comment 6.
[43] In this particular case we are not calculating CV; nevertheless, in adopting a particular policy approach, we are cognizant about potential of using CV in other cases.

on the actual protein content of the merchandise. In the Department's reliance on the nutritional label from the respective pasta package, the Department departed from the only reasonable, and only allowable, interpretation of its model match; that is, a model match based on the actual physical characteristics of the merchandise.

The Department's interpretation of the foreign like product is as follows: "Section 771(16)(A) of the Tariff Act of 1930, as amended (the Act) requires that the Department take into account physical characteristics in determining which comparison market sales to match to a U.S. sale."[44] The Department is required by statute, and in accordance with its own interpretation of that statute, to consider physical characteristics in determining which comparison market sales to match to U.S. sales. A packaging label is not a physical characteristic of the pasta; in contrast, the Department's model match criteria relies on physical attributes of the pasta based on the following six physical characteristics: shape, wheat species, milling form, protein content, additives, and enrichment. The Department's model match criteria does not include certain information that are not physical characteristics of the pasta (e.g., packaging form, packaging weight, or brand, even though the Department also collects this information as part of its review procedures).

In the 2007/2008 review of certain pasta from Italy, the Department stated that "laboratory test results information shows that the protein content of the semolina input is consistent with the protein content noted on the packaging of the finished pasta."[45] However, the term "consistent" does not translate to exactitude, and where the protein content specified on the label lies exactly on the division point (i.e., 12.5 percent protein content), a different tool is required in order to properly report the product's physical characteristics. Blind reliance on the nutritional label in this instance elevates the labeling information over the product's actual physical characteristics and, therefore, is contrary to the law.

Rummo does not disagree with the Department's general approach to rely on the protein content specified on the packaging label as a surrogate for identifying actual protein content. However, such reliance on the pasta labeling loses its accuracy, and therefore its convenience, where the specified protein content is on the 12.5 percent dividing line[46] and occurs because of rounding.

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[44] See Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada, 70 FR 22636 (May 2, 2005).

[45] See Certain Pasta from Italy: Notice of Final Results of the Twelfth Administrative Review, 75 FR 6352 (February 9, 2010) (2007/2008 IDM), and accompanying Issues and Decision Memorandum at Comment 1.

[46] In the Department's model match field, Protein Content, listed in its Section B Questionnaire, 12.5 percent protein corresponds with a higher Protein Content and is coded as "1".

Field Number 3.4: Protein Content
FIELD NAME: PROTEINH
1 = 12.5 percent or higher protein in finished pasta
2 = 10.00 - 12.49 percent protein in the finished pasta
NARRATIVE: Identify the percentage of protein in the pasta sold.

In the antidumping reviews involving Mexican Cement the Department chose to rely on sales documentation "as a convenient surrogate for more direct evidence..." and discussed its general approach to the model match as follows:

> "In the instant proceeding, we have sought, throughout each of the past six reviews, including the present one, to (i) match based on physical characteristics, (ii) rely on ASTM standards to distinguish one type of cement from another, and (iii) *rely on sales documentation as a convenient surrogate for more direct evidence (e.g., mill test certificates) of cement type*."[47]

The Department may treat products as identical if their differences are not commercially significant. This principal was articulated in Steel Pipe from Korea, citing Pesquera: Pesquera explains that the Department has the ability to consider products identical even if the products are not physically the same in all respects, so long as the differences are not commercially significant, or, as detailed by Pesquera, the products are "essentially equal or interchangeable."[48] Conversely, if the differences are commercially significant, then the products must not be considered identical.[49]

In the case of pasta made with regular semolina versus premium semolina, the commercial differences are significant, which the Department itself acknowledged this with respect to Garofalo in the 2007-2008 review.[50] Rummo's own data demonstrates the percentage cost difference based on whether the pasta has actual protein content greater than versus less than 12.5 percent.[51] Based on Rummo's own cost calculations, the effect of the Department's instructions is to group products made entirely with regular semolina into a category of products that were all made either exclusively or predominantly with premium semolina. Pursuant to Pesquera, such an approach is unacceptable.

Rummo also submitted pricing data indicating that the average price of protein code "1" pasta (based on actual protein content) is significantly higher than the average price of protein code "2" pasta.[52] Such price differences, accompanied by the cost differences identified by Rummo, equate to commercially significant differences that must be recognized in matching sales. With regard to protein content, the Department's reliance based on the nutritional label constitutes a change to the model match criteria which is not based on compelling reasons. As indicated in Ball Bearings once the Department has established a model-match methodology in an antidumping investigation, it will not modify that methodology in subsequent proceedings

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[47] See Gray Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review, 63 FR 12764, 12768 (March 16, 1998) (Mexican Cement) (emphasis added).
[48] See Issues and Decision Memorandum for the 2008-2009 Administrative Review of Circular Welded Non-Alloy Steel Pipe from the Republic of Korea, (June 13, 2011); see also Pesquera Mares Australes Ltda. v. United States (266 F.3d Federal Circuit 2001, at 1382-83) (Pesquera).
[49] See Final Results of Redetermination Pursuant to Remand: Union Steel v. United States, Court No. 09-00130, Slip Op. 11-18 (CIT February 15, 2011), July 15, 2011,at page 9.
[50] See 2007/2008 IDM.
[51] See Rummo's Case Brief, dated October 26, 2012, at Attachment 1, which was submitted at Exhibit SD1-33 of Rummo's May 3, 2012 supplemental questionnaire response.
[52] See Rummo's Case Brief, dated October 26, 2012, at Attachment 2, which was submitted at Exhibit SD1-34 of Rummo's May 3, 2012 supplemental questionnaire response.

unless there are "compelling reasons" to do so.[53] As indicated in CORE Korea, the Department will find that "compelling reasons" exist if "compelling and convincing evidence" that the existing model-match criteria "are not reflective of the merchandise in question," that there have been changes in the relevant industry, or that "there is some other compelling reason present which requires a change."[54]

In the 2007-2008 review of certain pasta from Italy, the Department discussed certain details regarding how protein content could be verified and how such information related to the finished pasta.[55] In the excerpt below, the Department specifically recognized that the proper way to report the protein content of the pasta was based on actual protein content of the pasta for laboratory tests and reports. Specifically, the Department stated,

> As part of its normal production process, the companies routinely conduct laboratory tests on the ash, gluten and protein content of the semolina they purchase and use. In addition, although less frequently, they also conduct laboratory tests on the protein content and other physical characteristics of the finished pasta. The companies routinely keep detailed records of these laboratory tests which can form a reliable basis for verifying the protein content of the finished pasta. The laboratory test results information shows that the protein content of the semolina input is consistent with the protein content noted on the packaging of the finished pasta. Based on this, we believe that pasta producers will be able to reliably report the protein content of finished pasta in future reviews of this order.[56]

The Department declared in its July 31, 2009 Memo[57] that "{a}ccordingly, the industry standard for superior semolina is that its protein content must exceed 12.5 percent."[58] Based on this statement, the Department may have inadvertently erred in defining the protein content field as "1 = 12.5 percent or higher protein in finished pasta." Instead, the Department should have defined code "1" as "higher than 12.5 percent protein in finished pasta." Given that this problem only occurs on packages where the serving size is listed as 56 grams and the protein content is

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[53] See Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Review, 70 FR 54711 (September 16, 2005) (Ball Bearings), and accompanying Issues and Decision Memorandum at Comment 2.
[54] See Notice of Final Results of the Twelfth Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, 72 FR 13086 (March 20, 2007), (CORE Korea), and accompanying Issues and Decision Memorandum at Comment 1(b).
[55] See 2007/2008 IDM at Comment 1 (Wheat Code Methodology).
[56] Id. at Comment 1 (footnote omitted).
[57] Rummo states that, in the 07/08 administrative review of pasta from Italy, the Department first considered the issue of revising its model match in this case with respect to wheat code classifications. The Department's first position with respect to redefining its model match was presented in its July 31, 2009 memorandum titled "Preliminary Model Match Clarification on Pasta Wheat Code Classifications" (July 31, 2009 Memo). The Department's proposed alteration of the model match in that memorandum was in fact adopted, beginning with the 08/09 review, and continues to be the governing model match for this review. The model match alteration eliminated the wheat code field, and added, in its place, the categories for wheat species, milling form, and protein content, with a delineation point of 12.5 percent within the protein content characteristic.
[58] See pages 6-7 of the Preliminary Model Match Clarification.

listed as 7 grams, the issue could be resolved in a method that would enable the Department to retain its reliance on packaging labels by simply changing the questionnaire to indicate the following for the protein content data field: "1" = greater than 12.5 percent protein in finished pasta; and "2" = 10.00-12.5 percent protein in the finished pasta.

In the 2007-2008 IDM, the Department discussed its decision to implement a new model match going forward, beginning with the 2008-2009 review. In Comment 1 of the 2007-2008 IDM the Department indicated its intention to base its methodology on the "physical characteristics of the finished pasta," and specifically on the protein content of finished pasta.[59] Basing a model match on the labels used to package the product, rather than on the physical characteristics of the product itself, would not meet the Department's stated intention and would be contrary to the express terms of the statute. Furthermore, in the 2007-2008 IDM, the Department discussed in detail its ability to rely on laboratory test result information for model match purposes.[60] The Department's statements in the 2007-2008 IDM strongly suggest that the Department was concerned with the actual protein content, and the physical characteristics of the product. The Department's acceptance of Garofalo's protein code reporting in the subsequent two reviews of the order, coupled with the aforementioned statements must be interpreted to indicate that company testing forms the basis for the proper coding of protein content. In addition, the respondent in the 2007-2008 review, Garofalo, explicitly raised the issue of packaging and rounding and its reporting methodology was accepted.

Information from the final results of the 2007-2008 review of this order indicates that the Department agreed with Garofalo that the packaging includes the information needed to convey the semolina quality of the pasta.[61] Packaging samples provided by Garofalo in that review and a specific reference to the higher semolina quality of the high-protein content pasta as "product made with richer semolina..." indicates that the Department's determination in the 2007-2008 review was based on consideration not only of the nominal protein content per the label, but also on an affirmative indication on the label that the semolina being used for the high protein content pasta was something different from, and better than, the regular semolina.[62] The Department clearly indicated in its 2007-2008 IDM that the basis for segregating wheat codes, as Garofalo requested for the 2007-2008 review, was tied to the different semolina types used to make pasta.[63] Although the Department referred to "wheat codes" or "protein content," the Department explicitly acknowledged that a product made with excellent semolina is significantly different from one made with regular semolina.[64]

Rummo's reporting of protein content is consistent with protein content reporting in recent reviews of this antidumping duty order as evidence by comparing Rummo's data in the instant review to the public versions of Garofalo's responses from the two prior reviews in which Garofalo reported "actual protein content on a product-specific basis, reviewing the entire actual production experience during the POR to determine the actual average protein content per

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[59] See 2007-2008 IDM at Comment 1.
[60] Id.
[61] See 2007-2008 IDM at Comment 3.
[62] See Garofalo's May 14, 2009, submission, at Exhibit 39 and page 36.
[63] See 2007-2008 IDM at Comment 3, page 11.
[64] Id.

product code."[65] In the two previous reviews of this antidumping order the Department was aware of the fact that the packaging labels for some brands indicate a protein content of precisely 12.5 percent (i.e., 7 grams per 56 gram serving), that due to rounding, the actual protein content of the product may be greater than or less than 12.5 percent, that the respondent, Garofalo, addressed this issue by relying on its actual production records; and that the Department accepted Garofalo's reporting methodology.

With respect to the instant review, Rummo reported its sales and costs consistent with Garofalo's reporting methodology when it faced the same issue as Garofalo (i.e., how to report protein content in instances where the packaging information would yield a rounded value of 12.5 percent).[66] The Department's supplemental questionnaire acknowledged Rummo's reporting, which included reliance on actual production records, but the Department did not instruct Rummo to revise its reporting methodology. Rather, the request was to provide documentation supporting the proper classifications.[67]

Rummo references a particular brand sold during this period of review and provides an example to show how distortions may occur based on a reliance of protein content, as reported on the nutritional label. Specifically, assuming that the actual protein content for a pasta product was 6.50 grams, the product label would still indicate 7 grams due to rounding, but the actual protein content, rather than being 12.5 percent, would instead be 6.5 grams/56 gram serving size = 11.61 percent. In this example, the Department's current instructions would result in a product made entirely of regular semolina (i.e., and not the more expensive "special" or "super-special" semolina), and with an actual protein content significantly below 12.5 percent (in fact, almost an entire percentage point, where the lower range defined by the Department totals only 2.5 percent), reported instead as a high-protein product. Subsequently, it would now be much more likely to match to high-protein products sold in Italy that are made using the more expensive special and super-special semolina, and sell at a significant price premium. This was the exact situation the Department was trying to avoid by adopting the different protein codes in the 2008-2009 review.

The nutritional labeling standards allow for significant variations. Specifically, according to Food and Drug Administration (FDA) regulations, for a Class II protein (i.e., protein for subject pasta), the protein content labeled on a package is deemed to be in compliance with U.S. FDA regulations as long as the declared protein content is within 80 percent of actual protein content.[68] Rummo provides theoretical examples in which it asserts that a reliance solely on the stated protein content package label would encourage Italian pasta producers to change the labeling of their product simply to avoid punitive treatment in antidumping duty proceedings, even though there has been no change to the product, and even though the labeling of the package has been made in complete accordance with the applicable U.S. Federal regulations.

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[65] See Garofalo's May 28, 2010 Supplemental Section A-C Questionnaire Response, at pages 1-2, in the 2008-2009 review; see also Garofalo's March 16, 2011 Supplemental Section A-C Questionnaire Response, at pages 10-11, in the 2009-2010 review.
[66] See Rummo's December 9, 2011 Section B response, at page 4 and Exhibit 3.
[67] See Rummo's First Supplemental Sales Questionnaire Response, dated March 8, 2012 at page 12.
[68] Rummo states that the applicable federal regulations regarding nutritional labeling requirements are those spelled out in Code of Federal Regulations, Title 21, Chapter 1, 101.9 (2011).

These examples demonstrate that, by legally changing the label on the package, a respondent could change a premium pasta into a standard pasta. Thus, the Department's proposed new interpretation will likely result in Italian pasta companies changing the protein content on the label to be closer to the actual value of the pasta simply to avoid having the Department mischaracterize their standard pasta as premium pasta when in fact it is standard quality pasta, even where the product itself has not changed in any way. The Department's attempt to rely on the protein content on the package is misguided because it fails to separate standard pasta from premium pasta in any meaningful way.

FDA Regulation 21 CFR Section 101.9(c)(7), which outlines reporting requirements for items such as protein, does not provide any assurance that products labeled as 7 grams per 56 ounce serving are actually made with premium quality semolina. This is because the actual protein content for any product will vary to a certain degree between production batches. In addition, the resultant protein content level (say, for example, 6.5 grams of protein), will then be rounded in accordance with FDA regulation 101.9(c)(7), to 7 grams.

It would be unfairly punitive for the Department to rely solely on protein content as reported on the packaging label where a company has fully complied with the relevant U.S. labeling requirements but was not duly informed in advance of the Department's decision to change its model match protein content reporting criteria. If the Department wants to change its model match criteria for the reporting of protein content, it should provide respondents with advance notice so that it can change its label to reflect the actual protein content of the pasta, while still being within the allowable nutritional labeling requirements.

The Department's margin calculation program utilized for the Preliminary Results would yield an estimated dumping margin of 0.00 percent based on the actual protein content, rather than the protein content appearing on the label. In contrast, by reclassifying Rummo's pasta based solely on the packaging label's indication of protein content, the Department calculated a preliminary dumping margin of 6.97 percent. The entire difference between dumping and not dumping found under what is a new interpretation of the model match criterion, proves there is a significant distortion of the actual margin of dumping under the Department's reliance on protein content based on the nutritional label.

Petitioners are incorrect in suggesting that a reliance on the protein content specified on the packaging label is "an objective and easily verifiable source for reporting the data,"[69] because it does not, in some cases, reflect the actual protein content of the pasta being sold. Furthermore, petitioners' suggestion that the Department cannot easily verify actual protein content is erroneous, and is contradicted by the Department's own past verification findings, for example with respect to Garofalo and PAM in the 2007/2008 review.[70] In the 2007/2008 review, the Department found that "companies routinely keep detailed records of these laboratory tests which can form a reliable basis for verifying the protein content of the finished pasta."[71] There is no issue of verifiability here because the Department has found that Italian pasta companies

[69] Id. at page 2.
[70] See 2007/2008 IDM at Comment 1.
[71] See Rummo's May 3, 2012 supplemental questionnaire response.

maintain the type of detailed records that ensure the verifiability of actual protein content reporting.

In sum, the rounded up protein value is not a good indication of the actual protein content of the pasta and it can obscure whether the pasta is a premium product made from superior quality semolina. Thus, the Department should abandon its requirement to base the protein content on the package label because of the aforementioned problems alleged by Rummo in relying on a model matching methodology that does not distinguish between standard and premium pasta based on the actual protein content.

Petitioners

The Department should affirm its Preliminary Results, and insist that Rummo report the protein content for all brands by reference to the product labels. The Department correctly based its model match reliance on the nutritional package label for protein content.

Rummo correctly notes that law requires the Department to base its product matching determinations on the physical characteristics of the subject merchandise; however, Rummo is incorrect to suggest that the Department cannot require respondents to refer to the product's physical characteristics, including protein content, when reporting protein content to the Department. The Department is not requiring respondents to report a physical characteristic of the product label itself. Rather, referencing the nutrition label showing the nutritional contents of the pasta within is similar to referencing a mill certificate in a steel case in that the information reported must be reasonably accurate to provide the consumer with relevant information and to ensure the health and/or safety of those using the product. The product label is the reference point for the purchaser, and tells the consumer each of the important physical attributes of the pasta. If exactitude in the specific protein content were at all relevant to the consumer, the FDA would not permit rounding of up to one-half gram of protein. The FDA permits rounding of as much as one-half gram, to the nearest gram, meaning that variations of one-half gram are not material or commercially significant.[72]

Rummo has never rebutted the fact that the product label is the objective reference point for all of the Department's matching criteria. Every physical characteristic that the Department relies on to match pasta in this case is evident on the product package and there is no need or reason to refer to subjective, internal "laboratory test reports" only for specific brands or protein levels.

Rummo has conceded that it relied on the package label for reporting all other physical characteristics of pasta, including protein content, except for a subset of pasta where the package label indicates exactly 12.5 percent protein content. Rummo never stated why pasta with exactly 12.5 percent protein content should be treated differently than pasta with 12, or 13, percent protein content. Rummo cites Mexico Cement as an instance where the Department relied on sales documentation, rather than mill test certificates, as a "convenient surrogate for

[72] See Petitioners' July 19, 2012 Letter at page 8 (citing FDA regulations at 21 C.F.R.§ 101.9(c)(7)) requiring package labels to provide "A statement of the number of grams of protein in a serving, expressed to the nearest gram."

more direct evidence," and suggests that it is equally applicable to data on the pasta label, except where the protein content is "on the 12.5 percent dividing line," when label data "loses its accuracy" due to rounding.[73] Rummo never explained how label data "loses its accuracy" at 12.5 percent protein, why relying on the admittedly rounded label protein content is fine in all other cases, or why the label as a "convenient surrogate" does not apply in all cases. If rounding is fine for pasta with 10.6 percent protein, or 11.3 percent protein, it is fine for all pasta, since the Department has selected two "bands" for reporting protein content: 10 to 12.49 percent for code "1" ("standard" pasta), and 12.5 percent and higher for code "2" ("premium" pasta). If Rummo believed accuracy in reporting the actual protein content to be critical, and variations of four-tenths of a gram to be commercially significant, Rummo would have argued for elimination of these two reporting bands, and for the use of actual protein values in product comparisons.

The use of non-label (internal lab reports) data allows Rummo to disregard the product label, and classify certain pasta brands in a manner that it wishes so that it may artificially lower its dumping margin. Petitioners demonstrated in their July 19 letter that this selective use of "internal tests" for 12.5 percent protein content pasta impacts both Rummo's U.S. and home market sales.[74]

Petitioners disagree with Rummo's assertion that trace distinctions in protein, between those provided on the package label and those in its internal test reports (by definition, they can be no more than a half-gram) are commercially important. The U.S. Government's Standards of Identity for pasta do not recognize such small differences, and only require separate labeling for a fortified protein pasta once the protein content exceeds 20 percent.[75] Similarly, both the Italian Government and International Codex Standards do not even acknowledge any significance to the 12.5 percent protein level, and certainly do not distinguish for trace differences in protein content.[76]

Rummo is wrong when it asserted that "blind reliance on the {product} label in this instance elevates the labeling information over the product's actual physical characteristics," and Rummo failed to cite any case authority for its claim.[77] By resorting to other source documents (internal lab tests) for this subset of pasta, Rummo can effectively manipulate the matching process by assigning such pasta to either "standard" or "premium" protein categories (generally the former), however it wishes, and in so doing can significantly understate its dumping margin, as Garofalo did in the 2007/2008 review. Rummo now characterizes this increase in its dumping margin as a distortion,[78] but the margins calculated in the last two review segments, which relied on these subjective, internal test reports, that were distorted because they did not consistently rely on the package label.

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[73] See Rummo's Case Brief, dated October 26, 2012, at page 4.
[74] See Petitioners' July 19, 2012 Letter at 10-12.
[75] See 21 C.F.R. § 139.117 (Enriched Macaroni Products With Fortified Protein), at Exhibit 5 in Petitioners' February 23, 2009 Letter, attached to Petitioners' November 20, 2009 Case Brief for Rummo, which is found at Attachment I to Petitioners' July 19, 2012 Letter.
[76] Id. at Italian Law 187 (Presidential Decree No. 187 dated Feb. 2001) and Codex Alimentarius 178-1991 (Rev-1995).
[77] See Rummo's Case Brief, dated October 26, 2013, at page 4.
[78] Id. at page 26.

Contrary to Rummo's arguments regarding the proper accounting for differences in protein content, small differences in protein content are not commercially significant and the consumer does not purchase pasta based on protein content or trace differences in protein content. Rummo is essentially claiming that a difference in protein content of no more than 0.4 grams, or less, is commercially significant.[79] Rummo's argument that the Department must rely on the "actual" protein content means that the Department must rely on all physical differences, no matter how small, and this argument has been specifically rejected by the Court of Appeals for the Federal Circuit in Pesquera Mares Australes.[80]

Rummo wrongly asserts that the Department has modified the established product matching criteria and that the Department has made such modifications without any compelling reason to do so. Specifically, the Department is not changing the model match methodology, as it is relying on the same two protein content reporting "bands" established in the 2007/2008 review. Furthermore, the Department is only requiring respondents to be consistent in the use of the reference source, the product label, for reporting purposes. The Department has simply directed respondents to report protein content based on the product label because it is an objective and easily verifiable source for reporting the data.

The Department may even change a methodology, so long as a respondent has not detrimentally relied on that methodology, and in the instant review the Department explains its reasons for making the change.[81] However, there has been no "change" in this case because the Department's methodology of using two protein content "bands" for matching remains the same. Assuming arguendo that reliance on the protein content stated on the package label amounted to a change in methodology, as Rummo alleges, this is Rummo's first review under that new matching methodology, so the company cannot be said to have detrimentally relied on it (despite its claim of "reporting sales and costs consistent with Garofalo's reporting" methodology).[82]

The Department first established the model-match characteristics in the 1996 antidumping investigation and relied on those physical characteristics for eleven successive administrative reviews. Despite a lack of "compelling reasons" to alter its existing model match methodology, two separate protein content categories for so-called "standard" and "premium" pasta were

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[79] See Petitioners' July 19, 2012 Letter at 6, (noting petitioners have consistently argued that a difference of one or two percent in the protein content does not make any difference to the pasta consumer, and cannot by any measure be deemed commercially significant).
[80] See Pesquera Mares Australes Ltda. v. United States, 266 F.3d 1372 (Federal Circuit 2001) (Pesquera Mares Australes). See also Petitioners' July 19, 2012 Letter at Attachment 1 (Petitioners' February 23, 2009 Letter in the 2007/2008 Review at pages 3-4, discussing the Pesquera Mares Australes case). Petitioners state that in this case, the Department disregarded certain minor physical differences purportedly associated with "superpremium" grade salmon, and compared "superpremium" grade to "premium" grade as "identical" merchandise. Respondents argued that "identical" meant identical in all physical characteristics, but the appellate court rejected that argument, noting that the Department had compared salmon of differing weights, within certain weight bands, as "identical" with the assent of all parties, and affirmed the Department.
[81] See NSK Ltd. v. United States, 19 CIT 1013, 1027, 896 F. Supp. 1263, 1275 (1995) (noting that Commerce need not "adhere to its prior ... methodology, especially where Commerce is striving for more accuracy"), affirmed in part and reversed in part on other grounds, 115 F.3d 965 (1997).
[82] See Rummo's Case Brief at page 17.

adopted in the model matching criteria in the 2007-2008 review, based on the urging of Garofalo. In the 2007-2008 review, petitioners provided package labels for U.S. brands made by Italian producers, which uniformly showed protein content of 12.5 percent (7 grams of protein per 56 gram serving) and noted that respondents were incorrectly classifying this pasta as "standard" (using internal test reports), rather than "premium," as required by the Department's matching criteria and the pasta package label.[83] This practice continued until the Preliminary Results in this review.

In the 2007-2008 IDM, the Department permitted respondent Garofalo to report protein content based on periodic "laboratory tests," finding that the lab test information "shows that the protein content of the semolina input is consistent with the protein content noted on the packaging of the finished pasta."[84] Rummo claims that this statement indicated the Department's belief that the "proper way" to report protein content was using the actual protein content from the lab tests." However, such an interpretation is not accurate, as Rummo concedes using the product label to report protein content for all pasta brands except those showing 12.5 percent protein on the label. Moreover, the Department's precise conclusion in the 2007-2008 IDM at Comment 1 was that the packaging label and lab tests were "consistent," suggesting that any slight differences were inconsequential to the Department's antidumping analysis, which is equally supportive of relying on the package label.

Rummo references several responses from respondent Garofalo in the 2007-2008 review to claim that the Department always intended to require respondents to report actual protein content from the lab tests, rather than the nominal protein content listed on the product label.[85] However, Rummo ignores the fact that Rummo has reported the nominal protein content on the package label to the Department in every case except one, where the label specifically references 12.5 percent protein content. Rummo claims that the Department declared it would rely on the "physical characteristics of the finished pasta" and suggests that this means the Department was concerned with the actual protein content, not the protein content on the label.[86] However, a complete review of the record and the quoted reference demonstrates that the Department was responding to petitioners' argument that the agency was inappropriately relying on the protein content of semolina, and not pasta, when it referenced the Italian grain exchanges use of protein content for sales of semolina, and was simply expressing its intention to rely on the protein content of the "finished pasta," as opposed to semolina.[87]

Rummo's wrongly argues that the use of "richer semolina" in "premium" brands in the 2007-2008 review suggests that the Department understood that the product label could identify that "semolina being used for high protein content pasta was something different from, and better than, the regular semolina."[88] This finding has nothing to do with protein content. Rather, in the 2007-2008 review the Department understood that a different physical characteristic of pasta, the

[83] See Petitioners' July 19, 2012 Letter at Attachment I (Petitioners' November 20, 2009 Case Brief in the 2007/2008 Administrative Review at 22).
[84] See Rummo's Case Brief at page 9 (citing the 2007/2008 IDM at Comment 1).
[85] Id. at pages 9-15.
[86] Id. at page 12.
[87] Id. at pages 11-12.
[88] Id. at page 14.

"milling form," could also be traced to the product label, and determined that, under Italian law, if a pasta was made with 97 percent or more durum semolina, it could be labeled as "100 percent durum semolina," (or if not, as a "blend," using less than 97 percent durum wheat, or "whole wheat" pasta).[89] Furthermore, the Department's "milling form" physical characteristic accounts for differences in the type of semolina used to make pasta but it does not support Rummo's contention that so-called "premium" pasta always possesses more than 12.5 percent protein.

Rummo's also wrongly contends that its reporting in the instant review is consistent with Garofalo's reporting in two prior review segments.[90] Rummo's claim in this regard is immaterial, even if true. The Department retains the discretion to make changes to its reporting requirements to increase the accuracy of its comparisons.

Petitioners refer to Rummo's July 10, 2012, letter addressed in Rummo's brief which contains an excerpt from the FDA regulations regarding generic nutritional labeling standards. Rummo argues that the regulation only requires a party to "ensure that the protein content is equivalent to 80 percent of the actual protein content,"[91] and suggests that producers regularly label at far less than 100 percent of actual to support its argument that its internal lab tests are the best source for reporting. In citing to this general misbranding regulation, Rummo fails to cite the more specific FDA labeling regulation at 21 C.F.R. § 101.9(c)(7), which requires food manufacturers to label packages for protein content by rounding to the nearest gram. Rummo vaguely responded to this citation by acknowledging that it rounds to the nearest gram, claiming that "actual protein content will vary among shipments of semolina," and suggesting that the FDA permits labeling "tolerance of 20 percent."[92] Rounding to the nearest gram, however, never results in a "20 percent tolerance," and the FDA does not permit such differences.[93] Rummo incorrectly argues that rounding up can "obscure whether the pasta is a premium product made from superior quality semolina"[94] Rummo presumes that "premium" pasta is established by protein content alone, but that is not the case.

"Premium" pasta brands are created via various production, marketing and sales measures. In its like product determination from the original investigation, the International Trade Commission (ITC) rejected respondents' claims that "premium" brand pasta comprised a separate domestic like product. The ITC's finding that [95] there is no objective definition of so-called "premium" pasta undermines Rummo's implicit argument that a brand labeled as 12.5 percent protein loses its "premium" cache if internal tests show the actual protein content to be 12.48 percent. A brand is a brand, and the package label remains the same no matter how it is classified for dumping purposes. DeCecco brand pasta, for example, is perceived by consumers

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[89] See Department's Antidumping Questionnaire at Field 3.3 "MILLFORMH."

[90] See Rummo's Case Brief at pages 17-20.

[91] Id. at 22; see also Rummo's May July 10, 2012 letter at pages 4-6.

[92] See Rummo's Case Brief, at pages 26-27.

[93] Petitioners provide an example, stating that a brand with an actual protein content of 6.4 grams, reported on the label as 6 grams, amounts to a six percent difference between actual and the label; a brand with 6.5 grams of protein, reported as 7 grams on the label, amounts to a seven percent difference.

[94] See Rummo's Case Brief at page 27.

[95] See Petitioners' July 19, 2012 Letter at Attachment 1 (citing Certain Pasta from Italy and Turkey, USITC Pub. 2977 (Final) (1996) at page 7, in Petitioners' February 23, 2009 Letter at page 5).

as a "premium" brand, regardless as to whether it actually contains 6.4 or 6.5 grams of protein, or lists "6 grams" or "7 grams" of protein on the label. Department's classification of that pasta would not change consumers' perceptions of that brand, just as the minimal rounding permitted by the FDA cannot convert a "standard" brand into a "premium" brand, or vice versa, as Rummo contends.

Department should reject Rummo's argument which asserts that the Department's protein reporting requirement "will result in the absurd market effect of encouraging Italian pasta producers to change the labeling of their product simply to avoid punitive treatment in antidumping duty proceedings..."[96] The Department's use of package labels and reporting in compliance with Federal labeling laws can hardly be deemed "unfairly punitive," as Rummo suggests. The other product characteristics in the Department's model-match hierarchy are readily identifiable and reported to the Department in reliance on the pasta package label, and there is no basis for making an exception for the protein content for one subset of brands, particularly when the manufacturers are required by law to identify the protein content to the nearest gram on their product labels.

The pasta labels provide an objective, readily accessible and easily verifiable standard practice for reporting and confirming the protein content for individual respondents. Rummo asserts that the Department was able to verify its lab tests results, and found those tests to be reliable and, therefore, dismisses the Petitioners argument that the product labels are an "objective and easily verifiable source." The lab tests may also be reliable, but that does not preclude the Department from resorting to the equally reliable package labels, since those labels are used to report protein content or other brands of pasta where rounding is also in use. Any differences between the product labels and the lab tests are not commercially significant, which is underscored by the FDA's allowance of rounding to the nearest gram on the package label. In each review segment, reliance on such internal test samples or alleged differences in various raw material "recipes" allows each respondent to subjectively determine the particular source documents it uses to report protein content, which can vary from batch to batch. In contrast, reliance on the protein content from the package is objective and is easily verifiable because the Department can require that every label for every brand sold in the POR be placed on the record.

Rummo's main complaint with reporting based on product labels is that it "converted" much of Rummo's U.S. pasta from "standard" to "premium" pasta. However, Rummo fails to note that use of the label protein data caused a parallel shift in reporting from "standard" to "premium" pasta between Rummo's home and U.S. markets.[97] This suggests that the Department's instruction to rely on the product label equally impacts both markets, and does not inordinately affect U.S. sales. The FDA labeling requirement has no force or effect on Rummo's sales in Italy, yet there is a similar impact on Rummo's home market reporting. Thus, it is apparent that something else, unexplained by Rummo, is causing this parallel shift to occur.

In summary, Rummo wrongly argues that the Department is compelled to continue to allow it to manipulate the model-match characteristics and the margin calculations, by permitting the

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[96] See Rummo's Case Brief at page 24.
[97] See Petitioners' July 19, 2012 Letter at pages 10-12.

company to unilaterally decide whether to classify pasta in packages with labels showing exactly 12.5 percent protein as "standard" or "premium." The Department must require respondents to rely on the protein content on the label, as relied on by the consumer, and must require Rummo to classify such 12.5 percent protein content pasta as "premium" (code = "1"), in accordance with the existing model matching requirements.

Department's Position:

We disagree with Rummo that the Department changed its model match methodology in this review with respect to the reporting of the protein content of the finished pasta. The Department issued its questionnaire in this review with the same model matching criteria and reporting bands/thresholds, as the questionnaire issued in the two prior reviews.[98] The respondents must report physical characteristics of finished pasta based on a consistent methodology using the information from the product nutritional label relied on by the consumer. In the 2007/2008 administrative review, we explained that our decision to use a minimum protein content of 12.5 percent for premium finished pasta was based in part on the fact that "there is not a clearly defined method of identifying premium pasta other than the protein content marked on the packages."[99]
In its questionnaire response, Rummo did not consistently use the protein content classifications for the finished pasta, as identified in the Department's model-match criteria. Specifically, the Department's model-matching criteria used to establish the product CONNUM characteristics require respondents to code a "1" for finished pasta that has a protein content of 12.5 percent or higher. This means that if the respondent is selling the pasta product as 12.5 percent or higher (based on the protein content indicated on the package), the sale transaction should be coded as a "1."

Rummo claims that the Department has altered the model-matching criteria based upon its reliance on the package label in the reporting of protein content. We find, contrary to this assertion, that Rummo was aware of the Department's intent to rely on the data from the pasta package to report protein and that it unilaterally chose for a subset of its data, to report in a different manner without the express consent of the Department. Specifically, Rummo states in its original response on page B-4:

> "The Rummo Group has reported the protein content of each home market sale during the POR as instructed. The Rummo Group provides the Department, at Exhibit B-3, a listing of protein content by brand, **as indicated on the packaging.** In all instances in which the listed protein content was greater than 12.5 percent, the actual protein content was also greater than 12.5 percent. In all instances in

[98] In the Department's model match field, Protein Content, listed in its Section B Questionnaire, 12.5 percent protein corresponds with a higher Protein Content and is coded as "1". See Prelim Wheat Code Memo at page 9.
Field Number 3.4: Protein Content
FIELD NAME: PROTEINH
1 = 12.5 percent or higher protein in finished pasta
2 = 10.00 - 12.49 percent protein in the finished pasta
NARRATIVE: Identify the percentage of protein in the pasta sold.

[99] See 2007/2008 IDM at Comment I.

which the listed protein content was less than 12.5 percent, the actual protein content was also less than 12.5 percent. **Packaging** for certain brands list the protein content as 12.5 percent exactly. For these, the Rummo Group has determined the actual semolina content, based on actual production records, and has reported the protein content variable accordingly."

See Rummo's Section B Questionnaire Response, dated December 9, 2011, at page B-4 (emphasis added). Rummo informed the Department in this review that the company "has relied on the packaging labels to classify all of its pasta except pasta that is labeled 12.5 percent" for which it appears Rummo unilaterally decided to report the protein content of the input (semolina) rather than the protein content of the finished pasta.[100] Rummo also stated, "{i}n fact Rummo has relied on the packaging labels to classify all of its pasta except pasta that is labeled 12.5 percent. Reliance on the labels is entirely acceptable for reporting purposes..."[101] We disagree with Rummo's decision to rely on a different reporting methodology for pasta that is labeled 12.5 percent. Our focus is on the protein content of the finished product, particularly the information made available to the customer, and not on the protein content of the input (semolina). Although the protein content of the semolina input could be consistent with the protein content noted on the packaging of the finished pasta and serve as a reasonable proxy for it under certain circumstances, it is common for pasta producers to blend more than one type of semolina based on a recipe of the finished pasta:

> Our analysis of the production operations of the pasta producers in this review, which is consistent with our findings in previous reviews, is that pasta producers generally acquire different types of semolina as raw material inputs and use these different types of semolina to produce finished pasta with different physical characteristics. The types of semolina are physically different in terms of ash, gluten and protein content and the characteristics of the semolina affect the physical characteristics which can be measured in the finished pasta. The different types of semolina are generally kept in separate storage facilities. For each batch of pasta being produced, the companies select which type of semolina to use, which regularly included blending more than one type of semolina, based on the recipe for the finished pasta. Generally, each batch is made to a specific recipe, to meet the requirements of the brand being produced. In some cases the brand is one that the company itself owns, in other cases, it is a brand owned by the customer purchasing the pasta.[102]

In addition, Granoro, the second mandatory respondent in the instant review, reported its protein content based on the package label and received the same questionnaire that was issued to Rummo. Specifically, Granoro stated that it "reports protein content according to the protein content on the packaging, because the Department has expressed a preference for use of the

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[100] See Rummo's May 3, 2012, letter to the Department at footnote 3; see also Rummo's Section A-C First Supplemental Questionnaire Response, dated March 8, 2012, at page 12, in which Rummo stated "{p}lease note that Rummo does not perform any test on the finished pasta for protein content."
[101] See Rummo's Case Brief, dated October 26, 2012, at page 13, footnote 3.
[102] See 2007/2008 IDM at Comment 1 (emphasis added).

ingredient panel as the source for this information."[103] Thus, both Granoro and Rummo were aware that the Department expected them to report protein content based on the protein content indicated on the package label of the finished product.

Rummo points to the lack of a specific reference to the packaging label in the Department's questionnaire, however, the Department was not aware that there were small differences between what was recorded in the company's production records and what was printed on the package. In the home market, companies print the actual percentage of protein in the finished pasta on the package, e.g., 13.2 percent; by contrast, in the U. S. market, the companies print the grams of protein per standard serving size, e.g., 7 grams per serving of 56 grams. In the U.S. market, if the pasta had slightly more than or slightly less than 7 grams per serving, in accordance with FDA guidelines, the company would report 7 grams for each. Thus, there is a small amount of rounding, which does not undermine our core priority of relying on the data specifically printed on the package, upon which the ultimate customers rely. As we stated in the 2007/2008 administrative review, "there is not a clearly defined method of identifying premium pasta other than the protein content marked on the packages."[104]

This statement by the Department and Rummo's acknowledgment that it relied on the package label in reporting protein content its original questionnaire response undermine Rummo's assertion that the Department intended to rely on the reporting of "actual" protein based on internal tests for each respondent. Rather, Rummo should have contacted the Department to seek clarification of the proper reporting basis when upon receipt of the original questionnaire issued in the instant review. Instead, Rummo introduced an alternative methodology in its reporting basis for instances where the package listed 12.5 percent protein exactly (the minimum threshold for the higher protein content code). Rummo references certain instances in which the Department relied on actual protein reporting from Garofalo in prior reviews. We find that reliance on Garofalo's reporting is misplaced.[105] Thus, the Department's acceptance of protein content, as reported by Garofalo in prior reviews,[106] represents an oversight on our part or was necessitated by review-specific evidentiary considerations, rather than an accepted practice. In 2007/2008 review, for example, in which we first proposed to change our wheat code methodology to account for the differences between premium and non-premium pasta, the Department compiled the record of that review while still considering and developing the new methodology.

In this regard, we note that in the prior reviews in which Garofalo reported actual protein content for certain sales transactions, all other firms reported protein content based on what was reported

[103] See Granoro's March 9, 2012 Section A-C SQR, at page 12 (emphasis added).
[104] See 2007/2008 IDM at Comment 1.
[105] Garofalo's explanation of its procedure for reporting protein content indicates that its product recipes call into question its reliability as an indicator of protein content. Specifically, Garofalo stated in the prior review, "{e}ach product Garofalo makes has a product recipe, which is a blend of the various types of semolina that Garofalo purchases. Moreover, although each product has its own recipe, it may occur for various reasons that the proportions of each semolina type may differ from the product recipe." See Garofalo's Section D Questionnaire Response, dated December 20, 2010, at page D-30.
[106] See Garofalo's May 28, 2010, supplemental sales response in the 2008/2009 review; see also Garofalo's March 16, 2011 Supplemental Section A-C Questionnaire Response in the 2009/2010 review at pages 10-11.

on the packaging. In all these instances, the Department accepted the firms' reporting methodology.[107] Furthermore, as noted above, in the instant review, Granoro reported protein content according to the protein content on the packaging.

Rummo's protein content reporting for a subset of its sales data is contrary to the Department's instructions to report the protein content of the finished pasta based on what the pasta package indicates. For customers of premium pasta, "there is not a clearly defined method of identifying premium pasta other than the protein content marked on the packages."[108] Accordingly, since the model-matching criteria was first modified in the questionnaire issued in the 2007/2008 review, the Department expected respondents to report the protein content indicated the package and not based on what they may claim based on internal testing was the protein content of the semolina used.[109] The proposed physical characteristics remained unchanged in the final.[110] In the final results, in addressing interested party comments, we noted that "{t}he laboratory test results information shows that the protein content of the semolina input is consistent with the protein content noted on the packaging of the finished pasta."[111] We also refer to the reliance on the package label in Comment 1 of the 2007/2008 IDM, stating "{t}he second factor is that there is not a clearly defined method of identifying premium pasta other than the protein content marked on the packages." Further, in the Department's analysis of protein, the Department stated, "{w}e note that labeling laws in the U.S. require that the protein content appear on the package and the same appears to be true in Italy. Having this protein information on a product-specific basis would allow the Department to have an objective and measurable criteria in terms of the finished product."[112]

Thus, the protein content of the finished pasta listed on the package is central to our analysis. As petitioner notes above, all of the physical characteristics that are the basis for our model match criteria are printed on the labels of the finished pasta packages. Buyers and sellers examine this information, as listed on the packaging, in determining which products to purchase and/or sell and the appropriate price. In addition, because pasta is sold through retail chain to individual customers, there are often many different intermediaries involved in the distribution and sale of finished pasta; each of which need to know the relevant information. Furthermore, our reliance upon the information listed on the packaging of the finished product (i.e., the same information that is available to a consumer in the United States) conforms to our statutory obligation to base our price-to-price comparison on a transparent and consistent basis. Thus, relying on the information reported on the packages of finished pasta is appropriate.

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[107] See Granoro's Questionnaire Response in the 2008/2009 review and Tomasello's Questionnaire Response in the 2009/2010 review.
[108] See 2007/2008 IDM at Comment 1.
[109] See Preliminary Model Match Clarification on Pasta Wheat Code Classifications, dated July 31, 2009 (Prelim Wheat Code Memo); see also the Department's Memorandum to the File titled, "Final Wheat Code Memorandum from Pasta from Italy 12th Administrative Review (POR: 07/01/2007 to 6/30/2008): Transfer of Documentation to the Case Record of this Review and Extension of Deadline for Submission of New Factual Information," dated July 20, 2012.
[110] See 2007/2008 IDM at Comment 1.
[111] See Certain Pasta from Italy: Notice of Final Results of the Twelfth Administrative Review, 75 FR 6352 (February 9, 2010), and accompanying Issues and Decision Memorandum at Comment 1 (the Department discussed its decision to implement a new model match going forward, beginning with the 2008/2009 review).
[112] See Prelim Wheat Code Memo at page 8.

Rummo argues that, pursuant to the statute, 19 U.S.C. § 1677(16)(A), the Department is required to consider physical characteristics in determining which comparison market sales to match to U.S. sales and asserts that a packaging label is not a physical characteristic of the pasta. Rummo's argument is misplaced. The Department did not say that a label is itself a physical characteristic; rather the Department relies on the protein content information reported on the label to identify the physical characteristic of protein. We utilize the information from the packaging label to track the physical characteristics to identify pertinent information for certain steel products. The product label is the point of reference for the consumer, and identifies each of the important physical attributes of the pasta contained inside the package. The pasta package identifies all of the physical characteristics that the Department relies on to match pasta in this case: 1) shape; 2) wheat species; 3) milling form; 4) protein content; 5) additives; and 6) enrichment, which are all identified on the product package. Therefore, we find that the package label is a reliable source for the Department to use in identifying the physical characteristics, including protein content.

Additionally, Rummo's argument that the Department must base its model matching criteria on the "actual" protein content from the test results of the input basically means that the Department must rely on all physical differences, even if such differences are insignificant. The Department disagrees with Rummo's assertion that we must account for every physical difference, no matter how miniscule, which occurs in its model matching of sales. As affirmed by the Court of Appeals for the Federal Circuit (CAFC) in Pesquera Mares Australes,

> Commerce has concluded that merchandise should be considered to be identical despite the existence of minor differences in physical characteristics, if those minor differences are not commercially significant. We conclude that this standard adopted by Commerce constitutes a permissible construction of the statute.[113]

We acknowledge that there may be slight differences between the protein content reported on packages of Rummo's finished pasta and the protein content of semolina as determined by Rummo's internal testing, but we do not consider such differences to be commercially significant. First, "there is not a clearly defined method of identifying premium pasta other than the protein content marked on the packages"[114] and, thus, the customer of premium pasta is likely to rely on the protein content reported on the packages of the finished pasta. Second, information provided by Rummo indicates that in certain instances the protein content of the semolina (input) determined by Rummo is slightly higher than that on the label of Rummo's finished pasta (i.e., rounded down), while in the other instances it is slightly lower (i.e., rounded up). These slight differences are not readily apparent to customers of the finished product and, therefore, are not commercially significant.

Rummo submitted certain proprietary data[115] from its supplemental response to demonstrate pricing and average cost differences that it claims indicate a "commercial significance" to pasta

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[113] See Pesquera Mares Australes at 1384 (citing Chevron U.S.A. Inc. v NRDC, 467 U.S. 837, 843 (1984)).
[114] See 2007/2008 IDM at Comment 1.
[115] See Rummo's case brief dated October 26, 2012, at pages 6-7, referencing Exhibit SD1-33 and SD1-34 of

made with "premium" versus "regular" semolina, based on the two reporting bands used to distinguish protein content in the Department's original questionnaire. We find, however, that Rummo has not demonstrated that any observed price or cost differences are solely attributable to the protein code or protein content. There are many other factors affecting cost and price comparability (e.g., the quantities produced, commercial discounts, rebates, impact of other model matching characteristics, cost structure, inventory, product demand patterns, etc.) which are not accounted for in Rummo's overly-simplified analysis. Therefore, we find Rummo's arguments do not demonstrate the distortions that it claims. While in general, as we acknowledged in our Prelim Wheat Code Memo (which outlined the updated model matching system), premium pasta sells for higher prices than non-premium, that is a general market pattern and Rummo's analysis is neither comparable nor directly related to the issue at hand. Specifically, Rummo's average figures used to highlight certain sales and cost differences between the two reporting bands (protein content coded "1" and "2") do not provide any relevant sale and cost comparison information regarding the specific sales at issue (i.e., the specific subset of sales for which Rummo argues should be based on its own internal production records, due to rounding of protein content on its package label). Instead, Rummo's figures only provide further support for the Department's designation of the two bands used for reporting protein content, as they highlight cost and pricing differences that exist between premium and non-premium pasta.

Rummo cites a reference in the Prelim Wheat Code Memo and asserts that the Department may have inadvertently erred when it designated code "1" of it protein content data field by stating it should be based on protein of 12.5 percent or higher in the finished pasta. Rummo states that the Department should have defined code "1" as "higher than 12.5 percent protein in finished pasta." The Department provides an excerpt containing the statement in question:

> "C. INDUSTRY STANDARDS
>
> Because we strive to identify a universal set of criteria which apply to all respondents in this proceeding, we looked to publicly available information and published industry standards for guidance. We first examined the definitions of superior semolina from the various commodity exchanges within Italy, all of which define superior semolina as semolina with a minimum protein content of 12.5 percent. The Milan Grain Exchange defines superior semolina as having "protein greater than 12.5 percent, and ash less than 0.87 percent." The Bologna Grain Exchange defines superior semolina as having a minimum protein content of 12.5 percent. The Bologna Commodities Exchange defines superior semolina "with characteristics greater than the legal minimum- protein of 12.5 percent." The Milan Commodities Exchange defines superior semolina as having a "minimum protein content of 12.5 percent, and a maximum ash content of 0.87 percent." Accordingly, the industry standard for superior semolina is that its protein content must exceed 12.5 percent. As noted below, by Italian Law, pasta must contain greater than 10.5 percent of protein."[116]

Rummo's May 3, 2012 supplemental questionnaire response.
[116] See Prelim Wheat Code Memo at pages 6-7.

The Department acknowledges that this statement from a Preliminary Wheat Code Memo was imprecise and inadvertently erred in stating "the industry standard for superior semolina is that its protein content **must exceed** 12.5 percent." However, the specific information referenced above from the various Italian Commodity Exchanges support our requirement to code protein content = "1" where the protein content is "12.5 percent or higher protein in finished pasta" as these Exchanges define superior protein content as having a **minimum** protein content of 12.5 percent. Furthermore, in the 2007-2008 IDM, the Department stated "Our decision to use a minimum protein content of 12.5 percent for premium finished pasta is based on four factors" and that "{t}he forth factor is that 12.5 percent minimum content is an industry standard developed in the Italian market place of pasta manufacturers and semolina sellers."[117] Thus, given that there are several references on the record of the prior case segments which support our finding that premium pasta has protein content of 12.5 percent or higher in the finished pasta, as reported on the package label, we have corrected the inadvertent error in the Preliminary Wheat Code Memo's narrative for the purposes of these final results.

Next, Rummo asserts that the rounding which occurs on its packaging label is based on a 20 percent tolerance[118] permitted by the FDA. The Department disagrees with Rummo's assertion. Specifically, FDA labeling regulation, at 21 C.F.R. § 101.9(c)(7),[119] requires food manufacturers to label packages for protein content by rounding to the nearest gram; however, it does not result in a 20 percent tolerance. As noted by the Petitioners, "a brand with an actual protein content of 6.4 grams, reported on the label as 6 grams, amounts to a six percent difference between actual and the label; a brand with 6.5 grams of protein, reported as 7 grams on the label, amounts to a seven percent difference."[120]

Rummo asserts that a reliance solely on the stated protein content package label would encourage Italian pasta producers to change the labeling of their product simply to avoid punitive treatment in antidumping duty proceedings, even though there has been no change to the product, and even though the labeling of the package has been made in complete accordance with the applicable U.S. Federal regulations. In addition, Rummo argues that "the Department's proposed new interpretation will likely result in Italian pasta companies changing the protein content on the label to be closer to the actual value of the pasta simply to avoid having the Department mischaracterize their standard pasta as premium pasta when in fact it is standard quality pasta, even where the product itself has not changed in any way."[121] The Department is not persuaded by such arguments. Reliance on package labels, which are in compliance with FDA regulations and provide objective pasta content information for the consumer's benefit, is not punitive, as Rummo asserts. We will not speculate what Italian pasta companies might do with respect to their labeling practices in the future, but we have not encountered any instances of manipulations alleged by Rummo after we announced our reporting requirements in the 2007-

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[117] See also Garofalo's July 7, 2009, supplemental questionnaire response, at pages 2-3, which specifically identifies a minimum requirement of 12.5 percent protein content to be considered superior semolina, as recognized by the Bologna and Milan Commodity Exchanges.
[118] See Rummo's October 26, 2012, case brief, at page 22.
[119] See Petitioner's July 19, 2012 Letter at 5 and Attachment 2 (wherein petitioners provided a copy of 21 C.F.R §101.9(c)(7)).
[120] See Petitioner's November 5, 2012, case brief at page 17, footnote 46.
[121] See Rummo's October 26, 2012, case brief, at page 24.

2008 administrative review. We also note that the internal test results could also be subject to potential manipulation.

Rummo also suggests that the Department was able to verify lab tests results in the 2007-2008 review, and found those tests to be reliable and, therefore, dismisses Petitioner's argument that the product labels are an "objective and easily verifiable source." The Department disagrees with Rummo's assertion that it has verified Rummo's lab tests results. The Department has verified Garofalo in the 2007-2008 review; however, it has not verified Rummo since the model match was revised pursuant to the Prelim Wheat Code Memo. Due to the fact that Rummo's lab test results have not undergone verification, we disagree with Rummo's broad assertion that "the Department has found that Italian pasta companies maintain precisely the type of detailed records that ensure the verifiability of actual protein content reporting."[122] Regardless of the alleged reliability of the internal test results, the Department may reasonably rely on package labels, particularly when Rummo used protein content from its labels to report protein content for other brands of pasta where rounding is also being used. Furthermore, it would create an excessive burden for the Department to confirm and verify the accuracy of each respondent's internal recipes, and test runs, used to report brand-specific protein content. The Department does not have lab equipment to test protein content of finished pasta or even semolina (an input) nor is it required to do such testing.

In sum, we disagree with Rummo's assertion that the Department has changed the model matching criteria. The other product characteristics in the Department's model-match hierarchy are readily identifiable and reported to the Department based on a reliance on the pasta package label. Therefore, we find that there is no basis for making an exception for the protein content for one subset of Rummo's brands, especially based on the fact that the manufacturers are required by law to identify the protein content to the nearest gram on their product labels. Moreover, any differences between the protein content reported on the pasta product packaging and the lab tests for protein content in semolina (an input) are not commercially significant, which is supported by the fact that the FDA allows rounding of protein content to the nearest gram on the package label. Accordingly, the Department is continuing to rely on the nutritional label stated on the respective pasta product because it provides a reliable, consistent, and objective measure of protein content.

Comment 5: Whether the Department Should Review All of Rummo's EP Entries During the POR

Rummo

Pursuant to the Department's instructions in the original questionnaire,[123] Rummo correctly reported all of its export price (EP) U.S. sales transactions which entered the United States for consumption during the POR. In Preliminary Results the Department incorrectly excluded certain EP sales from its margin calculation. Rummo references certain EP transactions that it made which were invoiced prior to the POR but entered during the POR. The Department's use

[122] Id. at page 28.
[123] See the Department's original questionnaire issued on October 4, 2011, Section C, at page C-2.

of time-specific costs (i.e., quarterly costs) in the Preliminary Results resulted in "window periods" for the margin program which excluded certain of Rummo's EP sales from consideration in the Department's margin calculations. Specifically, the Department set the beginning window period to the first day of the POR and the ending window period to the last day of the POR. As a result of this language, certain sales with sale dates prior to the POR but entry dates within the POR were erroneously excluded from the margin calculations for Rummo.

The Department is required under the antidumping duty law to review all of Rummo's EP entries during the review period. According to section 751(a)(2)(A) of the Act, the administering authority shall determine (i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry.[124] Furthermore, the Department's determination to rely on a quarterly costing methodology does not relieve the Department from its statutory obligation to review these EP sales and calculate a dumping margin based on these EP sales that were entered during the POR. Rummo proposes SAS language to correct the margin calculations to include the aforementioned EP sales.[125]

Petitioners

The Petitioners did not comment on this issue.

Department's Position:

We agree with Rummo and have modified the respective portions of the SAS program used in these final results for Rummo. Because the sales in question occurred prior to the POR, Rummo did not report quarter-specific costs for these observations. When faced with missing cost data in the context of quarterly average costing, the Department's first preference would be to use the cost of the most similar CONNUM as a surrogate for the CONNUM with missing costs. If such data is not available, the Department would then look to the quarterly purchase data to construct a cost for the pre-POR quarters via indices. However, as already noted, CONNUM costs for quarters prior to the POR are not on the record of this case, neither are the pre-POR purchase data available. Therefore, lacking the requisite information for either the initial or secondary options for missing cost data, as facts available the Department has applied the costs from the closest quarter (i.e., July to September 2010) to the June 2010 EP sales that were originally excluded by revising the SAS program to include the EP sales transactions which were invoiced prior to the POR but entered during the POR. Based on these changes, the Department has reviewed all EP sales transactions reported by Rummo during the POR and calculated Rummo's dumping margin based on these EP sales that were entered during the POR.

[124] See section 751(a)(2)(A) of the Act (emphasis added).
[125] See Rummo's October 26, 2012 case brief, at page 36.

Comment 6: Analysis of Targeted Dumping Allegation

Rummo's Arguments

The Department should rescind the Department's December 26, 2012, post-preliminary analysis because the Department failed to grant the parties adequate opportunity to analyze and comment on the post-preliminary analysis. Moreover, the analysis is unlawful as the application of targeted dumping in the context of an administrative review was not contemplated by the statute. Albeit, should the Department continue to apply targeted dumping in this case, the Department must modify its analysis to exclude non-dumped sales, to account for several facts unique to this case such as its separate LOTs and significant changes in cost, and to eliminate the application of zeroing on the non-targeted sales.

First, neither the statute nor the regulations grant the Department the authority to issue a post-preliminary analysis; nevertheless, it is the timing of the determination that violates the Department's regulations and requires the post-preliminary analysis to be rescinded. Pursuant to 19 CFR 351.309(c)(ii), 351.309(d)(1), and 351.221(b)(5) of the Department's regulations,[126] case briefs are to be filed within 30 days of the preliminary results, rebuttal briefs are to be filed five days afterward, and the final results are to be issued, at a minimum, 85 days after the rebuttal briefs are filed. However, with a Post-Preliminary Analysis date of December 26, 2012, and a final results date of February 4, 2013, a mere 35 days separate the two determinations, which is contrary to the Department's regulations. Further, the briefing schedule attributed only 11 days as opposed to 30 days for briefs and three rather than five days for rebuttals. Neither, has the Department allowed itself ample time to properly analyze the parties' comments. Such an abbreviated schedule especially in this case where targeted dumping is being applied in a pasta proceeding for the first time fails to allow sufficient time for full consideration of the new methodologies employed. As such, Rummo has been denied due process and the Post-Preliminary Analysis must be removed from the record.

The "exception" outlined by section 777A(d)(1)(B) of the Act under which the Department has derived its targeted dumping methodology actually falls under a subheading for investigations. Administrative reviews, are governed by a completely separate provision, i.e., section 777A(d)(2) of the Act, which lists no such exception to the Department's comparison methodology. Hence, no statutory authority is provided for the application of targeted dumping in administrative reviews, a fact which, according to Rummo, is even alluded to by the Department in its PPA. Specifically, the Department acknowledges that "{a}lthough section 777(d)(1)(B) of the Act does not strictly govern the Department's examination of this question in the context of administrative reviews, the Department nevertheless finds the issue arising under 19 CFR 351.414(c)(1) in administrative reviews is, in fact, analogous to the issue in antidumping investigations."[127] The structure of the statute intentionally distinguishes between investigations

[126] The Department notes that while Rummo's actual citation was to 351.222(b)(5) of the Department's regulations, this section provides for revocation of orders. The Department believes that Rummo intended to cite to 351.221(b)(5) of the Department's regulations, which covers the issuance of the final results of review and publication of the final results of review in the Federal Register.
[127] See PPA at 2.

and reviews. Accordingly, targeted dumping clearly falls under the subheading of investigations, while no such exception is listed under the subheading for administrative reviews.

The Department wrongly concluded that that the lack of specific guidance with regard to comparison methodologies for reviews allows the Department "considerable discretion in selecting an appropriate comparison methodology in reviews." Rather, proper guidance on the subject in the evolution of the modern administrative review procedure is provided in Congress' initial directive to compare each entry to the current authorization that averaging may be used in certain circumstances. Thus, while the Department may have been granted the authority to use an average-to-average (A-to-A) methodology, nothing either contemplates or sanctions the use of a targeted dumping analysis in a review procedure. FAG Italia states that "it is indeed well established that the absence of a statutory prohibition cannot be the source of agency authority."[128] Hence, Rummo by applying a targeted dumping analysis in this review the Department has disregarded the law and effectively established its own statute.

Nevertheless, should the Department continue to apply targeted dumping in this review, the Department must acknowledge that non-dumped sales have been improperly included in the analysis. The Nails Test is conducted prior to the margin analysis, i.e., prior to finding out which sales have been dumped. Application of the Nails test to Rummo in the instant review leads to a nonsensical finding of targeted dumping that is reliant on a targeted sales population of which ultimately 62 percent are not found to be dumped. When these non-dumped sales are excluded from the analysis, the second step of the Nails Test is not met and targeted dumping is not applicable.

Additionally, the Department should implement its prerogative as expressed in UAE Nails to "consider other factors in conducting a targeted dumping analysis."[129] In particular, Rummo urges the Department to consider Rummo's two LOTs, the impact of significant fluctuations in POR semolina costs, and the insignificance of the absolute price differences that were found for targeted CONNUMs. First, the use of two separate targeted dumping analyses for each of the company's two reported LOTs would effectively account for the impact of the varying LOTs. With regard to the fluctuating semolina costs, it is unreasonable for the Department to find that Rummo's selling prices correlate reasonably to changes in costs to such an extent that the Department must use an alternative quarterly cost of production and margin matching methodology, but then ignore the impact of these fluctuations on the sales prices used in the targeted dumping analysis. Lastly, the standard deviations and price gaps of one and two cents found in the instant review are insignificant and could simply be reflective of fluctuating sales adjustments, such as freight. As such, it is unthinking, devoid of common sense, and distortive for the Department in its evaluation of the Nails Test results to fail to consider the commercial significance of such differences in the context of the pasta market.

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[128] See FAG Italia S.p.A. v. United States, 291 F.3d 806, 816 (Fed. Cir 2002) (quoting La. Pub. Serv. Comm'n v. FCC 476 U.S. 355,374 (1986)).

[129] See Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value, 73 FR 33985 (June 16, 2008), (UAE Nails), and accompanying Issues and Decision Memorandum at Comment 2.

Finally, the average-to-transaction (A-to-T) with zeroing methodology should not be applied to non-targeted sales. Rummo concedes that applying this methodology to all sales in an investigation makes sense since investigations relate to an exporter's overall pricing behavior. However, reviews focus on greater specificity and, thus, A-to-T and zeroing should be applied only to the specifically targeted sales. As support for this conclusion, Rummo references the Department's Union Steel Defendant-Appellee Brief, where the Department articulates that it makes sense to use zeroing on specific sales during a period of review.[130] Further, if the Department's purported use of A-to-T and zeroing is to unmask dumping, then there is no need to apply the methodology to the non-targeted sales for which no masking is occurring. To do otherwise, inflates dumping margins. In fact, the Department's post-preliminary methodology improperly inflated Rummo's margin from 6.97 percent to 15.01 percent by failing to allow offsets for the non-targeted sales, whereas if offsets are allowed for the non-targeted sales, Rummo's margin only increases to 8.41 percent. With such a result the Department cannot consider it reasonable to apply its targeted dumping methodology to all of Rummo's sales. In closing, the application of zeroing to non-targeted sales contradicts the Department's methodologies as outlined in the Final Modification for Reviews.[131] Furthermore, after agreeing to the elimination of its zeroing practices the Department's current application of zeroing to non-targeted sales is nothing more than a brazen attempt to circumvent the United States' international commitment with the European Union (EU).

Petitioners

All of Rummo's arguments lack merit. Thus, the Department should continue to implement its PPA in the final results. First, while the statute requires the issuance of preliminary and final results in each annual review, the statute does not prohibit the amendment of the preliminary results through an amended or post-preliminary analysis. Since the statute is silent on the issue, under Chevron the Department's regular practice of releasing PPA to correct errors or omissions is reasonable.[132] Because the Department failed to address the Petitioners' April 20, 2012, targeted dumping allegation in the Preliminary Results, the Department's release of the PPA on targeted dumping was proper. Furthermore, the date of their targeted dumping allegation (i.e., April 20, 2012) versus the date of the PPA (i.e., December 26, 2012) refutes Rummo's contention that it was not given ample time to review and comment on the issue of targeted dumping.

Rummo wrongly argues that the statute does not permit the application of targeting dumping in administrative reviews. In the Final Modification for Reviews, the Department noted that while section 751(a)(2) of the Act provides three distinct comparison methodologies by which dumping may be determined, it "does not make reference to any specific comparison methodology to be used in reviews."[133] Further, in Ball Bearings the Department unequivocally

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[130] See Brief of Defendant-Appellee United States, Union Steel v. United States, CAFC 2012-1248, -1315, at 18-20 (Union Steel Defendant-Appellee Brief).

[131] See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101 (February 14, 2012) (Final Modification for Reviews).

[132] See Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc. 467 US (1984) (Chevron).

[133] See Final Modification for Reviews at 8104.

stated that the statute placed no "restrictions on the Department's selection of a comparison methodology in reviews," thus, the Department's regulations correctly "fill the silence in the statute."[134]

Rummo wrongly contends that the Department's targeted dumping methodology is flawed. Contrary to Rummo's assertions, the targeted analysis is required to be performed prior to the margin analysis, thus, it includes all sales. Specifically, just as the Department cannot alter the averaging groups under the A-to-A comparison methodology, the Department cannot isolate dumped and non-dumped sales for targeted dumping purposes.

Neither the statute nor recent case history provide for a targeted dumping analysis by LOT. Section 777A(d)(1)(B) of the Act merely directs the Department to determine whether there is a pattern of export prices for comparable merchandise that differs significantly among purchasers, regions, or time periods. It does not require the Department to modify the targeted dumping analysis to examine what, such as LOTs, has created a difference in price. In fact, in Belgian Plate the Department clearly articulated that with regard to targeted dumping the statute lists no requirement to "look behind the elements of those prices to determine which elements account for differences and which do not."[135] Nevertheless, the use of net prices in the targeted dumping comparisons already accounts for any differences in selling functions.

For similar reasons, Rummo is also wrong to argue that the Department's targeted dumping methodology should consider the significant changes in POR manufacturing costs. The very same claim was rejected in both UAE Nails 2012 and Belgian Plate. In UAE Nails 2012, the Department clarified that it "interprets comparability in the context of a targeted dumping analysis without determining "why" an exporter's pricing behavior may differ significantly."[136] Additionally, when the respondent in Belgian Plate argued that the Department's targeted dumping analysis failed to properly account for fluctuations in alloy prices, the Department responded that the use of export price would account for price adjustments such as surcharges and no further examination of why there were price differences was required under the statute.[137] Rummo's failure to provide a quarterly targeted dumping analysis is due to the fact that such an analysis would still result in targeted dumping. Moreover, the Department found targeted dumping on region and customer as well; therefore, the A-to-T methodology would still be employed even without a finding of targeted dumping by time period.

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[134] See Ball Bearings and Parts Thereof from France, Germany, and Italy; Final Results of Antidumping Administrative Reviews, 2010-2011, 77 FR 73415 (December 10, 2012), and accompanying Issues and Decision Memorandum at Comment 1 (Ball Bearings).
[135] See Stainless Steel Plate in Coils from Belgium; Final Results of the Antidumping Administrative Review, 77 FR 73013 (December 7, 2012) (Belgian Plate), and accompanying Issues and Decision Memorandum at Comment 2.
[136] See Certain Steel Nails From the United Arab Emirates: Final Determination of Sales at Less Than Fair Value, 77 FR 17029 (March 23, 2012) (UAE Nails 2012), and accompanying Issues and Decision Memorandum at Comment 4, pages 17-18.
[137] See Stainless Steel Plate in Coils from Belgium; Final Results of the Antidumping Administrative Review, 77 FR 73013 (December 7, 2012) (Belgian Plate), and accompanying Issues and Decision Memorandum at Comment 2, pages 11-12.

Rummo incorrectly claims that the Department's findings were based on price differences that are commercially insignificant. Rummo distorts the record by only referencing the smallest price differences rather than mentioning the other more significant differences that were found in the Department's comparisons. Furthermore, Rummo's argument that a 0.02 percent difference is commercially significant with regard to protein content, while at the same time claiming that $0.01 is not commercially significant for purposes of targeted dumping, is self-serving and contradictory. Finally, the Department's targeted dumping methodology relies on a standard and uniform statistical analysis that has been affirmed by the CIT, hence there is no basis for Rummo's assertion that this test should be supplanted by subjective judgments about the commercial significance of price differences.

Rummo wrongly contends that that the A-to-T and zeroing methodology should only be applied to the targeted sales. In UAE Nails 2012 the Department clearly expressed that

> we are not applying A-T comparisons to only a subset of sales. Instead, if the criteria of section 777A(d)(1)(B) of the Act are satisfied, we will apply A-T comparisons for all sales in calculating the weighted-average dumping margin. We find that it is reasonable to apply A-T comparison methodology to all sales because doing otherwise conceals margins associated with targeted sales.[138]

In sum, it is disingenuous for Rummo to accuse the Department of violating its agreement with the EU, while failing to acknowledge that the Department has modified its analysis to confirm to the methodology the EU uses, i.e., applying A-to-T while zeroing negative margins whenever that methodology results in a higher dumping margin than the A-to-A methodology. While Rummo selectively cites to the Final Modification for Reviews to support its position, a full reading of the document reveals that the Department's revised dumping methodology conforms to the methodology used by the EU and is WTO consistent.

Department's Position:

We continue to find, for Granoro, that a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or time periods does not exist and, therefore, the Department has not considered whether the A-to-A method can account for the observed price differences. With regard to Rummo, we find that a pattern of export prices (or constructed export prices) for comparable merchandise that differs significantly among consumers, regions, or time periods does not exist, and we have not considered whether the A-to-A method can account for the observed price differences. Therefore, the Department has used the A-to-A method to calculate the weighted-average dumping margin for both Granoro and Rummo.[139]

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[138] See UAE Nails 2012 at Comment 4.

[139] See the PPA memoranda for Granoro and Rummo dated December 26, 2012, and the final calculation memoranda for Granoro and Rummo dated concurrently with this memorandum.

Legal Framework For The Application of An Alternative Methodology

The respondents claim that the Department does not have the statutory authority to employ an alternative comparison method and to use the targeted dumping analysis in administrative reviews. We disagree. Section 771(35)(A) of Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." The definition of "dumping margin" calls for a comparison of normal value and export price or constructed export price. Before making the comparison called for, it is necessary to determine how to make the comparison.

Section 777A(d)(1) of the Act describes three methods by which the Department may compare normal value and export price (or constructed export price) and places certain restrictions on the Department's selection of a comparison method in antidumping investigations. The statute places no such restrictions on the Department's selection of a comparison method in administrative reviews. The Department's regulations at 19 CFR 351.414 describe the methods by which normal value may be compared to export price or constructed export price in administrative reviews: average-to-average, transaction-to-transaction, and average-to-transaction. These comparison methods are distinct from each other. When using transaction-to-transaction or average-to-transaction comparisons, a comparison is made for each export transaction to the United States. When using average-to-average comparisons, a comparison is made for each group of comparable export transactions for which the export prices or constructed export prices have been averaged together (i.e., for an averaging group). The Department's regulations at 19 CFR 351.414(c)(1) fill the silence in the statute on the choice of a comparison method in the context of administrative reviews. In particular, the Department has determined that in both antidumping investigations and administrative reviews, the average-to-average method will be used "unless the Secretary determines another method is appropriate in a particular case."

The antidumping duty statute, the SAA, and the Department's regulations do not address directly whether the Department should use an alternative comparison method in an administrative review based upon a targeted dumping analysis conducted pursuant to section 777A(d)(1)(B) of the Act.[140] In light of the statute's silence on this issue, the Department recently indicated that it would consider whether to use an alternative comparison method in administrative reviews on a case-by-case basis, but declined to "speculate as to either the case-specific circumstances that would warrant the use of an alternative methodology in future reviews, or what type of alternative methodology might be employed."[141] At that time, the Department also indicated that it would look to practices employed by the agency in antidumping investigations for guidance on this issue.[142]

In antidumping investigations, the Department examines whether to use an A-to-T method by using a targeted dumping analysis consistent with section 777A(d)(1)(B) of the Act:

[140] See section 777A(d)(1)(B) of the Act; SAA, at 842-43; 19 CFR 351.414.
[141] See Final Modification for Reviews, 77 FR at 8107.
[142] See Final Modification for Reviews at 8102.

> The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if
>
>> (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
>>
>> (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

Although section 777A(d)(1)(B) of the Act does not strictly govern the Department's examination of this question in the context of an administrative review, the Department nevertheless finds that the issue arising under 19 CFR 351.414(c)(1) in an administrative review is, in fact, analogous to the issue in antidumping investigations. Accordingly, the Department finds the analysis that has been used in antidumping investigations instructive for purposes of examining whether to apply an alternative comparison method in this administrative review.

The SAA does not demonstrate that the Department should conduct targeted dumping analysis in investigations only. The SAA does discuss section 777A(d)(1)(A)(i) of the Act, concerning the types of comparison methods that the Department may use in investigations. That provision, however, is silent on the question of choosing a comparison method in administrative reviews. Section 777A(d)(1)(A) does not require or prohibit the Department from adopting a similar or a different framework for choosing a comparison method in administrative reviews as compared to the framework required by the statute in investigations. The SAA states that "section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions or time periods." Like the statute, the SAA does not limit the proceedings in which the Department may undertake such an examination.

<u>Targeted Dumping Analysis</u>

In recent antidumping investigations and administrative reviews where the Department has addressed targeted dumping allegations, the Department has employed the <u>Nails</u> Test for each respondent subject to an allegation to determine whether a pattern of export prices or constructed export prices for comparable merchandise that differ significantly among purchasers, regions or time periods existed within the U.S. market. The <u>Nails</u> Test involves a two-step process, as described below, that determines whether the Department should consider whether the A-to-A method is appropriate in a particular situation.

In the first stage of the test, the "standard-deviation test," we determined the volume of the allegedly targeted group's (<u>i.e.</u>, purchaser, region or time period) sales of subject merchandise (by sales volume) that are at prices more than one standard deviation below the weighted-average price of all sales under review, targeted and non-targeted. We calculated the standard deviation on a product-specific basis (<u>i.e.</u>, by CONNUM) using the weighted-average prices for the alleged targeted group and the groups not alleged to have been targeted. If that volume did not exceed 33 percent of the total volume of the respondent's sales of subject merchandise for the allegedly targeted group, then we did not conduct the second stage of the Nails Test. If that volume exceeded 33 percent of the total volume of the respondent's sales of subject merchandise for the allegedly targeted group, on the other hand, then we proceeded to the second stage of the Nails Test.

In the second stage, the "gap test," we examined all sales of identical merchandise (i.e., by CONNUM) sold to the allegedly targeted group which passed the standard-deviation test. From those sales, we determined the total volume of sales for which the difference between the weighted-average price of sales for allegedly targeted group and the next higher weighted-average price of sales to the non-targeted groups exceeds the average price gap (weighted by sales volume) for the non- targeted groups. We weighted each of the price gaps between the non-targeted groups by the combined sales volume associated with the pair of prices for the non-targeted groups that defined the price gap. In doing this analysis, the allegedly targeted group's sales were not included in the non-targeted groups; the allegedly targeted group's average price was compared only to the average prices for the non-targeted groups. If the volume of the sales that met this test exceeded five percent of the total sales volume of subject merchandise to the allegedly targeted group, then we determined that targeting occurred and these sales passed the Nails test.

As explained in the PPA, if the Department determined that a sufficient volume of U.S. sales were found to have passed the Nails Test, then the Department considered whether the A-to-A method could take into account the observed price differences. To do this, the Department evaluated the difference between the weighted-average dumping margin calculated using the A-A method and the weighted-average dumping margin calculated using the A-to-T method. Where there is a meaningful difference between the results of the A-to-A method and the A-to-T method, the A-to-A method would not be able to take into account the observed price differences, and the A-to-T method would be used to calculate the weighted-average margin of dumping for the respondent in question. Where there is not a meaningful difference in the results, the A-to-A method would be able to take into account the observed price differences, and the A-to-A method would be used to calculate the weighted-average dumping margin for the respondent in question. With regard to Rummo, we find that a pattern of export prices (or constructed export prices) for comparable merchandise that differs significantly among consumers, regions, or time periods does not exist, and we have used the A-to-A method to calculate Rummo's weighted-average dumping margin.[143]

Rummo argues that when non-dumped sales are excluded, the Nails test is negative, and that Congress did not intend for sales with no dumping margin to factor into a targeted dumping finding.[144] We disagree. Section 777 A(d)(l)(B)(i) of the Act speaks only to whether there is a "pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time." Section 777A(d)(l)(B) of the Act

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[143] See the PPA memoranda for Granoro and Rummo dated December 26, 2012, and the final calculation memoranda for Granoro and Rummo dated concurrently with this memorandum.
[144] See Rummo's case brief, dated January 7, 2013, at pages 10-11.

does not refer to a pattern of dumping margins; nor does it call for a comparison of the export prices or constructed export prices to normal value prior to determining whether there is a pattern. Similarly, the Nails test, affirmed in Mid Continent Nail, seeks only to determine whether a pattern of export prices or constructed export prices for comparable merchandise that differ significantly amount purchasers, regions, or time periods exists within the U.S. market. The Court of International Trade has found that this test "do{es} not violate the statutory language" of section 777A(d)(l)(B)(i) of the Act.[145] Therefore, we find that the Department has acted consistent with congressional intent.

In advocating the application of the A-to-A method, Rummo claims that the Department should modify its targeted dumping methodology to include an analysis of the effects of differences in levels of trade and significant fluctuations in the cost of semolina. Rummo also alleges that the standard deviation methodology should include consideration of the absolute differences in prices for the targeted product CONNUMs.[146] It is unnecessary to address these arguments by Rummo at this time, because under the Department's Nails test without modifications requested by Rummo, the Department determined that a pattern of export prices (or constructed export prices) for comparable merchandise that differs significantly among consumers, regions, or time periods does not exist, and we have used the A-to-A method to calculate Rummo's weighted-average dumping margin,

Rummo argues that, if the Department continues to use an A-to-T methodology without offsets for non-targeted sales, it would run counter to the Final Modification and commitments between the United States and the EU. Because the Department determined to use A-to-A methodology with offsets, it is unnecessary to address Rummo's argument at this time.

With respect to Rummo's argument that the Department has not allowed adequate opportunity for parties to comment on its targeted dumping methodology, we disagree. The petitioners submitted their targeted dumping allegation on April 20, 2012 (105 days before the issuance of the Preliminary Results) and the Department issued its PPA on December 26, 2012. Therefore, Rummo had 250 days before the PPA was issued to review the Petitioner's specific targeted dumping allegation, the analysis output for Rummo's U.S. sales database, and the programming code, in order to comment on any issues regarding the allegation. Moreover, Rummo did not request any additional time to comment on the post-preliminary determination and timely submitted its comments. Therefore, we disagree with Rummo's assertion that it was not given ample time to review and comment on the issue of targeted dumping.

We also disagree with Rummo's claim that we do not have the authority to issue a post-preliminary analysis. The statute provides that we issue, at minimum, a preliminary results and a final results of administrative reviews, but there is no statutory or regulatory prohibition against interim analyses being placed on the record with a request for comment and/or case and rebuttal briefs from interested parties. We have previously issued post-preliminary determinations where we faced difficult issues and the courts have never opined that such practice is contrary to law.[147]

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[145] See Mid Continent Nail Com. v. United States, Slip. Op. 2010-47 at 14.
[146] See Rummo's Case Brief, dated January 7, 2013, at pages 11-12.
[147] See e.g., Decision Memorandum for Preliminary Results of 2010-2011 Antidumping Duty Administrative

To the extent that the statute is silent on this issue, it is reasonable for the Department to issue an amendment to its Preliminary Results and allow interested parties to comment and to increase the accuracy of its determinations. Therefore, in accordance with our practice, the Department may issue post-preliminary results in response to various issues that arise during the review period, as it has done on many occasions in prior cases.[148]

With respect to the remaining arguments from respondents regard the specifics of the Nails Test, we find that none of them affect our determination in these final results that a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions or time periods does not exist, and therefore we have continued to use the A-to-A method to calculate the weighted-average dumping margin for each respondent. Thus, for purposes of these final results of review, we find that Rummo's remaining arguments are not relevant to our analysis. Accordingly, for the final results, the Department has applied the average-to-average method with offsets for purposes of determining Rummo's weighted-average dumping margin. Thus, Rummo's arguments regarding consistency of the A-to-T methodology and zeroing with the Final Modification and international commitments are moot and we do not need to address them at this time.

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: ______

Paul Piquado
Assistant Secretary
for Import Administration

1 February 2013
Date

Review: Diamond Sawblades and Parts Thereof from the People's Republic of China, December 3, 2012 at 2 ("We intend to release the verification reports and issue a post preliminary determination addressing the petitioner's fraud allegation"); Amended Preliminary Determination: Live Cattle from Canada, 64 FR 39970 (July 23, 1999).

[148] See, e.g., Decision Memorandum for Preliminary Results of 2010-2011 Antidumping Duty Administrative Review: Diamond Sawblades and Parts Thereof from the People's Republic of China, December 3, 2012 at 2 ("We intend to release the verification reports and issue a post preliminary determination addressing the petitioner's fraud allegation"); Amended Preliminary Determination: Live Cattle from Canada, 64 FR 39970 (July 23, 1999).