70 FR 6832, February 9, 2005

A-475-818
Administrative Review 02/03
Public Document
Office III: EBG

February 2, 2005

MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

RE: Certain Pasta from Italy (Period of Review: July 1, 2002 through June 30, 2003)

SUBJECT: Issues and Decisions for the Final Results of the Seventh Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination to Revoke in Part

Summary:

We have analyzed the case briefs and rebuttal briefs submitted by interested parties. As a result of our analysis, we have made changes in the margin calculations. We recommend that you approve the positions we have developed in the Discussion of Interested Party Comments section of this memorandum. Below is the complete list of the issues in this review for which we received comments from the parties:

I. List of Comments:

Barilla Alimentare, S.p.A. (Barilla)

Industria Alimentare Colavita, S.p.A. and Fusco S.r.l. (collectively Indalco)

Pasta Lensi S.r.l. (Lensi)

PAM S.p.A. (PAM)

Pasta Riscossa F. Illi Mastromaura, S.r.l. (Riscossa)

Pastificio Carmine Russo S.p.A./ Pastificio Di Nola S.p.A. (Russo)

II. Background

On August 6, 2004, the Department published the preliminary results of the seventh administrative review of the antidumping duty order on certain pasta from Italy. See Notice of Preliminary Results, Partial Rescission of Antidumping Duty Administrative Review and Revocation of the Antidumping Duty Order in Part: For the Seventh Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, 69 FR 47880 (August 6, 2004) (Preliminary Results). On October 6, 2004, at the request of Barilla, the Department held a public hearing. On November 4, 2004, the Department extended these final results until February 2, 2005. See 69 FR 64275. The merchandise covered by this review is described in the Federal Register notice issued the same date as this memorandum. The review covers eight manufacturers/exporters: (1) Barilla (2) Corticella Molini e Pastifici S.p.A. (Corticella) and its affiliate Pasta Combattenti S.p.A. (Combattenti) (collectively, Corticella/Combattenti), (3) Pastificio Guido Ferrara S.r.l. (Ferrara), (4) Indalco, (5) Lensi, (6) PAM (7) Riscossa, and (8) Russo. The period of review (POR) is July 1, 2002, through June 30, 2003. We received case/rebuttal briefs from the petitioners[1] and the following respondents: Barilla, Indalco, Lensi, PAM, Riscossa, and Russo. We did not receive comments from Corticella/Combattenti or Ferrara.

III. Wheat Codes

In the Preliminary Results, the Department discussed certain parties' proposed modifications to the two wheat codes identified in the Department's questionnaire. See 69 FR at 47883. The Department discussed how the two wheat codes used to determine the product match were established during the Pasta Investigation where the wheat quality was determined to be commercially significant as measured by ash and gluten content and cost. See Id., and Notice of Final Determination of Sales at Less than Fair Value: Certain Pasta from Italy, 61 FR 30326, 30346 (June 14, 1996) (Pasta Investigation). In the instant review, we preliminarily found that Ferrara's wheat code 2 and PAM's wheat code 5 met the standards outlined in the Pasta Investigation and, thus, warranted separate wheat code classifications. We also preliminarily determined that PAM's wheat code 1 and Lensi's wheat codes 2 and 4 did not warrant a separate classification. See Preliminary Results, 69 FR 47884. For these final results, we affirm our decisions in the Preliminary Results with respect to wheat codes. For further discussion of parties' comments regarding this issue, see Comments 18 and 21, below.

IV. Discussion of Interested Party Comments

[1] Petitioners are New World Pasta Company, Dakota Growers Pasta Company, Borden Foods Corporation and American Italian Pasta Company.

BARILLA

Comment 1: Double Counting of the Cost of Semolina Purchases

Barilla argues that the Department should allow its claimed semolina sales revenue offset to raw material costs for the final results. Barilla asserts that the Department's disallowance of the item in the Preliminary Results was erroneous and double counts certain semolina costs. Barilla states that because it sells the semolina to its affiliate, Barilla Alimentare Mediterranea (i.e., BAM), and BAM then uses the semolina to produce pasta which Barilla purchases, the raw material semolina costs are already included in the transfer price of the finished product. Therefore, Barilla reduced the reported raw materials cost by the semolina sales revenue to avoid double counting.

Petitioners contend that the Department correctly disallowed the semolina sales revenue offset. Petitioners note that the Department cited Barilla's use of a semolina offset in Section I, summary of findings, of its July 30, 2004, Cost Verification Report. Petitioners state that the Department's adjustment did not double count purchases of semolina.

Department's Position: We find that the cost of semolina sold from Barilla to BAM was in fact double counted by the adjustment applied in the Preliminary Results. However, we do not agree with Barilla's methodology to eliminate the double counting of semolina costs. Barilla's methodology uses total semolina sales revenue, not just BAM semolina sales revenue. For the final results, we reduced the raw material costs by Barilla's semolina revenue from sales to BAM only.

Comment 2: Treatment of Subject Merchandise Produced by Other Italian Manufacturers

Petitioners argue that the Department should consistently use pasta purchased by Barilla in the cost and price calculations for these final results. For the Preliminary Results, petitioners state that the Department used sales of commingled merchandise in determining average home market prices, while at the same time excluding the costs associated with the acquisition of the non-Barilla pasta. See Memorandum from Lyman Armstrong and Joy Zhang, Case Analysts, to Eric Greynolds, Program Manager, Concerning Analysis Memorandum for Barilla Alimentare, S.p.A: Preliminary Results of 2002-03 Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, dated July 30, 2004 (Barilla's Preliminary Calculation Memorandum) at 2. Specifically, the Department included sales designated as "COMMINGLED" in the margin program while excluding the cost associated with these sales in the cost database. For the final results, petitioners argue, the Department should treat non-Barilla pasta purchases and resales consistently in cost and price calculations by either (a) including the acquisition costs in the cost of production or (b) excluding the non-Barilla product from the sales listing before determining normal value (NV).

Barilla disagrees with petitioners that sales marked "COMMINGLED" should be excluded from the NV calculation. First, in accordance with the Department's questionnaire instructions, when Barilla could identify a single producer for specific sales, it reported the corresponding plant code; however, when sales were of a product produced both by Barilla or another Italian manufacturer, Barilla reported "COMMINGLED." See Barilla's response to the Department's Section B Questionnaire (October 31, 2003) at B-15. Further, Barilla states that when an unaffiliated supplier cannot be separately identified for sales purposes by the respondent, the Department's practice is to include these sales in the margin calculation program. See Notice of Final Results of Administrative Review: Certain Pasta From Italy 69 FR 6255 (February 10, 2004) (Pasta Six) and Decision Memorandum at Comment 33. Citing 19 U.S.C. § 1677b(a)(1)(B), Barilla states that because the "COMMINGLED" pasta is produced by both Barilla and one or more co-packers, the Department must use "COMMINGLED" sales in determining NV.[2]

Finally, Barilla argues that if the Department decides that the cost calculations need to be on the same basis as the price calculations, the Department should then apply the same methodology in all cost calculations, including the calculation of the DIFMER adjustment, the difference in the variable cost of manufacturing. Barilla states that in the normal course of business it treats the cost of acquiring co-packer produced pasta as a cost of manufacturing and, thus, this cost should be added to the DIFMER calculation. Barilla therefore argues that for these final results the Department should include "COMMINGLED" sales in calculating NV. However, if the Department decides not to include these sales, the Department should adjust the DIFMER cost accordingly.

Department's Position: When pasta purchases from an unaffiliated supplier cannot be separately identified for sales purposes by the respondent (so-called "COMMINGLED" pasta), the Department's practice is to include these sales in the margin calculation program. See Preliminary Results; see also, 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, 65 FR 7349, 7356 (February 14, 2000) ("Pasta Two); see also, Pasta Six at comment 33. Consistent with this practice, our questionnaire specifically instructed respondents to list the manufacturing field as "COMMINGLED" or to provide an appropriate code in the manufacturing field when it is not possible to identify the pasta supplier for a specific sale of pasta. See Department's Initial Questionnaire to Barilla, dated September 10, 2003, at V-2. We also directed respondents to exclude the costs of purchased pasta where the supplier of the pasta type sold could be identified in the weighted-average cost of manufacturing. Barilla complied with these instructions. Therefore, for these final results, we are including sales of commingled pasta and continuing to exclude purchased pasta in Barilla's margin calculation program. See Memorandum from Lyman Armstrong and Joy Zhang, Case Analysts, to Eric Greynolds, Program Manager, Concerning Analysis Memorandum for Barilla

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[2] In its case brief, Barilla uses the term co-packer to describe pasta that it purchases from other pasta producers.

Alimentare, S.p.A: Final Results of 2002-03 Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, dated February 2, 2005 (Barilla's Final Calculation Memorandum) at 2.

Comment 3: Overstatement of Constructed Export Price (CEP) Profit

Barilla argues that the Department should correct its CEP profit calculation to include the cost of both self-produced and purchased pasta to make an apples-to-apples comparison. Citing section 772(f) of the Tariff Act of 1930, as amended (the Act), Barilla states that the Department is required to calculate the CEP profit using the aggregate revenues actually earned on the home market (HM) and U.S. sales, and the total actual cost or expenses associated with those sales. Specifically, the total actual profit earned is calculated using "total expenses," which are defined as "all expenses . . .which are incurred by or on behalf of {Barilla} with respect to the production and sale of subject merchandise and the foreign like product." See section 772(f) of the Act.

Barilla claims that, in Preliminary Results the Department did not use in the denominator of the CEP profit ratio the total actual cost of goods sold, which includes the cost for co-packer produced and commingled pasta, as well as Barilla's self-produced pasta. Barilla further argues that while the Department's margin program excludes pasta produced by other Italian manufacturers, the Department included in the numerator of the CEP profit ratio calculation revenues from all sales, including sales of Barilla's self-produced, co-packer produced, and commingled pasta products. Accordingly, Barilla asserts that the Department's calculation is distorted because the basis for determining the total revenue (which is part of the numerator of the CEP profit ratio) and total expenses (the denominator for the CEP profit ratio) are different, and, therefore, the Department has not made an apples-to-apples comparison.

Barilla contends that to make a consistent apples-to-apples comparison the Department should recalculate the denominator of the CEP profit ratio based on Barilla's total actual cost of goods sold, including the costs incurred for co-packer produced and commingled pasta. Barilla argues that this information is already on the record. See Barilla's Response to the Department's Second Supplemental Questionnaire, dated May 18, 2004. Therefore, Barilla contends that for these final results the Department should recalculate the CEP profit rate based on the actual total cost of production.

Petitioners disagree with Barilla that the Department should consider purchased pasta expenses in calculating the denominator of the CEP profit ratio. Petitioners contend that if the Department is to consider using purchased product costs they should be treated consistently throughout the margin program, that is they should be used in the cost test as well.

Department Position: Section 772(f) of the Act states that the total actual profit earned is calculated using "total expenses," defined in relevant part as "all expenses. . . which are incurred by or on behalf of

{Barilla}. . .with respect to the production and sale of subject merchandise and the foreign like product" divided by the aggregate revenues actually earned on the HM and U.S. sales. Accordingly, for revenues, the Department preliminarily included sales of Barilla's self-produced, co-packer produced, and commingled pasta products in the numerator of its CEP profit ratio calculation. See section 772(f) of the Act. However, for the denominator of the CEP profit ratio calculation, the Department excluded from total expenses the cost of Barilla's purchased pasta. See Barilla's Preliminary Calculation Memorandum at Appendix 1. To accurately reflect the amount of CEP profit Barilla would have earned, the Department should have included the cost of purchased pasta in the denominator of the CEP profit ratio calculation. Barilla provided this information in its second supplemental response. See Barilla's Response to the Department's Second Supplemental Questionnaire, dated May 18, 2004. Therefore, for these final results the Department will include Barilla's purchased pasta in the denominator of the CEP profit ratio calculation.

Comment 4: CEP Offset

Petitioners argue that a CEP offset should not be granted to Barilla for these final results because the difference in selling activities between the HM and the U.S. market was minimal. Petitioners argue that in the Preliminary Results, the Department granted a CEP offset on the premise that the HM sales were made at a more advanced level of trade (LOT) than the LOT in the United States. See Barilla's Preliminary Calculation Memorandum at 9-10. Petitioners claim that Barilla requested a CEP offset on the basis that there were limited selling activities in support of CEP Sales. According to petitioners, Barilla specifically claimed that the logistics assistance provided by Number One, Barilla's affiliated selling agent in the HM, was minimal compared to the services provided on behalf of Barilla's U.S. affiliate, Barilla America, and that inventory was not maintained in Italy for CEP sales. See Barilla's Response to the Department's Supplemental Questionnaire, dated March 5, 2004, at 15. However, petitioners argue that Barilla's description in the initial questionnaire response of the sales process and distribution channels of three of the four home market sales channels and the U.S. sales channels indicate that both HM and EP and CEP U.S. sales were via sales intermediaries (either affiliated or unaffiliated brokers, or both) and that these sales were no different from CEP sales made to Barilla America. See Barilla's response to the Department's Initial Questionnaire Sections A through D responses, dated, October 31 and November 10, 2003 (Barilla's Questionnaire Response), at B-50. Therefore, based on Barilla's questionnaire response, petitioners assert that the Department's decision to grant Barilla a CEP offset was based on the faulty premise that Barilla's HM sales were made at a more advanced LOT than the LOT in the United States. See Barilla's Preliminary Calculation Memorandum at 9-10. Petitioners further contend that if the Department conducts a more thorough analysis of Barilla's sales activities, as opposed to the analysis it conducted in the Preliminary Results, it will find that a CEP offset is not warranted. See Barilla's Preliminary Calculation Memorandum at 8-9.

Barilla disagrees with petitioners that Barilla's CEP sales and HM sales are at a similar LOT and that a CEP offset is not warranted for these final results. According to Barilla, in determining the CEP LOT, the Department analyzes the level of selling activities after deducting those activities/expenses associated

with the sale to the first unaffiliated customer after importation into the United States. See NSK Ltd. v. United States, 217 F. Supp.2d 1291, 1327 (CIT 2002). Barilla contends that no brokers, affiliated or otherwise were involved in sales to Barilla America and that the only affiliated or unaffiliated intermediaries involved in sales to Barilla America were those based in the United States who sold out of inventory after importation to the United States. In addition, Barilla claims that the Department verified that some of the selling activities (i.e., rebates) were provided in Italy, but were not provided for the CEP sales prior to importation into the United States. See the Department's Verification of Barilla's Sales Questionnaire, dated July 30, 2004 (Barilla's Sales Verification Report), at 26.

Finally, Barilla argues that the Department found significant differences in the selling functions between all channels of HM sales and CEP sales such that the CEP LOT was at a less advanced marketing stage in the chain of distribution than the HM sales. See Barilla's Preliminary Calculation Memorandum at 9. Barilla states that this finding was supported by Barilla's selling function charts, which show that thirteen of the fourteen selling activities differed with respect to degree of activity between the HM and the U.S. market. See Barilla's Questionnaire Response at Exhibit A-4. Accordingly, the Department should continue to grant a CEP offset for these final results.

Department Position: In the Preliminary Results, we found Barilla's HM sales were made at a more advanced LOT than its CEP sales, Ssee Preliminary Results, 69 FR at 47886. Specifically, we found that in comparing the CEP LOT, after making the appropriate deductions under section 772(d) of the Act, to the HM LOT, the selling activities differed between the two markets. See Preliminary Results, 69 FR at 47886; see also Barilla's Preliminary Calculation Memorandum at 8-9.

In the Preliminary Results, the Department based its decision to grant Barilla a CEP offset on information provided by Barilla in its questionnaire response. See Barilla's Questionnaire Response at Exhibit A-4. The Department later verified the information provided by Barilla. See Barilla's Sales Verification Report at 12-13. Contrary to petitioners' assertions that Barilla's selling activities in the HM via sales intermediaries were no different from its CEP sales made to Barilla America, we find that Barilla provided sufficient information for the Department to compare selling functions and the difference in the degree of selling functions in the two markets. See Barilla's Preliminary Calculation Memorandum at 8 -9. For example, information provided by Barilla, and verified by the Department, demonstrates that Barilla's selling functions for the HM sales are different and more extensive than those associated with Barilla's sales to Barilla America. See Barilla's Sales Verification Report at 12-13 and Exhibit 4. Therefore, we conclude that HM sales are at a more advanced LOT than U.S. sales.

Finally, the information on the record indicates that it is not possible for the Department to make an LOT adjustment. Specifically, because all HM sales were made at one LOT, which is not the same LOT of the U.S. sales, it is not possible to quantify the extent to which price differences are due to LOT differences. Given that the HM sales are at a more advanced LOT, and that it is not possible to

make an LOT adjustment, section 773(a)(7)(B) of the Act directs the Department to make a CEP offset.

Given that our verification confirmed our preliminary findings and because there is no information on the record requiring modification of our preliminary LOT determination, we continue to conclude that we cannot match CEP sales to sales at the same LOT in the HM, and therefore Barilla qualifies for a CEP offset adjustment pursuant to section 773(a)(7)(B) of the Act.

Comment 5: Use of Facts Available for Financial Discount

Barilla argues that the Department's use of facts available with respect to its financial discounts was unwarranted. First, Barilla states that due to an inadvertent computer programming error, Barilla failed to report the financial discount for certain sales that actually received a financial discount. Barilla agues that at verification, when it realized the error, it provided the Department with a spreadsheet that corrected the financial discount information and that it fully cooperated with the Department. See Barilla's Sales Verification Report at Exhibit 14. Barilla explains that, instead of using the information provided in Exhibit 14, the Department used facts available, applying a financial discount to all of Barilla's CEP sales. Barilla argues that the Department's use of facts available was unwarranted and ignored verified information. In so doing, the Department failed to meet its statutory obligation to determine current margins as accurately as possible. See Rhone-Poulenc Inc. V. United States, 899 F.2d 1185, 1991 (Fed.Cir. 1990); see also, Steel Concrete Reinforcing Bar From the Republic of Korea: Final Results of Administrative Review, 69 FR 19399 (April 13, 2004), and Decision Memorandum at Comment 6.

Moreover, Barilla claims that the Department's decision to apply facts available in this instance is inconsistent with its practice regarding other respondents in this review. Barilla states that the Department noted errors in Ferrara's HM selling expense field but did not apply facts available. See the Department's Verification of Ferrara's Sales and Cost Questionnaire, dated July 30, 2004 (Ferrara's Sales and Cost Verification Report) at 19. Therefore, the Department should not apply facts available with respect to Barilla's financial discount and should use the information provided at verification.

Petitioners argue that the Department should continue to apply facts available with respect to Barilla's financial discounts. First, petitioners contend that, whether inadvertent or not, Barilla's errors should have been discovered during the reconciliation process and reported to the Department no later than the beginning of verification. Second, the statute requires the Department to rely on facts available for "necessary" information that is not submitted in the "form and manner" requested by the established deadline. See section 776(a)(2) of the Act. Finally, petitioners argue that verification is meant to determine whether information already submitted by the respondent is complete and accurate. Correction of errors is generally not permitted, with the exception of appropriate minor revisions

disclosed at the beginning of verification. Petitioners argue that if the Department were to accept Barilla's correction of errors discovered at verification without applying facts available, it would set a precedent that would encourage respondents to withhold information. Petitioners therefore assert that for these final results, the Department should continue to apply facts available with respect to Barilla's financial discount.

Department Position: We continue to find that Barilla did not properly report all of its U.S. discounts and rebates expenses. Section 776(a)(2) of the Act provides that:

> if an interested party or any other person – (A) withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i), the administering authority shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title.

As long recognized by the Court of International Trade (CIT), the burden is on the respondent, not the Department, to create a complete and accurate record. See, e.g., Pistachio Group of Association Food Industries v. United States, 641 F. Supp. 31, 39-40 (CIT 1987). Barilla failed to create a complete and accurate record with respect to certain cash discounts and rebates. As explained in the Preliminary Results, 69 FR at 47882, prior to verification and at the beginning of verification, the Department's verifiers asked Barilla to present minor changes to its questionnaire responses resulting from the company's preparation for verification. See the Department's May 26, 2004 verification outline. Barilla presented its minor changes in Exhibit 1 of the Memorandum to Eric B. Greynolds, from Lyman Armstrong and Joy Zhang, Re: Verification of the Sales Response of Barilla Alimentare and Barilla America (collectively, Barilla) in the 02/03 Administrative Review of the Antidumping Duty Order of Certain Pasta from Italy (Barilla Verification Report), a proprietary document of which the public version is available in room B-099 of the Central Records Unit (CRU) of the main Commerce Building. While verifying Barilla's U.S. discount and rebate fields, the verifiers discovered errors that were not among those listed in Barilla's minor corrections exhibit. Id. Namely, the verifiers discovered that Barilla failed to report a significant number of cash discounts offered to its CEP customers and failed to report rebates granted to one of its CEP customers during POR. Id.; see also pages 27 through 29 of the Barilla Verification Report. In other words, Barilla failed to accurately report its expense fields in a timely fashion and in the form and manner requested by the Department as required by section 776(A)(2)(B) of the Act.

Although Barilla contends that the information in Exhibit 14 of the Barilla Verification Report should be used to correct the error it made to the U.S. discount field, we do not agree. Barilla claims Exhibit 14 identifies those sales for which there really was no discount provided, as well as those for which they

had originally reported no discount, but for which a discount was in fact granted. Although we collected Exhibit 14 at verification, the Exhibit does not identify the value of the missing discounts. Rather, it merely identifies the sales for which Barilla now claims to have provided discounts. Given the pervasive errors identified in Exhibit 14, we did not verify the accuracy of Exhibit 14. Additionally, given the number of sales affected by Barilla's misreporting, the Department did not attempt the complicated task of correcting Barilla's database for its omissions on a transaction specific basis. In accordance with section 776(a)(2)(B) of the Act. we have continued to apply partial facts available in calculating Barilla's dumping margin using the approach from the Preliminary Results. See 69 FR at 47882. Specifically, with regard to Barilla's U.S. discount field, we have applied a cash discount to all sales of Barilla's CEP customers. Id. Further, for the one customer for which Barilla failed to report a rebate, the verifiers were able to establish the portion of the rebate that Barilla granted the customer during 2002. Therefore, as partial facts available, we applied the rebate in effect for that customer in 2002 to the portion of 2003 covered by the POR. Id.

Finally, we disagree with the implication of Barilla's argument that it has been treated differently than Ferrara. As opposed to the minor errors reported by Ferrara to the Department and addressed in Ferrara's Sales and Cost Verification Report, the errors to the U.S. discounts and rebates fields discovered by the Department during the verification of Barilla are pervasive.

Comment 6: Reclassification of Rebate Payments as Selling Expense

According to petitioners, the type of reimbursements Barilla paid to its customers for certain activities would normally be reclassified by the Department as selling expenses. See Barilla's Questionnaire Response at B33-B38 and C30-C32. As a result, petitioners argue that the Department should reclassify these rebates for these final results.

Barilla disagrees with petitioners and claims the Department should continue to treat these expenses as rebates for these final results. Barilla states that its rebate payments to its customers were appropriately classified as rebates in Barilla's sales databases and that the Department verified its rebate program and accounting classifications for rebates and noted no discrepancies. See Barilla's Questionnaire Response at B33-B38 and C30-C32; see also, Barilla's Sales Verification Report at 5, 23, 27, 28. Further, Barilla argues that petitioners provided no record evidence as to why the Department should reclassify its rebates. Therefore, Barilla contends that the Department should continue to treat rebates granted to Barilla's customers in both the home and U.S. markets consistently as rebates under section 351.102(b) of the Department's regulations for these final results.

Department Position: We have continued to classify the price adjustments as rebates. The Department's Questionnaire defines rebates as "reductions in the gross price that a buyer is charged for goods. . .a rebate is a refund of monies paid, a credit against monies due on future purchases, or the conveyance of some other item of value by the seller to the buyer after the buyer has paid for the

merchandise." See Department's Initial Questionnaire to Barilla, dated September 10, 2003, at I-12. Barilla's price adjustments all fall within this standard definition of a rebate. See Barilla's Questionnaire Response at B33-B38, C30-C32, and Exhibit 5A, where it contains contracts in which Barilla offers rebates to certain customers in return for meeting sales targets. Further, the Department verified that customers met the terms of the rebate contract and earned money back on their purchases of Barilla products. See Barilla's Sales Verification Report at 5, 23, 27, 28. Moreover, the Department verified and tied Barilla's classification of these expenses to its accounting system. See Barilla's Sales Verification Report at 5, 23, 27, 28 and Exhibits 9 and S20. Additionally, petitioners provide no evidence as to why these expenses should be reclassified. Therefore, consistent with our practice, we have continued to classify these price adjustments for Barilla as rebates for these final results.

Comment 7: Margin Calculation Methodology

Barilla argues that the Department improperly reset to zero transaction-specific price differentials where the CEP or EP exceeded NV. The Department's practice of zeroing, according to Barilla, is not warranted by U.S. statute, citing sections 773(a) and 771(35) of the Act, and is contrary to the United States' law and its WTO obligations.

Barilla further argues that even assuming, *arguendo*, that the Act does not expressly prohibit zeroing, the U.S. Supreme Court has held that Congress' statutes should never be interpreted to violate the United States' international obligations when other permissible interpretations exist, citing Murray v. Schooner Charming Betsy, 6 U.S. 64, 118(1804) ("Charming Betsy") ("An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . ."). Barilla cites the WTO Appellate Body's recent determination in Final Dumping Determination On Softwood Lumber From Canada, WT/DS264/AB/R, AB-2004-2, Report of the Appellate Body (August 11, 2004). (U.S. - Softwood Lumber). Barilla asserts that the Department should interpret the Act to calculate an overall weighted-average dumping margin without resorting to zeroing, consistent with the dictate of the Supreme Court in Charming Betsy.

Petitioners state that in Timken Co. v. United States, the appellate court expressly affirmed the Department's zeroing policy as reasonable and in accordance with law. See 354 F.3d 1343 (Fed. Cir. 2004) (Timken). Petitioners further argue that the decision in U.S. - Softwood Lumber is very limited and applies to only the United States' Softwood Lumber investigation. In any event, petitioners assert that 19 U.S.C. § 3533 prohibits a government agency from changing policy in response to a WTO decision without invoking the procedures required by 19 U.S.C. § 3533.

Department's Position: We have not changed our calculations of the weighted-average dumping margin for purposes of these final results, as requested by Barilla. The U.S. Court of Appeals for the Federal Circuit (CAFC) has affirmed the Department's methodology as a reasonable interpretation of the statute in the context of both administrative reviews and investigations. See Timken Company v.

United States, 240 F. Supp. 2d 1228 (CIT 2002), aff'd, 354 F.3d 1334, 1342-44 (Fed. Cir. 2004), reh'g denied, 2004 U.S. App. Lexis 6741 (March 17, 2004), cert denied, Koyo Seiko v. United States, 125 S. Ct. 412 (2004)(covering an antidumping administrative review); see also Corus Staal BV v. Department of Commerce, Slip-Op 04-1107 (Fed. Cir. January 21, 2005), at 8-9, *publication pending* (the Department's interpretation of section 771(35) of the Act is permissible in an investigation).

As discussed below, we include U.S. sales that were not priced below NV in the calculation of the weighted-average margin as sales with no dumping margin. The value of such sales is included in the denominator of the weighted-average margin along with the value of dumped sales. We do not, however, allow U.S. sales that were not priced below NV to offset dumping margins found on other sales.

Section 771(35)(A) of the Act defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Section 771(35)(B) of the Act defines "weighted-average dumping margin" as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." These sections, taken together, direct the Department to aggregate all individual dumping margins, each of which is determined by the amount by which NV value exceeds EP or CEP, and to divide this amount by the value of all sales. The directive to determine the "aggregate dumping margins" in section 771(35)(B) of the Act makes clear that the singular "dumping margin" in section 771(35)(A) of the Act applies on a comparison-specific level, and does not itself apply on an aggregate basis. The Act does not direct the Department to factor negative price differences (i.e., the amount by which EP or CEP exceeds NV) into the calculation of the weighted-average dumping margin. In other words, the value of non-dumped sales is not permitted to cancel out the dumping margins found on other sales.

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

Furthermore, this is a reasonable means of establishing estimated duty-deposit rates in investigations and assessing duties in reviews. The deposit rate we calculate for future entries must reflect the fact that U.S. Customs and Border Protection (CBP) is not in a position to know which entries of subject merchandise are dumped and which are not. By spreading the liability for dumped sales across all reviewed sales, the weighted-average dumping margin allows CBP to apply this rate to all merchandise subject to review.

Finally, with respect to Barilla's WTO specific arguments, we note that U.S. law, as implemented through the Uruguay Round Agreements Act (URAA), is fully consistent with our WTO obligations.

Comment 8: Application of Case Discount

Petitioners claim that the Department made a ministerial error with respect to calculating the cash discount for Barilla's CEP customers. Specifically, petitioners claim that the Department intended to apply a cash discount to all of Barilla's CEP customers, but the programming language used was incorrect, resulting in the intended change never occurring. See Barilla's Preliminary Calculation Memorandum at 5. Petitioners request that the Department correct this error for these final results.

Barilla did not address this issue.

Department Position: The Department made an inadvertent error, i.e., we intended to apply a cash discount to all of Barilla's CEP customers. We have corrected this error for these final results. See Barilla's Final Calculation Memorandum.

INDALCO

Comment 9: Liquidation Instructions

Indalco asks the Department to clarify its liquidation instructions to CBP by including the correct importer name and specifying Indalco and Fusco S.r.l. as producers. Indalco suggests such revisions to the Department's liquidation instructions in order to ensure that entries are properly liquidated.

Department's Position: We have amended the draft liquidation instructions for Indalco in the manner requested so as to provide clarity to CBP.

Comment 10: Margin Calculation Methodology

Indalco argues that the Department improperly set all negative dumping margins to zero in its Preliminary Results and that it should not perform such a calculation in the final results of this review. Indalco argues that the policy of zeroing all negative dumping margins is unfair and unreasonable, contrary to U.S. statute, and forbidden by WTO appellate body rulings.

Petitioners argue that the Department should stand by its long-standing practice of zeroing negative margins.

Department's Position: We have not changed our calculation of the weighted-average dumping margin for purposes of these final results, as suggested by Indalco. For further discussion regarding this issue, see Comment 7 above.

Comment 11: Selling, General & Administrative (SG&A) Expenses

Petitioners argue that the Department must adjust Indalco's SG&A expense ratio to include general warehousing expenses. Petitioners assert that Indalco reported on-site warehousing expenses as indirect selling expenses instead of reporting them correctly as SG&A expenses. Petitioners state that the Department's normal practice is to consider warehousing expenses as movement expenses, if warehousing is incurred at a distribution warehouse not located at the production facility. Petitioners also assert that the Department followed this practice in the 2001-2002 administrative review of this proceeding.

Petitioners suggest that the Department add the on-site warehousing expenses, reported by Indalco, to the numerator of the SG&A ratio. They also state that the Department should apply the new SG&A ratio to the cost of production (COP) and constructed value (CV). Further, petitioners state the Department should remove Indalco's calculated per-unit on-site warehousing expenses from the INDIRSH field in Indalco's HM database.

Indalco did not address this issue.

Department's Position: Indalco books its on-site warehousing expenses in its normal course of business as part of its costs of production. As demonstrated in previous segments of this proceeding, the Department treats Indalco's on-site warehousing expenses as SG&A expenses. See, e.g., page 2 of Indalco's February 3, 2004, final calculation memorandum from Laurens van Houten, Senior Accountant, to Neal M. Halper, Director, Office of Accounting, entitled, "Cost of Production and Constructed Value Adjustments for the Final Results," which was issued as part of the Pasta Six administrative review. The public version of this proprietary document is on file in the CRU. Accordingly, we have adjusted Indalco's SG&A ratio to include general warehousing expenses and applied the new ratio to Indalco's COP and CV. Also, we have subtracted Indalco's calculated per-unit on-site warehousing expenses from the INDIRSH field found in Indalco's HM database.

Comment 12: DIFMER Adjustment

Petitioners explain that Indalco reported in its questionnaire response HM and U.S. market pasta with identical codes in the first three positions of the matching control number (CONNUM), i.e., the codes for shape, wheat, and additives for the HM and U.S. market. Petitioners submit that Indalco nonetheless claimed that a small cost difference existed between enriched and un-enriched products in the U.S. and HM sales that should be recognized as a difference in merchandise (DIFMER)

adjustment, pursuant to 19 CFR 351.411. See Indalco's October 31, 2003 questionnaire response at Exhibit B-11. Petitioners point out that Indalco calculated a small DIFMER adjustment to account for the purported difference between its enriched and un-enriched pasta. See Indalco's November 10, 2003, questionnaire response at Exhibit D-10.

Petitioners state, however, that upon examination of the concordance printout from the preliminary calculations, Indalco's DIFMER adjustment was much larger than the minor adjustment it previously reported in its questionnaire response, thereby resulting in the un-enriched pasta sold in Italy being significantly more expensive than the enriched, but otherwise "identical" pasta, sold in the United States. Petitioners argue that pursuant to 19 CFR 351.411(b), the Department will not consider differences in cost of production when compared merchandise has identical characteristics. Thus, petitioners argue that the Department should make the necessary changes to its margin calculations so that the DIFMER adjustment is equal to the minor cost difference that was reported by Indalco to account for enrichment cost differences that exist between Indalco's enriched and un-enriched pasta.

Indalco did not brief this issue.

Department's Position: Indalco stated in its questionnaire response that each product it sold during the POR in the HM had an identical match in the U.S. market, except for minor cost differences pertaining to the enrichment of the product. Therefore, according to the information submitted by Indalco, any differences in the cost of manufacture stemming from pasta enrichment should be accounted for in the minor DIFMER adjustment that Indalco provided in its questionnaire response. However, in our preliminary calculations, a comparison of Indalco's identical products, not taking into account enrichment, indicates that the differences in cost are significantly larger than the minor DIFMER adjustment that Indalco reported. Thus, in our final calculations, we have set Indalco's DIFMER adjustment for enrichment equal to the unit value it reported in its questionnaire response when matching pasta with identical codes in the first three positions of the CONNUM, i.e., HM and U.S. pasta sales that, with the exception of enrichment, are identical in terms of their matching characteristics. The minor DIFMER adjustment granted on the fourth position of the CONNUM, enrichment, constitutes the sole DIFMER adjustment granted to Indalco.

LENSI

Comment 13: Credit and Purchase Order Adjustments to the Gross Unit Price in the Net U.S. Price Calculation

Lensi alleges that the Department improperly added credit note price adjustments (CREDADJU/T) to the gross unit price, where it should have deducted these adjustments. Lensi claims that it reported these fields in a manner that was consistent with the Department's previous programs and manner of treating the credit note price adjustments but that the Department treated the adjustments inconsistently

with its past practice. Specifically, Lensi claims that the Department added the CREDADJU and POADJU fields to the U.S. gross unit price; however, in its submissions, Lensi reported positive CREDADJU and POADJU for the credits which should be deducted from the gross unit price, and reported negative CREDADJU and POADJU for debits which should be added to the gross unit price. This method of reporting adjustments was consistent with the Department's previous treatment of credit note price adjustments. In support of its claim, Lensi states that the calculation worksheets provided in the company's submission show a $/lb positive adjustment for a credit note which is a reduction to the price.

Lensi also claims that the Department improperly added the POADJU field to the gross unit price. Lensi states that in its supplemental questionnaire, it shows that the last line of the invoice included in the exhibit demonstrates that the POADJU is an adjustment which reduces the price. Lensi further notes that in its supplemental questionnaire it stated that the POADJU field relates to reductions in the amount that American Italian Pasta Company (AIPC) charges to its customers if the customer orders the merchandise for pick-up. The result of applying the opposite adjustment to the gross unit price caused the net price to be improperly increased where the adjustment should have been negative and vice versa, alleges Lensi.

To correct this error Lensi recommends that the Department subtract GUPADJ from GRSUPRU in the final margin program.

Petitioners did not comment on this issue.

Department's Position: Credit expenses are deducted from the U.S. gross unit price. Pursuant to section 772(d)(1)(B) of the Act, the price used to establish the CEP price shall be reduced by the amount generally incurred for "expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties." Therefore, we find that we incorrectly applied Lensi's credit and purchase order adjustments in the Preliminary Results. We have made the appropriate changes to the margin program for the final results.

Comment 14: Credit Adjustment to Gross Unit Price in Calculating NV

Lensi alleges that the Department improperly added credit adjustments to the gross unit price in calculating the NV for the comparison market. Lensi stated that it reported positive CREDADJT for credits (or deductions) to gross unit price. As explained above, Lensi claims that the Department deducted the reported home/comparison market credit adjustments from the gross unit price in calculating NV for the previous administrative reviews. Lensi recommends that for the final calculations, the Department deduct CREDADJT from gross unit price in calculating NV.

Petitioners did not address this issue.

Department's Position: For the reasons explained above in Comment 13, it is appropriate to correct the credit adjustment for calculating the NV for the comparison market. We have made the appropriate changes to the margin program for the final results.

Comment 15: Commission Offset for CEP Sales

Lensi claims that it incurred commission expenses on sales in both the U.S. and home markets and, therefore, should be entitled to a commission offset up to the threshold for that offset. Lensi claims that the Department did not set the relevant commission offset values in each market to reflect the commission expense incurred in that market. Lensi alleges that the Department properly set the comparison market commission offset variable, however a programming error in an earlier section of the margin program set the U.S. side commission offset variable, XPTCOMMU, to zero. Lensi claims that the programming language resulted in a zero U.S. commission value, which was reflected in the commission offset calculation and resulted in Lensi not receiving a commission offset at all on any CEP sales.

To correct this error Lensi asserts that the Department must set the U.S. commission offset variable equal to the amount of U.S. commission expenses in order for the offset calculation to function properly.

Petitioners did not address this issue.

Department's Position: As reflected in the comparison market program, the Department intended to apply a commission offset. We have corrected the errors in both the comparison market and the margin programs, thus allowing the commission offset to be applied.

Comment 16: CEP Offset

Lensi alleges that while the Department claims that Lensi is entitled to a CEP offset, the margin program prevents the CEP offset from being calculated and applied correctly. Lensi claims that the margin program erroneously classified all sales as a LOTMATCH "YES" causing the CEP offset application loop to ignore the CEP offset code. Lensi claims that the Department should correct the programming error and set LOTMATCH to "NO," thus allowing the CEP offset to be applied.

Petitioners did not address this issue.

Department's Position: We continue to find that Lensi is entitled to a CEP offset. We have made the appropriate changes to the margin program such that Lensi's CEP offset will be reflected in the calculations of the final results.

Comment 17: Imputed Credit Expenses

Lensi claims that the language in the margin program does not properly calculate the imputed credit expense for sales that had more than one payment. Lensi also alleges that the Department made other errors in calculating the imputed credit expense. First, Lensi claims that the Department used an incorrect U.S. short-term interest rate for CREDITU. Lensi asserts that the Department verified the correct short-term interest rate. Second, the Department added CREDADJU to rather than deducting it from the gross unit price. See above Comment 13. Third, for those values that had missing CREDITU values, the parameters the Department used to calculate the CREDITU were incorrect and caused 3311 sales observations with partial payment to fail the parameters. Lensi claims that by failing the program's parameters, 3311 sales observations were excluded from the data set thus resulting in an incomplete sales data set used to calculate the margin.

To correct these errors, Lensi recommends that the Department use the short-term interest rate as listed in the CEP Verification Exhibit 11, deduct CREDADJU, and fix the partial payment parameters.

Petitioners did not address this issue.

Department's Position: We find that in our Preliminary Results, we incorrectly calculated Lensi's imputed credit expenses. We have made the appropriate changes to the programming language, as noted by Lensi. Specifically, we have (1) corrected the error pertaining to Lensi's short-term interest rate, (2) deducted CREDADJU from GRSUPRU to calculate the price net of adjustments used for the CREDITU calculation, and (3) corrected the errors in the programming language used to calculate missing CREDITU values.

Comment 18: Wheat Classifications

In the Preliminary Results, the Department explained that it was collapsing certain wheat codes. See 69 FR 47884. Lensi claims that by recalculating the variable costs of manufacture (VCOM) for the collapsed control numbers by sales quantity rather than by production quantity, the Department distorted the average VCOM for those products. Lensi claims that the Department should combine the total costs for each component control number and divide the total costs by the combined production quantity of the collapsed control number. Lensi asserts that this method of recalculating the VCOM for the collapsed control numbers will be more accurate because it reflects Lensi's actual production costs. Lensi further states that by using the sales quantity the Department is using a factor that is not related to the cost of production.

To correct this distortion, Lensi claims that the Department should average the VCOM by using the total production costs and quantities incurred during the POR.

Petitioners did not address this issue.

Department's Position: Based on comments submitted by Lensi, we find that we should use the actual production costs to calculate the VCOM for the collapsed wheat code products, rather than the sales quantity that was used in the preliminary results calculations. We find this approach more accurately calculates the products' VCOM. Therefore, for these final results, we are recalculating the collapsed products' VCOM by using actual production costs and quantity.

Comment 19: CEP Profit

Lensi claims that the Department improperly calculated Lensi's CEP profit when it used Lensi's fiscal year 2003 financial statements. Lensi claims that the record contains more accurate data that represents the revenues and expenses for the POR. Citing Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from South Africa, 67 FR 31243, 31245 (May 9, 2002) (Cold-Rolled Steel from South Africa) Lensi asserts that the goal of the CEP profit calculation is to calculate a profit amount which is more specific to the merchandise under investigation rather than to rely on a derived profit amount. Lensi claims that the 2003 Financial Statements reflect Lensi's sales of all products including subject and non-subject merchandise to all countries, not just the United States. Therefore, Lensi asserts that calculating a profit rate using its 2003 financial statements does not provide an accurate profit rate for sales of subject merchandise to the United States and the comparison market during the POR. Further, Lensi cites the Statement of Administrative Action (SAA) which states that the Department does not apply any adjustment for CEP profit if the company is operating at a loss. See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. 5100, H.R. Doc. No. 316, Vol. 1, 103rd Cong. 2d Session (SAA), at 155. Lensi also cites Frozen Orange Juice from Brazil as evidence that the Department made no adjustment for CEP profit because the respondent operated at a loss during the POR. See Frozen Concentrated Orange Juice from Brazil; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 64 FR 43650, 43658 (August 11, 1999) (Frozen Orange Juice from Brazil).

Lensi claims that there are three methods by which the Department could use Lensi's reported data to more accurately calculate CEP profit. First, Lensi states that it has reported total cost of manufacture (TCOM) for U.S. sales and VCOM for comparison market sales. According to Lensi, the comparison of those expenses alone to the revenues reported by Lensi indicates a loss, even without the additional costs and expenses that would have been reported to the Department in a full Section D questionnaire response.[3] Lensi asserts that, based on this fact, it is not necessary for the Department to consider any additional costs. Alternatively, Lensi contends that there is record evidence by which the Department could calculate and add G&A expenses and interest expenses to Lensi's reported costs to complete the

[3] Lensi was not required to submit a Section D response in this segment of the proceeding.

set of costs and expenses normally used in the CEP profit calculation. Lensi argues that because CEP profit was already negative prior to the inclusion of such additional costs, it obviously remains negative using this method. If the Department opts not to utilize the first and second methods described above, Lensi contends that there is a third option by which the Department could correctly calculate Lensi's CEP profit. Lensi argues that if the Department continues to rely on Lensi's financial statements, the Department should use Lensi's internal income statement covering the POR rather than rely on the company's 2003 financial statements. Lensi asserts that the internal income statement is based on POR data and, therefore, more accurately reflects the true CEP earned by Lensi during the POR. Thus, the internal income statement should be used as the basis for the CEP profit calculation if the Department determines that such a calculation should be performed using financial statement data. Lensi contends that use of its internal income statement data also yields a negative CEP profit.

Petitioners did not comment on this issue.

Department's Position: In the Preliminary Results, the Department used data from Lensi's 2003 financial statements to calculate total revenue (TOTREV), total cost of goods sold (TOTCOGS), total general and administrative expenses (TOTSGNA), and total interest expense (TOTINTEX). See the June 30, 2004, memorandum to the file from Tipten Troidl, Case Analyst, to James Terpstra, Program Manager, "Preliminary Results Calculation Memorandum – Pasta Lensi s.r.l. (Pasta Lensi)" at Attachment I, lines 1821 - 1831. Using these variables, the Department, in turn, calculated total expenses (TOTEXP), total profit (TOTPROFT), and the CEP ratio.[4] Id. The CEP ratio was, in turn, used to calculate CEP profit.[5] Id.

We have determined to revise our approach to calculating Lensi's CEP profit. Lensi reported the total cost of manufacturing field (TOTCOM) in its questionnaire response. The Department examined this field during verification. See Exhibit L-17 of the July 30, 2004, memorandum to Eric B. Greynolds, Program Manager, from Cindy Robinson and Tipten Troidl, Case Analysts, "Verification of the Sales Response of Pasta Lensi S.r.l. (Lensi) and American Italian Pasta Company (AIPC) in the Seventh Administrative Review of the Antidumping Duty Order of Certain Pasta from Italy (Lensi Verification Report).[6] As the data in the TOTCOM field reflects the total cost of manufacture for all subject merchandise CONNUMs produced during the POR and given that the Department verified the

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[4] In the Preliminary Results, the Department calculated TOTPROFT by subtracting TOTEXP from TOTREV and calculated the CEP Ratio by dividing TOTPROFT by TOTEXP.

[5] In the Preliminary Results, the Department calculated CEP profit by multiplying the CEP Ratio by the constructed export price selling expenses (CEPSELL).

[6] Using information already on the record of this segment of the proceeding, Lensi has recalculated its TOTCOM by CONNUM taking into account the Department's decision to collapse several of Lensi's wheat codes. See Exhibit 1 of Lensi's September 7, 2004, Case Brief. We have used the TOTCOM data in Exhibit 1 in Lensi's final results margin calculations.

TOTCOM field, we find it is more appropriate to base the CEP profit calculation, in part, on the TOTCOM data. Furthermore, the use of the TOTCOM field reflects the approach taken by the Department with respect to Lensi's CEP profit calculation in the fifth and sixth administrative reviews. See the February 3, 2002, final calculation memorandum to the file from the Team entitled, "Analysis Memorandum for the Italian American Pasta Company (IAPC)," that was issued as part of the 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) (Pasta Five), and the February 3, 2004, memorandum to the file from Alicia Kinsey, Case Analyst, entitled, "Final Results Calculation Memorandum – Pasta Lensi S.r.l. ("Lensi")," that was issued as part of Pasta Six.[7] Both memoranda are proprietary documents, the public versions of which are available in the CRU. However, unlike the fifth and sixth reviews, Lensi did not supply the data necessary to calculate its SG&A and interest expenses (INTEX), of which the TOTCOGS field is a partial function.[8] Thus, for purposes of these final results, we have calculated Lensi's SG&A and INTEX for the POR using its 2003 financial statements. We note that Lensi's 2003 financial statements were audited and reflect three quarters of the POR. See Lensi's Final Results Calculation Memorandum.

Comment 20: Revocation of the Antidumping Duty Order for Lensi

Lensi notes that the Department stated in the Preliminary Results that it determined not to revoke the antidumping duty order because Lensi made sales at less than NV. See 69 FR 47880. Lensi argues that once the Department corrects the above errors, it will find that Lensi did not make sales at less than NV and that the order should be revoked.

First, Lensi argues that it has sold subject merchandise in commercial quantities at not less than NV for three consecutive administrative review periods. Specifically, Lensi argues that its sales quantities and values in the United States have increased from each review period to the next and have also consistently exceeded the comparison market quantities and values.

Second, Lensi argues that the Department found in the past two administrative reviews that Lensi sold subject merchandise at not less than NV. If the Department finds in this review that it sold subject merchandise at not less than NV, then it will have made sales of not less than NV for three consecutive years.

Third, Lensi claims that it is not likely to sell subject merchandise at less than NV in the future. Lensi stresses that in the past two administrative reviews it was found not to sell at less than NV and its past behavior is a good indicator that it will likely not sell at less than NV in the future. In addition, Lensi

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[7] Lensi was formally called IAPC.

[8] As explained above, CEP profit is a partial function of the TOTCOGS field.

stresses that at the time of the imposition of the antidumping duty order Lensi was not yet in business and, thus, was not responsible for any of the dumping that was found to have injured the U.S. industry.

Fourth, in its request for an administrative review and partial revocation of the antidumping duty order, Lensi agreed in writing to be reinstated in the order if the Department concludes in the future that Lensi has sold subject merchandise at less than NV.

Lensi claims that it has satisfied all of the elements necessary for the Department to revoke Lensi from the antidumping duty order.

Petitioners did not comment on this issue.

Department's Position: As a result of the changes we have made to Lensi's margin calculations, we find that the company's rate is de minimis for purposes of these final results. Therefore, we are revoking the antidumping duty order with respect to Lensi based on three years of sales in commercial quantities at not less than NV. For further information, see the "Determination to Revoke" section of the final results and Lensi's Final Results Calculation Memorandum.

PAM

Comment 21: Collapsing PAM's Wheat Types 1 and 2

PAM argues that the Department erred in collapsing PAM's wheat types 1 and 2. It states that PAM provided a summary of semolina purchases by quantity which shows that special semolina (type 1) costs 12 percent more on average than normal semolina (type 2). See PAM's February 24, 2004, Supplemental Response at Exhibit 18. In addition, PAM notes that the cost of manufacture (COM) of products produced with special semolina is nearly 17 percent greater than that of products produced with normal semolina. PAM contends that these cost differences are commercially significant without any further evidence and states that the Department's own standards do not allow it to disregard margins, individual adjustments or group adjustments in the neighborhood of 12 percent.

Furthermore, PAM argues that its use of a special semolina for a particular brand, the Liguori brand, satisfies the criterion expressed in the fifth review of this order with respect to Pastificio Garofalo S.p.A. (Garofalo), "The additional expense of an input in the creation of a unique product does justify a separate classification." See Pasta Five and accompanying Issues and Decision Memorandum at Comment 8. In addition, PAM states that it has reported different wheat types for normal and special semolina in each of its previous reviews, and the Department accepted these types. Moreover PAM states that the Department conducted a sales verification during the sixth review and found no issues with PAM's reporting of two wheat types.

Finally, PAM argues that the Department may not change policies from one review to the next without strong justification, particularly when respondents have relied on the policy. See Cultivos Miramonta S.A. v. United States, 21 CIT 1059, 1064, 980 F. Supp. 1268, 1274 (1997) and Shikoku Chems. Corp. V. Unites States, 16 CIT 382, 388-389, 795 F. Supp. 417 (1992). PAM contends that this precludes the Department from changing its wheat-type policy with respect to the pasta cases without evidence warranting such a change and given that PAM has relied on the Department's prior policy in setting its prices in both the home and U.S. markets.

Petitioners did not comment on this issue.

Department's Position: We find that a separate wheat code is not warranted for PAM's specialty semolina. A cost difference, as verified by the Department, between PAM's normal and special semolina does exist; however, PAM's statement pertaining to the cost differential of the COM for special verses normal semolina is misleading, as other cost differences, such as the use of bronze dies, are reflected in the COM. Furthermore, a cost difference alone does not justify an additional wheat code. As explained in the Preliminary Results, the Pasta Investigation, 61 FR at 30346, established that rather than relying solely on cost differences when assigning wheat codes, the Department will also take into consideration the extent to which the ash and gluten content differ from one wheat type to another. In examining the information provided by PAM regarding the ash and gluten content of its normal and speciality semolina, we did not find differences of a commercially significant nature. See PAM Verification Report at Exhibit 5, which contains information indicating the ash and gluten content in PAM's normal and specialty semolina.[9] Thus, while cost differences between wheat types are a factor in assigning wheat codes, additional wheat codes are not warranted absent accompanying differences in the ash and gluten content.

PAM contends that the Department had no issue with PAM's reporting of wheat codes in Pasta Six. However, Pam fails to mention that the Department ultimately applied adverse facts available to PAM in Pasta Six and, thus, did not rely on any of PAM's reported sales or cost data. Significantly, the Department did not analyze the appropriateness of PAM's wheat code reporting methodology when calculating the company's antidumping margin in Pasta Six.

Further, regarding PAM's contention that the Department's approach with respect to Garofalo's wheat codes in Pasta Five should compel the Department to grant PAM's request for separate wheat codes in the current review, we note that in the subsequent review, Pasta Six, we revised our position regarding Garofalo's wheat codes. Regarding the wheat code issue, in Pasta Six we stated:

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[9] The actual percentages of ash and gluten content in PAM's normal and specialty semolina are proprietary and, thus, cannot be discussed on the public record.

> . . .we continue to find that cost and pricing information is informative in determining whether a proposed modification to a product characteristic is commercially significant. However, we agree with petitioners that the most important factor in this determination is the physical differences between the types of wheat.
>
> . . .Although the Department used Garofalo's third wheat type category in our preliminary results margin calculations, we have since reconsidered our usage of this wheat type. The third type of semolina reported by Garofalo is merely a blend of the two already accepted by the Department. As such, the Department is not persuaded that this new type results in a new category with physical characteristics that are different, in a commercially significant way, from the two categories previously defined, nor does it enable more accurate model matching. Thus, we are not including this wheat type in the calculation of these final results. . .
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> Emphasis added.

See Comment 26 of the Issues and Decision Memorandum that accompanied the February 3, 2004, Final Results of the Sixth Antidumping Duty Administrative Review. As is made clear in Pasta Six, the Department's practice concerning product characteristics is not based solely on cost differences. While cost differences are a factor, the Department also examines the extent to which there are differences in the physical characteristics among the categories under consideration. As indicated in the Pasta Investigation, with respect to wheat codes, those physical characteristics are the ash and gluten content of the wheat. As explained in the Preliminary Results at 69 FR 47883 and above, we did not find find differences of a commercially significant nature between PAM's wheat types 1 and 2.

This finding is consistent with the Department's practice first articulated in the Pasta Investigation and followed in Pasta Six.

RISCOSSA

Comment 22: Use of a Constant Factor for Inland Freight Expense

Riscossa states that it originally reported its domestic market inland freight expense by applying a percentage factor to the net price. The numerator of the factor was total domestic inland freight expense in the POR, and the denominator was the total value of domestic sales in the POR. However, during the sales verification, the Department requested that Riscossa recalculate its freight expense reflecting how the expense was incurred (i.e., on the basis of weight rather than sales value). Riscossa argues that the Department incorrectly multiplied the recalculated freight charge by the net price. In addition, Riscossa states that "if this is the unit freight expense, then it does not need to be multiplied by the net price to yield the unit freight expense; it already is the unit freight expense." See Riscossa Case

Brief at 3. Riscossa states that to correct this discrepancy, the INLFTCH field should be reported with a constant figure submitted at verification.

Petitioners did not comment on this issue.

Department's Position: The recalculated figure was inadvertently applied to the net price in the calculations of the Preliminary Results. Therefore, the Department has corrected this discrepancy in the final margin program. See Riscossa's Final Calculation Memorandum, dated February 2, 2005 (Riscossa's Final Calculation Memorandum), which is on file in the CRU.

Comment 23: Correction of the Home Market Warranties field

Riscossa contends that a statement made by the Department with regard to Riscossa's database correction is inaccurate. Specifically, the Department stated in the preliminary calculation memorandum that Riscossa did not revise the HM warranties (WARRH) field in the database that Riscossa submitted to correct several errors found during verification. In support of its argument, Riscossa submitted 31 pages of SAS output which shows that Riscossa made the requested correction to its WARRH field which occurred at 12 to 16 places to the right of the decimal point. Therefore, Riscossa requests that the Department affirm that Riscossa did, in fact, correct the WARRH field as instructed.

Petitioners did not comment on this issue.

Department's Position: We find that Riscossa did, in fact, correct its WARRH field pursuant to the Department's request. However, the Department's calculations for the WARRH field have remained unchanged because, despite the Department's incorrect statement, Riscossa's revised HM database was utilized in the preliminary calculations.

Comment 24: Inclusion of Purchased Pasta in Comparison Market Program

Petitioners argue that the Department should include purchased pasta in the comparison market database to fairly reflect Riscossa's business practices and prevent the manipulation of the margin calculation. Petitioners provided an analysis of Riscossa's purchased pasta to show that its inclusion would typically result in a higher NV. Petitioners suggest that purchased products be included in the margin analysis when the product is highly fungible, when purchased products represent a significant share of sales and production, and when there are significant variations in the costs incurred and prices set for purchased products as compared to the respondent's own production. Petitioners also argue that there is no requirement that NV calculations exclude a respondent's sales merely because the respondent did not produce the products sold.

Riscossa rebuts petitioners' claim that purchased pasta should be included in the NV calculation based on the statute and precedent. See, e.g., Notice of Final Results of Antidumping Duty Administrative Review and Revocation of Antidumping Duty Order in Part: Certain Pasta from Italy, 67 FR 300, at Comment 7 (January 3, 2002) (Pasta Four). Riscossa cites support from the definition of "foreign like product" from section 771(16) of the Act and argues that pasta produced by Riscossa exists in Italy, which is a satisfactory basis for the calculation of NV. Therefore, Riscossa asserts that the Department is precluded from using pasta produced by a producer other than Riscossa itself as foreign like product. Riscossa also argues that this rule has been consistently applied by the Department since the investigation.

Department's Position: Based on the Department's practice, we have consistently excluded purchased pasta from the calculation of NV. See Pasta Four, 67 FR 300, at Comment 7. Therefore, we have excluded purchased pasta from the comparison market database in our final calculations. See Riscossa's Final Calculation Memorandum.

Comment 25: Adjustment of Semolina Costs

Petitioners argue that as partial facts available, the Department should increase Riscossa's reported semolina costs by a factor that would account for an understatement in wheat purchases, which the Department identified at verification.

Riscossa rebuts petitioners' argument and contends that Riscossa already made the correction to its semolina costs in its July 8, 2004, submission. Therefore, Riscossa states that no further action is required with respect to its semolina costs.

Department's Position: We find that Riscossa did, in fact, make the correction to semolina cost in its July 8, 2004 submission. Therefore, no additional changes are required with regard to Riscossa's semolina cost.

Comment 26: Revision of Riscossa's Reported Interest Rate

Petitioners argue that Riscossa's use of a six-month London Inter Bank Offer Rate (LIBOR) for calculating U.S. credit expense was erroneous and should be revised using the Federal Reserve's prime interest rate. Petitioners state that the LIBOR is the rate of interest at which banks offer to lend money to one another in the wholesale money markets in London and represents an index that is used to set the cost of variable-rate loans. Petitioners reference the Import Administration Policy Bulletin, Number 98.2, Imputed Credit Expenses and Interest Rates, February 23, 1998, at 4-5, and state that while the LIBOR rate might be "readily obtainable," it is not reasonable and is not a rate actually realized by borrowers in the course of usual commercial behavior. Moreover, petitioners assert that as the LIBOR is the rate in the wholesale money markets, it is lower than the rates available to commercial enterprises.

Petitioners state that the Federal Reserve rates fulfill the criteria outlined in the Import Administration Policy Bulletin because they represent a reasonable surrogate for respondent's U.S. dollar borrowing rates, are readily available, and are easy to obtain. Therefore, petitioners argue that the Department should reject Riscossa's use of a six-month LIBOR rate and, instead, use the Federal Reserve's weighted-average data for commercial and industrial loans maturing between one month and one year, or 4.4225 percent. See Interest Rate Policy Bulletin at 6. See also http://www.federalreserve.gov/releases/h15/data/m/prime.txt.

Riscossa rebuts petitioners' argument regarding the use of the LIBOR rate, stating that it is untimely at this stage of the proceeding because the deadline for the submission of factual information has passed. Riscossa argues that even if petitioners' factual argument is permitted, there are no Federal Reserve rates on the record of this proceeding and Riscossa would be deprived of the opportunity to comment on the particular information. Riscossa contends that it would have access to dollar loans from Italian or other European banks; therefore, Riscossa states that the London dollar lending rates are more appropriate than the Federal Reserve rates.

Department's Position: The Interest Rate Policy Bulletin specifically states that for cases where a respondent has no short-term borrowing in the currency of transaction the Department will use publicly available information to establish a short-term interest rate applicable to the currency of the transaction. See Import Administration Policy Bulletin, Number 98.2, Imputed Credit Expenses and Interest Rates (Interest Rate Policy Bulletin), February 23, 1998, at 4**.**

As set forth in the Interest Rate Policy Bulletin, the Department recognized that respondents may not always have short-term loans in U.S. dollars. The methodology generally adopted in the policy bulletin is to use the "Federal Reserve's weighted average data for commercial and industrial loans maturing between one month and one year from the time the loan is made." Id. at 4. Consistent with the Department's policy and practice, for the final results we have recalculated the credit rate used to derive U.S. imputed credit expenses using the Federal Reserve Statistical Release Table 1, "commercial and industrial loans made by all commercial banks" at line 21. See Riscossa's Final Results Calculation Memorandum.

Federal Reserve rates, which are suggested by the Interest Policy Bulletin, are a more appropriate surrogate rate than the LIBOR rate reported by Riscossa. The Federal Reserve rates, i.e., the weighted-average data, fulfill the criteria outlined in the Interest Rate Policy Bulletin because they represent a reasonable surrogate for respondents' U.S. dollar borrowing rates, are readily available, and are easy to obtain. Id. In contrast, the LIBOR rate reported by Riscossa represents the rate of interest at which banks offer to lend money to one another in the wholesale money markets in London. Further, we have not adopted petitioners' suggestion that the Department use a rate of 4.4225 percent for the POR which represents the prime rate reported by the Federal Reserve rather than the weighted-average rate for commercial and industrial loans.

Riscossa's contention that petitioners' argument relies on untimely information is without merit. The Department's policy with respect to the calculation of interest expense is specifically set forth in the Interest Rate Policy Bulletin, which is publicly available on the Department of Commerce website. See http://ia.ita.doc.gov/policy/bull98-2.htm. In addition, this policy has been consistently implemented. See e.g., Stainless Steel Wire Rod from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 69 FR 29923 (May 26, 2004), and accompanying Issues and Decision Memorandum at Comment 13; See also Certain Steel Concrete Reinforcing Bars from Turkey; Final Results of Antidumping Duty Administrative Review and New Shipper Review, 64 FR 49150, 49155 (September 10, 1999). Therefore, respondent has not been prejudiced by the Department's application of its policy.

Accordingly, consistent with the Department's policy and practice, for the final results, we have recalculated the credit rate used to derive U.S. imputed credit expenses using the Federal Reserve Statistical Release Table 1 "commercial and industrial loans made by all commercial banks" at line 21, which refers to loans maturing between one month and one year. See Riscossa's Final Calculation Memorandum for a detailed calculation of the average short-term interest rate in accordance with the Interest Rate Policy Bulletin.

RUSSO

Comment 27: U.S. Price Calculation

Russo argues in its case brief that the Department erred in applying the countervailing duty (CVD) subsidy adjustment to the U.S. net price. Russo states that the Department attempted to calculate the CVD subsidy adjustment by multiplying the CVD export subsidy for pasta (0.0083) by the entered value, before the entered value was calculated. Russo notes that this error resulted in various missing values for the U.S. net price. Russo asks the Department to correct this error for the final results.

Petitioners did not address this issue.

Department's Position: We have revised our calculation of the CVD subsidy adjustment in the final results by calculating the adjustment after the calculation of the entered value.

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

Agree _____ Disagree _____

_____
Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

_____
Date